

## BEFORE DISABILITY CIVIL RIGHTS: CIVIL WAR PENSIONS AND THE POLITICS OF DISABILITY IN AMERICA

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### I. INTRODUCTION

The tenth anniversary of the Americans with Disabilities Act ("ADA") has been a bittersweet event for the scholars and activists who have used the occasion to take stock of the statute's impact on the lives of disabled Americans. On the one hand, they have celebrated the fact that the ADA is quietly transforming the nation's built environment and prompting employers to make workplace accommodations that have enabled disabled persons to join, or remain in, the workforce.<sup>1</sup> On the other hand, they have noted the discouraging judicial reception of the ADA, which has resulted in defendant victories in over ninety percent of

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1. See, e.g., Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271 (2000) (discussing trends prior to and after the ADA).

employment discrimination cases and a string of Supreme Court decisions that have rejected expansive readings of the legislation.<sup>2</sup>

Many scholars have invoked the history of twentieth-century American disability policy to explain why courts have so stubbornly resisted the conceptions of civil rights and anti-discrimination that are at the core of the ADA.<sup>3</sup> They have attached significance to the fact that in the 1970s and 1980s, the commitment to the civil rights of disabled people embodied in the ADA rapidly replaced a "medical" conception of disability that had structured government disability policy for most of the twentieth century.<sup>4</sup> Although they draw different conclusions about the impact of this conceptual transformation on the judicial reception of the ADA,<sup>5</sup> commentators have been united in a particular reading of disabled Americans' experiences under the medical model.

In the narrative that has gained unquestioned legitimacy in recent ADA scholarship, the medical model focused on the individual, whose disability was conceived as an infirmity that precluded full participation in the economy and society. It posited that government should direct resources to rehabilitation programs that would enable the disabled to "overcome" their impairments. As a result, the medical model cast disabled people in a subordinate role in their encounters with doctors, rehabilitation professionals, psychologists, and social workers who aimed to "help them" adjust to a society structured around the convenience and interests of the nondisabled. Because the medical model never questioned the physical and social environment in which disabled people

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2. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 103-10 (1999); ABA Commission on Mental and Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYS. DIS. L. REP. 403, 403-07 (1998).

3. See *infra* notes 4-5.

4. See, e.g., Patricia Illingworth & Wendy E. Parmet, *Positively Disabled: The Relationship between the Definition of Disability and Rights under the ADA*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 3-17 (Leslie P. Francis & Anita Silvers, eds., 2000); Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124-25 (Leslie P. Francis & Anita Silvers, eds., 2000); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 31-37 (2000); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 55-61 (2000); Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 213-17 (2000).

5. See Diller, *supra* note 4, at 37-38 (arguing that the unsympathetic judicial reception of the ADA reflected the generally restrictive view toward civil rights that characterized the 1990s). Cf. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 488-89 (2000) (arguing that because the disability rights movement of the 1970s and 1980s never became part of popular consciousness like the black civil rights movement of the 1950s and 1960s, neither Section 504 of the Rehabilitation Act of 1973 nor the ADA "was supported by a broad-based popular understanding of the injustices faced by people with disabilities, the nature of their continuing struggle for inclusion and equality, or the particular theory of equality that informed the statutes' many ambiguous provisions").

were forced to function, it countenanced their segregation and economic marginalization. And because it aimed to address the "needs" of the disabled rather than recognize their civil rights, the medical model frequently led to governmental policies that viewed assistance for the disabled as a species of welfare.<sup>6</sup>

By contrast, the civil rights model that began to influence government policy in the 1970s conceptualized the disabled as a minority group entitled to the same hard-won legal protections that emerged from the struggles of African-Americans and women for equality. Proposing that disability is a social and cultural construct, the civil rights model focuses on the laws and practices that subordinate disabled persons and insists that government must secure the equality of disabled persons by eliminating the legal, physical, economic, and social barriers that preclude their full involvement in society.<sup>7</sup>

There is, of course, much truth to this historical reading of disabled Americans' experiences under the governmental policies that put the medical model into practice. Yet, like any interpretation of the past that posits an epochal paradigm shift, this narrative obscures as much as it reveals. By focusing on the stigmatization of the disabled embedded within the medical model, the standard narrative ignores the ways in which disabled people have coped with—and contested—those limiting attitudes during the first three quarters of the twentieth century in America. Earlier scholars' emphasis on the hierarchical relationships between disabled persons and bureaucrats, doctors, and rehabilitation counselors similarly has downplayed the ways in which the disabled shaped those relationships and, through their own advocacy, transformed conceptions of disability in the period well before the notion of civil rights for the disabled was even conceivable.

This Article examines the history of Civil War pensions for disabled veterans—a crucial yet neglected chapter in the history of disability in America—and uses it to complicate scholarly assumptions about disabled individuals' encounters with the state in the century before the rise of the disability rights movement that culminated in passage of the ADA. After the Civil War, the federal government created a pension program for disabled Union veterans that became, to that time, the

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6. For related discussions, see Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1345-55 (1993); JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 63, 112 (1993); Harlan Hahn, *Changing Perception of Disability and the Future of Rehabilitation*, in SOCIAL INFLUENCES IN REHABILITATION PLANNING: BLUEPRINT FOR THE 21ST CENTURY: A REPORT OF THE NINTH MARY E. SWITZER MEMORIAL SEMINAR 53-55 (1985); Michael Ashley Stein, *From Cripple to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245 (1994).

7. See Diller, *supra* note 4, at 31-34; Drimmer, *supra* note 6, at 1355-59; Scotch, *supra* note 4, at 214-17.

world's largest and most generously funded social insurance scheme. In an era when the national government played a minimal role in the affairs of most Americans, Civil War pensions consumed as much as 42% of the federal budget in many years.<sup>8</sup> At its peak in the early years of the twentieth century, the federal pension system disbursed approximately \$140 million per annum to one million Union Army veterans and their dependents, providing them with an average annual payment of \$139 in a period when the average worker earned only \$375.<sup>9</sup> In the 1880s and 1890s, southern states also granted pensions to wounded and disabled Confederate veterans, who were ineligible for federal pensions. Although southern pension plans were small compared to the massive federal system, they represented a significant fiscal sacrifice by poorly-funded governments and similarly placed disabled veterans in a novel and complex relationship with their state governments.<sup>10</sup>

A lively scholarly literature acknowledges the significance of the Civil War pension plans in the evolution of the American state, but historians only recently have begun to examine the experiences of disabled veterans as they filed claims under the state and federal schemes.<sup>11</sup> As Part II of this Article shows, the emerging historical record suggests that scholars and advocates who wish to gauge the past and present ability of disabled persons to alter the institutional practices that impact upon their lives must look beyond conventional forms of political expression and protest. Although disabled Civil War veterans enjoyed the political support of the Republican Party and submitted their pension applications to a sympathetic bureaucracy in Washington, we have illustrated in prior empirical studies that these advantages did not accrue to individual veterans with unusual medical conditions or controversial claims.<sup>12</sup> In fact, our findings suggest that the federal pension system's decision-makers privileged some disabled veterans over others. By the end of the nine-

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8. Maris Vinovskis, *Have Social Historians Lost the Civil War? Some Preliminary Demographic Speculations*, 76 J. AM. HIST. 34, 53 (1989).

9. Vinovskis, *supra* note 8, at 51-56.

10. See William H. Glasson, *The South's Care for Her Confederate Veterans*, 36 THE AMERICAN MONTHLY REVIEW OF REVIEWS: AN INTERNATIONAL MAGAZINE 40, 44-47 (1907) (providing overview of southern pension systems) [hereinafter Glasson, *The South's Care*]; James R. Young, *Confederate Pensions in Georgia, 1886-1929*, 66 GA. HIST. Q. 47, 49-52 (1982) (calculating percentage of state expenditures spent on pensions in Georgia and North Carolina); M. B. Morton, *Federal and Confederate Pensions Contrasted*, 16 THE FORUM 68, 68-74 (1886) (surveying pension expenditures in southern states).

11. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 102-51 (1992) [hereinafter SKOCPOL, *PROTECTING SOLDIERS*]; Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85, 85-115 (1993) [hereinafter Skocpol, *Expansion of Benefits*]; Vinovskis, *supra* note 8 at 34-58.

12. Peter David Blanck, *Civil War Pensions, Civil Rights, and the Americans with Disabilities Act: Empirical Study (1862-1907, 1990-2000)*, 62 OHIO ST. L.J. (forthcoming 2001) (manuscript on file with author) [hereinafter Blanck, *Civil War Pensions*] (discussing these issues and providing extensive background for the present Article).



teenth century, Union veterans with particular disabilities, such as nervous disorders and infectious diseases, were rejected at higher rates and received smaller pensions even when the Pension Bureau initially approved their claims.<sup>13</sup>

We also find that despite these attitudinal barriers, even poor and socially marginalized veterans seized upon the opportunities granted by pension legislation to pursue their claims. Approval ratings for stigmatized and hard-to-verify disabilities were strikingly high, albeit not as high as those secured by veterans whose disabilities were viewed with favor by the Pension Bureau. These approval rates reflect the persistent bureaucratic maneuvering of ordinary veterans and their advocates as they sought to persuade the Bureau's decision-makers that they had satisfied the federal government's definition of disability.<sup>14</sup>

Part III compares Union veterans' encounters with the federal pension system to the experiences of former Confederate soldiers who received state pensions in the post-Reconstruction South. When Democrats attempting to solidify white control over state politics granted pensions to Confederate veterans in the 1880s and 1890s, they reacted against the expansive definitions of disability embodied by federal legislation as well as against the Bureau's adversarial, lawyer-dominated procedures.<sup>15</sup> As we will show by an examination of Virginia's evolving pension laws, legislators limited pension eligibility to soldiers of modest means and good character who had been wounded in the war. Moreover, they discouraged challenges to administrative rulings by forbidding applicants from hiring attorneys to assist them in the claims process. Perhaps because Confederate pensions were a species of charitable relief which buttressed the cult of the "Lost Cause" that engaged many white Southerners in the late nineteenth century, the plans were politically popular even though they absorbed funds that could have been spent on schools, roads, and public health.<sup>16</sup> Disabled southern veterans, however, paid a price for political and cultural legitimacy. By supporting pension schemes that reduced them to mute icons of the South's glorious past, Confederate veterans and their families forfeited the opportunity to become a powerful political force in a period when the Democratic Party's hegemony was uncertain.

Finally, Part IV of this Article explores the continuities between

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13. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 68-71) (describing Figure 12 contained therein; which analyzes rejection rates and disability severity ratings for 6596 claimants from four northern states).

14. See *infra* text accompanying notes 100-13.

15. See *infra* text accompanying notes 164-79 (discussing related party politics).

16. CHARLES R. WILSON, *BAPTIZED IN BLOOD: THE RELIGION OF THE LOST CAUSE, 1865-1920*, 66-80 (1980) (characterizing white Southerners' commemorations of the Civil War as a "civil religion").

Civil War veterans' experiences with the federal pension plan and subsequent encounters between disabled individuals and the government. It proposes that many legal commentators have drawn selectively upon the history of disability in the twentieth century to create a distorted depiction of the experiences of disabled Americans under the "medical model" that dominated federal policy for most of the twentieth century. These accounts of the medical model have overemphasized the impact of rehabilitation programs on the disabled and underemphasized disabled persons' experiences with benefits programs such as the Social Security Disability Insurance ("SSDI") program. As a result, legal scholars have underplayed the ways in which disabled persons have played a crucial (albeit limited) role in shaping the governmental policies that affect their lives by using tactics remarkably similar to those employed by Civil War veterans in their pursuit of benefits: that is, the use of lawyers and grass roots advocacy efforts to persuade physicians and governmental agencies to endorse more expansive conceptions of disability.

A word is in order about our aims in writing this Article. Inquiry into the history of disabled soldiers in the late nineteenth century is in its infancy. This Article draws upon the work of other scholars and reports the preliminary findings of our empirical research on the experiences of veterans who applied for pensions in the North and South. Our aim at this stage is to raise questions rather than provide answers. We hope that the Article will provoke scholars to look anew at the construction of disability as well as the legal and political agency of disabled persons in the past and in our own time.

## II. UNION SOLDIERS AND THE FEDERAL PENSION SYSTEM

The notion that war veterans deserve to be compensated by the nation emerged haltingly in early America. Congress granted pensions to disabled veterans after the American Revolution, but it did not assist impoverished veterans of that war until 1818.<sup>17</sup> In 1832, the federal government finally offered pensions to the approximately 33,000 living survivors of the revolutionary war.<sup>18</sup> These schemes were complemented by the more individualized generosity of Congress and state legislatures, which granted pensions to destitute veterans and their dependents who submitted petitions.

Thirty years later, the Civil War placed unprecedented pressures on the federal government to raise large armies, especially after the northern public's initial burst of enthusiasm for the war disappeared along

17. SKOCPOL, PROTECTING SOLDIERS, *supra* note 11, at 105.

18. *Id.*

with hopes for a quick and decisive Union victory. Congress responded by creating a pension scheme that assured enlisted men that, if wounded, they could claim benefits as a matter of right.<sup>19</sup> By the early twentieth century, Union veterans' continuous pressures on the government to embrace broader conceptions of disability had transformed the Civil War pension system from a program that benefited only veterans whose war-related wounds and illnesses rendered them incapable of performing manual labor into the largest and most generous social insurance scheme in the world.

*A. From Disability-Based Pensions to General Service Pensions,  
1862-1907*

In 1861, shortly after the outbreak of the Civil War, Congress passed legislation that granted pensions to disabled veterans as well as to the widows and minor children of dead soldiers. A year later, Congress created the "General Law System."<sup>20</sup> The 1862 legislation expanded upon the first statute by establishing a medical screening system for rating and compensating disabilities. Although the Pension Office in Washington was charged with scrutinizing claims, the new scheme relied on surgeons to examine applicants to confirm that their medical conditions were genuine and to rate the severity of claimants' disabilities. Under the General Law System, an army private in 1862 received \$8 per month if rated as "totally disabled," which was defined as the inability to perform manual labor.<sup>21</sup> A veteran whose disability was less than total received a proportionally reduced sum. For instance, a veteran who lost a finger was deemed to be 2/8 disabled and received a \$2 monthly pension.<sup>22</sup>

Congress revised the pension laws in 1864 and again in 1866. The new legislation increased the maximum compensation to \$25 per month and granted pensions for such war-related diseases as malaria and measles, with compensation for these conditions based on their "equivalence in disability" to war-related wounds.<sup>23</sup> The 1864 and 1866 laws also declared that certain disabilities, such as loss of both eyes or hands, entitled a veteran to a full pension.<sup>24</sup> In the war's aftermath, pension expenditures climbed from \$15,000,000 in 1866 to \$29,000,000 in 1870.<sup>25</sup>

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19. Matthew Sanders, *History of the Civil War Pension Laws*, in R.W. FOGEL, PUBLIC USE TAPE ON THE AGING OF VETERANS OF THE UNION ARMY: SURGEONS' CERTIFICATES, 1860-1940: DATA USER'S MANUAL 213 (1999) [hereinafter Sanders, *History of the Civil War Pension Laws*].

20. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 9-11).

21. *Id.* at 10.

22. *Id.* at 11-12.

23. *Id.* at 12.

24. *Id.* at 11-12.

25. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 13).

Congress responded in 1874 to the administrative difficulties that emerged as the system grew by passing the "Consolidation Act" of 1873. That law fused the 1862 rating system with the supplemental legislation of 1864 and 1866 by creating a highly graduated system under which awards ranged from \$31.25 per month (e.g., for total blindness, the loss of both hands, or a condition requiring the "regular aid and attendance of another person") to as little as one dollar per month.<sup>26</sup>

More controversially, the 1873 Act compensated veterans for conditions and diseases contracted during military service that *subsequently* resulted in a disability. Given the state of medical diagnostic knowledge in the 1870s, the new legislation posed difficulties for the physicians responsible for screening applicants. The new eligibility criteria soon led to charges that corrupt doctors were validating veterans' false and exaggerated claims of disability. Press accounts referred to "bogus" pension applicants and labeled the pension agents who assisted them as "bounty hunters."<sup>27</sup> Despite these criticisms, the 1873 legislation had a marked effect on the pension system: Sixty-four percent of pensions granted between 1862 and 1888 were for diseases and conditions *not* incurred on the battlefield or campground.<sup>28</sup>

The final pension law revision of the 1870s proved to be as controversial as the 1873 Act. In 1879, Congress passed the Arrears Act, which granted lump sum back payments for war-related disabilities.<sup>29</sup> The 1879 legislation led to a striking increase in the number of veterans applying for and receiving pensions. Although almost half (46%) of all pension requests were rejected in the period between 1880 and 1885, the Arrears Act provoked critics to assert that the system was riddled with abuses.<sup>30</sup> An 1887 editorial in the *Chicago Tribune* was typical in its claim that the Arrears Act put "a premium upon fraud, imposition, and perjury."<sup>31</sup>

The next major reform of the pension system occurred in 1890, when Congress passed the Disability Pension Act.<sup>32</sup> The 1890 legislation expanded veterans' access to pensions but reflected legislators' continued resistance to veterans' repeated calls for the federal government to grant pensions to all former soldiers, regardless of whether or not they were disabled.<sup>33</sup> The Disability Pension Act continued the earlier policy of granting pensions only to disabled veterans. However, the 1890 Act

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26. *Id.* at 12-13.

27. *Id.* at 13-14.

28. *Id.* at 14-15.

29. Arrears Act, ch. 187, 20 Stat. 469 (1879).

30. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 15-18).

31. *A Serpent of Temptation*, CHI. TRIB., Feb. 12, 1887.

32. Disability Pension Act, ch. 634, 26 Stat. 182 (1890).

33. *Id.*



allowed veterans to claim for disabilities unrelated to military service, so long as they were not the product of vicious habits or gross carelessness.<sup>34</sup> The 1890 Act also reduced the length of military service needed to qualify for a pension to 90 days.<sup>35</sup> Although veterans could now claim for diseases and conditions incurred after the war, the legislation responded to a long-standing criticism of the pension laws that the practice of allowing individual doctors to make disability assessments had increased the number of fraudulent claims.<sup>36</sup>

Contemporary observers noted that the 1890 Act created the most costly and liberal pension scheme in the world.<sup>37</sup> By 1893, the number of veterans receiving pensions had swollen to one million—a threefold increase since 1885—and pension expenditures represented almost half of the federal government's budget.<sup>38</sup> The expanded numbers of recipients and the mounting costs attracted criticisms from a variety of political and public perspectives. Reports appeared in the press of excess, fraud, and corruption, and pensions were frequently described as wind-fall payments to undeserving claimants.<sup>39</sup> Other critics, drawing on the emerging discourse of psychiatry, charged that veterans claiming pensions for mental impairment and nerve disorders typically had feigned their illness.<sup>40</sup>

The storm of criticism surrounding the Pension Office abated in the early twentieth century, when the federal government transformed the pension system into a general old-age social insurance scheme for veterans. In 1904, President Theodore Roosevelt issued Executive Order No. 78, which declared that old age itself was a disability covered by the 1890 Act.<sup>41</sup> Congress formalized Roosevelt's declaration by passing the Service and Age Pension Act of 1907, which granted pensions to all veterans over age sixty-two. Subsequent legislation between 1908 and 1920 increased pension rates on the basis of age and length of military service.<sup>42</sup>

### B. *The Evolving Civil War Pension System*

Turning an envious eye toward the universal social insurance

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34. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 19-20).

35. Disability Pension Act of 1890, ch. 634, § 3, 26 Stat. 182 (1890).

36. *Id.*

37. See, e.g., WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES 233* (1918) [hereinafter GLASSON, *FEDERAL MILITARY PENSIONS*].

38. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 20-22); Vinovskis, *supra* note 8, at 55.

39. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 38-48) (discussing findings of content analysis of news stories about the pension system).

40. *Id.* at 21-22.

41. *Id.* at 8-24 (discussing pension laws).

42. *Id.* at 22-24.

schemes devised by industrialized European states at the end of the nineteenth century, Progressive-era scholars argued that the pension system was a product of flawed policy and political favoritism. William Glasson, author of the landmark *Federal Military Pensions*, lamented that the expansion of the pension system had been driven by veterans' lobbying and that it transferred government revenues derived from taxing "the necessities and comforts of the poor" to "persons who were better off than a large proportion of the taxpayers."<sup>43</sup>

These critics had a point. In the first place, the pension scheme was a highly politicized form of income redistribution. The federal revenues that financed veterans' pensions were derived from tariffs on imported goods, a policy that harmed southern cotton producers as European textile manufacturing nations began to encourage cotton cultivation in their colonies.<sup>44</sup> As the federal pension system expanded, even Union veterans who had not incurred a disability during the war could anticipate claiming a tariff-funded pension as they approached old age and the infirmities it brought. The tariffs assisted northern manufacturers by shielding them from foreign competition. Both northern manufacturers and Union veterans showed their thanks by supporting the Republican Party, which championed high tariffs and generous pensions.<sup>45</sup> The party's decisive victory in 1888, when it took both houses of Congress and the White House, was widely attributed to Union veterans' votes in key states such as New York and Indiana.<sup>46</sup> Northern manufacturers lavished Republican candidates with campaign contributions, helping the party regain the White House in 1896 after oil refiner Marcus Alonzo Hanna solicited contributions from railroads and other industrial interests, raising ten times the sum expended by Democrat William Jennings Bryan.<sup>47</sup>

The Progressive-era critique gained even more force from the fact that Union veterans' pensions were the only form of large-scale income

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43. GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 37, at 238-239.

44. Walter Clark, *Government Pensions to Confederates*, 20 CONFEDERATE VETERAN 227, 228 (1912) (arguing that tariff-funded pensions have "aided vastly to keep us poor in our poverty . . . The United States pension list has been padded extravagantly to keep up an excuse for a high tariff"); William H. Glasson, *The South and Service Pension Laws*, 1 S. ATLANTIC Q. 351, 359 (1902) (branding the pension system as "an inequitable and oppressive disposition of the public funds").

45. RICHARD F. BENSEL, *SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880-1980*, 62-73 (1984); see also Larry M. Logue, *Union Veterans and their Government: The Effects of Public Policies on Private Lives*, 22 J. INTERDISC. HIST. 411, 424 (1992) (finding that in the early 1880s, Republican-dominated counties contained greater numbers of pensioners); Gerald W. McFarland & Kazuto Oshio, *Civil War Military Service and Loyalty to the Republican Party: 1884*, 15 HIST. J. MASS. 169 (1987) (examining party loyalty in Massachusetts and New York in the 1884 election).

46. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 127.

47. NELL IRVIN PAINTER, *STANDING AT ARMAGEDDON: THE UNITED STATES, 1877-1919*, 135-39 (1987).

assistance offered by the federal government in these decades. At a time when farmers in the South and West suffered from declining commodities prices, immigrants lived in teeming, unsanitary slums, and industrial workers lacked access to health or disability insurance, Progressive commentators were correct when they noted that the needs of aging, native-born veterans who lived largely in the rural North were hardly the most pressing social concern in the nation.<sup>48</sup>

Although more recent scholarly assessments have acknowledged the truth behind Progressive-era criticisms of the pension system, they also have highlighted its beneficial impact on northern communities and its significance for the history of governance in America. Theda Skocpol has estimated that almost thirty percent of all American men aged 65 or over received a Union pension in 1910, and the scheme funneled hundreds of millions of dollars in sizeable monthly payments to the rural hinterlands of the North where the majority of claimants lived.<sup>49</sup> In 1910, for example, the average pensioner received \$172 per year, which was equivalent to 30% of the average worker's salary. Of course, such a sum was no substitute for a full wage. But this amount could enable a family to hold onto its farm, supplement wages earned by a partially disabled veteran, or make it financially feasible for an aged veteran to live with a measure of dignity in the household of an adult child.<sup>50</sup>

No less impressive than its economic impact on veterans, their families, and their communities was the pension system's role in the emergence of the modern American state. In nineteenth century America, the largest branch of the federal government was the post office, with its far-flung network of community postmasters. Washington was a sleepy town in which small clerical staffs carried out the nation's business. The size and complexity of the pension scheme, however, forced the government to transform the somnolent Pension Office that had previously looked after the needs of a dwindling group of veterans from America's earlier wars. By 1891, the Pension Bureau employed over 2,000 men and women in Washington, many of whom were disabled veterans and soldiers' widows.<sup>51</sup> The sight of so many clerical workers in one place forced even sophisticated observers to scramble for metaphors to describe it. One writer commented that "the appearance of well-dressed people of both sexes suggest an audience assembled to listen to a lecture

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48. *Id.* at 110-26 (describing the depression of the 1890s); see generally GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* 51-80 (1986) (analyzing the underdevelopment of the southern economy between 1880 and 1930).

49. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 132-35.

50. *Id.*; ANN SHOLA ORLOFF, *THE POLITICS OF PENSIONS: A COMPARATIVE ANALYSIS OF BRITAIN, CANADA, AND THE UNITED STATES, 1880-1940*, 137-38 (1993).

51. LEONARD D. WHITE, *THE REPUBLICAN ERA, 1869-1901: A STUDY IN ADMINISTRATIVE HISTORY* 211 (1967) [hereinafter WHITE, *THE REPUBLICAN ERA*].

on some scientific or literary theme; or, as all the people are bending over desks writing or looking at papers, a teachers' convention in some New England city."<sup>52</sup>

The pension system also created an ongoing relationship between the federal government, individual veterans, and the veterans' organizations that represented their interests. Although such alliances are commonplace today, they were a novelty in the late nineteenth century. The federal government then played only a sporadic role in the lives of most ordinary Americans, and most grass-roots demands for federal assistance faltered. Consider, for example, the fate of the Populists. In response to the depressed agricultural prices of the 1880s and 1890s, farmers' alliances in the South and Midwest proposed that the federal government liberalize its monetary policies, implement mechanisms to boost crop prices, and provide loans to credit-starved farmers. These alliances coalesced in the People's Party in 1892. By the end of the decade, however, the movement had faltered after the Democratic Party attracted the Populists' support and jettisoned their most radical demands in the 1896 presidential election.<sup>53</sup>

By stark contrast, Union veterans successfully transformed their national organization, the Grand Army of the Republic ("G.A.R."), into a formidable political machine whose activities kept the veterans' war-time sacrifices in the public consciousness and whose lobbying efforts played an important role in the pension system's expansion. Republicans repeatedly resisted the G.A.R.'s calls for general service pensions for all veterans. But the Dependent Pension Act of 1890 was a major victory for the G.A.R. that was only possible because former Union soldiers had rallied under the Republican banner in key northern states two years earlier.<sup>54</sup> In the 1950s, political scientists argued that such political decision-making in America reflected the ongoing and competing efforts of interest groups to influence policy-makers.<sup>55</sup> Although the pension system certainly had its roots in the "patronage democracy" that first emerged in America in the 1820s when political parties began to reward their followers with governmental largesse, it also is arguable that the repeated clashes between the Union veterans' advocates and their critics

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52. Eugene V. Smalley, *United States Pension Office*, 28 THE CENTURY ILLUSTRATED MONTHLY MAG. 428, 433 (1884).

53. See generally LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978).

54. ORLOFF, *supra* note 50, at 231; SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 124-30; Heywood T. Sanders, *Paying for the "Bloody Shirt": The Politics of Civil War Pensions*, in *POLITICAL BENEFITS: EMPIRICAL STUDIES OF AMERICAN PUBLIC PROGRAMS* 137-59 (Barry S. Rundquist ed., 1980) [hereinafter Sanders, *Bloody Shirt*].

55. See ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* 131-34 (1956); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 256-57 (1992) (describing Dahl's work as "perhaps the most influential book on democratic theory during the post-war period").



was a harbinger of the "interest group pluralism" that was to characterize American political culture for much of the twentieth century.<sup>56</sup>

*C. Veterans, Doctors, and the Pension Process: Returning Civil War Veterans to the History of Disability in America*

Recent scholarship on the Civil War pension system has demonstrated its importance to a complete understanding of political competition and the state in the late nineteenth century.<sup>57</sup> Historians who have mined the records of the Pension Bureau also have enriched understanding of the impact of pension availability upon the aging process by comparing the lives of pensioners with the majority of their contemporaries who faced old age with scant resources and no hope for governmental assistance.<sup>58</sup> Curiously, however, historians of disability have ignored the Civil War pension system. Drawing on Pension Bureau records, the work of historians who have examined the pension system, and contemporary observers, the remainder of this Part begins the process of redressing this gap in the history of disability in America.

Like most recent works on disability, we begin with the premise that disability is a social construct. In the words of Rosemarie Garland Thomson, disability is "the attribution of corporeal deviance—not so much a property of bodies as a product of cultural rules about what bodies should be or do."<sup>59</sup> Because the pension process engaged thousands of physicians in the evaluation of applicants' claims about their bodies, it was one of the central means by which the nineteenth-century American state came to define the boundary between fitness and disability. Drawing on our recently-completed empirical studies that analyzed a sample of over 6,600 Union veterans' pension applications from four northern states,<sup>60</sup> here we trace the transformations in physicians' attitudes toward disabilities and categories of claimants, particularly as the pension system evolved from a program that solely benefited veterans with war-related wounds and illnesses into a scheme that compensated veterans for disabilities that emerged after the war.

