

12-2-2012

The Case for Reforming the Program's Spouse Benefits While "Saving Social Security"

Peter W. Martin

Cornell Law School, peter.martin@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/clsops_papers

 Part of the [Elder Law Commons](#), [Family Law Commons](#), [Social Welfare Law Commons](#), and the [Women Commons](#)

Recommended Citation

Martin, Peter W., "The Case for Reforming the Program's Spouse Benefits While "Saving Social Security"" (2012). *Cornell Law Faculty Working Papers*. Paper 101.

http://scholarship.law.cornell.edu/clsops_papers/101

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Working Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

The Case for Reforming the Program's Spouse Benefits While "Saving Social Security"*

Peter W. Martin**

Introduction

In 2011 nearly \$113 billion in Social Security payments, 15.6% of total benefit payments for the year, were distributed to spouses, former spouses, and surviving spouses solely or principally on the basis of a present or past marital relationship. The year before the percentage was slightly higher, the amount, slightly lower.¹ No additional payroll tax was levied on the employee-spouse to cover these benefits nor did they constitute a shift in the payout pattern between spouses of a set amount of benefits. These were quite simply additional payments based on marriage.

Spouse benefits, which were appended to Social Security in 1939 and dramatically liberalized since, represent a discrete and increasingly problematic feature of the program. At a time when analysts and politicians of nearly all persuasions agree that the long-term fiscal health of Social Security calls for legislative revision, one might expect serious proposals for change in the provisions that direct benefits to wives (and husbands), widows (and widowers), but so far that has not occurred. No doubt, that is because any prospective reduction in spouse benefits that promised to contribute to Social Security's long-term fiscal balance would, standing alone, quite properly be perceived as having a negative impact on women. Costly, outdated, and inequitable, these marriage-based benefits may be, but unless supplanted by some less arbitrary way to connect Social Security to families and alternative measures to assure adequate retirement income for women they cannot be got rid of. On the other hand, any package of Social Security reforms that fails to rethink and revise the spouse-benefit provisions will miss a rare opportunity to improve the fairness and adequacy of the program's benefits for women and run the risk of disadvantaging them as a group.

A few basic facts about the Social Security benefit structure should illuminate why this is so. Two separate routes to Social Security entitlement exist. The first is through one's own prior covered employment; the second, through the prior covered work of a family member, most commonly a spouse or former spouse. Primary benefits, based on one's own work, become available upon retirement (as measured by advanced age and, for a slightly younger group, age and low earnings) or earlier in the event of total disability. Secondary benefits, arising from another's work, are paid to "dependents" or "dependent survivors" of covered workers. Those eligible include several categories of children and adults. Among adult dependents, spouses and former spouses are by far the most numerous.

The Social Security Act currently provides secondary benefits to the wives or widows of covered workers who retire, become disabled, or die. To qualify, a woman must have been married to the worker for a short period and must be old (sixty-two, dropping to sixty in the case of a widow, fifty in the case of a disabled widow) or caring for children

under sixteen. If a wife's or widow's primary retired-worker or disability benefits equal or exceed her secondary benefit entitlement, she receives only the primary benefits. However, if her secondary benefit amount is greater she receives both her primary benefit and enough of the secondary benefit to bring the total up to its level.

Men can also qualify for benefits based solely on their status as husband or widower of a worker; but spouse benefits go overwhelmingly to women. Table 1 illustrates the relative importance of primary and secondary benefits to men and women. Less than one percent of adult male beneficiaries receive secondary benefits, while the percentage for all adult female beneficiaries is over twenty-two.² Among females sixty-two and older, it is higher still.³ Average monthly payments to male retired workers are substantially higher than those to female retired workers, spouses of male retired workers, or widows. Because of this disparity well over a third of the women receiving retired-worker benefits also receive secondary benefits. The number of men with "dual entitlement" is miniscule.⁴

Table 1
Adult Social Security Beneficiaries by Sex and Benefit Type
December 2010

	<i>Men</i>		<i>Women</i>	
	N	\$	N	\$
Primary:				
Retired Workers	17,582,235	1,323.10	19,542,879	1,022.90
Disabled Workers	4,309,685	1,191.10	3,894,266	931.30
Total	21,891,920		23,437,145	
Secondary:				
Spouses of Retired Workers				
--without children ^a	56,912	365.90	2,216,430	586.90
--with children ^b	92	458.20	43,102	509.10
Spouses of Disabled Workers				
--without children ^a	4,682	267.60	81,487	344.80
--with children ^b	1,930	178.90	72,201	224.80
Surviving Spouses				
--without children ^a (nondisabled)	65,538	977.90	3,975,422	1,136.40
--without children ^a (disabled)	12,220	498.70	232,733	690.90
--with children ^b	11,891	729.90	146,170	858.60
Total	153,265		6,767,545	

N = Number receiving benefits.

\$ = Average monthly benefit.

^a Spouses eligible by virtue of age.

^b Younger spouses eligible because of eligible children.

Source: Social Security Administration, Annual Statistical Supplement, 2011, Tables 5.A1.1, 5.A1.3, 5.A1.5, 5.A1.6, 5.A1.7.

Social Security benefits of both types, primary and secondary, hold greater importance for women than men.

- For women, age sixty-five and older, Social Security comprises over 60% of total income. For men, the comparable figure is 55%.⁵ And among those sixty-five and older receiving Social Security benefits, for a significantly larger fraction of women than men, it constitutes 90% or more of family income.⁶
- Elderly women are less likely than elderly men to have significant income from other pensions in addition to Social Security. The percentage of women with pensions of any kind is lower, and their median pension amounts, much lower than men.⁷
- Since women, on average, live longer than men,⁸ they represent a majority of Social Security recipients sixty-five and older and a significantly higher percentage of the oldest beneficiaries.⁹ Because of their greater longevity, women are also more likely than men to outlive a spouse and any retirement savings.¹⁰

It would be comforting to suppose that changes in the labor market and more equal allocation of work within the family home will, before long, lead to a withering away of supplemental benefits for wives, former wives, and widows. If that occurs, it will not be any time soon. A 1998 interagency working group concluded that a significant percentage of women Social Security beneficiaries would continue to receive spouse benefits as far out as 2060, average retired-worker benefits for women would remain well below those for men in 2050, and the life expectancy differential at age sixty-five would persist.¹¹ A study published in 2012 projected that for the cohort born from 1966 through 1975 (“GenXers”) “about one fourth of GenX wives and two-thirds of GenX widows .. [would] receive auxiliary benefits at retirement.”¹² As the program trustees discharge their annual duty to project benefits and income under current law, they continue to forecast spouse benefits enduring past 2090.¹³ Since the amount of an individual’s Social Security primary benefit is based on an earnings record stretching back as many as thirty-five years, even when the day arrives that women and men are paid equally and divide family care responsibilities down the middle, it will still take a long time thereafter for Social Security payments to reflect that altered reality.

This article focuses on the law that governs entitlement to and the amount of spouse benefits, exploring why a program addition that seemed so attractive in 1939 has become a source of disturbing arbitrariness and inequity and how a measure specifically designed to improve retirement income for women has become less and less effective. The deficiencies of the present system are illuminated through comparison with alternative methods of connecting a family’s covered earnings with later benefits modeled on state marital property regimes and the law’s treatment of other forms of spousal retirement income. Although this study does not explore the full range of alternative approaches to improving Social Security benefits for women nor the implications for women of the many Social Security restructuring proposals aimed at establishing fiscal sustainability, it does attempt to connect reform of this one program element to a number of those options.

In terms of the issues explored here the exclusion of same-sex marriages from Social

Security's spouse benefits by the federal Defense of Marriage Act (DOMA), currently in the spotlight,¹⁴ is at most a side note. Should DOMA be struck down or repealed, spouse benefits will continue to be fundamentally inequitable. Removal of this barrier, erected by Congress in 1996, will simply permit a few more spouses, male and female, to claim marriage-based benefits under a seriously flawed system.

I. Spouse Benefits as Originally Conceived

As first enacted Social Security did not include spouse benefits. The Social Security Act of 1935 tied benefit entitlement rather closely to contribution; the program paid benefits only to retired workers (male or female) or, upon death, to the worker's estate.¹⁵ In 1939, however, acting on the recommendation of the Social Security Board,¹⁶ Congress relaxed the benefit-contribution relationship in several ways, including the addition of secondary benefits.¹⁷ The amendments of that year established "supplemental payments" to aged wives of retired workers to "take account of [the] greater presumptive need of the married couple without requiring investigation of individual need."¹⁸ On similar "welfare" grounds, the amendments substituted survivor benefits to aged widows and children for lump-sum payments to the worker's estate.¹⁹

An acute short-term economic and political problem – the extremely low payout and coverage of Social Security during its infancy – motivated enactment of these measures. They were thought to possess limited long-range importance: "Since in the course of time many women will have developed substantial benefit rights based upon their own past earnings, the cost of providing the supplement for dependent wives [and widows should] gradually decline, and eventually the additional cost [should] be reduced to a relatively small amount."²⁰ The inequities thus created – single workers and two-worker couples contributed no less and sometimes more than one-worker couples, yet reaped no advantage from the new classes of benefits – seemed a small matter at a time when the Social Security tax was only 1% of the first \$3,000 of annual wages.²¹

Anticipating objections to secondary benefits on the ground that "presumptive need" should not shape entitlement, the Social Security Board argued that the program already reflected a concern for relative need.²² The Board suggested that providing new dependent and survivor benefits and revising the retired-worker benefit formula did not violate the contributory or "insurance" character of the system so long as a "reasonable relationship . . . between benefits payable and past earnings" was maintained.²³ The Board found no offense to this "reasonable relationship" test in the additional wife benefits because everyone, married or single, would, for the immediate future, receive more than they had contributed.²⁴ The 1939 amendments also set a maximum on the total monthly benefits payable on a particular worker's account. That ceiling, today termed the "family maximum," limited the degree of unfairness to unmarried contributors resulting from the new secondary benefits.²⁵

The original terms governing wife and widow benefits left little doubt that Congress intended them to meet a presumed loss of income caused by the retirement or death of a husband rather than as an expression of the notion that a wife had contributed to or had a stake in her husband's earnings. Eligibility hinged on marriage at the time of

the worker's retirement or death, not during the period in which he built up his Social Security wage account.²⁶ To qualify in accordance with the presumptive need rationale, a woman had to show she was living with her husband or at least financially dependent on him.²⁷ Regardless of her age, a wife could receive spouse benefits only when her husband was old enough to receive retired-worker benefits and had, in fact, retired and applied.²⁸ Divorce ended a wife's entitlement; remarriage ended a widow's.²⁹ Finally, each dollar of retired-worker benefits a woman was eligible to receive on her own account displaced a dollar of these need-premised spouse benefits.³⁰

On the other hand, at the time it seemed obvious that most eligible wives and widows would have been married to the covered worker during the period in which he earned his primary benefits.³¹ The new secondary benefits reflected, ever so slightly, a notion of shared contribution. Rather than adding a single uniform payment for dependent wives and surviving widows (which would have typified a need-oriented or "welfare" approach), the benefit formula set individual amounts proportionate to the retired-worker benefits a woman's husband could claim at sixty-five. A dependent wife was entitled to 50% of her husband's benefits; a widow, 75%.³² Despite frequent references then, as now, to "the couple's benefit" or to "a supplement for married men," the secondary benefits established in 1939 truly belonged to the eligible spouse. The male retired worker received his benefit; his eligible wife received her own.³³ However, the number of points at which a wife's eligibility rested on the covered worker's status — including matters largely within his control — significantly qualified this independence.