Our discussion of the Civil War pension system attempts to move beyond recent scholarship by exploring the ways in which disabled per-

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56. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 120 (describing the pension application program as "a classic example of a recurrent pattern in U.S. politics: a central agency linked with constituents and voluntary groups in thousands of local communities across America").

57. See, e.g., SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 107-130; ORLOFF, *supra* note 50, at 44.

58. See ORLOFF, *supra* note 50, at 136-37.

59. ROSEMARIE GARLAND THOMSON, *EXTRAORDINARY BODIES: FIGURING DISABILITY IN AMERICAN CULTURE AND LITERATURE* 6 (1997).

60. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 48-54) (discussing research methods).

sons themselves participated in the social construction of disability. No less than the Pension Bureau's doctors, veterans themselves played a role in articulating the meaning of disability in late nineteenth-century America. Although the pension system disfavored some disabilities, we argue that applicants were not passive objects of the labeling and stigmatizing processes embedded within Bureau practices. To the contrary, veterans aggressively exploited the Bureau's adversarial procedures. In their pursuit of pensions, veterans hired (and fired) attorneys, appealed claims rejections, and challenged the Union Army's medical records from particular battles and campaigns. Disabled veterans' experiences in securing pensions are reminders that efforts to negotiate bureaucratic structures and turn them to personal advantage, no less than more overt forms of advocacy, contestation and resistance, are political acts by which the members of marginalized groups subtly transform the institutions that impinge upon their lives—or at the very least, secure small victories that bring greater autonomy to the individual.<sup>61</sup>

1. *Defining Disability: Doctors and the Pension Application Process*

The gatekeepers of the pension system were community doctors who examined claimants and then filled in a surgeon's certificate that was forwarded to the Pension Bureau in Washington. If the examining physicians determined that the claimant was disabled, they then rated the severity of the disability. Although Pension Bureau officials retained final control over the acceptance or rejection of claims, the workings of the pension system depended on the impartiality and accuracy of the examination process. Critics of the system charged that sympathetic local physicians were frequently tempted to inflate the seriousness of a veteran's claim; as one writer noted, "their natural disposition would be to favor the applicant as a neighbor and acquaintance, and perhaps a patient."<sup>62</sup>

Rather than focusing on the impact of physicians' decisions on the disposition of Civil War pension claims, twentieth-century scholars have generally debated the degree to which Union veterans' social class, geographic location, and political affiliation shaped the outcome of their claims. Asserting that the pension system was a taxpayer-financed subsidy for the middle class, Progressive-era scholar William Glasson claimed that "[p]ensions were provided for the highly paid but rheu-

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61. Our formulation of a broader conception of protest and resistance is indebted to Robin D. G. Kelley. See ROBIN D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS* 7-10 (1994).

62. Smalley, *supra* note 52, at 430.

matic lawyer, for the prosperous business man hurt in a street accident, [and] for the ex-soldier public official with heart disease."<sup>63</sup> Later researchers have concluded that, while the distribution of pensions did not depend on the applicant's class or occupational level, it was heavily influenced by geography, by the applicant's political affiliation, and by the attitude of presidential administrations toward the pension system.<sup>64</sup> Historian Heywood Sanders, for instance, found that claimants tended to live in rural farming areas, with relatively low levels of wealth, where the Republican party was strong.<sup>65</sup> Moreover, Sanders concluded that the percentage of rejected pension applications tended to fall when Republicans held the White House but rose during Democratic administrations.<sup>66</sup>

Our investigation returns the focus of inquiry to the examining surgeons' encounters with pension claimants. Drawing on a sample of roughly 6,600 veterans' applications from four northern states (Illinois, New York, Ohio, and Pennsylvania), we test earlier scholars' hypotheses about the administration of the pension system over time and the impact of veterans' occupational status on the outcome of their applications.<sup>67</sup> In contrast with earlier studies, we find that veterans' occupational status affected the outcome of their claims. Rather than favoring middle-class veterans, however, doctors were somewhat more sympathetic toward applicants who engaged in physical labor.<sup>68</sup> Most importantly, we examine the disabilities claimed by veterans, exploring the extent to which the distribution of pensions was shaped by doctors' prejudices or sympathies when confronted with particular medical claims.

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63. GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 37, at 236-37.

64. Sanders, *Bloody Shirt*, *supra* note 54, at 148-155.

65. *Id.*

66. *Id.*

67. The study is based on data collected and classified by the Center for Population Economics, whose principal investigator is Professor Robert Fogel of the University of Chicago. The data is found on the Public Use Tape on the Aging Veterans of the Union Army, Version S-0 (Advance Release), Surgeon's Certificates, Ohio, Pennsylvania, New York, and Illinois Regiments, 1860-1940. These four states are significant because, as Skocpol has noted, they represented a large portion of existing and pending pension claims in the 1880s. The first wave of data from surgeons' certificates is drawn from a total sample of 35,747 white male Civil War veterans from 19 states who served as privates in 331 Union Army companies. The companies were chosen randomly from the Union Army's Regimental Books. Of the 6,600 individuals from the four states used in this study, Illinois veterans comprise 26 percent of the sample, New York veterans comprise 33 percent, Ohio veterans comprise 20 percent, and Pennsylvania veterans represent 19 percent. Additional measures in this study are drawn from the data sets based on information collected before and after the Civil War, including (1) Union Army pension applications and eligibility determinations, including medical screening information from surgeon's certificates, (2) veterans' health, medical, and demographic information before and after the Civil War, including information from U.S. census records, and (3) veterans' military records. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 49-50).

68. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 68-70) (discussing these findings in Figure 12).

*a. Bureaucratic Regularity*

Examining physicians were the most important mediators between the applicants who lived in their communities and the Pension Office's bureaucracy in Washington. As historian Robert Wiebe has famously observed, America in the years after the Civil War was a nation of "island communities," where local ties mattered more than national loyalties and even the most educated professionals rarely had much familiarity with the world that lay beyond the nearest large city.<sup>69</sup> In such communities, it was only natural that physicians' highly localized sympathies and prejudices would shape their pension claim assessments. Congress preferred this decentralized form of administration.<sup>70</sup> In the late 1870s, Commissioner of Pensions J. A. Bentley proposed the creation of a centralized process, with full-time salaried surgeons who would conduct medical examinations of applicants within their districts.<sup>71</sup> Although the proposal would have reduced costs and ensured more impartial examinations, Congress ignored it.<sup>72</sup>

Consistent with Congress' preferences, the Pension Bureau in Washington appears to have deferred to local doctors' evaluations. Thus, review of the four-state sample shows that the findings from applicants' medical examinations reliably predicted whether they received a pension, and if so, the level of benefits they received.<sup>73</sup> These strong relationships, of course, cannot reveal the degree to which doctors accurately assessed applicants' disabilities. Nor can they lay to rest the claims of contemporary critics that the pension system was rife with fraud, for a doctor bent on deception could easily complete a surgeon's certificate in a manner that supported the applicant's claim. While it is certainly likely that favorably-inclined physicians inflated the severity of veterans' disabilities, ongoing research suggests that such practices were not as common as critics charged.<sup>74</sup> Chen Song has examined a sub-sample of 3,215 hernia evaluations and found that physicians' ratings of pension claimants' disability levels were stable across time and did not vary from state to state.<sup>75</sup> She concludes that "the examining surgeons had carried out their duties accurately and fairly."<sup>76</sup>

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69. ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, 2-4, 44 (1967).

70. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 119-20.

71. *Id.*

72. *Id.*

73. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 61-63) (findings described in Appendix 2).

74. Chen Song, *Justice or Politics: New Evidence on Surgeons' Performance during the United States Civil War Pension Process*. A Proposal Submitted to the Selection Committee of the Cliometric Society for Presentation in the January 2001 ASSA Meeting (unpublished manuscript on file with authors).

75. *Id.*

76. *Id.*



More research will be necessary before historians may dispose of the frequently-made claim that medical examiners routinely falsified and inflated Civil War veterans' claims. As Song notes, it is almost impossible for a claimant to fake a hernia.<sup>77</sup> It is therefore likely that physicians who wished to aid an examinee would not falsely claim that he had a hernia. And since hernias are easily measurable, it is possible that doctors would not have been tempted to exaggerate the severity of genuine cases. At the same time, the Pension Bureau defined disability so capaciously that physicians who wanted to assist a veteran could rely on harder-to-diagnose conditions such as a nervous system disorder or even the applicant's general appearance.<sup>78</sup>

Nevertheless, the findings in our prior studies indicate that no matter what factors shaped the outcome of the examination (such as the doctor's attitude toward the applicant or his claimed disabilities), the surgeon's certificate was an accurate predictor of the level of pension benefits received by the veteran.<sup>79</sup> For better or for worse, applicants could anticipate that the disposition of their disability claims by Pension Bureau clerks in distant Washington would hinge on the outcome of medical examinations conducted in their home communities.

*b. Physicians and the Medico-Bureaucratic  
Construction of Disability*

Federal pension legislation defined disability as a condition that restricted the veteran's ability to obtain his subsistence by manual labor.<sup>80</sup> This open-ended conception of disability invited veterans with a wide range of claimed illnesses and conditions to apply for pensions, a situation that challenged physicians who had to make decisions using the limited diagnostic techniques of the late nineteenth century. Bureau regulations created even more diagnostic challenges for the examining surgeons. Applicants could not receive pensions for disabilities that

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77. *Id.*

78. See Sanders, *History of the Civil War Pension Laws*, *supra* note 19, at 49-50 (describing 21 categories of disability found in surgeons' certificates in the four-state sample).

79. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 61-65) (noting that the empirical findings are consistent with the hypothesis (and the operational premise of the pension system) that disease screen ratings should be strong predictors of zero and pension ratings; and illustrating for each of the disability groupings, the correlations among the disease screening items and disability and zero ratings).

80. The precise wording changed over time. The 1862 Act referred to a disability as a "total disability for the performance of manual labor requiring severe and continuous exertion." Disability Pension Act of 1862, ch. 166, 12 Stat. 566 (1862) (emphasis added). The Disability Pension Act of 1890 covered veterans whose disabilities incapacitated them "from the performance of manual labor in such a degree as to render them unable to earn a support." Disability Pension Act of 1890, ch. 634, 26 Stat. 182 (1890). See also Sanders, *History of the Civil War Pension Laws*, *supra* note 19, at 213, 218.

stemmed from "vicious habits or gross carelessness."<sup>81</sup> In the period before 1890, moreover, doctors had to determine whether the claimant's condition stemmed from his wartime service,<sup>82</sup> which was an evidentiary question that forced doctors to draw on their understanding of the impact of military service on soldiers' bodies.

Our prior analysis of the four-state sample reveals that physicians implemented the Bureau's rules in surprising ways. First, they collectively favored claimants who worked on the land over craft workers and professionals, belying critics' assumptions that the system disproportionately rewarded middle-class Union veterans.<sup>83</sup> Although applicants who claimed particular disabilities were more likely to be rejected by doctors, those who overcame the examiners' skepticism or antipathy toward stigmatized disabilities tended to receive higher pensions than claimants with less stigmatized conditions.<sup>84</sup>

Analysis of these complex patterns and the reasons behind them is still preliminary. Our aim here is to present these initial findings and explore a variety of hypotheses that may account for them rather than provide conclusive explanations. We begin with the conviction that the Bureau's practices must take into account the quotidian institutional challenges faced by pension doctors. The disparate treatment of veterans' claims certainly reflected culturally-derived attitudes toward particular conditions. Yet disparate outcomes also stemmed from physicians' efforts to apply the Bureau's restrictions on pension eligibility to the varied claimants who entered their examination rooms, a challenge that, as we shall see, led them to consider veterans' trustworthiness and occupational status, as well as to treat certain categories of disability with more suspicion than others.

### i. External Traits and the Problem of Trust

For those veterans who qualified, a federal pension was a legally-protected entitlement rather than a charitable grant. But in an era when the most sophisticated analyses of relief programs drew a distinction between the "worthy" and "unworthy" poor,<sup>85</sup> it is not surprising that the

81. Disability Pension Act of 1890, ch. 634, 26 Stat. 182 (1890). Michael Pilgrim, Ph.D., Director of the National Archives' Military History branch, has defined "vicious habits" as "smokin', drinkin', and whorin'." See Sanders, *History of the Civil War Pension Laws*, *supra* note 19, at 229.  
82. Disability Pension Act of 1862, ch. 166, 12 Stat. 566 (1862) (defining a disability as "any wound received or disease contracted while in the service").  
83. See *supra* text accompanying notes 63-68.  
84. See *supra* text accompanying notes 63-68; see also Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 45-46) (discussing media portrayals of the disabled).  
85. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 45-47) (discussing media portrayals of the disabled as deserving or undeserving recipients of pensions).

legislators who created the Civil War pension system refused to accept the possibility that their generously-funded and inclusive scheme would work to the advantage of undeserving applicants.<sup>86</sup> Rather than compelling doctors to determine the moral character of applicants, the pension legislation subsumed such evaluations within the diagnostic process.<sup>87</sup> Veterans could not claim pensions for disabilities arising from vicious habits or gross carelessness.<sup>88</sup>

Once a physician had satisfied himself that a claimant did not fall into the "morally less deserving" category, the Bureau instructed him to base his disability evaluation on objective fact.<sup>89</sup> The Bureau's faith in its doctors' abilities to reach objective truth reflected the striking advances in medical diagnostic techniques during the second half of the nineteenth century, which advanced at a faster pace than physicians' abilities to cure the claimed illnesses and diseases.<sup>90</sup> By the late 1800s, pension doctors could rely on the stethoscope and laryngoscope; in short time, they could use X-rays, microscopes, and bacteriological tests to determine veterans' medical conditions.<sup>91</sup>

As medical historian Stanley Reiser has observed, the invention of these new diagnostic instruments allowed doctors to free themselves from their earlier reliance on patients' accounts of their own symptoms.<sup>92</sup> The Pension Bureau's rules, however, made it impossible for the physician to treat the examination of a veteran as a "detached relation, less with the patient but more with the sounds from the body."<sup>93</sup> Not only were they required to determine whether the disability arose from the applicants' negligence or bad habits, but the Bureau also relied on doctors to collect and evaluate claimants' representations concerning their incapacity for manual labor and (in the period before 1890) the service-based origins of the disability.<sup>94</sup> Examining doctors therefore had to determine whether a claimant was credible, an inquiry that led them to consider the outward signs that might provide insights into the

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86. MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 66-80 (1986) (describing "scientific charity" in the post-Civil War decades and its proponents' insistence that the poor not become dependent on relief).