During their first decade, wife and widow benefits proved to be expedient need-focused or antipoverty measures. Although the male-female ratio was then more closely balanced than at present, even during the 1940s elderly women outnumbered elderly men.³⁴ Very few older women had enough recent employment (post-1936) to qualify for Social Security retired-worker benefits.³⁵ Poverty was so prevalent among the elderly at the time that any program paying benefits to those sixty-five and over could reasonably have been called an antipoverty measure;³⁶ and poverty was most pervasive among elderly women,³⁷ particularly widows.³⁸

Under these circumstances, paying secondary benefits to wives and widows of Social Security contributors seemed a pragmatic way to provide limited amounts of monthly income to a class of needy people. In 1942 only 13,000 women qualified for retired-worker benefits, compared to 87,000 men.³⁹ Wife benefits permitted an additional 33,000 elderly women to qualify for payments; 15,000 elderly widows collected on the accounts of their deceased husbands, and 32,000 widows under sixty-five were eligible because of young children in their care.⁴⁰ Since payments were small,⁴¹ the few cases where presumed need did not in fact exist represented neither serious fiscal waste nor a major windfall to the recipient.

Even with the new benefits, Social Security reached less than 20% of the nation's elderly by the end of the forties. Without benefits for dependent and surviving spouses, the program's payments in 1949 would have diminished by nearly one quarter and the number of beneficiaries by an even larger fraction.⁴²

II. Subsequent Revisions That Produced a Very Different System

A. Liberalized Eligibility, More Generous Amounts (for Women)

Contrary to congressional expectations on enactment, spouse benefits have remained significant even as more and more women have become eligible for retired-worker benefits on their own account. In large part that is the result of subsequent changes to their terms. Under the 1939 formula, a woman retiring at age sixty-five in 1949 had only to have earned average monthly wages of \$37 for twelve years to receive benefits on her own account, so long as she was married to the average male beneficiary retiring the same year.⁴³ The average monthly wages of a female worker in manufacturing in 1939 were almost twice that amount. The gradual disappearance of spouse benefits was thus a reasonable prediction assuming stable wage levels and an unchanging benefit formula.⁴⁴

Events soon upset both those underlying assumptions. From 1940 on, wages and prices rose steadily and, beginning in 1950, Congress responded with periodic revisions of the benefit formula.⁴⁵ Each revision increased retired-worker benefits and produced proportionate increases for secondary-benefit recipients. The relationship that evolved between the two types of benefits differed substantially from that contained in the 1939 legislation. Furthermore, the same motivations that led Congress to create dependent and survivor benefits in 1939, later induced it, time and again, to liberalize the terms on which they were awarded.

In 1950 Congress granted wife benefits to younger wives caring for eligible children of retired workers, and extended survivor benefits to divorced former wives caring for children of deceased workers.⁴⁶ A 1956 amendment reduced from sixty-five to sixty-two the age at which women could collect wife or widow benefits (without having young children in their care), and also retired-worker benefits.⁴⁷ For widows, a 1965 amendment reduced the age to sixty;⁴⁸ one two years later dropped it to fifty for totally disabled widows.⁴⁹

Congress dropped the “living with” requirement for both wives and widows in 1957, leaving marital status the sole test of “dependency” and also slightly clarified the marital status definition.⁵⁰ Three years later, Congress again liberalized the wife- and widow-benefit provisions, reducing the durational requirement a wife had to meet from three years to one⁵¹ and adding a new purely federal test of marital status that qualified those who, although not legally married under state law, had gone through a marriage ceremony in good faith.⁵²

In 1958, two years after adding disability benefits to Social Security, Congress extended dependent benefits to spouses and children of disabled workers on the same terms as it had to dependents of retired workers.⁵³

The 1939 amendments pegged wife benefits at 50% of the worker’s primary insurance amount and aged-widow benefits at 75%.⁵⁴ In 1961, the latter figure was increased to 82.5% and in 1972, to 100%.⁵⁵

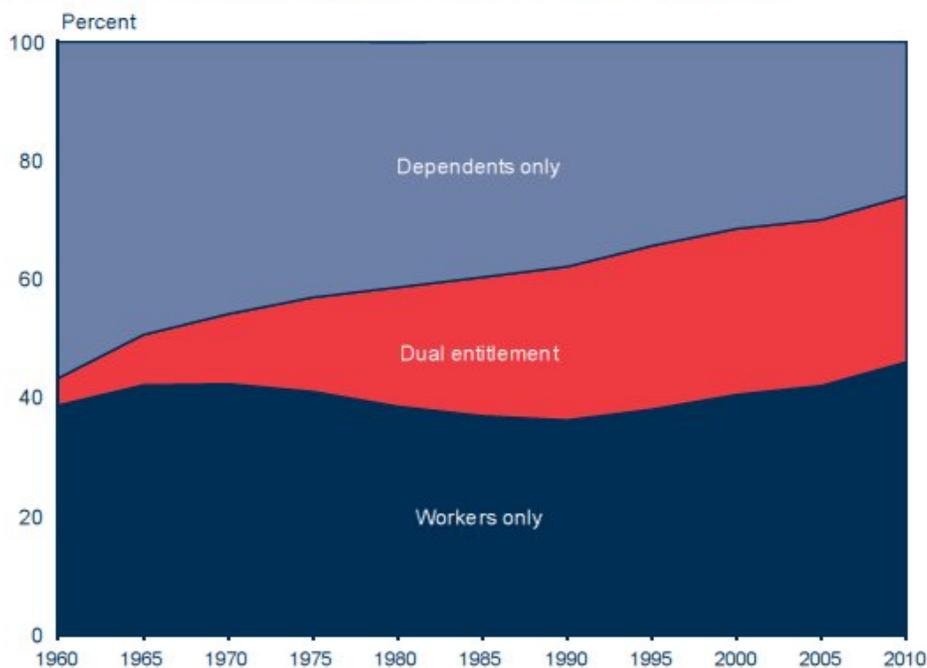
The equivalent of wife and widow benefits were extended to divorced women in 1965 on condition that their marriages had lasted twenty years and that they continued to be financially dependent on their former spouses.⁵⁶ Congress removed the actual-

dependency requirement in 1972,⁵⁷ and reduced the durational requirement to ten years in 1977.⁵⁸ When it added benefits for divorced spouses Congress placed them outside the family maximum.⁵⁹ The 1990 Social Security Act amendments did the same for a “legal spouse” in cases where there is also another person “deemed” a spouse under the Act.⁶⁰ The linkage between divorced spouse benefits and the retired-worker benefits to which they related was loosened in 1983.⁶¹ No longer did an individual who had been divorced at least two years have to wait for the former spouse’s application for retired-worker benefits or worry about benefits being reduced due to the former spouse’s continuing earnings.

These numerous amendments, combined with the growth in Social Security coverage, made it increasingly easy for women to qualify for spouse benefits. In addition, the dramatic improvement in basic benefits and in the widow’s entitlement as a percentage of the primary insurance amount substantially raised the value of such secondary benefits. Although more women do, indeed, qualify for retirement benefits, under the present retired-worker formula women’s wage and work patterns often yield benefit amounts below wife or widow entitlements. Nearly 40% of the women currently receiving retired-worker benefits also receive secondary spouse benefits, compared to 15% at the end of 1966 and less than 10% at the end of 1956.⁶²

Figure 1⁶³

Women aged 62 or older, by basis of entitlement, selected years



SOURCE: Social Security Administration, Master Beneficiary Record, 10 percent sample for 1993–2005 and 100 percent data for all other years.

Behind the many spouse-benefit amendments lay no clear scheme or consistent rationale. Indeed, Congress’s ad hoc approach to modifying these provisions virtually guaranteed that “[no] particular amendment fits with mathematical nicety into a carefully conceived overall plan for payment of benefits.”⁶⁴ Nonetheless, taken together the amendments

reflect two important features of the spouse-benefit approach. First, because entitlement to such benefits stems from a “presumed need” rather than a contribution rationale, Congress has frequently succumbed to the argument that a particular group of women (and occasionally men) excluded by existing eligibility rules should be included. The case for their inclusion is simply that they are at least as deserving as many of those already receiving benefits. Because the line between eligible and ineligible is demonstrably arbitrary, it has proven, over time, to be particularly unstable.

Second, many of the post-1939 amendments seemed to respond to the entanglement of spouse benefits in hard-to-manage factual and legal questions. The dependent and dependent-survivor benefits added in 1939 proved complicated to administer. Eligibility and benefit calculations for retired workers primarily required proof of age and use of routinely collected wage records. In contrast, determining eligibility for wife or widow benefits required ascertaining the validity of marriages and divorces under state law and scrutinizing living and support arrangements. As a consequence, these secondary benefits accounted for a significant portion of Social Security administrative appeals and litigation⁶⁵ before Congress injected the far more troublesome issue of “disability” into the system in 1956.⁶⁶ Removal of the “living with” test for wives and widows in 1957 and the support test for divorced wives in 1972 eliminated difficult legal and factual issues.⁶⁷ The 1960 addition of a liberal federal definition of “spouse” also simplified marital status determination in some cases.⁶⁸

While any conclusion about what the many spouse-benefit amendments demonstrate is debatable; their cumulative effect is clear: they assured that spouse benefits would not “wither away” and increased the inherent arbitrariness of this program element.

B. Gender Neutrality

Congress provided limited secondary benefits to aged husbands and widowers as early as 1950.⁶⁹ Those carried a test of “actual dependency” on the wage earner more stringent than any applied to wives or widows.⁷⁰ That test remained after the 1957 amendments eliminated the requirement that wives or widows either be living with or financially supported by their husbands.⁷¹ It remained after 1972, when Congress deleted the requirement that divorced women be financially dependent on their retired or deceased former husbands.⁷² Thus, by 1975, women received spouse benefits solely on the basis of their marital status at benefit time; men did not. In addition, certain spouse benefits — principally benefits for divorced women and for young widows caring for children of deceased wage earners (mother benefits) — remained wholly unavailable to men.

In 1975, the Supreme Court began to chip away at this gender-differentiated structure in *Weinberger v. Wiesenfeld*,⁷³ holding that Social Security had to furnish young widowers with benefits comparable to mother benefits. Two years later, the Court substantially completed the job in *Califano v. Goldfarb*,⁷⁴ *Califano v. Silbowitz*,⁷⁵ and *Califano v. Jablon*,⁷⁶ ruling that Social Security must grant elderly widowers and husbands spouse benefits on the same terms it does to widows and wives.⁷⁷ Congress amended the Social Security Act to codify those decisions and remove most other gender-based distinctions in 1983.⁷⁸

C. Preventing a Windfall to Husbands (and Wives) Whose Careers Fell outside Social Security

The extension of secondary benefits to men on the same terms as they were available to women highlighted a growing problem with that scheme.⁷⁹ The attenuated chain of presumption it embodied – a presumption of need resting upon a presumption of financial dependency on the covered spouse’s earnings which in turn rested upon marital status alone – too often failed to conform to the facts. And the payment of benefits to those for whom the presumptions of need and dependency were invalid could no longer be dismissed, as it had been in 1939, as involving neither significant fiscal cost nor major windfall to the recipient.⁸⁰

Two features of the spouse-benefit provisions helped contain the problem. First, greatly expanded Social Security coverage made it increasingly likely that a spouse’s work outside the home would be reflected in a Social Security wage record. Spouses with sufficient wage records to support retired-worker benefits received those benefits, which then offset spouse benefits dollar for dollar.⁸¹ Second, the retirement test, applicable to both retired-worker and spouse benefits, blocked benefits to those who were non-needy because of their own or their spouses’ continuing earnings, at least prior to age seventy-two.⁸²