87. Disability Pension Act of 1890, ch. 634, 26 Stat. 182 (1890).

88. *Id.*

89. *Id.*

90. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 137-138 (1982).

91. *Id.*

92. *Id.* at 136 (citing STANLEY J. REISER, *MEDICINE AND THE REIGN OF TECHNOLOGY* 38-43 (1978)).

93. *Id.*

94. When completing surgeon's certificates, examining physicians were merely required to describe the applicant's statement of his incapacity to perform manual labor. *See, e.g.,* Increase Pension Claim No. 151197, March 26, 1890 (relaying applicant John H. Wallace's statement that "his leg troubles him very badly, is often an open ulcer; cannot work at his trade of shoemaking.") (claim on file with authors). On the Bureau's reliance on doctors to ascertain the military origins of applicants' disabilities, *see supra* text accompanying notes 69-70.

applicant's character.

Our review of the surgeon's notes for 6,600 of the claimants considered in this study reveals only six references to claimants as "dead-beats," "malingerers," "fakes," or "frauds."<sup>95</sup> Yet the ways in which doctors described these veterans reveals how their bad habits encouraged doctors to treat their claims with suspicion. In one case, for example, the examining doctor noted that the veteran "seems very inclined to dissipation and very much inclined to malingering."<sup>96</sup> In another case, the surgeon branded the applicant as "very intemperate and a regular deadbeat. Utterly unreliable and untruthful."<sup>97</sup> A third physician informed the Bureau that he had "great doubt if he [the applicant] really deserves anything for he looks dead beat and is one I believe."<sup>98</sup>

These cases illustrate, in extreme form, the readings of pension claimants' character that must have been one of the most difficult challenges facing conscientious examiners. Even if applicants' bad habits did not provoke doctors to label them as fakes, those habits had a discernible effect on the disposition of many veterans' claims. In fact, we find that Union veterans from the four-state sample whose examining physicians noted their alcohol use, drug use, malingering behavior, or sexually transmitted disease were substantially more likely to receive a lower pension rating or to have their claims rejected outright.<sup>99</sup>

## ii. Occupational Status and the Meaning of Disability

The occupational status of Civil War veterans also shaped physicians' evaluation of their disability claims. Pension recipients increasingly were an anomalous demographic group in late nineteenth century America.<sup>100</sup> In a period of massive immigration from southern and eastern Europe, as well as quickening migration from rural to urban areas, Civil War pensioners were overwhelmingly native born, and a notable proportion lived in the rural North.<sup>101</sup> Early studies of the Civil War pension system compared it to the contemporaneous European social insurance schemes that benefited the working class and concluded that the typical pension recipient was a member of the middle class.<sup>102</sup> More

95. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 67-68).

96. To examine this possibility, a content analysis was performed of the surgeons' notes for these roughly 6,600 claimants, searching for reference to the terms "malingerer," "deadbeat," "fake," and "fraud." See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 67-68) (quoting case number #1310005023).

97. *Id.* (quoting case number #2408002058).

98. *Id.* (quoting case number #2101207037).

99. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 68).

100. See SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 131-32.

101. *Id.*

102. See, e.g., ISAAC RUBINOW, *SOCIAL INSURANCE, WITH SPECIAL REFERENCE TO AMERICAN CONDITIONS* 406 (1913); GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 37, at 238-39.



recent studies have argued that Union veterans' occupational status had no direct bearing on the disposition of claims.<sup>103</sup>

Our investigation of the four state sample suggests that occupational status had some discernible impact on the disposition of pension claims. Claimants in the sample for whom occupational information was available were classified into three categories: agriculture, manual labor, and professional, skilled or service occupations. The percentage of zero pension ratings (outright rejections) and average disability severity ratings for claimants in each of the three occupational groups for seventeen categories of diseases and disabilities were analyzed. We found that veterans in agricultural service were less likely to be rejected outright, and veterans in professional and skilled occupations received lower average disability ratings than farmers and manual laborers.<sup>104</sup> In certain disability categories, the distinctions between occupational groups were striking. For example, professional and skilled claimants with nervous system disorders had disability ratings almost twice as high as those working in agriculture, yet claimants in the higher-status occupations tended to receive lower disability severity ratings when they suffered from hernias.<sup>105</sup>

There are a number of possible explanations for these results. Although the Pension Bureau's definition of disability focused on the veteran's capacity to perform manual labor, it is possible that doctors found it impossible to apply this universalized conception of disability when they confronted an applicant who, in actual fact, could satisfactorily perform his job despite a physical condition that would prevent a manual laborer from working. A lawyer with a hernia, for example, could still write briefs and advise clients. Conversely, a nervous disorder might impair the lawyer's ability to interact with clients and colleagues but have less serious consequences for a farmer.

As Ann Orloff has argued, it is also possible that the farmers who applied for pensions decades after the war ended may have suffered from worse health relative to other veterans, which would justify the slightly higher disability ratings they received.<sup>106</sup> Finally, it is plausible that these results reflect the abilities of veterans with varying degrees of education, literacy, and political connections to pursue a claim through the pension system. For example, higher-status applicants claiming eye

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103. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 135 (arguing that "[i]nstead of working-class status or low income, factors such as territorial residence, timing of arrival in the country, ethnicity, and political connections . . . differentiated those Americans who benefited from those who got nothing out of the system of aid to Civil War veterans.").

104. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 68-70) (illustrated in Figure 12).

105. *Id.*

106. ORLOFF, *supra* note 50, at 95.

diseases were more likely to be rejected or to receive lower disability ratings.<sup>107</sup> Perhaps a professional with a minor eye ailment would have pursued his claim more readily than a manual laborer, who might have been motivated to seek compensation only when his eye condition seriously undercut his ability to earn a living.

If the latter explanation partially accounts for the differential treatment of occupational groups, then our findings are compatible with the view that occupational status did not figure prominently into the distribution of pension benefits.<sup>108</sup> However, our findings suggest that researchers should examine more closely the class composition of veterans who actually applied for pensions to determine if lower-income veterans were less likely to pursue claims. The activities of pension lawyers and the Bureau itself certainly suggest that poorer veterans did not seek pensions on their own initiative as readily as their wealthier counterparts.<sup>109</sup> The most successful pension lawyers of the late nineteenth century hired agents who scoured the docks and alleyways of major cities in search of poor veterans who were unaware of their pension eligibility.<sup>110</sup> In 1882, the Bureau determined that over a million veterans had not applied for benefits, and two years later, the Bureau Commissioner deputized examiners to track down eligible veterans in states that were crucial to the Republicans' fortunes in the 1884 presidential election. More mundanely, the Bureau often cooperated with the G.A.R. in locating potential applicants.<sup>111</sup>

We find that doctors' disparate treatment of occupational groups emerged most strongly in the final decade of the nineteenth century.<sup>112</sup> In our sample, the rejection rate for farmers and manual laborers *declined* after 1890 while the rejection rate for skilled and professional workers *rose* sharply during the same years.<sup>113</sup> Because the 1890 Disability Pension Act allowed veterans to make claims for disabilities incurred after the war, it is possible that physicians were sympathetically inclined toward middle-aged veterans whose health had declined over a lifetime of outdoor labor. By contrast, they may have felt little sympathy for claimants with less physically taxing jobs who nevertheless claimed to have become disabled. If there is any validity to this hypothesis, it

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107. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 68-70) (12 illustrating findings in Figure 12).

108. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 135.

109. *Id.* at 123-24.

110. See Carrie Kiewitt, *A Study of Fraud in African-American Civil War Pensions: Augustus Parlett Lloyd, Pension Attorney, 1882-1909*, 22-23 (1996) (unpublished M.A. thesis, University of Richmond) (on file with authors).

111. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 123-24.

112. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 88-90) (discussing findings in Figure 22).

113. *Id.* at 89-90 (illustrated in Figure 22).

underscores the degree to which physicians' constructions of disability fused Bureau policy with judgments based on their views toward the lifetime experiences of the claimants who appeared before them.

### iii. Doctors and the Differential Stigmatization of Disability

Even if veterans lacked the physical traits or work history that could prejudice an application, they often received disparate treatment from physicians on the basis of the disabilities they claimed. Analysis of the four-state sample reveals that veterans claiming certain disabilities, such as infectious diseases, eye diseases, and nervous system disorders, were rejected at higher rates than veterans claiming such conditions as hernias, tumors, and cardiovascular problems.<sup>114</sup> However, veterans who *successfully* claimed a disability with a high rejection rate often were more likely to receive a higher pension award than veterans who *successfully* claimed a disability with a lower rejection rate.<sup>115</sup> This phenomenon was particularly striking in the case of veterans claiming nervous system disorders. While 27% of these applicants were rejected, the successful claimants were, on average, deemed to be 72% disabled and consequently received high pension payments.<sup>116</sup> Only one group of claimants—hernia sufferers—received higher average disability ratings (81%).<sup>117</sup>

What accounts for the disparate treatment of veterans presenting various forms of disability? There are a variety of possible hypotheses, none of which exclude other explanations. In the first place, disparate treatment might reflect the general stigma associated with particular disabilities. It is not possible to determine with any certainty the relative levels of prejudice experienced by persons with various disabilities in the late nineteenth century. However, studies by Marjorie Baldwin and others have found that individuals with certain disabilities, such as mental illness and infectious disease, are subject to more prejudice in contemporary society than those with other conditions.<sup>118</sup> There are, of course, difficulties with using the results of these studies to understand the Civil War pension system. Such analysis necessarily relies on the

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114. *Id.* at 64-68 (illustrated in Figure 11).

115. Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 64-68).

116. *Id.*

117. *Id.*

118. Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 45, 52 (1997) (concluding that the ADA is "least likely to help those workers with disabilities who are most disadvantaged in the labor market" and summarizing researching and providing research basis for categorization); *see also* Michelle Fine and Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3-21 (1988) (discussing sources of disability stigma).

assumption that attitudes toward disability present in the general population of the late twentieth century may be ascribed to physicians one century earlier. Yet it is certainly arguable that contemporary attitudes toward disability had their roots in nineteenth-century views, and it is likely also that physicians would have found it difficult to set aside their culture's views on disability and illness when they encountered pension claimants in their examining rooms.

Acknowledging these caveats, we have classified the disabilities claimed by veterans in the four-state sample into two categories: those subject to more prejudice and those subject to less prejudice.<sup>119</sup> Veterans claiming more stigmatized diseases and disabilities were twice as likely to be rejected outright by pension doctors. However, applicants who persuaded examiners that they possessed a "stigmatized" yet pension-worthy disability received, on average, comparably higher disability severity ratings as those with less prejudicial conditions.<sup>120</sup>

The differential treatment of more and less stigmatized disabilities most dramatically manifested itself after 1890, when veterans could make claims for non-war related disabilities. Before 1890, when claimants had to link their disabilities to wartime service, severity ratings for nervous disorders (a stigmatized disability) and gunshot wounds (a non-stigmatized disability) rose and fell in tandem; in fact, nervous disorder claimants received higher severity ratings.<sup>121</sup> After 1890, however, applicants claiming to have nervous disorders were rejected at much higher rates and received ever-lower disability severity ratings.<sup>122</sup>

One explanation for the striking changes across time is that in the period before 1890, successful applicants' discussions of their disabilities with physicians had rooted their current physical condition in their military experiences. Since many pension doctors had themselves served in the war, it is possible that their sense of solidarity with these applicants enabled them to hold in check negative attitudes toward, or doubts about, particular disabilities. After 1890, however, an applicant's disability was likely to stem from his experiences in civilian life. Perhaps physicians' willingness to sympathize with veterans presenting stigmatized disabilities diminished when those disabilities were unrelated to army service and the risks that attended it.

Another hypothesis that may explain the disparate treatment of pension claims categories focuses not on the relative level of stigma associated with particular disabilities but instead on doctors' efforts to imple-

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119. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 57-59) (illustrated in Figure 8).

120. *Id.* at 64-65 (illustrated in Figure 11).

121. *Id.* at 87 (illustrated in Figure 20).

122. *Id.* at 87 (illustrated in Figure 20).



ment the Bureau's definitions of disability and evidentiary requirements. As we have noted, federal pension legislation defined disability as an impairment of the veteran's capacity to earn a living by manual labor. When doctors implemented this statutory mandate through their examinations of applicants, they were forced to determine the ways in which veterans' conditions truly separated them from the general population and limited their capacity for work.

It is possible that our findings partly reflect these assessments. Consider, for example, the disposition of claims based on genito-urinary conditions. This category includes such problems as painful and frequent urination, loss of sexual function, and kidney and bladder disease.<sup>123</sup> Claims in this category resulted in a high level of rejections (53%), and even when claimants successfully established that they were disabled, physicians gave them, on average, low disability ratings (27%).<sup>124</sup> Why were doctors so collectively hostile toward these claimants? Perhaps they concluded that these veterans' capacities for manual labor were minimally impaired by difficulties with urination. Moreover, doctors may have concluded that loss of sexual function did not render a claimant highly disabled, especially because it was unlikely to impair his capacity to work and because the average claimant in this category was 52 years old.<sup>125</sup>

It is also likely that in the period before 1890, high rejection rates for certain disability categories reflected decision-makers' hesitations when faced with conditions that seemed tenuously linked to the veteran's military service. These evidentiary problems took a variety of forms. In the first place, disabilities were not pensionable unless sustained "in the line of duty," a technical term that encompassed wounds and diseases incurred on as well as off the battlefield.<sup>126</sup> However, this category did not include wounds received while the applicant was engaged in a variety of other activities which were illegitimate but ordinary incidents of military and camp life.<sup>127</sup> As Deputy Commissioner of Pension Calvin B. Walker explained in an 1882 treatise, soldiers were frequently injured when they quarreled with each other, handled their

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123. *Id.* at 61-63 (discussed in Appendices 1 and 2).

124. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 64-66) (illustrated in Figure 11).

125. *Id.* at 66-67.

126. CALVIN B. WALKER, A TREATISE ON THE PRACTICE OF THE PENSION BUREAU, GOVERNING THE ADJUDICATION OF ARMY AND NAVY PENSIONS, BEING THE UNWRITTEN PRACTICE FORMULATED 10 (1882) (defining "line of duty" as "that relation which a soldier or sailor sustains to the military or naval service" of the United States when the soldier is "performing an act connected with any of the possible conditions or requirements of the service, or in the observance of the proper orders of his superiors, not in violation of the army or naval regulations") [hereinafter WALKER, PRACTICE OF THE PENSION BUREAU].