Nonetheless, spouses who had never been financially dependent on a covered worker could receive substantial spouse benefits. That was, of course, true of some wives and widows before *Goldfarb*. But the husband and widower benefit cases threatened the system with a wave of new benefit claims from “nondependent” men who lacked Social Security retirement coverage of their own, not because of insubstantial employment, but because their employment had not been covered by Social Security but instead by some other public pension scheme. (Federal employees and many state and local government workers were at the time not yet covered by Social Security.)⁸³ All three men seeking spouse benefits in the cases decided by the Supreme Court in March 1977 were retired federal employees on pension.⁸⁴

In response to *Goldfarb*, the administration proposed a new test of actual dependency for all spouse benefits. That test would have qualified only people who earned less than their spouses during the three-year period immediately preceding the event triggering eligibility – retirement, death, or disability.⁸⁵ Opponents argued that the proposal threatened to exclude many deserving women. They noted that a three-year period of relative earnings would often fail to reflect accurately the long-term economic relationship of a marriage, especially since the critical period under the test was likely to fall between ages fifty-five and sixty-five.⁸⁶

Congress substituted a narrower and less controversial provision. It offset pensions from uncovered public employment against secondary benefits much in the way the system had always offset retired-worker benefits. The provision, which did not extend to spouse benefits already applied for, created a reduction in spouse benefits equal to “the amount of any monthly periodic benefit payable ... for such month which is based upon [his or] her earnings while in the service of the Federal government or any State (or political subdivision thereof. . .) if, on the last day [he or] she was employed by such entity, such service [was not covered by Social Security].⁸⁷

Congress was primarily concerned with preventing a post-*Goldfarb* flow of spouse benefits to “non-needy” male spouses and hesitant to upset the expectations of women facing imminent retirement. For this reason, the amendment deferred the new offset’s effective date for those who met the requirements of the spouse-benefit provisions as they were “in effect and being administered in January 1977” – in other words, prior to *Goldfarb*, *Silbowitz*, and *Jablon*.⁸⁸ Once the phase-in period passed, spouse benefits were limited to people without comparable publicly provided retirement benefits, whether in the form of retired-worker benefits from work covered by Social Security or pension benefits from public employment.⁸⁹

III. Growing Unfairness Vis-à-vis Contributors for Whom Spouse Benefits Have Little or No Value

A. The Retreat from Marriage, Increased Divorce, the Prevalence of Two-Earner Marriages

Although a constructive step, blocking the flow of benefits to the largest visible group of otherwise eligible “non-needy” retirees left untouched the core inequity of the spouse-benefit system. For a growing fraction of those who pay the Social Security tax these benefits hold no value, direct or indirect. Viewed from that “contributor’s” perspective such secondary benefits seem quite unfair, and unfair to a far greater degree than when they were first added to Social Security.

The national norm in 1939, the group favored by spouse benefits grows less typical each year, while those who contribute but receive no return in this form steadily increase in number. The former are those in qualifying marriages in which one spouse has been the family’s primary earner and possesses a full Social Security earnings record while the other has consistently had low or no covered earnings. Those covered by Social Security for whom spouse benefits hold little or no value include the never married, those once married but divorced after fewer than ten years, and those married to individuals with very similar earnings histories. The difference in Social Security’s implicit rate of return on contribution for these polar groups is huge. The return to a one-earner couple with high earnings is more than double that to an otherwise identical single worker or two-earner couple; at lower income levels the discrepancy is pronounced although less extreme.⁹⁰

Since 1970 U.S. age-adjusted marriage rates have been in steady decline.⁹¹ In the cohort of women closely approaching the age of Social Security eligibility (namely, those in their fifties), 9% have never married. The figure is 13% among women in their forties, over 20% among those in their thirties. This “retreat from marriage” is particularly pronounced among black women for whom the never married figures for the same three cohorts are 22%, 31%, and 47%.⁹² It also is more pronounced among those with lower incomes and less education.⁹³

For a prior marriage ending in divorce to be a source of spouse benefits, it must have lasted at least ten years. Although the reduction of the durational threshold from twenty years dramatically expanded the eligible group, the percentage of divorced women with fewer than ten years in any past marriage is both significant and growing, having more than doubled among fifty-year-olds between 1990 and 2009. In 2009, the figure for all women in their fifties was 7%, for black women it was 12%.⁹⁴ Among all living adults

whose first marriages ended in divorce the median duration of those ended marriages was eight years.⁹⁵ Among women whose second marriages ended in divorce it was no longer.⁹⁶

Because primary benefits offset secondary benefits, spouse benefits have their greatest value for couples in which one spouse has a continuous history of covered earnings and the other has none. They have no value for couples in which the covered earnings of husband and wife are the same. Today, well over half of U.S. married couples report earnings from both spouses.⁹⁷ Remove couples above the age of Social Security eligibility and the percentage is higher still.⁹⁸

In sum, benefits that can be worth hundreds of thousands of dollars, the case with an individual without a meaningful earnings record of her own, married to (or divorced after ten years from) a high earnings worker, are subsidized by a growing fraction of the working population – the unmarried and married couples with similar earnings records. Disproportionately low income individuals and families, blacks, and Hispanics are in that subsidizing fraction.⁹⁹

B. Spouse Benefits No Longer Limited to a Single Spouse

The 1939 amendments limited the total of dependent benefits that could be paid on the account of any contributing worker.¹⁰⁰ In addition, the reference to state law for the marital status determination assured that in most states there could be but one eligible spouse. Before Congress repealed it in 1957, the “living with” requirement combined with the “legal spouse” requirement virtually assured a limit of one spouse per worker.

The 1965 addition of divorced wives constituted a complete break with that constraint, introducing a significant possibility of at least two spouses qualifying on a single worker’s account. At the same time the family maximum was removed as a limitation. Benefits paid to a divorced spouse are not subject to the worker’s family maximum nor do they count against the maximum when it is applied to other benefits paid on the worker’s account.¹⁰¹ In 1977, Congress reduced the duration-of-marriage test for divorced wives to ten years, thereby substantially increasing the pool of eligible individuals and the extent to which divorced-wife benefits can undermine the family maximum.¹⁰² Theoretically, a single worker’s account can now give rise to benefit claims from multiple divorced wives which when combined with those of diverse children and a current wife will far exceed the maximum. (In 2009 over a quarter of the men in their fifties had been married at least twice.)¹⁰³ Since 1990 it has been possible for there also to be a wife or widow eligible by virtue of an undissolved “deemed valid” marriage whose benefits will be unconstrained by the maximum’s limit.¹⁰⁴ (Under an amendment Congress passed that year, a state law spouse and a spouse qualifying under the federal “deemed valid” marriage test can both receive benefits, with the state-law spouse receiving benefits outside the family maximum.)¹⁰⁵

C. Unintended Consequences: Clever Claiming Strategies (for Those Who Can Afford Them)

Even though spouse benefits and retired-worker benefits interact, they represent distinct

entitlements with different adjustments for the age at which benefits are begun. For a couple with the health and financial flexibility to decide when each will claim Social Security this opens up some startling possibilities. That is because after an individual has passed his or her “full retirement age” (sixty-six for those now in their sixties) applications for retirement worker and spouse benefits can be filed separately.¹⁰⁶ A high earning spouse can file for spouse benefits on a younger lower earning spouse’s account, drawing unreduced secondary benefits for several years. All the while the older spouse will be accumulating delayed retirement credits that will increase his or her retirement benefit when ultimately claimed as well as any surviving spouse benefit based on it.¹⁰⁷

Similarly, a widow or widower can claim a retired-worker benefit while holding off filing for surviving spouse benefits until full retirement age (at which point no further adjustment in that benefit’s monthly amount will occur) or reverse the order, delaying retired-worker benefits until seventy to take advantage of the delayed retirement credit which operates only on the primary benefit. Which is the better strategy will depend on the relative earnings levels of the deceased worker and the survivor.¹⁰⁸

Such options are, of course, available only to those who have sufficient resources to choose when to commence their Social Security benefits and access to sophisticated retirement planning advice.¹⁰⁹

IV. Who Is an Eligible Spouse – Arbitrary Distinctions, Troubling Incentives

Seeming arbitrariness also pervades the provisions that establish which women (and men) have sufficient connection to a covered former worker to qualify for spouse benefits and set the benefit amount. The system incorporates no coherent rationale. A reasonable presumption of need, occasioned by the cessation of earnings on which the individual was dependent, no longer fits the statutory pattern. Many categories of spouses are eligible despite a lack of dependence on the insured’s earnings at retirement, disability, or death. On the other hand, constructive or shared contribution based on periods of work within the home, invoked from time to time to justify spouse benefits, finds no consistent expression in the eligibility rules. A marriage taking place after the accumulation of all or nearly all of the earnings on which benefits will be based can, in a year or less, give rise to spouse benefit eligibility providing payments no different than those available to a spouse in a long-term marriage who sacrificed personal earnings to work within the home.¹¹⁰ In short, whether spouse benefits are viewed from the vantage point of those whose earnings are covered, taxed, and counted toward future benefits or from that of potential recipients their allocation is extraordinarily difficult to justify.

A. Nothing for the Nine-Year, Eleven-Month Ex-Spouse, Full Benefits Immediately after Passing the Ten-Year Mark

The extension of benefits to former spouses, despite their lack of the requisite marital status or actual financial dependency at benefit time, represented an implicit but marked shift in justification for spouse benefits. Participation in a marriage, presumably as parent/homemaker, during a period in which the covered worker built up part of a wage record necessarily replaced “presumed” need arising from the interruption of the working spouse’s earnings.

While more than one individual can qualify for spouse or divorced spouse benefits on a single earnings record, for any one claimant the stakes are “all or nothing.” The individual is either eligible or not. A marriage finalized nine months before a worker’s death will qualify the surviving spouse for full widow or widower benefits; one day short and the claim fails. The same discontinuity adheres to divorce. A former spouse whose divorce has become final only days prior to the ten-year mark is ineligible,¹¹¹ while one who barely passes that threshold receives the same share of spouse benefits as an individual who divorced after thirty or forty years of marriage. In no case do the type of factors that divorce courts consider in dividing other marital assets, including pensions, public and private, affect eligibility for or the amount of a Social Security divorced spouse benefits.

B. An Incentive to Divorce

The fact that benefits paid a qualifying divorced spouse are not limited by the family maximum while those paid a still-married though long separated spouse are, can provide a powerful incentive to divorce once a marriage has passed the ten-year mark. Eligible children may provide the catalyst. Indeed, a stably married one-earner couple with one or more children eligible for secondary benefits can increase the family’s total benefits if they divorce but remain together. If those children are adults, living independently but still eligible on their parent’s account because of disability, this result seems particularly perverse. Divorce carries another Social Security advantage over remaining married, again assuming a marriage of adequate duration. A spouse, otherwise eligible for secondary benefits, cannot obtain them until the higher-earning spouse has begun Social Security retired-worker benefits or died. Furthermore, even after the higher-earning spouse has applied, continued earnings on his part can cause a reduction in benefits for a still-married spouse. In both respects divorce severs the link to what the spouse with the underlying earnings record has done or not done.¹¹²

C. State Law Distinctions, Major Federal Benefit Consequences

While Social Security disregards state law when allocating earnings between spouses, its determinations of marital status, on which spouse benefits rest, depend (DOMA aside) largely on the law of the state in which the earner resides (or did reside at the time of death). The question framed by the Act is: Would the courts of that state find the couple to be validly married? There are numerous points of law governing marriage and divorce on which the fifty states differ. For example, a few states recognize common law marriages. Most do not. And some, while not permitting couples to enter into common law marriages within the state, will recognize such marriages if contracted elsewhere. As a consequence, entitlement to valuable benefits in this federal program can depend on where a putative married couple lived and traveled over the course of their time together.¹¹³ Similarly, in cases where a divorced spouse apparently falls short of the 10-year duration requirement, but argues that the divorce proceedings were invalid because of a lack of personal jurisdiction, the Social Security Administration must determine whether the courts of the state in which the earnings record holder resides would find the divorce to be void, leaving the marriage still in effect.¹¹⁴

D. Remarriage

Originally, since they rested on the interruption of earnings on which the system presumed the individual to have been dependent, benefits for surviving spouses terminated upon remarriage.¹¹⁵ Remarriage, so the logic went, supplanted the need for benefits with a new dependent relationship. Consistent with that rationale, the 1958 Social Security Act Amendments created a complex set of exceptions to avoid terminating dependent or survivor benefits when two secondary beneficiaries marry one another – the case, for example, of a person collecting widow benefits marrying a widower benefits recipient.¹¹⁶

That exception, however, did not significantly ameliorate the most troublesome feature of the remarriage provision – the financial loss it attached to the marriage of a retired male worker and a widow collecting benefits on the account of a deceased husband. This potential loss reportedly caused many elderly couples to forego marriage.¹¹⁷ Concern over the perceived inequity of treating elderly married couples less favorably than those cohabiting without marriage and the resulting discouragement of remarriage among seniors put pressure on Congress to remove or reduce the remarriage penalty.