127. *Id.* at 10.

weapons carelessly, or foraged without orders.<sup>128</sup> In addition, the Bureau treated with suspicion gunshot wounds in the hands or feet, which might have been self-inflicted by soldiers attempting to avoid battle.<sup>129</sup> Although an examining physician could clinically confirm the existence of these disabilities, Bureau clerks in Washington were charged with weeding out such claims as a result of the context in which the disabilities had been incurred.

Second, the gradual expansion of federal pension eligibility in the 1870s created a variety of diagnostic difficulties for examining physicians. After 1873, Union veterans could claim pensions on the basis of disabilities which had their origins in illnesses contracted during military service but had not manifested themselves until after the war.<sup>130</sup> To eliminate fraudulent claims, the Bureau determined the pathological sequences of a variety of frequently-alleged wartime medical problems, and examining doctors were asked to ascertain whether the veterans' subsequent medical history could be related to these wartime illnesses.<sup>131</sup> For example, veterans who claimed to have had typhoid fever during the war could suffer from diarrhea or "derangement of the nervous system" later in life, and veterans with lung disease could plausibly trace their condition back to pneumonia contracted during the war.<sup>132</sup>

The Bureau was also suspicious of conditions experienced by soldiers during the war that frequently reemerged for unrelated reasons later in life. Chief among these was rheumatism.<sup>133</sup> As Walker explained, "[a] large number of soldiers had it to some extent, but in very many cases it never developed to a pensionable degree."<sup>134</sup> He concluded that these "claims therefor [sic] should be very carefully guarded."<sup>135</sup> The 1879 Arrears Act similarly created diagnostic difficulties for examining physicians. After 1879, doctors were required to determine whether the claimant's disability had its origins in military service. For the Bureau to accurately calculate the veteran's lump-sum arrears payment, doctors were also compelled also to assess changes in the severity of the veteran's disability over the period between his military discharge and his pension claim.<sup>136</sup>

In addition to any difficulties that doctors experienced in confirming the existence of applicants' claimed disabilities, the Bureau's need for

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128. *Id.*

129. *Id.* at 21.

130. See *supra* notes 34-42 and accompanying text.

131. WALKER, PRACTICE OF THE PENSION BUREAU, *supra* note 126, at 22-24.

132. *Id.* at 25.

133. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 64-66) (illustrated in Figure 11).

134. WALKER, PRACTICE OF THE PENSION BUREAU, *supra* note 126, at 27-28.

135. *Id.* at 28.

136. *Id.* at 33.

doctors to determine the origins, causation, and severity of those disabilities doubtlessly led them to treat some disease categories with more suspicion than others. It is likely, for example, that examining physicians were skeptical of veterans who based their claims on present-day infectious diseases that allegedly originated in military service. The Bureau instructed doctors to be alert to such disability claims for which the applicant could present no evidence of medical intervention since the war's end. As the Bureau's Pension Commissioner Calvin Walker observed, "it is not reasonable to presume that the claimant has been disabled to a pensionable degree during the entire time since discharge, and had no medical treatment during such period."<sup>137</sup> Faced with these evidentiary and diagnostic challenges, doctors' stigmatization of particular disabilities may have been rooted in their efforts to implement the Pension Bureau's regulations and instructions.

## 2. *Contesting Disability: Pension Process and the Empowerment of Civil War Veterans*

More than any other group of disabled persons in American history that has sought assistance from a governmental agency, the Civil War Union veterans who pursued pensions could be secure in the knowledge that the officials who would decide upon their claim were sympathetic toward them, and in many cases had shared their experiences of war and disability. Commenting on the bonds that linked pension applicants with the Bureau's personnel, journalist and Civil War veteran Eugene V. Smalley wrote in 1884:

When the lunch hour comes there is a creaking of artificial legs upon the stairs, and among the limping procession is the Commissioner himself, Col. W. W. Dudley, a veteran of an Indiana regiment. There is something touching in the sight of this throng of disabled soldiers engaged in examining claims for pensions. The examiner acts as the soldier's friend, and shows him the way to get the evidence to prove his claim, if it be a just one.<sup>138</sup>

As the foregoing analysis of the four-state sample has shown, however, not all veterans were included within the bonds of solidarity described by Smalley. The Bureau treated certain disability claims, such as those for infectious diseases and nervous system disorders, with suspicion and hostility. Doctors collectively favored agricultural workers over veterans who may have satisfied the Bureau's formal requirements

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137. *Id.* at 33.

138. Smalley, *supra* note 52, at 433.

but did not earn a living from manual labor. And the unlucky veterans whose drinking habits or sexual history led doctors to challenge their overall appearance of trustworthiness experienced higher rejection rates and lower severity ratings even when their medical condition would otherwise have entitled them to a pension.

In addition to experiencing the institutional stigmatization of particular disabilities and categories of claimants, applicants who pursued claims for less-than-obvious disabilities could not count on the support of fellow veterans. Although the G.A.R. assiduously lobbied for more inclusive eligibility standards, a larger Bureau staff, and higher benefits, local branches were suspicious of veterans who joined the organization in the hopes of receiving a pension. As Stuart McConnell has observed, veterans often were hostile toward other former soldiers who joined the G.A.R. for ulterior, self-interested reasons.<sup>139</sup> The G.A.R.'s commander in chief encapsulated the organization's attitude toward members who too quickly sought the assistance of fellow veterans after they joined the organization when he observed in 1886 that many veterans "join our ranks looking for immediate and purely material and selfish benefits, and . . . finding their expectation slow of realization, properly and naturally fall out."<sup>140</sup>

Yet Union veterans, many of whom were poor and unfamiliar with the levers of power in their society, refused to be the passive objects of either governmental generosity or hostility. In large measure, veterans who successfully navigated the Bureau's application process received their pensions because they actively managed their cases by communicating convincingly with medical examiners and by locating witnesses who could testify to the wartime origins of their disabilities. Moreover, disappointed applicants frequently demonstrated their refusal to accept the denial of their claims by pursuing appeals through the Bureau's review process and by enlisting the assistance of lawyers and elected officials.<sup>141</sup>

Our research on these processes has only begun recently, and the discussion that follows is intended to sketch the main contours of the Bureau's procedures whose interstices veterans exploited in their search for pensions. Our inquiries start with the proposition that although veterans who applied for pensions were self-seeking individuals, their claims strategies should nevertheless be regarded as *political* acts by which they attempted to improve their lives and exercise some measure

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139. STUART MCCONNELL, *GLORIOUS CONTENTMENT: THE GRAND ARMY OF THE REPUBLIC, 1865-1900*, 107-08 (1992).

140. *Id.* at 108.

141. See *infra* text accompanying notes 145-48 (discussing veterans' efforts to secure pensions).



of control over their encounters with public officials. In the process, their collective grass roots actions transformed the Pension Bureau into a complex, modern administrative agency.

Michel Foucault wrote that "[w]here there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power."<sup>142</sup> Just as the forms of stigmatization embedded within the Civil War pension system were bound up with doctors' efforts to enforce the Bureau's evidentiary rules, the distinctively juridical character of the Bureau's processes shaped veterans' resistance to an agency that was suspicious of disability claims that were diagnostically controversial, contravened the army's own records, or were brought by disabled veterans who did not conform to the popular image of the gallant but domesticated war hero.<sup>143</sup> As Stephen Skowronek has observed, courts and political parties—and not administrative agencies—were the most powerful and dynamic aspects of the late nineteenth-century American state.<sup>144</sup> It is not surprising, then, that Bureau officials took their cues from the legal system when they were forced to devise procedures to cope with the unexpectedly large numbers of veterans who stepped forward with controversial claims or who challenged the denial of their claims. But even after the Bureau created these procedures to impose some order on the claims process, veterans seized the opportunities for contestation found within those procedures.

The adjudicative dimensions of Bureau practice took three major forms. In the first place, veterans' dogged efforts to claim disability status forced the Bureau to develop its own rules of evidence by which it could justify rejection of individual claims. Veterans frequently sought pensions for disabilities that could not be verified in the military's official records, and after they became eligible for arrears payments in 1879, veterans began to claim that they had continuously suffered from disabilities since their army days.<sup>145</sup> In addition, many veterans alleged that they contracted a disabling condition shortly after commencing military service, and these claims raised the possibility that the soldier had already contracted the condition before joining the army. Most intriguingly of all, many veterans seem to have utterly dominated their physical examinations by Bureau-appointed physicians. In his 1882 treatise, Calvin B. Walker complained:

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142. MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY. VOLUME 1: AN INTRODUCTION* 95-96, cited in Lila Abu-Lughod, *The Romance of Resistance: Tracing Transformations of Power Through Bedouin Women*, 17 AM. ETHNOLOGIST 41, 42 (1990).

143. See Blanck, *Civil War Pensions*, *supra* note 12 (manuscript at 38-48) (discussing content analysis study of media portrayal of Civil War veterans).

144. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, 37-42 (1982).

145. See WALKER, *PRACTICE OF THE PENSION BUREAU*, *supra* note 126, at 33-37.

It would seem unnecessary to state that reports of medical examinations made up of claimants' statements are wholly worthless, were it not for the fact that so large a number are filed in the office which contain but little else, and without any finding of the surgeon or the board making the report other than that "if the claimant's statements are true he is entitled to a pension," or something of a similar character.<sup>146</sup>

Veterans also actively enlisted friends, old army companions, and neighbors in their quest for pensions. The Bureau allowed veterans to support their claims with *ex parte* affidavits that testified to their medical condition before the war, the military origins of their disability, and the continuation of the disability after their return to civilian life.<sup>147</sup> As Union veterans began to flood the Bureau with affidavits in support of their claims, its officials were faced with the intractable problem of determining the credibility of these witnesses.

To help its clerks and officials cope with the stream of evidence submitted by veterans, the Bureau developed detailed regulations regarding the combinations of written and parol evidence needed to sustain particular claims. Moreover, its medical experts devised a web of diagnostic presumptions that could govern cases in which the veteran claimed to have become ill shortly after enlisting. For example, the Bureau generally disallowed claims for chronic diarrhea that had developed within three months of enlistment, compelling veterans who sought to make such claims to gather evidence of their physical soundness before joining the army.<sup>148</sup> On the other hand, the Bureau acknowledged that certain diseases, such as typhoid, malaria, and pneumonia, could manifest themselves within a short period after they were contracted, and it reminded decision-makers that such claims should not be rejected merely because the veteran claimed to have manifested the disease shortly after enlistment.<sup>149</sup>

The second juridical feature of Bureau practice was an elaborate set of appeals processes. Veterans whose claims were rejected or whose requests for pension increases were denied received notice from the Bureau, and they then had twelve months to supply the evidence needed to

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146. *Id.* at 52.

147. *Id.* at 1-13 (detailing Bureau's policies regarding affidavits); see also Smalley, *supra* note 52, at 430 (criticizing the willingness of the Bureau to accept *ex parte* affidavits and observing that "[m]en asked to do the neighborly act of witnessing a pension paper are always compliant, and are seldom particular as to what they certify to. No one appears for the Government to cross-examine them").

148. WALKER, PRACTICE OF THE PENSION BUREAU, *supra* note 126, at 24.

149. *Id.* at 23.

sustain the claim.<sup>150</sup> Upon resubmission, a Bureau examiner would prepare a brief which summarized the facts of the case, assessed the weight and character of the evidence, and decided whether the claim should be accepted or rejected. A Review Board then considered the brief. The Bureau consciously structured the Review Board as an appellate body. Its rules specified that questions of fact were the province of the examiner who prepared the brief and that "[t]he sole function of the Review Board is to treat cases judicially, upon the papers."<sup>151</sup> After considering the brief, the Review Board solicited an opinion on the medical evidence in the case from a medical reviewer.<sup>152</sup> If it sustained the veteran's claim, the Review Board then relied on medical reviewers to fix the severity of the applicant's disability.<sup>153</sup>

The third adversarial dimension of Bureau practice was the agency's willingness to let veterans hire lawyers to shepherd their cases through the application process. The complexity of many cases and the large number of veterans who sought legal assistance turned pension law into a highly visible—and notorious—specialty within the late nineteenth-century legal profession. In 1898, 60,000 persons were authorized to practice as attorneys in Bureau proceedings.<sup>154</sup> About one thousand lawyers dominated the field, and the most active was George E. Lemon, who managed an astounding 125,000 claims at one point in his career.<sup>155</sup>

Pension lawyers were allowed to collect ten dollars for each claim they pursued. By the end of the nineteenth century, the Bureau's critics denounced them as parasites who were responsible for defrauding both the government and their own clients. As Carrie Kiewitt has shown in her biography of pension attorney August P. Lloyd of Baltimore, there was some truth to these accusations. Pension lawyers frequently augmented their ten dollar fees by soliciting "presents" from veterans.<sup>156</sup> The most corrupt lawyers hired canvassers who trawled the streets of large cities for down-at-the heels veterans who could be induced to apply for pensions on the basis of spurious disability claims. Although critics of the Bureau argued that pension lawyers preyed upon veterans, Kiewitt's study of African American veterans in Baltimore who hired Lloyd suggests that disabled veterans were shrewd consumers of legal services.<sup>157</sup> Over half of Lloyd's clients either came to him after dismiss-

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150. *Id.* at 5-7.

151. *Id.* at 6-7.

152. *Id.* at 6.

153. WALKER, PRACTICE OF THE PENSION BUREAU, *supra* note 126, at 6.

154. WHITE, THE REPUBLICAN ERA, *supra* note 51, at 220.

155. *Id.*

156. Kiewitt, *supra* note 110, at 42-44 (detailing corrupt practices of Baltimore pension attorney Augustus P. Lloyd, such as requiring a client to pay \$15 to cash a check).

157. See, e.g., S. N. Clark, *Some Weak Places in Our Pension System*, 26 THE FORUM 318 (1898) (arguing that pension lawyers belong to "the 'shyster' breed, whose sole object in life is to

ing another attorney or left him to seek the services of another lawyer.

The ability to hire a legal advocate undoubtedly empowered disabled veterans in their dealings with the Bureau. Although their canvassers and printed circulars may have tempted ineligible veterans to seek pensions, these same practices heightened genuinely disabled veterans' awareness of their eligibility. Back at the office, lawyers marshaled affidavits to sustain their clients' claims, solicited independent medical opinions for clients who were rejected by the Bureau's medical board, and pursued appeals. The Bureau's regulations acknowledged veterans' reliance on lawyers by making provision for examiners to notify their attorneys directly when rejecting their claims.<sup>158</sup> Although more research is necessary before historians can reach firm conclusions on the impact of pension lawyers upon the Bureau's practices, it is likely that the pension system spawned such elaborate rules of evidence and procedure because lawyers demanded them.<sup>159</sup>

In addition to seeking the assistance of lawyers, veterans did not hesitate to enlist the influence of their elected representatives in their pursuit of pensions. Skocpol has noted that one quarter of many Congressmen's correspondence consisted of petitions and letters from veterans, and Robert M. La Follette estimated that he spent twenty-five to thirty percent of his time as a Congressman in the late 1880s assisting veterans with their claims problems.<sup>160</sup> By 1891, the Bureau received almost 155,000 inquiries each year from members of Congress acting on behalf of constituents.<sup>161</sup>

In future studies, we will examine in greater detail the ways in which veterans took part in the claims process. We want to determine the frequency with which veterans utilized the Bureau's appeals process, the social and medical characteristics of the veterans who invoked it, and their success in altering the disposition of their claims. We want to trace, in greater detail, the ways in which the Bureau's internal adjudicative processes grew in response to veterans' challenges to its decisions, and we hope to bring into view the relationships between individual veterans and the lawmakers who assisted them in their conflicts with the Bureau.

The Union veterans who engaged in these institutional maneuvers

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line their own pockets at the expense of both the Government and their unfortunate clients"), cited in Kiewitt, *supra* note 110, at 73.

158. WALKER, PRACTICE OF THE PENSION BUREAU, *supra* note 126, at 5-6.

159. On the analogous role of lawyers in forcing courts to articulate rules of evidence and procedure in eighteenth- and early nineteenth-century English criminal trials, see J.M. Beattie, Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries, 9 L. & HIST. REV. 221-67 (1991) and Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990).

160. SKOCPOL, PROTECTING SOLDIERS, *supra* note 11, at 121-22.

161. *Id.*



were unabashedly self-interested actors. As they doggedly argued that the Bureau should grant them a pension, their consciousness as disabled persons rarely prompted them to identify with other disabled veterans, let alone disabled persons who had not shared their experience of war-time service. Nonetheless, our preliminary research suggests that these atomized individuals collectively played a key role in the medical and political construction of disability in late nineteenth-century America. Their novel and controversial claims forced the Bureau to devise elaborate adjudicative and diagnostic procedures that required over six thousand clerks and physicians across the country to implement them.<sup>162</sup> Reformers' criticisms of Bureau practices were, at root, an alarmed reaction to the forms of contestation and self-identification adopted by the hundreds of thousands of veterans who contested a crabbed and restrictive conception of disability.<sup>163</sup>

### III. POLITICS OF DEFERENCE: DISABILITY AND VETERANS' PENSIONS IN THE POST-RECONSTRUCTION SOUTH

In 1907, pension authority and economist William H. Glasson published an article in *The American Monthly Review of Reviews* that examined pension schemes enacted by the states of the former Confederacy.<sup>164</sup> Glasson's article tellingly began with an account of the solemnities surrounding the recent dedication of a monument to Jefferson Davis in Richmond, Virginia, which culminated a reunion in the city that drew 15,000 Confederate veterans and 55,000 of their spouses, children, grandchildren, and well-wishers.<sup>165</sup> Glasson, who taught at Trinity College in North Carolina, well understood that, like the erection of monuments to Confederate leaders, the provision of pensions to veterans was "calculated to show the practical devotion of the South" to the Lost Cause.<sup>166</sup>

Southern states began to grant pensions to Confederate veterans in the 1880s, and by 1893, one authority estimated that they collectively

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162. WHITE, THE REPUBLICAN ERA, *supra* note 51, at 211 (describing the rapid growth of the Bureau in the decades after the Civil War).

163. As the ADA has encouraged litigants to step forward with claims that contest traditional conceptions of disability that predominate American culture, modern critics have similarly responded with alarm. See, e.g., Michelle Stevens, *Editorial, Disability Law Falls Down*, CHI. SUN TIMES, Sept. 20, 1998, at 37 ("I fear . . . that many able-bodied Americans are latching onto the Americans With Disabilities Act. If these parasites keep filing lawsuits claiming eligibility under a law designed to remedy discrimination against people with genuine shortcomings—and winning—how soon before there's a national backlash that unfairly encompasses the blind, the lame, and others with serious handicaps?"). See also Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223-245 (analyzing media images of ADA plaintiffs).

164. Glasson, *The South's Care* *supra* note 10, at 40-47.

165. *Id.* at 40-41.

166. *Id.* at 44-45.

disbursed \$1.1 million per annum to approximately 27,000 former soldiers.<sup>167</sup> Southern state legislatures, like Congress, gradually expanded the reach of their pension schemes. The southern plans first covered only indigent, disabled ex-soldiers and gradually expanded to cover indigent veterans who were elderly or had become disabled after the war. Skocpol has observed that the pension systems created by southern states benefited roughly the same percentage of veterans as their federal counterparts by the early twentieth century.<sup>168</sup> In all other respects, however, the southern and federal pension systems were vastly different. In the first place, most southern states limited benefits to needy veterans. Second, the typical Confederate veteran received a pension that was a mere fraction of that claimed by his northern counterpart. In 1907, for example, a Union soldier who had totally lost his sight received \$1200 per year.<sup>169</sup> In Georgia, blind veterans received \$150.<sup>170</sup>

It is not surprising that southern pensions were so paltry compared to those granted by the federal government and were largely limited to veterans with low incomes and few assets. Hobbled by debt and limited by a small tax base that was constrained by the region's industrial underdevelopment and stagnating prices for the region's chief agricultural commodities, southern legislatures were in no position to fund large pensions for Confederate veterans regardless of personal wealth. Despite the low value of these pensions and the limited class of veterans who were eligible for them, they nevertheless entailed a significant budgetary commitment by state legislatures. Georgia, for example, spent an average of only \$462,547 per year on pensions during the 1890s, but this amount comprised fifteen percent of the entire state budget.<sup>171</sup>

What is more surprising is the seeming lack of controversy surrounding the southern pension system when compared to the federal system. Not only were charges of fraud rare, but southern voters did not challenge the wisdom of expending large sums of state money on veterans. As Glasson observed, the pension schemes reflected politicians' willingness to benefit veterans "even on pain of doing without much needed improvements in schools, roads, and other public institutions."<sup>172</sup> Glasson concluded that the fiscal sacrifices entailed by the pension schemes indicated "a popular and deliberate approval of the expenditure," and historians have agreed.<sup>173</sup> James R. Young, for example, has argued that white Southerners wished to reward former Confederates

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167. Morton, *Federal and Confederate Pensions*, *supra* note 10, at 68.

168. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 139.

169. Glasson, *The South's Care*, *supra* note 10, at 45.

170. *Id.*

171. Young, *supra* note 10, at 49.

172. Glasson, *The South's Care*, *supra* note 10, at 45.

173. *Id.* at 45.

before the beginnings of prosperity in the 1880s made it feasible for southern state governments to allocate funds for this purpose.<sup>174</sup> Skocpol has similarly suggested that southern Democratic leaders were motivated by the desire to keep up with the evolving pension system for Union veterans.<sup>175</sup>

These interpretations of the origins of southern pension systems comport with the widely held assumption that a politically and culturally homogeneous white electorate stood united behind the Democratic Party in the decades after the Civil War. Yet, as historians who are sensitive to the politics of race and class have long emphasized, Democratic control of the late nineteenth-century South was more tenuous than scholarship on the state pension systems has acknowledged.

In all southern states, Democrats wrestled political control from bi-racial Reconstruction coalitions by the early 1870s in a process they self-congratulatorily termed "Redemption."<sup>176</sup> African American voters refused to accept passively the return of government by (and for) whites only and continued to support Republican and independent candidates.<sup>177</sup> Moreover, many poorer whites were skeptical about the Redeemers' message of fiscal conservatism, white supremacism, and retreat from the social programs inaugurated during Reconstruction.<sup>178</sup> In the early 1880s, between thirty and forty-six percent of voters in Alabama, Arkansas, Florida, Georgia, Mississippi, and Texas voted for independents in Congressional elections.<sup>179</sup> A few years later, Democrats in many southern states were forced to seek the endorsement of the Farmers' Alliance, which demanded railroad rate reform and other forms of governmental assistance for farmers who had been battered by depressed agricultural prices.<sup>180</sup> In the 1890s, the same demands and frustrations drew many farmers, black and white, into the People's Party.<sup>181</sup> Only in the 1890s and early years of the twentieth century did southern Democrats stifle these challenges to their hegemony, and they cemented power by enacting laws that disfranchised almost all black voters and a surprisingly large number of whites.<sup>182</sup>

174. Young, *supra* note 10, at 48.

175. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 139.

176. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, 575-601 (1988); EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 7-9 (1992).

177. AYERS, *supra* note 176, at 43-46.

178. *Id.* at 37-43 (describing the persistence of black and white support for the Republican Party in the South during the 1880s).

179. *Id.* at 47.

180. *Id.* at 240-248.

181. See generally AYERS, *supra* note 176, at 249-282; GOODWYN, *supra* note 53, at 293-310 (analyzing the forces that created, and destroyed, the People's Party).

182. See C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, 321-49 (1951) (analyzing the motives behind, and consequences of, electoral disfranchisement in the late nineteenth-

From the vantage-point of the mid-1880s, it was by no means certain that Confederate veterans would unqualifiedly support the Democratic party. Both the revolution in racial relations wrought by emancipation and the economic transformations of the postwar decades had profoundly undermined the status of many Confederate veterans who approached middle age in the 1880s. The editorial page of the January 1884 edition of *The Southern Bivouac*, a Confederate veterans' magazine published in Louisville, Kentucky, tellingly revealed the status anxiety experienced by many former soldiers and their alienation from the Democratic politicians who had mastered the new realities.<sup>183</sup> One brief editorial decried the fact that "we have the negro with us still, but he is changed. Bill and Samson are now well known by even white folks as Mr. Brown and Mr. Taylor. The children speak of their employer as 'the boss' or 'the man,' but of the colored neighbor Harry, as Mr. Smith."<sup>184</sup>

Another editorial praised Georgia for granting disability pensions, but the magazine's editors observed that if other states continued to ignore veterans, "the conclusion may be that their Legislatures are governed not by the men who fought, but by those who stayed at home and made money."<sup>185</sup> Not only could the frustrations felt by *The Southern Bivouac*'s readers drive veterans away from Democrats, but their experiences during and after the war also might have drawn ex-soldiers to the politicians who spoke for agrarian interests in the 1880s. According to one study of Georgia elections, the legislators elected with the endorsement of the Farmers' Alliance in the late 1880s were older than regular Democrats and more likely to have fought in the Civil War.<sup>186</sup> Veterans may have found it easier to join the Alliance since its leaders' life experiences paralleled their own.

The origins of the Confederate state pension schemes are intertwined with the tumultuous political history of the South during the 1880s and 1890s, but more research is necessary before it will be possible to understand those linkages. Given the different ways in which the political tensions sketched above played themselves out in the states of the former Confederacy, it is likely that the political motivations surrounding the creation of veterans' pensions varied from state to state. Given the contentious politics of these decades, historians must move beyond the myth of a united white South to explain why, once they were created, the day-to-day operation of the Confederate pension schemes

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century South).

183. Untitled Editorial, 2 THE SOUTHERN BIVOUAC 238 (1884).

184. *Id.*

185. *Id.*

186. AYERS, *supra* note 176, at 246.



generated so little criticism or controversy. The remainder of this Part examines the pension system in Virginia in an effort to answer this question for one representative southern state.<sup>187</sup> In the process, it will shed more light on the federal pension practices that empowered disabled Union veterans by examining a state pension scheme that was designed on wholly different lines.

*A. Veterans, Pensions, and the Origins of One-Party Politics in Virginia, 1879-1888*

The evolution of Virginia's pension scheme casts into bold relief the ways in which veterans' benefits were intertwined with the efforts of Democratic politicians to establish their hegemony. In 1869, Virginia became the first state of the former Confederacy in which Democrats, who called themselves Conservatives, returned to power.<sup>188</sup> A decade later, however, Virginia became the first state to witness a successful biracial challenge to Conservative hegemony. In 1879, the Conservatives, now called "Funders" because they supported full funding for interest payments on state debts, lost control of the state legislature to the "Readjusters," a movement that united rural mountain whites with blacks and Republicans from the state's Tidewater and Southside regions under the leadership of William Mahone, a railroad baron and Confederate general.<sup>189</sup> The Readjusters won the governorship in 1881, and during its four years in power, Mahone's coalition lowered farmers' taxes, increased those paid by corporations, expanded educational spending, reduced the impact of debt payments on the state budget, and protected the civil rights of African Americans.<sup>190</sup> The Conservatives, now calling themselves Democrats, regained control of the Virginia General Assembly in 1883, but they faced further challenges to their hegemony in the latter years of the decade.<sup>191</sup> In 1889, Mahone was the Republican candidate for governor, and he gained three sevenths of the vote despite a split in his party.<sup>192</sup>

Virginia's first comprehensive pension scheme for veterans was created in 1888, after Democrats had returned to power but before it was

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187. We selected Virginia's pension system for study because it was typical in limiting disability benefits to indigent veterans and because the legislature's annual allocations placed it in the middle tier of southern states with pension schemes. See Morton, *supra* note 10, at 68-73.

188. FONER, *supra* note 176, at 421.

189. CHARLES C. PEARSON, *THE READJUSTER MOVEMENT IN VIRGINIA* 118-131 (1917); AYERS, *supra* note 176, at 46-47.

190. NELSON M. BLAKE, *WILLIAM MAHONE OF VIRGINIA: SOLDIER AND POLITICAL INSURGENT 186-93* (1935).

191. *Id.* at 225-232.

192. *Id.* at 243-50.

entirely certain that they could retain power over state politics. The 1888 pension legislation granted annual payments to veterans with war-related disabilities who had incomes of less than \$300 and property valued at less than \$1,000.<sup>193</sup> Replacing an earlier system that granted one-time commutation payments to disabled veterans, the impetus for the new pension law was the political competition between Democrats and Readjusters in the middle and late 1880s.<sup>194</sup> The Democrats, triumphant after four years out of power but anxious not to repeat the political errors of the late 1870s, selectively embraced the Readjusters' agenda. They chose not to reverse the Readjusters' debt policies, and in the 1885 gubernatorial race, their candidate won, in part because he outflanked his opponent by endorsing policies once championed only by the Readjusters.<sup>195</sup> Democrat Fitzhugh Lee and Readjuster John S. Wise both pledged support for free school textbooks, local control over liquor licensing, and veterans' pensions.<sup>196</sup> By the mid-1880s, Virginia Democrats had realized that support for veterans' pensions was a way to demonstrate fiscal generosity without endorsing the more radical, redistributive programs articulated by Readjusters, Alliancemen, and other spokesmen for beleaguered farmers.