A major problem of equity, however, lay on the other side. Without loss or adjustment of widow benefits upon remarriage, two couples, otherwise identical, could receive quite different benefits. The first, a retired-worker husband and his dependent wife, would receive one and one-half times his primary insurance amount. The second, a retired-worker husband and his wife, the widow of another (identical) worker, would receive more (two full primary insurance amounts under the current widow-benefit percentage).

Concern over the remarriage disincentive led Congress, in 1965, to permit remarriage from sixty on for widows (sixty-two for widowers) with only a 50% reduction in benefits (based on the original spouse's primary insurance amount) rather than their complete loss.¹¹⁸ In 1977, Congress completely removed the remarriage penalty for this group.¹¹⁹ This resolution inescapably produced a benefit structure in which widow/retired-worker and widower/retired-worker married couples receive “more than other couples would get where the husbands [or wives] had an identical record of covered earnings.”¹²⁰ It also draws an important line at age sixty that may be inconspicuous to those contemplating remarriage at an earlier age and, in some cases, a strong marriage disincentive to those aware of it.

E. The Death of an Ex-Spouse

While a surviving divorced spouse can, like a widow or widower, safely remarry upon reaching sixty, anyone drawing benefits on the account of a living ex-spouse cannot. Until the ex-spouse dies, remarriage at any age blocks eligibility for secondary benefits. The death of the ex-spouse also doubles the divorced spouse benefit amount. Unlike other ties between divorced spouse benefits and the primary benefit holder that have been severed these remain. The death of an individual with whom the divorced spouse may have well have ended all legal and economic ties long ago can have a major effect on benefits as it converts the divorced spouse (eligible for 50% of the worker's primary insurance amount so long as she not remarry) into a surviving divorced spouse (eligible for 100% of the primary insurance amount and free to remarry upon attaining age sixty) or in the case of a younger person caring for a child who is eligible for survivor's benefits

(mother or father benefits equal to 75% of the primary insurance amount) without regard to age.

Arbitrary consequences like these are simply unavoidable; they inhere in this system of benefits tied neither to actual financial dependency or need nor to direct or derivative contribution.

V. Realigning Social Security's Treatment of Marriage with State Marital Property Law: The Idea of Earnings Sharing

A. Equitable Division of Marital Property

Since Social Security spouse benefits were first established and later extended to divorced former husbands and wives, state domestic relations law and most segments of federal employee benefit law have moved to the view that both parties to a marriage have a claim upon each other's earnings and retirement income. In ten states this is reflected in comprehensive community property regimes.¹²¹ As a leading treatise on community property explains the core idea:

Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth accumulated by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution.¹²²

Since 1948 federal tax law has granted all married couples the equivalent of community property treatment of income through the joint return.¹²³

During recent decades divorce law reform in non-community property states has sought a similar result in non-enduring marriages. This has been accomplished by treating earnings and all property acquired by divorcing spouses during their marriage as marital property subject to equitable division between them.¹²⁴ As New York's highest court explained:

"Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership *to which both parties contribute as spouse, parent, wage earner, or homemaker.*" ... The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends "not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home."¹²⁵

Pensions and other retirement benefits are almost universally included among the marital assets to be divided between divorcing parties.¹²⁶

The 1984 amendments to ERISA known as the "Retirement Equity Act" aligned federal pension law with this state family law trend. Judicial orders in divorce cases that meet the act's terms must be honored by ERISA-qualified pension plans.¹²⁷ Similarly, the Uniformed Services Former Spouses' Protection Act, enacted to overturn a decision by

the Supreme Court holding that federal law prevented state courts from treating military retirement pay as community or marital property, provides for recognition of the claims of divorcing military spouses.¹²⁸ The pensions of non-military federal employees, whether accrued under the Federal Employees Retirement System or under the Civil Service Retirement System, are also subject to division by state courts allocating marital property.¹²⁹

By focusing on the parties' economic gains during the years of the marriage, this approach to divorce yields results quite different from Social Security's. Social Security divorced spouse benefits are based on the primary earner's entire earnings record, not just the portion built up during the marriage. They are also limited to ten-year marriages. States employing equitable distribution in divorce proceedings apply it to three-year marriages, five-year marriages, seven-year marriages as well as those lasting ten years and more.

The Social Security programs of Canada, Germany, and Switzerland all provide for sharing the pension rights of divorcing couples between the parties in proportion to the years of their marriage.¹³⁰

B. The Spouse's Elective Share of an Estate

The concept of marriage as an economic partnership has also seen expression in estate law reform. In community property states the surviving spouse's one-half interest in marital property is largely secure.¹³¹ In non-community property states where, in general, wills and title govern property distribution upon death, widows and widowers are nonetheless usually protected by a statutory right to elect a share of their deceased spouse's estate, without regard to the terms of the will. State law reform on this front has taken the form of expanding the pool of assets to which the elective share applies to include assets transferred by means other than by will and expanding the spousal share for lengthy marriages to one-half, while reducing the fraction in shorter marriages so as to approximate the result in a community property state.¹³²

With pensions any death benefit for a surviving spouse will depend on elections made earlier by the pension holder. For that reason, the federal Retirement Equity Act not only dealt with spousal claims arising out of divorce but also established important survivorship rights for spouses and former spouses.¹³³ Unless waived by the nonemployee spouse, ERISA requires that covered pensions be structured to include a survivorship annuity in the case of married participants.¹³⁴

C. Social Security Essentially Untouched by the Equality Norm Driving these Reforms

There have been efforts to align Social Security with the marital property idea. They stretch back forty years or more. Yet the program remains locked onto the premise that the earnings record of a married worker belongs to the worker alone. In 1979 the Supreme Court held, in *Hisquierdo v. Hisquierdo*,¹³⁵ that retirement pensions established by the Railroad Retirement Act were not subject to division in a community property jurisdiction's divorce proceeding. The holding has been understood universally as applying with equal force to Social Security.¹³⁶ Although some state courts have considered themselves free to consider the prospect of Social Security benefits in dividing

other marital assets between divorcing parties, a task which can pose challenging valuation issues, federal preemption bars them from addressing Social Security payments directly.¹³⁷ Either by omission or explicit exclusion Social Security benefits are also typically left out of the “augmented estate” from which states will calculate a surviving spouse’s elective share.¹³⁸

Shielded by preemption from state marital property reforms, Social Security’s own provisions for giving spouses a stake in each other’s earnings, including both its treatment of spousal earnings and the program’s spouse-benefit structure, stand seriously at odds with the equal shares norm.

D. Ways of Incorporating the Idea of Shared Marital Earnings within Social Security

1. The Direct Approach

When Congress last addressed a Social Security financing crisis, in 1983, adopting measures recommended by the Greenspan Commission, it passed on the opportunity to reshape Social Security along marriage-as-partnership lines. However, it acknowledged the issue by mandating a study. That year’s amendments directed the Department of Health and Human Services (then the parent agency for Social Security) to develop proposals for legislation that would implement the concept of earnings sharing by combining the “earnings of a husband and wife during the period of their marriage” and dividing them equally “between them for social security benefit purposes.”¹³⁹ Bills providing for various forms of Social Security earnings sharing as a replacement for spouse benefits had been introduced in Congress during the 1970s and recommended in several government reports.¹⁴⁰ The 1983 act directed that the “earnings sharing implementation report” include analysis of two specific earnings sharing bills and also a plan set out in a report on providing equal treatment of men and women under Social Security called for by 1977 legislation.¹⁴¹

In concept applying earnings sharing to Social Security should be straightforward; the earnings credits of both spouses would be summed and divided equally between them, annually as they are built up. This would result in married men and women accumulating identical wage records throughout their marriages, regardless of respective earnings levels or whether one spouse devoted substantial or full time to nonmarket, “community” affairs: cleaning, meal preparation, or child rearing. Two-earner and one-earner couples would receive equal return on their tax payments into the program. Marital status would be taken into account from year to year on the contribution side, rather than only at certain critical points or periods as it is under the current spouse-benefit system. Credits received as spouse and as worker would cumulate, not offset one another. Credits would also remain secure through divorce and entry into or exit from the labor force.

Such an approach ought to render spouse benefits in their current form unnecessary. Instead, each spouse would possess an independent entitlement to old-age and disability benefits. Periods without paid employment devoted to child rearing, other work in the home, or education would not leave blank years for Social Security. Half the covered earnings of an employed spouse would be credited to his or her stay-at-home partner. Discrepancies between the work patterns of married men and women and their earnings

levels would, with earnings sharing, balance out. Divorce would not threaten benefits for they would no longer depend on marital status at benefit time. A divorced or separated spouse would take from the marriage a wage record reflecting his or her share of its earnings. Remarriage by divorced or surviving spouses would start a new period of earnings sharing rather than threaten eligibility.

Because of the bias toward one-earner marriages embodied in the spouse-benefit structure its replacement with earnings sharing could face political opposition. Straight earnings sharing would, on average, mean benefit reduction for that currently favored group. Those urging earnings sharing in the past felt a need to cushion the loss by including additional credits to couples with different earnings levels in their proposals.¹⁴² In view of more recent changes in work and family patterns that may no longer be necessary, particularly following an adequate period of transition.

A change to earnings sharing would, of course, raise countless issues of detail and pose difficulties of transition. That is true of almost any significant Social Security benefit revision. But the resulting scheme could be conspicuously fairer than the present dual system of primary and secondary benefits. If combined with complementary changes in the primary benefit formula, this reform need not produce a net reduction in Social Security benefits for women.

2. Issues of Implementation

Implementation of a year-by-year division of earnings between spouses would entail resolving myriad questions of detail. The report mandated by Congress in 1983 contains a lengthy inventory. The list includes such matters as whether earnings above the maximum annual amount for an individual should be split (and presumably taxed), what events (separation or divorce, disability, retirement) should end earnings sharing for a couple, the implications for children's benefits, what to do in the case of couples in which one spouse has a career of public sector work not covered by Social Security, how marital status ought to be determined and verified, and many more.¹⁴³

In addition, there are issues of whether, and if so how, spouses might coordinate the benefits paid out of their split accounts. One example is furnished by Alicia Munnell:

Consider the case of a male worker aged sixty-five who wishes to retire but whose nonworking wife is too young to collect her benefits. With the mandatory division [of credits], the husband can collect only half the benefits the couple is entitled and thus may not be able to afford retirement until [his wife is older].¹⁴⁴

A related puzzle is posed by disability. While earnings sharing could, by yielding an earnings record for spouses stricken with disability while devoting time to non-market activities within the home, extend Disability Insurance coverage and improve the benefits payable to women under such circumstances,¹⁴⁵ that very shift would, without more, threaten a reduction in the benefit level available when the higher-earning spouse becomes disabled.

Taken individually issues like these are hardly insurmountable.¹⁴⁶ To deal with the first situation, for example, Congress could lower the age of eligibility for a younger, low-earnings spouse (with suitable actuarial reduction). A couple could also be given an option to reallocate some of the credits accrued during their marriage back to the older or

disabled spouse. Other workable solutions are possible.¹⁴⁷ Collectively, however, these issues appear to have dampened any Agency enthusiasm for a switch to earnings sharing. After carefully reviewing the costs, political challenges, administrative burdens, and transition issues posed by Social Security reform along these lines, the 1985 report back to Congress made no recommendation.

Conversion to earnings sharing would, without question, require coordinated changes in many features of the Social Security benefits system, extending to its benefit provisions for children. It would, in fact, force redesign of the entire system. The need for such drastic change is not, by itself, adequate ground for rejecting an approach that promises fairer recognition of both earnings and marriage and a reduction in the inequity of privileging one-earner couples at the expense of others. That, of course, assumes that, notwithstanding the difficulties, a transition from the present worker/spouse dual-benefit approach to earnings sharing is administratively and politically feasible and that no simpler alternatives are available.

3. More Limited Earnings Sharing Variants Focused on Divorce and Retirement

A. Retrospective Earnings Sharing in the Event of Divorce

A simpler variant on the year-by-year earnings sharing approach would limit the combination and division of earnings credits to divorcing couples. This could take the form of subjecting either Social Security earnings records or future benefits to division under state divorce law, by allowing state courts and negotiated divorce settlements to reallocate the parties' covered earnings or the resulting benefits. Alternatively, Congress could rework the program to internalize the marital-property concept, providing for the automatic pooling and division of a couple's marital earnings upon notice of their divorce. Either approach would align the program with current legal and social trends,¹⁴⁸ while avoiding many of the implementation challenges of annual earnings sharing.

Importantly, this more limited approach would not require the Social Security Administration to keep track of the marital status of all covered earners. Instead, the burden of presenting evidence supporting the division of a couple's Social Security earnings records could rest on the benefitted divorcing party, endorsed perhaps by a state court. Since 1978 Canada has had such a scheme in place for its social security system.¹⁴⁹ Originally, an option limited to divorcing parties, Canada's "credit splitting" provisions were amended in 1987 to extend to separating spouses and "common law" partners. It is now available as a matter of right unless waived through an agreement signed by both parties.¹⁵⁰

B. Waiting to the Time of Eligibility to Divide Primary Benefits or Earnings between Spouses

The Federal Employee Retirement System provides survivors' benefits to the spouses of all covered employees who are married at the time of retirement. Unlike Social Security secondary benefits this feature is not costless to the retiree. A survivor's benefit equal to 50% of the retiree's payment results in a 10% reduction in the retiree's amount.¹⁵¹ This

survivor's benefit can be waived or reduced but only with the consent of the non-employee spouse. A similar framework, with different parameters, applies to retirement benefits under the Civil Service Retirement System.¹⁵² In like fashion ERISA requires private pension plans to provide a joint and survivor annuity in the case of married individuals, unless waived by the non-employee spouse. Under such qualified joint and survivor annuities, the size of the reduction during the period both members of the couple are alive compensating for the ongoing payment to the survivor is a function of their respective ages.¹⁵³

Adapting such an approach to Social Security retirement benefits would require creating one or more joint and survivor payment plans for those who are married at the point either of the pair applies for retirement benefits. Actuarial adjustments based on the spouses' respective ages could hold the value of this benefit package or set of options equal to that of two single individual's retirement benefits.¹⁵⁴ Taking benefits in this form would presumably be mandatory unless waived by both spouses.

C. Combining a Surviving Spouse Benefit with Year-by-Year Earnings Sharing?

A cost-neutral, joint and survivors benefit for couples still married at benefit time could also be attached to year-by-year earnings sharing. The rationale for such an addition rests on the premise that a surviving spouse needs more than one half the income on which the couple was previously living. For that reason and because of the typical earnings, wealth, age, and life expectancy differential between husbands and wives, the inadequacy of earning sharing alone as a solution to the income needs of widows seems to have become accepted. Both plans modeled in the 1985 Health and Human Services study provided for "inheritance" of the portion of the earnings record of a deceased spouse compiled during the years of the marriage.¹⁵⁵

Under the current dual benefit system, spouses with essentially equal earnings records receive their respective retired-worker benefits during years of shared retirement while a one-earner couple with the same total annual covered earnings receives more, the sum of one full primary benefit and a spouse benefit equal to an additional 50%. Death reduces the one-earner couple's total Social Security by one-third (dropping the sum from 150% of the primary benefit to 100%) while it cuts the two-earner couple's monthly amount in half. (Because of the primary benefit offset, that same individual benefit level, one-half the couple's prior total, continues for the survivor without any widow(er) augmentation.) A straightforward application of earnings sharing produces the latter result in the case of both one- and two-earner marriages that endure. For marriages occurring later in life that bring together individuals with very different Social Security records earnings sharing would pose the risk of an even more dramatic decline in benefits for the survivor. Even with inheritance of earnings from the period of the marriage, this would be the case if the high earner spouse were to be the first to die.

A system that gave each spouse the right to have the other's retirement benefit taken in the form of an actuarially equivalent joint and survivor annuity could assure the surviving spouse of a benefit greater than 50% of the benefits paid during the couple's joint lives without placing the burden of funding this assurance on others as the current widow(er) benefit structure does.

4. Administrative Challenges

Surveying the challenges entailed in administering a year-by-year earnings sharing system in 1985, the Agency stressed the difficulty it would face in determining and verifying marital status on an ongoing basis. (It estimated that over 90% of those sixty-two and over will have been married at some point, nearly half of them more than once.). The Social Security Administration emphasized the incapacity of its existing data systems and procedures to handle so different a method of tracking earnings and calculating benefits.¹⁵⁶ The report left little doubt that these were not challenges the Agency was eager to take on and that if they had to be undertaken the conversion would require substantial lead time and funding:

Once the details of an earnings sharing plan [became] known, it would take SSA at least 5 years to develop [an automated system to pay claims based on it]. It should be noted, however, that even if a large percentage of the workload were automated prior to implementation of earnings sharing, the number of cases remaining to be processed manually would still constitute a significant workload. Moreover, because of the added complexity, time needed to process earnings sharing benefits would be considerably greater than the time that is needed under present law.¹⁵⁷

Converting to even one of the more limited earnings sharing variants would not remove the need for the Agency, on occasion, to resolve difficult questions of fact and law bearing on whether two persons are “validly married”. Constructed carefully, however, an earnings sharing approach could drastically reduce the importance of such questions. The current Social Security system puts so much stress on these issues because of the large stakes – eligibility for spouse benefits – riding on the answer. In contrast, when determining eligibility to file a joint return, the Internal Revenue Service relies largely on the parties’ own declaration of status.¹⁵⁸ Tying the Social Security treatment of a couple’s earnings to their federal income tax return status, would not be a bad solution. That approach would be particularly attractive if the marital status on which any year’s sharing of earnings rests were, after a short period, to enjoy a strong statutory presumption of validity.¹⁵⁹

5. Implications for Mother/Father and Child Benefits

Social Security’s current spouse-benefit structure not only extends benefits to senior widows and widowers, it also provides mother and father benefits to younger surviving spouses and former spouses caring for children of a deceased earner, children who are themselves eligible for survivors’ benefits. When the Act’s earlier failure to provide such benefits for men was addressed by the Supreme Court in *Weinberger v. Wiesenfeld*,¹⁶⁰ the majority quite sensibly viewed this category of spouse benefits as more focused on the welfare of children than on the needs of the surviving spouse to whom they are paid. This led the Court to its conclusion that:

Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent.¹⁶¹

As is true of most other components of the spouse-benefit complex, the purposes

underlying mother and father benefits are, in truth, blurred. Unlike the benefits paid directly to the children these end upon a surviving spouse's remarriage and are reduced or blocked if the survivor has significant earned income. On the other hand, concern with the surviving children results in this being the one situation in which a divorced former spouse need not have spent ten years in the marriage to be eligible. Still, a qualifying marriage is a prerequisite; parentage is not enough. And other caretaking relatives, grandparents, say, taking care of the children of a deceased son or daughter, do not qualify.

Were earnings sharing adopted in some form with a surviving spouse's benefit attached, surviving children might be better served by a slight increase in their own benefit amounts than by the re-grafting some form of mother and father benefits onto this altered structure.

6. Implications for the Treatment of "Excess Earnings"

Except in the case of a spouse divorced for two years or more, spouse benefits are reduced in the event the primary beneficiary has substantial earnings. Not only does eligibility depend on the primary beneficiary's application for retirement benefits but the amount is affected by "excess earnings" of the primary beneficiary spouse. Presumably, with earnings sharing, the retirement benefit applications and excess earnings of one spouse would not affect the other's benefit eligibility or amount. As a consequence, a spouse with low or no earnings could commence benefits well ahead of the retirement of the couple's principal earner, albeit at an actuarially reduced amount. In cases where the two no longer coordinate financial decision-making or comprise a household this would be an improvement over the status quo.

VI. The Challenge of Transition

Nearly all of the revisions of spouse benefits explored here would require significant changes in the Social Security Administration's procedures and data systems and, as a consequence, delayed implementation. Following an adequate period for the necessary administrative changes, however, many of them could be applied without further delay. Plans proposing significant changes in the terms governing primary benefits for retirees routinely exempt all current beneficiaries and those within a decade or so of eligibility. Sensitivity to the expectations of prospective spouse benefit recipients need not be so sweeping. Assuming implementation is delayed several years so as to give the Social Security Administration time to prepare, there is no reason at that point not to begin applying earnings sharing and new survivorship options to all future marriages. Unacceptable as it would be to reduce the Social Security retirement benefit formula for individuals in their sixties, changing the Social Security consequences of future marriages by members of that same age cohort, let alone younger ones, seems altogether different. Similarly, assuming an effective date five years or more beyond enactment, applying an earnings sharing regime instead of current law to all subsequent divorces, without regard to the age of the parties or duration of the marriage, would appear to run little risk of upsetting firm retirement income plans or other settled expectations.

How to phase in replacement of spouse benefits for individuals currently married who remain in those marriages until reaching the age of Social Security eligibility poses a far more difficult question. Current Social Security recipients should, of course, be left under

the existing structure. This ought to include those currently receiving no spouse benefit due to the level of their own primary benefit but for whom benefits as a widow or widower are in prospect should they outlive their current partner. At the opposite extreme, married individuals toward the beginning of their working years can, quite reasonably, be brought under any replacement regime. Change to year-by-year earnings sharing, coupled with an actuarially sound joint and survivor payout option, should probably not be forced on married individuals a decade or less from Social Security's age of eligibility. For most younger persons, however, the ultimate effect of substitution should be sufficiently speculative to undercut any argument that change disturbs settled long-range income plans.

Other measures curbing the inequity built into the current spouse-benefit system might be applied during a phase out period. For example, in the case of married individuals 55 and younger spouse benefits could be capped. Rather than scaling as a percentage of the primary benefit all the way to the maximum amount, spouse benefits could be limited so that those married to the highest earners would receive no more than the spouses of average earners.

A key factor in determining the pace at which the present spouse benefits provisions can be replaced for future beneficiaries is the extent to which spouse benefit changes are accompanied by complementary program revisions that improve primary benefits for women.