The pension scheme was not merely symbolic politics. Virginia Democrats surely must have viewed pensions as a means of cementing the ties between their party and a key constituency. Like their counterparts in other parts of the South, Virginia veterans lobbied the legislature for increased benefits. In 1896, for example, a veterans' organization in Middlesex County petitioned for amendments to the pension law.<sup>197</sup> As we shall see, however, Virginia Democrats devised policies that secured veterans' political loyalties without empowering them to demand the dramatic expansion of the new disability pension schemes.

### *B. Disability and Deference: The Evolution of Virginia Pension Laws*

Although the creation of pensions for disabled veterans was inter-

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193. Act of Mar. 5, 1888, 1888 Va. Acts ch. 398 ("An Act to give aid to confederate soldiers, sailors, and marines of Virginia maimed or disabled . . . and their widows.").

194. See Jeffrey R. Morrison, *Increasing the Pensions of these Worthy Heroes: Virginia's Confederate Pensions, 1888 to 1927*, at 7-15 (1996) (unpublished M.A. thesis, University of Richmond) (on file with author) (describing commutation legislation in Virginia between 1870 and 1888).

195. See PEARSON, *supra* note 189, at 169-170 (describing Virginia gubernatorial campaign of 1885).

196. *Id.*

197. Morrison, *supra* note 194, at 16-17; see also MARK E. RODGERS, *TRACING THE CIVIL WAR VETERAN PENSION SYSTEM IN THE STATE OF VIRGINIA: ENTITLEMENT OR PRIVILEGE* 26 (1999) (describing efforts of the United Confederate Veteran Association to lobby southern legislators for more generous pension benefits in the late nineteenth century).

twined with Democrats' efforts to solidify their political power in the late 1880s, they were not the first response of Virginia governments—Conservative or Readjuster—to veterans' needs. As early as 1867, the Virginia legislature allocated funds for its veterans to purchase artificial limbs, and beginning in 1873, the state granted a commutation payment of up to \$60 to veterans whose artificial limbs did not fit or who were disabled but unable to benefit from an artificial limb.<sup>198</sup> Over the next fifteen years, the legislature gradually expanded the funding of these programs and reduced the eligibility requirements, eventually allowing the widows and children of disabled veterans to receive the commutation payments and granting the maximum payment to veterans who were initially eligible for only partial payments.<sup>199</sup>

The legislators who crafted the system of commutation payments made a number of administrative and policy decisions that shaped the more comprehensive pension scheme enacted in 1888. As noted above, federal pension legislation empowered local doctors to rate veterans' disability levels, and by and large, pension officials in Washington acquiesced in their judgment. The federal system thus relied on a decentralized network of individuals who were rooted in their communities but also bound by the norms of their profession.<sup>200</sup> By contrast, county judges became the gatekeepers of the Virginia commutation system, a policy choice whose implications were surely recognized by the many lawyers who served in the state legislature.<sup>201</sup> County judges in late nineteenth-century Virginia were elected officials, and salaries were too low to attract talented individuals. One member of the bar complained that some judges were not formally trained in law and that those who were lawyers knew less about law than the attorneys who appeared in their courtrooms. Another writer branded the county courts as the "most expensive, inefficient, and unsatisfactory tribunals ever devised."<sup>202</sup>

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198. See Morrison, *supra* note 194, at 5-7 (discussing artificial limbs legislation). The policy of purchasing artificial limbs for veterans was an innovative response to the medical and social consequences of war in the 1860s. The British government did not provide such assistance until after World War I. See JOANNA BOURKE, *DISMEMBERING THE MALE: MEN'S BODIES, BRITAIN AND THE GREAT WAR* 43-46 (1996).

199. See Morrison, *supra* note 194, at 7-10 (describing commutation legislation).

200. See *supra* text accompanying notes 71-72.

201. Act of Feb. 14, 1882, ch. 126, § 2, 1882 Va. Acts 126 ("An Act to provide commutation to such maimed soldiers, sailors, and marines, in lieu of artificial limbs or eyes, or otherwise disabled, as may not heretofore have received the same under the provisions of former acts") (allocating \$30,000 for commutation payments to veterans who had been certified as disabled by their county courts); Act of Feb. 25, 1884, ch. 152, § 2, 1884 Va. Acts 187 ("An Act to give aid to the citizens of Virginia, wounded and maimed during the late war, while serving as soldiers or marines.") (allocating an additional \$60,000 for commutation payments).

202. J.P. Harrison, *Suggested Changes in Our Judicial System*, 1899 VA. BAR ASSOC. REP. 244; R.G. H. Kean, *Our Judicial System*, 1 VA. BAR ASSOC. REP. 153 (1830). Both articles cited in ALBERT OGDEN PORTER, *COUNTY GOVERNMENT IN VIRGINIA: A LEGISLATIVE HISTORY, 1607-1904*, 262-63 (1966).

By making county judges responsible for processing commutation applications, the Virginia legislature privileged local attitudes toward disability and deservingness over those held by a professional elite which would be insulated to some degree from community values and prejudices. Nevertheless, the legislature had misgivings over the operation of the pension system. The 1884 commutation statute required that a "competent physician" certify in writing the nature of the applicant's wound and the extent of his disability, and in 1887, the legislature required certification from a board of three physicians.<sup>203</sup>

In addition, the Virginia legislature ensured that commutation applicants would not view the payments as an entitlement. The legislation specified the maximum grant that could be received by applicants, but it did not guarantee that each applicant would immediately receive payment. Instead, the legislature set aside lump sums for commutation payments, such as the \$60,000 allocated in 1884, and state officials made payments as long as funds were available.<sup>204</sup> Late filers were forced to wait for the next infusion of funds. The problem of unfunded pensions became so acute that the 1884 commutation law reassured claimants whose applications were rejected by the state auditor that they would not lose their place on the application list if they refiled within ninety days.<sup>205</sup>

Finally, the commutation legislation enshrined an easily-enforceable definition of disability that spared the system's gatekeepers from difficult decisions but also excluded a large number of veterans from the application process. Like the federal pension system, Virginia law defined disability as the incapacity to perform manual labor. However, only veterans who had been disabled by wounds or the surgical treatment of those wounds could receive a commutation.<sup>206</sup> Soldiers who had suffered the many other war-related illnesses and diseases covered by the federal pensions, such as hernias from carrying heavy packs, were

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203. Act of 1884 § 2; Act of May 23, 1887, ch. 379, § 2, 1887 Va. Acts 483 ("An Act to require proper proof of disability in order to obtain aid as a disabled soldier or marine.") (authorizing county board of supervisors to appoint a board of three competent physicians to certify applicants' injuries, their extent, and their proximate cause).

204. See, e.g., Act of Feb. 20, 1874, ch. 52, 1874 Va. Acts 40 ("An Act to Provide Artificial Limbs for Soldiers Maimed in War, and for other Purposes.") (noting that "the sum of money heretofore appropriated for artificial limbs and commutation therefor has been exhausted, and several soldiers entitled to limbs or commutation therefor have not received either"); Act of Mar. 12, 1878, ch. 185, 1878 Va. Acts 180 ("An Act to provide commutation to certain maimed soldiers, sailors, and marines, in lieu of artificial limbs or eyes, heretofore provided by law.") (noting that \$10,000 allocated in 1877 for commutation payments had been exhausted and "many soldiers entitled to such commutation have not received it").

205. Act of 1884 § 3.

206. *Id.* § 2 (requiring veteran to show that "he was engaged in military service . . . and while in such service lost a limb, or eye, or was so seriously and permanently disabled by wounds or surgical operation, rendered necessary thereby, as to prevent him . . . from performing manual labor").



not eligible.<sup>207</sup>

The 1888 pension law retained the features of earlier commutation legislation that had ceded control over the application process to local authorities, added new procedures that forced applicants to adopt a deferential posture, and avoided complex conceptions of disability. In the first place, the 1888 pension scheme, like the earlier commutation system, merely granted qualified veterans a place on a list of successful applicants.<sup>208</sup> The system was underfunded, and many disabled veterans waited several years to receive their pensions.<sup>209</sup> In addition, the 1888 system continued to restrict benefits to applicants who were disabled as a result of battle wounds or their consequences.<sup>210</sup> Like the earlier commutation law, the 1888 statute limited pension eligibility to veterans with incomes under \$300 and property worth less than one thousand dollars.<sup>211</sup> Rather than increasing these amounts over time, the Virginia legislature reduced them. After 1902, veterans and widows were required to show that their incomes were under \$150 and that they possessed property valued at less than \$500.<sup>212</sup>

Other provisions of the 1888 law ensured that veterans would view their pensions as a privilege—and not a right—that could be secured only with the acquiescence of local officials. The 1888 legislation formally enhanced the power of county judges. Rather than relying on the three-physician certification panels created by the 1887 commutation law, the pension statute granted judges the authority to determine the extent of veterans' disabilities.<sup>213</sup> Although a 1900 statute required each county and municipality to create a five-member pension board to examine pension applications, the legislature abandoned this approach two years later and returned power to county judges.<sup>214</sup>

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207. Veterans frequently contracted such conditions as rheumatism, chronic diarrhea, malaria, and varicose veins. Claims based on rheumatism and chronic diarrhea alone comprised 24% of the disabilities for which pensions were granted by the federal government between 1862 and mid-1888. See GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 37, at 138.

208. Act of Mar. 5, 1888, ch. 398, § 11, 1888 Va. Acts 469 (allocating a maximum of \$65,000 per annum for pensions).

209. See, e.g., RODGERS, *supra* note 197, at 75-85 (illustrating lists of pension applicants under the 1888 law and providing numerous examples of applicants who waited several years to receive their pensions).

210. Act of 1888 § 1.

211. Act of 1888 § 2.

212. Act of Apr. 2, 1902, § 2, 1902 Va. Acts ch. 453 ("An Act to aid the citizens of Virginia who were disabled by wounds received during the war between the States."). While the 1902 pension law imposed a more stringent means test, it broadened eligibility to include veterans who were disabled by diseases contracted during the war or who were over age sixty-five and by reason of infirmity were incapable of earning a livelihood. See *id.*, § 1.

213. Act of 1888 § 5 (providing that applicants claiming partial disability must prove "to the satisfaction of the judge to be such [that] incapacitates the applicant for obtaining a livelihood by his manual labor").

214. Act of Mar. 7, 1900, § 1, 1900 Va. Acts ch. 1149 ("An Act to give aid to soldiers, sailors, and marines disabled in the war between the states.") (instructing county judges to appoint five-member pension boards); Act of 1902 § 3 (returning pension certification responsibilities to county

The Virginia pension law used more subtle techniques to bolster the power of judges and local elites. The 1888 legislation both acknowledged and reacted against the ways in which lawyers had empowered disabled applicants under the federal pension law. The statute forbade applicants from hiring attorneys to pursue their claims, thereby ensuring that courthouse officials could control the disposition of claims with few challenges to their discretion from men and women who most likely had little experience with bureaucratic processes.<sup>215</sup> The inability to hire a lawyer must have strikingly shaped the claims experience for illiterate veterans and their widows. Jeffrey Morrison's study of pensioners in Virginia's King William's County has found that in 1900, twenty percent of veterans receiving pensions were illiterate.<sup>216</sup> These men could not have successfully navigated the claims process without the assistance of courthouse officials and literate neighbors and relatives, and it is possible that many illiterate veterans never even attempted to secure a pension.

Finally, Virginia pension laws included a set of provisions that had the effect of excluding applicants who were unable to demonstrate that they met community standards of respectability. Although veterans could initiate the application process by swearing under oath that the information they provided the court was true, widows were required to produce two credible witnesses who could confirm the veracity of their claim.<sup>217</sup>

A 1902 statute took additional steps to ensure that only veterans and widows of good reputation could receive pensions. The new legislation excluded the thousands of veterans who had deserted the army, although most Confederate veterans had abandoned the military to assist their suffering families as the war dragged on.<sup>218</sup> It further required veterans to submit affidavits from two other ex-soldiers who could attest to their military service and confirm their assertions regarding the origins of their disabilities.<sup>219</sup> Widows' claims were made even more straightforwardly dependent on their community reputation. They were now re-

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judges). See also RODGERS, *supra* note 197, at 32 (speculating that the county pension boards had never actually been created).

215. Act of 1888 §10 (providing that "[n]o fee or other compensation shall be charged or received by any clerk, attorney, or other person for any services rendered to any applicant under the provisions of this act").

216. Morrison, *supra* note 194, at 114.

217. Act of 1888 § 4 (requiring widow to produce at least two credible witnesses who could confirm that she had been married to a veteran, that he was deceased, and that she had not remarried).

218. Act of 1902 § 7. As early as 1862, Confederate soldiers began to desert in order to return to their suffering families. By February 1865, Robert E. Lee reported that hundreds of soldiers deserted from his army each night. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR* 440, 820-821 (1988).

219. Act of 1902 § 3.

quired to receive certification from the camp of Confederate veterans in the county where they resided or, if there was no veterans' camp, they were compelled to produce two veterans who could attest to their worthiness.<sup>220</sup>

Residency requirements similarly ensured that only long-standing community members of good repute would file for pensions, and these requirements became more stringent even as the state expanded the pension scheme to cover elderly veterans. The 1888 law covered only Virginia natives who were residents of the state when they applied for a pension, thereby excluding both Virginia veterans who had left after the war as well as veterans who had migrated to Virginia from other states.<sup>221</sup> After 1902, applicants had to show that they had been Virginia residents for two years as well as residents of their county for one year.<sup>222</sup>

By the early decades of the twentieth century, the combined effect of the residency and certification requirements was that pension benefits were limited to poor but respectable men and women with strong ties to their local communities. Soldiers who had been unable to establish a toehold in Virginia's post-war economy and had drifted elsewhere were ineligible. Applicants who had recently moved to a new county could theoretically wait until they had satisfied the residency requirement, but they would nevertheless face the obstacle of locating witnesses who could attest to their military service. For widows required to find local veterans who could attest to their character, removal to a new county must have presented a formidable barrier.

The precise ways in which these requirements shaped the workings of Virginia's pension system will require more detailed research, especially on the applicants whose claims were rejected. However, Jeffrey Morrison's work on King William's County pensioners supports the hypothesis that successful applicants enjoyed firm social connections with other veterans and county residents.<sup>223</sup> Between 1888 and 1934, 43 of the county's 88 veterans had belonged to three army units, and the husbands of 50% of the widows who received pensions had belonged to those units.<sup>224</sup> Morrison found that successful pensioners frequently verified that other applicants met the qualifications for a pension. Even when pensioners turned to non-recipients for assistance with their applications, they relied on a small cluster of individuals, whose good character and familiarity with their neighbors presumably carried weight with

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220. Act of 1902 § 3.