VII. Complementing Spouse Benefit Reform with Other Program Adjustments that Would More Equitably Improve Retirement Income Security for Women

While replacing spouse benefits with earnings sharing in some form combined with an actuarially sound joint and survivor payout for spouses would yield a fairer system – in relation to the never married, those in marriages in which spouses have comparable earnings, and individuals divorced after fewer than 10 years – the cumulative effect on women would be negative. To be acceptable, therefore, any replacement of spouse benefits would require offsetting adjustments in the method of calculating retired-worker benefits, adjustments that respond to the factors that hold down benefit levels for women, especially women at the bottom of the scale. More than 40% of female Social Security retired worker beneficiaries receive amounts that are below a poverty-level income.¹⁶² The figure for men is 17%.¹⁶³ Women make up over two-thirds of the Supplemental Security Income recipients sixty-five and over.¹⁶⁴ Without changes in how Social Security's retired-worker benefits are calculated, spouse benefit reform would increase the gender poverty gap among seniors.

Retired-worker benefits depend on average earnings during periods of covered employment. Although wage parity between men and women may lie ahead, in the near future women as a group will continue to receive lower Social Security retired-worker benefits because of lower past wages.¹⁶⁵ There is partial mitigation in the system's "tilt"¹⁶⁶ – lower wage employees receive a better return in Social Security benefits than higher wage employees – but not enough to offset the wage disparity. Since more men than women earn above the taxable wage base for Social Security, raising that cap, a

component of several long-term solvency plans, would, standing alone, increase the gender differential.¹⁶⁷

The treatment of years spent out of covered employment or in part-time work also affects the benefits retired women receive from Social Security. Historically the work lives of women have – in comparison with those of men – incorporated significant periods spent in the home caring for children. Women are far more likely than men to be single parents, forced to make compromises on the amount and nature of their work and bearing costs that reduce the ability to save.¹⁶⁸ The retired-worker benefit formula rests on thirty-five years of average indexed earnings.¹⁶⁹ Reducing that number generally or ignoring years of work at home or while caring for children or other relatives would yield higher retired-worker benefits for many women.¹⁷⁰ A step beyond ignoring such years would credit them in some fashion toward eventual benefits-in old age or disability. A few have proposed, in this vein, that a constructive wage for Social Security purposes be attached to child-rearing, elder care, or work in the home more generally.¹⁷¹ Serious practical problems and theoretical objections surround such an approach.

As an alternative to the standard benefit formula Social Security contains a Special Minimum Benefit designed for steadily employed low earnings workers.¹⁷² While it has withered away to insignificance,¹⁷³ if revived and enhanced it could improve the lot of senior women, particularly if, as some have proposed, the amount of earnings necessary for a year of credit were reduced and years spent in child-rearing and the like were counted.¹⁷⁴

Finally, women's greater average longevity and more limited retirement income resources suggest another form of benefit adjustment that has begun to appear in Social Security reform proposals – benefit amount increases for recipients who live past certain benchmark ages.¹⁷⁵

Finally, the Social Security backstop available to those with grossly inadequate benefits and the ineligible is the federal need-tested program for seniors, Supplemental Security Income (SSI). Over half of all SSI recipients eligible on the basis of age also receive Social Security benefits.¹⁷⁶ With the exception of the annual cost-of-living adjustment, SSI benefits are reduced dollar-for-dollar for increases in a recipient's Social Security beyond an initial \$20 exclusion. This amount that has remained unchanged since the program was adopted forty years ago. Because of how these programs interact improvement in Social Security's Special Minimum Benefit and related reforms focused on those with low life-time earnings will have little or no net impact on many of those most in need unless corresponding changes are made to SSI.¹⁷⁷

Conclusion

Spouse benefits responded quite reasonably to the mores as well as the practical realities of another era. During Social Security's early years they succeeded in fulfilling the purpose that led Congress to append them to the system in 1939, without serious inequity to contributors and recipients or waste to the system. In recent decades, however, dramatic social, economic and legal changes have altered the profile of the American family, at home and at work. Since 1939, the Social Security system itself has grown and changed enormously. In today's environment, the dual system – primary benefits based

on the worker's prior employment set off against secondary benefits based on a present or past marriage to a covered worker – functions awkwardly and unfairly. Its allocation of non-contributory spouse benefits seems quite arbitrary, and the tax burden associated with those benefits weighs heavily on the large and growing portion of the work force that receives no benefit from them. The system's failure to produce benefits for women comparable to those it yields for men can no longer be lightly dismissed. If it is to respond adequately to these developments, Congress will have to revise the Social Security benefit scheme substantially, not only the spouse-benefit provisions but those governing primary benefits.

That will require more attention and political will than these issues have received in over a decade. Beginning in the mid-1990s proponents of various forms of “privatization” focused the Social Security policy debate.¹⁷⁸ By definition, privatizing, however packaged, amounted to converting Social Security at least in part from a defined benefit into a defined contribution plan, thereby threatening its progressive benefit formula and all features like spouse benefits that do not map directly onto an individual's past covered and taxed employment. The resulting political debate pushed those concerned about benefit adequacy for and equity among older women onto the defensive. While groups with such concerns had once been critics of Social Security's spouse-benefit structure, during the late 1990s and throughout the Presidency of George H.W. Bush they became its defenders and even advocates for liberalizing marriage-based benefits.¹⁷⁹ More recently, fear of Social Security's being trimmed as part of some “grand bargain” on federal debt reduction has had a similar effect. Given the importance of Social Security to women, nearly all the measures discussed as plausible ways of reducing Social Security's long-term expenditures threaten a disproportionate impact on older women. They have, for that reason, quite consistently drawn opposition from women's advocacy groups.¹⁸⁰

If Social Security's long-term fiscal imbalance is addressed with a tweak here and a tuck there without attention to such outdated features as the spouse-benefit provisions and how the primary benefit formula fits the work lives and family commitments of women, the nation will have missed a rare opportunity to improve the fairness and adequacy of the program's benefits. Carefully done such comprehensive reform could be part of rather than at odds with bringing the program's long-term costs and revenues into balance.

* © Peter W. Martin, 2012. This work is licensed under the Creative Commons Attribution-Noncommercial-ShareAlike 3.0 License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-sa/3.0/> or send a letter to Creative Commons, 543 Howard Street, 5th Floor, San Francisco, California, 94105, USA. This article returns to a topic first addressed by the author over three decades ago. See Peter W. Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789 (1978).

** Jane M.G. Foster Professor of Law, Emeritus, Cornell Law School, Ithaca, New York and author of *Martin on Social Security*, an electronic reference work first published in 1990 and now accessible at <http://social-security-law.wikispaces.com/>.

¹ See ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 32 (2012), available at <http://www.ssa.gov/oact/tr/2012/> [hereinafter 2012 SOCIAL SECURITY TRUSTEES REPORT].

² See Table 1.

³ See SOCIAL SECURITY ADMINISTRATION, INCOME OF THE POPULATION 55 AND OVER, 2010, Table 5.A14 (2012) [hereinafter INCOME OF OLDER PERSONS, 2010].

⁴ See *id.*.

⁵ *Id.* 304.

⁶ See *id.* 165.

⁷ See *id.* 188-90.

⁸ See Elizabeth Arias, *United States Life Tables, 2007*, 59 NATIONAL VITAL STATISTICS REPORTS, No. 9, at 2 (National Center for Health Statistics 2011).

⁹ See INCOME OF OLDER PERSONS, *supra* note 3, at 20-22 (2012).

¹⁰ *Id.*

¹¹ See NATIONAL ECONOMIC COUNCIL INTERAGENCY WORKING GROUP ON SOCIAL SECURITY, WOMEN AND RETIREMENT SECURITY 11 (1998).

¹² Barbara A. Butrica & Karen E. Smith, *The Impact of Changes in Couples' Earnings on Married Women's Social Security Benefits*, 72 SOC. SEC. BULL. 1, 8 (2012).

¹³ See 2012 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 1, at 123.

¹⁴ See *Massachusetts v. United States HHS*, 682 F.3d 1 (1st Cir. 2012). For Social Security and all other federal benefits linked to marital status, DOMA overrides state law on the validity of same sex marriages. See 1 U.S.C. § 7 (2012).

¹⁵ The amount paid to the worker's estate, like the monthly retired-worker benefit, was based upon the total of covered wages on which contribution (tax) had been paid. The Act directed payment of a full 3.5% of such total covered wages to the estate of a worker who died before collecting old age benefits; 3.5% minus the total of monthly payments received before death, to the estate of a deceased retired worker. Social Security Act of 1935, ch. 531, § 203, 49 Stat. 620. Compared to the present law, the simplicity of the 1935 legislation is overwhelming. The Old Age Insurance provisions took up less than four pages. For a good summary, see SOCIAL SECURITY BOARD, SOCIAL SECURITY IN AMERICA 222-26 (1937).

¹⁶ The 1939 amendments, with few exceptions, embodied the recommendations contained in a report of the Social Security Board. See SOCIAL SECURITY BOARD, PROPOSED CHANGES IN THE SOCIAL SECURITY ACT (1939) [hereinafter cited as SOC. SEC. BD. PROPOSED CHANGES], reprinted in *Social Security: Hearings Relative to the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 3 (1939) [hereinafter cited as *1939 Hearings*]; Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360.

The Board's recommendations, in turn, closely tracked those of a 1938 Advisory Council on Social Security. See ADVISORY COUNCIL ON SOCIAL SECURITY, FINAL REPORT, S. Doc. No. 4, 76th Cong., 1st Sess. (1938), reprinted in *1939 Hearings*, *supra* at 18. For a full account of the gendered assumptions revealed in the Advisory Council's lengthy deliberations and also the role of racial politics, see Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 87 (Linda K. Kerber et al. eds. 1995).

¹⁷ The shift in the retired-worker benefit formula – from a total contribution basis to an average covered-wages basis – had the effect of improving immediate payout by relaxing the benefit-contribution relationship. See SOC. SEC. BD. PROPOSED CHANGES, *supra* note 16, at 5-6. See generally A. ALTMAYER, THE FORMATIVE YEARS OF SOCIAL SECURITY 96-117 (1966).

¹⁸ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 16, at 4. Although eligible retired workers could be of either men or women, these spouse benefits were exclusively for “aged wives.”

¹⁹ The Social Security Board's report argued for the substitution in these terms:

Under a social insurance system the primary purpose should be to pay benefits in accordance

with the presumptive needs of the beneficiaries, rather than to make payments to the estate of a deceased employee regardless of whether or not he leaves dependents. The payment of monthly benefits to widows and orphans, who are the two chief classes of dependent survivors, would furnish much more significant protection than does the payment of lump-sum benefits.

Id. at 6.

In addition to providing for wives and widows, the amendments created dependent and survivor benefits for children of a contributor and survivor benefits for financially dependent elderly parents (the latter only if no wife or eligible children survived). Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360.

²⁰ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 16, at 4. The Senate Finance Committee expressed the same view. *See* S. REP. NO. 734, 76th Cong., 1st Sess. 11 (1939) (accompanying H.R. 6635). *See also* 1939 Hearings, *supra* note 15, at 1014, 1218.

²¹ The 1939 amendments halted a scheduled increase to 1.5%. *See* Social Security Act of 1935, ch. 531, § 801, 49 Stat. 620; Social Security Act Amendments of 1939, ch. 666, § 601, 53 Stat. 1360. Congress similarly deferred subsequent scheduled tax increases until 1950, when the tax rate rose to 1.5%. *See* Social Security Act Amendments of 1950, ch. 809, § 201, 64 Stat. 477 (now I.R.C. § 3101).