221. Act of 1888 § 1.

222. Act of 1902 § 1.

223. Morrison, *supra* note 194, at 75-77.

224. *Id.* at 75, 112.

the county judge.<sup>225</sup> In short, King William's County veteran-pensioners were soldiers who had cultivated close ties with comrades during the war, returned with them to the county, and maintained those relationships after Appomattox. The women who received widows' pensions had married men who satisfied these criteria, and in addition, they had personally garnered the respect of their husbands' military companions in the decades after the war ended.

If Virginia's pension scheme generated little dissension in the late nineteenth and early twentieth centuries, perhaps it was because its architects had eliminated the features of the federal pension scheme that made it so controversial—but also made it so successful, flexible, and inclusive. Although the federal system embraced a complex definition of disability and then demanded that physicians, administrators, and veterans determine its applicability in individual cases, the Virginia pension plan limited its benefits to wounded soldiers until the early twentieth century.

The United States Pension Bureau empowered applicants to seek legal assistance in filing their disability claims, thereby making it possible for many poor and illiterate veterans to learn about their eligibility in the first place and then to navigate the evidentiary complexities of the application process. Virginia, by contrast, made its veterans dependent upon unpaid assistants and courthouse officials when they filed their applications, surely limiting the ability of many rejected veterans to pursue doubtful claims. Although historians have shown that the majority of northern pension applicants came from small communities where veterans would have enjoyed close social ties to their former army companions,<sup>226</sup> the Virginia scheme made such social relations a precondition for eligibility. Confederate veterans who qualified for benefits under Virginia laws certainly enjoyed the approbation of their fellow citizens whose taxes financed their pensions, but social legitimacy and the social construction of disability came at a price. Their pensions were a form of charitable relief that rendered disabled veterans individually dependent on local elites and collectively dependent on the annual generosity of the Democratic Party.

#### IV. RETHINKING THE MEDICAL MODEL: TOWARD A REVISIONIST HISTORY OF DISABLED PEOPLE AND THE AMERICAN STATE IN THE TWENTIETH CENTURY

The federal and state Civil War pension plans reached their peak in the early years of the twentieth century. As the generation that fought

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225. *Id.* at 75.

226. See Sanders, *Bloody Shirt*, *supra* note 54, at 151-52.



the Civil War began to die, the plans served fewer and fewer veterans, receded from popular consciousness, and were virtually extinct by the 1950s.<sup>227</sup> The last Virginia Confederate Veteran died in 1959.<sup>228</sup> Yet fragments of the vast social welfare scheme survived into the 1990s. In August 1998, Virginia's Department of Social Services still made \$30 monthly payments to six beneficiaries who claimed under pension law provisions for the widows and unmarried children of Confederate veterans.<sup>229</sup>

As the Civil War pension schemes' impact on state and federal budgets declined, academic interest in America's first major social insurance scheme also vanished. The scholarly studies of the pension system that appeared in the Progressive era were not followed up by later historians or policy analysts until scholars such as Theda Skocpol rediscovered the pension schemes in the course of their work on the origins of American welfare policy.<sup>230</sup> Unfortunately, the revival of scholarly interest in the pension schemes began too late to influence the most significant historical works on American disability policy. Claire Liachowitz's widely-cited *Disability as a Social Construct* begins its survey of disability policy with the eighteenth century and then moves forward to the vocational education schemes of the World War I era.<sup>231</sup> Deborah Stone's influential work, *The Disabled State*, traces conceptions of disability in England back to the middle ages, but its examination of American policy begins in early twentieth century.<sup>232</sup>

Although disability historians have not given the Civil War pension schemes the attention they deserve, these programs cast a formidable shadow over subsequent governmental policies. Skocpol has shown that veterans and their friends in Congress may have presided over the creation of a large and generously-funded pension scheme, but their critics proved to have had a more lasting influence on governmental responses to social problems in the twentieth century.<sup>233</sup> Reacting against the corruption that, they charged, was endemic to the pension system, twentieth-century reformers rejected social programs that would have required

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227. See SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 109 (noting that the one million Union veterans still living in 1900 had been reduced to 424,000 by 1915).

228. See RODGERS, *supra* note 197, at 72.

229. *Id.* at 72; see also TONY HORWITZ, *CONFEDERATES IN THE ATTIC* 336-51 (1998) (interviewing surviving Confederate widow).

230. See generally GLASSON, *FEDERAL MILITARY PENSIONS*, *supra* note 37, at 233; RUBINOW, *supra* note 102; SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at vii-viii, 155-59 (describing the work of Progressive-era social scientists Henry Rogers Seager and Charles Richmond Henderson, who examined the Civil War pension system as part of their advocacy of workingmen's insurance).

231. See generally CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* (1988).

232. DEBORAH A. STONE, *THE DISABLED STATE* 29-89 (1984).

233. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 532-33.

direct cash payments to beneficiaries. In the first two decades of the twentieth century, proposals to create social insurance schemes for workers failed in most states as influential reformers predicted that they would become as corrupt and tied to patronage politics as the Civil War pension system.<sup>234</sup> Proposals for old-age pensions met the same fate. The reformist critique of Civil War pensions even cast its shadow over the Social Security Act of 1935, which financed its benefits through workers' and employers' contributions rather than direct transfers of governmental funds.<sup>235</sup>

In addition, twentieth-century disability programs have echoed the conceptions of disability articulated in pension legislation. Like the Civil War pension plans, the vocational-rehabilitation programs and insurance schemes created in the first half of the twentieth century persisted in defining disability as the incapacity to work.<sup>236</sup> The Social Security Disability Insurance ("SSDI") program embraced the adversarial decision-making process first put into practice by the Pension Bureau by enabling applicants to appeal benefits denials before administrative law judges.<sup>237</sup>

However, just as Civil War veterans were emboldened to seek pensions for controversial claims, disabled Americans in the twentieth century seized upon legislatively-created opportunities to shape the conceptions of disability that mediated their relationship with the state. Although a lively scholarly literature explores the forms of activism and agency adopted by disabled people in the decades before the emergence of the disability rights movement,<sup>238</sup> legal scholars' selective accounts of disabled Americans' experiences under the "medical model" has notably downplayed the forms of agency adopted by disabled persons.<sup>239</sup>

By emphasizing the experiences of disabled Americans who actively attempted to exert control over their encounters with the state, our aim is not to deny the forms of exclusion, prejudice, and subordination experienced by the disabled, no more than historians and anthropologists deny

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234. *Id.*; see also M.A. Stein, *The Development of Employer/Employee Liability for Personal Injuries During the Reign of Victoria* (1998) (unpublished thesis, Cambridge University) (discussing historical aspects of insurance programs).

235. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 11, at 533.

236. See STONE, *supra* note 232, at 68-72.

237. See EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED* 87-95 (1987).

238. See, e.g., ROBERT M. BUCHANAN, *ILLUSIONS OF EQUALITY: DEAF AMERICANS IN SCHOOL AND FACTORY, 1850-1950*, 37-51, 85-101 (1999) (describing deaf workers' protests against exclusion from civil service jobs in the early twentieth century and work relief programs during the Depression); SHAPIRO, *supra* note 6, at 63-64 (describing the occupation of the Works Progress Administration offices in Washington by members of the League for the Physically Handicapped in the 1930s).

239. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 436-45 (2000) (arguing that the exclusion and stigmatization of the disabled have rendered them a "dependent caste"); Drimmer, *supra* note 6, at 1359-75.

the realities of violence, political disempowerment, and economic exploitation when they document the forms of accommodation and resistance adopted by other oppressed groups.<sup>240</sup> To the contrary, we share with these scholars the conviction that an understanding of subordinated peoples' day-to-day accommodation and resistance can only deepen our understanding of the power relations that structure society.<sup>241</sup>

We may illustrate the ways in which disabled persons in the twentieth century have played a crucial role in shaping the policies, influenced by the "medical model," that impacted upon their lives by describing the actions of hundreds of thousands of individual claimants that collectively transformed the SSDI program after its inception in 1956. SSDI was a statutory embodiment of attitudes and assumptions derived from a medicalized conception of disability. It benefited only the "worthy" disabled who could no longer work, and its architects relied on doctors' assessment of applicants in their efforts to restrict benefits to a narrow, clinically ascertainable category of workers whose physical or mental impairments rendered them "unable to engage in substantial gainful activity."<sup>242</sup>

Yet, as Deborah Stone has shown, individual applicants began to exert pressure on the Social Security Administration's definition of disability soon after the program was in place. Their strategies were remarkably similar to those employed by Union Army veterans seventy-five years earlier.<sup>243</sup> In the first place, applicants exerted subtle pressure on examining physicians to certify them as impaired. They were often successful, especially when they were examined by doctors whose loyalties to individual patients outweighed their interest in enforcing the Social Security Administration's definition of physical impairment.<sup>244</sup>

Second, rejected applicants hired lawyers, availed themselves of the Social Security Administration's internal appeals process, and sought redress in federal courts. Requests for hearings increased by five hundred percent between 1955 and 1958 and continued to grow exponentially over the next three decades.<sup>245</sup> In 1965, SSA received slightly more than 23,000 requests for hearings; by 1980, over 250,000 applicants had appealed their denials of benefits.<sup>246</sup> After 1970, applicants

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240. See JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* xv-xvii (1985); KELLEY, *supra* note 61, at 8-13.

241. See Abu-Lughod, *supra* note 142, at 41-43.

242. See STONE, *supra* note 232, at 85; Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 416-17, 433 (1996) (noting SSDI's "emphasis on disability as a status that can be objectively determined through scientific and uniform methods").

243. See STONE, *supra* note 232, at 145.

244. *Id.* at 148-49.

245. BERKOWITZ, *supra* note 237, at 90.

246. *Id.*

began to employ legal counsel for these hearings, and Edward Berkowitz estimated that they appeared in over half of all disability cases by the late 1980s.<sup>247</sup>

Applicants' recourse to the appeals process likewise had a demonstrable effect on the disposition of their claims. Berkowitz calculated that more than twenty percent of individuals who were admitted to SSDI secured their eligibility through the appeals process.<sup>248</sup> Rejected applicants also pursued their cases in federal district court, bringing thousands of cases in the 1960s.<sup>249</sup> As Lance Leibman noted in 1976, the federal courts frequently accepted plaintiffs' invitations to authorize conceptions of disability that were broader than those endorsed by SSA.<sup>250</sup> These strategies adopted by disabled Americans and their advocates played a role in transforming SSDI into a program providing tens of billions of dollars each year in income and health benefits to millions of individuals.<sup>251</sup>

Of course, the men and women whose actions shaped SSDI cannot represent the majority of disabled Americans who lacked (and continue to lack) access to legal counsel and experiences in the workplace before becoming disabled.<sup>252</sup> An almost impassable gulf separated them from the disabled who were sequestered in institutions, labored in sheltered workshops, or depended on philanthropic organizations, relatives, or other governmental programs for financial assistance. As historians and scholars from other disciplines continue to bring the experiences of disabled persons to light, they will describe in greater detail the subordination encountered by the disabled and their responses to it. Nevertheless, the actions of SSDI claimants illustrate a long history of advocacy efforts by disabled Americans to exert control over their dealings with government and to align official conceptions of disability with their own life experiences in a social, economic, and physical environment not designed with them in mind.

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247. *Id.* at 91.

248. *See id.* at 90.

249. *Id.* at 97.

250. Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 850-53 & n.62 (1976) (describing decisions in the 1960s in which federal courts ruled in favor of SSDI claimants who were capable of performing work but were unable to obtain it).

251. BERKOWITZ, *supra* note 237, at 2 (noting that in 1984, SSDI paid almost \$30 billion in retirement and health benefits to 3.8 million individuals).

252. Moreover, the SSDI program's philosophy continues to reflect the medical model's conceptualization of disability despite the rise of the disability rights movement.



## V. CONCLUSION

In 1862, the Commissioner of the Pension Bureau predicted that the benefits scheme recently enacted by Congress for disabled Union Army veterans "would in no year exceed \$7,000,000."<sup>253</sup> He was proven wrong by the unexpected duration of the war, the willingness of both political parties to court veterans with generous benefits, and as we have argued in this Article, by the willingness of hundreds of thousands of veterans to press their conceptions of disability upon the government.

Veterans claiming certain disabilities were treated with suspicion and hostility by the Pension Bureau. But applicants' generally impressive success in securing governmental recognition of their disability claims was partly a consequence of the Bureau's own institutional processes. By flexibly defining disability as the incapacity to perform manual labor and by relying heavily on the judgment of local physicians, the Bureau gave Union veterans the opportunity to present their cases to gatekeepers who were answerable to the Bureau but also rooted in their own communities. By allowing Union veterans to engage the services of attorneys, the Bureau enabled veterans who had little experience of law or government to pursue claims that sometimes required gathering elusive forms of evidence and multiple medical exams. In the postbellum South, by contrast, state governments created pension schemes for Confederate veterans that relied on simple definitions of disability, fostered applicants' deference to the local elites charged with certifying their claims, and limited benefits to poor but respectable and "deserving" veterans and their dependents.

As we commemorate the tenth anniversary of the Americans with Disabilities Act, our efforts to gauge the past decade are enhanced by an awareness of the ways in which disabled Americans, both in the nineteenth century and in our own time, have attempted to shape the governmental institutions and policies that affect them. Foremost, their actions are a reminder that disabled Americans have found ways to act politically, and to assert their claims as full citizens, regardless of the model of disability that informs public policy in a particular era.

Second, just as late nineteenth-century federal legislation embodied a vague and capacious conception of disability that ultimately benefited veterans who convinced local physicians to certify them as pension-worthy, it is possible that the ADA's "notoriously, albeit intentionally, vague"<sup>254</sup> definition of disability will ultimately become a source of expanded rights for the disabled rather than a barrier to successful litigation.

253. Sanders, *History of the Civil War Pension Laws*, *supra* note 19, at 213.

254. Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 625 (1999).

tion.<sup>255</sup> Lastly, the experiences of Civil War veterans and SSDI claimants reveal that the ability of thousands of individuals to engage legal counsel in pursuit of complex disability claims can, over time, confound the most entrenched practices and prejudices of bureaucrats, legislators, judges—and perhaps even society.

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255. See Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1423 (1999); Michael S. Wald, Comment, *Moving Forward, Some Thoughts on Strategies*, 21 BERKELEY J. EMP. & LAB. L. 473 (2000) (observing that the ADA requires situational and flexible decisions that are at odds with the traditional approach to civil rights law in America).