²² The original legislation provided larger payments – in relation to contribution – for beneficiaries with low wages and few years of covered employment before retirement. *See* Social Security Act of 1935, ch. 531, § 202(a), 49 Stat. 620.

²³ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 16, at 2.

²⁴ The Board argued: “In order that greater social adequacy may not be achieved at the expense of individual equity, the Board recommends that the benefits payable to unmarried persons continue to be at least as much as they could purchase from a commercial insurance company with their own contributions.” *Id.* at 4-5.

²⁵ That maximum was (a) twice the wage earner’s primary insurance amount, (b) 80% of his average monthly wage, or (c) \$85, whichever was least. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360.

²⁶ Of course, for the first wave of retirees, marriage during the years immediately prior to retirement did correspond to the period of covered employment. To qualify as a wife at 65, a woman had to be married to the worker before he turned 60. Shorter marriages were recognized for those married as of January 1, 1939, or bearing children of the worker. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360. A widow had to be married for a year or the mother of a child of the deceased worker. *Id.*

²⁷ Section 201 limited wife benefits to those “living with” a husband receiving retired-worker benefits. *Id.* It also provided: “A wife shall be deemed to be living with her husband if they are both members of the same household, or she is receiving regular contributions from him toward her support, or he has been ordered by any court to contribute to her support . . .” *Id.* Identical conditions applied to widows.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Covered wages for retired workers began in 1937. A wife qualified for dependent benefits if she was married prior to January 1, 1939. *See id.* There cannot have been many workers retiring during the early forties who married their wives after January 1937 but before January 1939.

³² *Id.*

³³ Even where a marriage resulted in separation, the wife could meet the “living with” requirement provided she met one of two support tests. *See* note 27 *supra*.

³⁴ The 1940 census reported 4,613,194 women 65 and over and 4,406,120 men, a male to female ratio of 95.5 per 100. *See* BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 2 SIXTEENTH CENSUS OF THE

UNITED STATES: 1940 – POPULATION, Part 1, Table 8, at 27 (1943). That ratio was 70 per 100 in 2000, 75.8 per 100 in 2010. See CARRIE A. WERNER, BUREAU OF THE CENSUS, THE OLDER POPULATION: 2010, at 2 (2011).

³⁵ For 1938, the ratio of male to female workers with taxable wages was 2.6 to 1. Many more male than female workers were close to retirement. See SOCIAL SECURITY BOARD, SOCIAL SECURITY YEARBOOK 1939, at 54-55 (1940).

In 1940, the first year in which monthly benefits were payable – as a consequence of the 1939 amendments – the ratio of male to female retired-worker benefit recipients was 7.9 to 1. A 6.5 to 1 ratio prevailed among recipients who had just turned 65. See SOCIAL SECURITY BOARD, SOCIAL SECURITY YEARBOOK 1940, at 158 (1941).

In 1939, slightly more than 20% of all women 14 years of age and over held jobs, compared to approximately 66% of all men. The disparity was far greater among women and men within a few years of age 65. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 2 SIXTEENTH CENSUS OF THE UNITED STATES: 1940 – POPULATION, Part 1, Table 16, at 44 (1943); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SIXTEENTH CENSUS OF THE UNITED STATES: 1940 – POPULATION, THE LABOR FORCE: EMPLOYMENT AND PERSONAL CHARACTERISTICS, Table 1, at 17-18 (1943).

³⁶ The federal government did not measure poverty in 1940, but the poverty rate among the elderly was certainly very high. At the time, the elderly represented the most obvious and attractive target for public antipoverty measures. See SOCIAL SECURITY BOARD, SOCIAL SECURITY IN AMERICA 149-54 (1937).

³⁷ In the 1940's, over half the women age 65 and over were widows. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, Part 1, at 20 (1975). See generally Barkev S. Sanders, *Family Composition in the United States*, 2 SOC. SEC. BULL., April 1939, at 9, 11-12.

In 1975, more than half the women 65 and over were widowed, and more than one-third were living alone. By contrast 3 out of 4 men 65 and over were married and living with their (often younger) wives. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, DEMOGRAPHIC ASPECTS OF AGING AND THE OLDER POPULATION IN THE UNITED STATES 45 (Current Population Reports, Special Studies, Series P-23, No. 59, 1976).

By 2000, the percentage of widows among women 65 and over had dropped to 45. See YVONNE GRIST & LISA HETZEL, U.S. CENSUS BUREAU, WE THE PEOPLE: AGING IN THE UNITED STATES (2004). In 2010 it was lower still, at 38.6. See INCOME OF OLDER PERSONS, *supra* note 3, at 22.

³⁸ The initial Old Age Assistance rolls showed significant over-representation of widowed women. See *Sex, Marital Status, and Living Arrangements of 1,000,000 Recipients of Old-Age Assistance*, SOC. SEC. BULL., Feb. 1939, at 20, 20-25.

³⁹ See SOCIAL SECURITY BOARD, SOCIAL SECURITY YEARBOOK 1942, Table 86, at 133 (1943). The figures are for workers awarded retired-worker benefits during 1942, not for total beneficiaries.

⁴⁰ See *id.*, Tables 98-90, at 135.

⁴¹ In 1942, monthly payments averaged \$12.46 for wives and \$20.05 for widows. See *id.* at 51, 58. Recall that a wife received half her husband's primary insurance amount (P.I.A.); a widow, three quarters. The average monthly benefit for young widows eligible because of children in their care was \$19.56 per month. See *id.* at 58.

⁴² The precise reduction in payment would have been 23.7%: 9% for wives, 8.9% for elderly widows, and 5.8% for young widows with children. See ANNUAL STATISTICAL SUPPLEMENT, 1949, SOC. SEC. BULL., Sept. 1950, Table 19, at 35.

⁴³ The average monthly benefits awarded male retirees in 1949 were \$29.41. See ANNUAL STATISTICAL SUPPLEMENT, 1975, SOC. SEC. BULL., Table 62, at 93 (1976) [hereinafter 1975 ANNUAL STATISTICAL SUPPLEMENT]. To equal the wife benefits payable on such a primary amount, a woman needed retired-worker benefits of \$14.71 which in turn required average monthly wages of about \$37.00. See Social

Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360.

To qualify for retired-worker benefits, however, a woman (or man) had to be “fully insured.” As then defined, such status was hard to achieve if a person spent significant time, between January 1, 1937, and retirement, in uncovered employment, which included military service or working in the home. The requirement, modified in 1950, tended to undercut the prediction that retired-worker benefits would gradually displace spouse benefits. *See* EDWIN E. WITTE, *SOCIAL SECURITY PERSPECTIVES* 33 (1962).

⁴⁴ *See* BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, Series D 830-844, at 172 (1975). For the period 1937-1948 a woman worker steadily employed at the average wage for such workers earned an average monthly wage of \$114.17. *See id.*

⁴⁵ *See* SOCIAL SECURITY ADMINISTRATION, *ANNUAL STATISTICAL SUPPLEMENT*, 2011, SOC. SEC. BULL., Table 2.A19 (2012) [hereinafter 2011 ANNUAL STATISTICAL SUPPLEMENT].

⁴⁶ Social Security Act Amendments of 1950, ch. 809, § 101(1), 64 Stat. 477 (current version at 42 U.S.C. § 402(b), (g) (2012)).

⁴⁷ Social Security Amendments of 1956, ch. 836, § 102(a), 70 Stat. 807 (current version at 42 U.S.C. § 402(a), (b), (e) (2012)). For men, 65 remained the threshold until 1961. *See* Social Security Amendments of 1961, Pub. L. No. 87-64, § 102, 75 Stat. 131 (current version at 42 U.S.C. § 402(a), (c), (f) (2012)).

⁴⁸ Social Security Amendments of 1965, Pub. L. No. 89-97, § 307, 79 Stat. 286.

⁴⁹ Social Security Amendments of 1967, Pub. L. No. 90-248, § 104, 81 Stat. 821. This amendment also applied to widowers, but the qualifying age for nondisabled widowers remained 62 from 1961 until 1972, when it became 60. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 107, 86 Stat. 1329.

⁵⁰ *See* Act of Aug. 30, 1957, Pub. L. No. 85-238, § 3, 71 Stat. 518 (current version at 42 U.S.C. §§ 402, 416 (2012)). The original 1939 legislation left unclear whether marital status, as determined for inheritance purposes under state law, sufficed for eligibility or whether ability to inherit was required. *See* *Kandelin v. Social Sec. Bd.*, 136 F.2d 327 (2d Cir. 1943). The 1957 amendment removed the doubt by creating alternative eligibility standards: married status under state law or the right to take personal property under intestate succession laws of the state. For the background of that amendment, see Marjorie Rombauer, *Marital Status and Eligibility for Federal Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227 (1977).

⁵¹ Social Security Amendments of 1960, Pub. L. No. 86-778, § 207, 74 Stat. 924. The three-year test for wives, itself a relaxation of the 1939 requirement (*see* note 26 *supra*), was the result of a 1946 amendment. *See* Social Security Act Amendments of 1946, ch. 951, § 408, 60 Stat. 978. In 1967, Congress reduced the durational test for widows and widowers from the one year set in 1960, to nine months. Social Security Amendments of 1967, Pub. L. No. 90-248, § 156, 81 Stat. 821. In addition, a new provision allowed for waiver of the durational test in the event of accidental death and in certain other cases. *Id.* Congress modified this waiver provision in 1972. Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 115(b), 145(a), 86 Stat. 1329. *See generally* Weinberger v. Salfi, 422 U.S. 749, 767-85 (1975).

⁵² *See* Social Security Amendments of 1960, Pub. L. No. 86-778, § 208, 74 Stat. 924. For example, a woman who married without knowledge of her husband’s prior undissolved marriage could receive benefits.

⁵³ *See* Social Security Amendments of 1958, Pub. L. No. 85-840, § 205, 72 Stat. 1013.

⁵⁴ Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360.

⁵⁵ Social Security Amendments of 1961, Pub. L. No. 87-64, § 104, 75 Stat. 131; Social Security Amendments of 1972, Pub. L. No. 92-603, § 102, 86 Stat. 1329. Benefits for young widows caring for children have remained constant at 75% since 1939. *See* 42 U.S.C. § 402(g)(2) (2012).

Section 103 of the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821, imposed a \$105 maximum on the monthly benefit payable to wives and husbands. At the time, however, no one approached that level. Congress removed the maximum in § 1004 of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

⁵⁶ See Social Security Amendments of 1965, Pub. L. No. 89-97, § 308, 79 Stat. 286. The Senate Finance Committee Report offered this rationale for the new class of beneficiaries:

It is not uncommon for a marriage to end in divorce after many years, when the wife is too old to build up a substantial social security earnings record even if she can find a job. . . .

. . . .

These changes would provide protection mainly for women who have spent their lives in marriages that are dissolved when they are far along in years - especially housewives who have not been able to work and earn social security benefit protection of their own

S. Rep. No. 404, 89th Cong., 1st Sess. 107-08, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2047-48. Under the 1950 amendments, younger divorced wives caring for eligible children of deceased wage-earners could receive the equivalent of mother benefits without meeting the 20-year test. Social Security Act Amendments of 1950, ch. 809, § 101, 64 Stat. 477 (current version at 42 U.S.C. § 402(g) (2012)). These amendments did not give divorced spouses benefits equivalent to those paid younger wives caring for children of retired or disabled workers. In *Mathews v. DeCastro*, 429 U.S. 181, 185-89 (1976), the Supreme Court held that this discrepancy in treatment did not violate the due process clause of the Fifth Amendment.

⁵⁷ Social Security Amendments of 1972, Pub. L. No. 92-603, § 114, 86 Stat. 1329.

⁵⁸ Social Security Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1509.

⁵⁹ See 42 U.S.C. § 403(a)(3)(C) (2012).

⁶⁰ Social Security Amendments of 1990, Pub. L. No. 101-508, § 5119(c), 104 Stat. 143.

⁶¹ See Social Security Amendments of 1983, Pub. L. 98-21, § 132, 97 Stat. 65 (current version at 42 U.S.C. §§ 402(b)(4) (2012)).

⁶² 2011 ANNUAL STATISTICAL SUPPLEMENT, *supra* note 45, Table 5.G2.

⁶³ SOCIAL SECURITY ADMINISTRATION, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2011, at 21 (2011).

⁶⁴ *Califano v. Goldfarb*, 430 U.S. 199, 225 (1977) (dissenting opinion, Rehnquist, J.).

⁶⁵ See generally Michael Fooner & Robert Francis, *Relationship as a Problem in Old-Age and Survivors Insurance*, SOC. SEC. BULL., Aug. 1941, at 24.

⁶⁶ Ever since the disability freeze and disability benefits were added to the Social Security program, the issue of disability has accounted for the overwhelming majority of litigated claims (nearly three-fourths of the published district court Social Security decisions from 1960 to 1965). Of the balance, spouse-benefit cases have represented a significant fraction (one-fifth of the published district court non-disability Social Security decisions from 1960 to 1965).

⁶⁷ See notes 27 & 50 *supra*.

Until 1972, a divorced woman seeking benefits on her former husband's account had to: (1) be receiving one-half her support from her former husband, (2) be receiving "substantial" contributions from him pursuant to written agreement, or (3) have a court order for "substantial" contribution in effect. 42 U.S.C. § 402(b)(1)(D), (e)(1)(D) (1970) (amended 1972). The third criterion became critical where the husband had ceased payments for a period prior to death or retirement. For cases suggesting some of the difficulties of this three-pronged test, see *Gershman v. Finch*, 454 F.2d 229 (4th Cir. 1971); *Adair v. Finch*, 421 F.2d 652 (10th Cir. 1970); *Roop v. Richardson*, 324 F. Supp. 1130 (W.D. Va. 1971); *Collins v. Finch*, 311 F. Supp. 301 (W.D. Pa. 1970).

⁶⁸ See note 52 and accompanying text *supra*.

⁶⁹ Social Security Act Amendments of 1950, ch. 809, § 101, 64 Stat. 477 (current version at 42 U.S.C. § 402(c), (f) (2012)).

⁷⁰ To qualify, a husband or widower had to be “receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Administrator [of Social Security], from [his wife] at the time she became entitled to old-age insurance benefits [or died].” *Id.* for a harsh application of the test, see *Clark v. Celebrezze*, 344 F.2d 479 (1st Cir. 1965) (widower who met support test when his wife turned 65, but not at time of her death less than one year later, held ineligible).

Husband and widower benefits also required the wage earner to be both “fully” and “currently insured”; wife and widow benefits required only “fully insured” status. In 1967, Congress removed the requirement of “currently insured” status for husbands and widowers. Social Security Amendments of 1967, Pub. L. No. 90-248, § 157, 81 Stat. 821 (current version at 42 U.S.C. § 402(c), (f) (2012)).

⁷¹ See note 50 *supra*.

⁷² See note 57 *supra*.

⁷³ 420 U.S. 636 (1975). For an analysis of the law before *Wiesenfeld*, see Martha S. West, Note, *Sex Classifications in the Social Security Benefit Structure*, 49 IND. L.J. 181 (1974).

⁷⁴ 430 U.S. 199 (1977).

⁷⁵ 430 U.S. 924 (1977), *aff’g mem.* 397 F. Supp. 862 (S.D. Fla. 1975).

⁷⁶ 430 U.S. 924 (1977), *aff’g mem.* 399 F. Supp. 118 (D. Md. 1975).

⁷⁷ Although those decisions struck down the gender distinctions that had the greatest impact on Social Security beneficiaries, others remained. For a full catalog, see HEW REPORT OF THE TASK FORCE ON THE TREATMENT OF WOMEN UNDER SOCIAL SECURITY 75-76 (1978). The decisions also created interesting questions about retroactive application. See *Crumpler v. Califano*, 443 F. Supp. 342 (E.D. Va. 1978).

The same year the Supreme Court upheld, in *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam) the statutory formula that allowed women retiring before 1972 to omit three more low-wage years than men in calculating average monthly wages for retirement benefit purposes. The Court characterized that formula as a permissible measure aimed at “redressing our society’s longstanding disparate treatment for women.” *Id.* at 314-16.

⁷⁸ See Social Security Amendments of 1983, Pub. L. 98-21, §§ 301-310, 97 Stat. 65.

There are still “wife benefits” and “husband benefits,” “widow benefits,” and “widower benefits,” but the 1983 amendments conformed their terms, and the program’s regulations address them collectively as “spouse” and “surviving spouse” benefits.

In 2004 the last minor provision of the Social Security Act that explicitly reflected traditional gender roles was removed. See Social Security Property Act of 2004, Pub. L. No. 108-203, § 425, 118 Stat. 493. This remnant was a provision that applied only in community property states. Prior to the 2004 amendment, all of the self-employment income from a trade or business that community property law divided between spouses was attributed to the husband “unless the wife exercises substantially all of the management and control.” In the latter case all of it was attributed to her. See 42 U.S.C. § 411(a)(5)(A) (2003).

⁷⁹ It is intriguing to speculate whether the 1939 wife- and widow-benefit provisions, which had no equivalents for men, would have met the constitutional requirements of equality reflected in this set of Supreme Court decisions. The clearly discernible compensatory purpose of the original provisions suggests that they might well have. *Goldfarb* and its progeny seem more the result of post-1939 tinkering with the original scheme than a reaction to the concept of sex-differentiated benefits for spouses.

⁸⁰ For the month of March 1977, benefits paid to wives of retired workers totaled \$331 million; for the same month widow benefits equaled \$832 million. Husband and widower benefits totaled less than \$1 million. See *Quarterly Statistics*, SOC. SEC. BULL., Dec. 1977, Tables Q-6, Q-9, at 77, 79.

⁸¹ By 1975 Social Security covered over 90% of paid civilian employment. See 1975 ANNUAL STATISTICAL SUPPLEMENT 1975, *supra* note 43, Table 7, at 44. The Social Security offset provision is contained in 42 U.S.C. § 402(k)(3)(A) (2012).

⁸² See 42 U.S.C. § 403(b) (1970). In 1977, Congress reduced to 70 the age at which the retirement test no longer applied. See Social Security Amendments of 1977, Pub. L. No. 95-216, § 302, 91 Stat. 1509. In 1998, the threshold was dropped to the recipient's "full retirement age" – which lies between 65 and 67 depending on the individual's year of birth.

⁸³ During the mid-seventies there were about 5.7 million jobs in public employment not covered by Social Security. Most of them were covered under public staff-retirement systems. (About 2.4 million jobs out of 2.7 million jobs in Federal civilian employment were excluded from coverage. Out of 12.3 million jobs in State and local employment, about 3 million jobs were not covered but would have been if the States elected coverage for these employees and 0.3 million jobs were categorically excluded from coverage.)

See H.R. REP. NO. 702, 95th Cong. 1st Sess., pt. 1, at 33-34, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4155, 4190-91.

During this period an elderly civil servant's small or nonexistent Social Security wage record could be a spectacularly untrustworthy indicator of need or dependency.

⁸⁴ See *Califano v. Goldfarb*, 430 U.S. 199, 203 (1977); *Silbowitz v. Secretary of HEW*, 397 F. Supp. 862, 864 (S.D. Fla. 1975), *aff'd mem.*, 430 U.S. 924 (1977); *Jablon v. Secretary of HEW*, 399 F. Supp. 113, 122 n.5 (D. Md. 1975), *aff'd mem.* 430 U.S. 924 (1977).

⁸⁵ See H.R. 8218, 95th Cong., 1st Sess. § 312 (1977).

⁸⁶ See *President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 1st sess. 571, 577 (1977) [hereinafter *1977 Hearings*].

⁸⁷ Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(a)(2), (b)(2), (c)(2), (d)(2), (e)(2), 91 Stat. 1509. Having the offset rest on lack of coverage during the "last day" of employment permitted avoidance strategies that Congress subsequently sought to block by amending the test in 2004 to require five years of uncovered work. See 42 U.S.C. § 402(k)(5) (2012).

⁸⁸ Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g)(3).

⁸⁹ See 42 U.S.C. § 402(k)(5) (2012).

⁹⁰ See Michael Clingman et al., Office of the Chief Actuary, Social Security Administration, *Internal Real Rates of Return Under the OASDI Program for Hypothetical Workers*, Actuarial Note No. 2011.5, Table 1, at 6 (July 2012). The present value difference between the lifetime Social Security benefits for an unmarried male with average earnings and a single-earner couple with the same earnings is over \$200,000. Add in Medicare and the difference is \$578,000. The total lifetime contributions (taxes) are, in both cases, the same. See C. Eugene Steuerle & Caleb Quakenbush, Urban Institute, *Social Security and Medicare Taxes and Benefits over a Lifetime*, 2012 Update (2012), <http://www.urban.org/publications/412660.html>.

⁹¹ The marriage rate has dropped from approximately 100 per 1,000 unmarried individuals during the decade from 1960 to 1970 to 55 per 1,000. See Karen E. Smith, *The Status of the Retired Population, Now and in the Future*, in SOCIAL SECURITY AND THE FAMILY: ADDRESSING UNMET NEEDS IN AN UNDERFUNDED SYSTEM 47, 54 (Melissa M. Favreault et al. eds., 2002).

⁹² Howard M. Iams & Christopher R. Tamborini, *The Implications of Marital History Change on Women's Eligibility for Social Security Wife and Widow Benefits, 1990-2009*, 72 SOC. SEC. BULL. 23, 30 (2012). See also Madonna Harrington Meyer et al., *Linking Benefits to Marital Status: Race and Diminishing Access to Social Security Spouse and Widow Benefits in the U.S.*, CRR WP 2004-05, http://crr.bc.edu/wp-content/uploads/2004/03/wp_2004-051.pdf.

⁹³ See ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, CURRENT POPULATION REPORTS, P70-125, at 5 (2011).

⁹⁴ Howard M. Iams & Christopher R. Tamborini, *The Implications of Marital History Change on Women's Eligibility for Social Security Wife and Widow Benefits, 1990-2009*, 72 SOC. SEC. BULL. 23, 30 (2012). See also Christopher R. Tamborini & Kevin Whitman, *Women, Marriage, and Social Security Benefits Revisited*, 67 SOC. SEC. BULL. 1 (2007); Barbara W. Butrica & Karen E. Smith, *The Retirement Prospects of Divorced Women*, 72 SOC. SEC. BULL. 11 (2012); Melissa M. Favreault et al., *Social Security Benefits for*

Spouses and Survivors: Options for Change, in SOCIAL SECURITY AND THE FAMILY: ADDRESSING UNMET NEEDS IN AN UNDERFUNDED SYSTEM 177, 188-90 (Mellisa M. Favreault et al. eds., 2002).

⁹⁵ Rose M. Kreider & Renee Ellis, U.S. Census Bureau, *Number, Timing, and Duration of Marriages and Divorces: 2009*, CURRENT POPULATION REPORTS, P70-125, Table 8, at 18 (2011).

⁹⁶ *Id.*

⁹⁷ See U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook*, Table 23, at 76 (2011), <http://www.bls.gov/cps/wlf-databook-2011.pdf>.

⁹⁸ In 2010 only 26% of the married couples and non-married individuals 65 and over received any earnings. SOCIAL SECURITY ADMINISTRATION, FAST FACTS AND FIGURES ABOUT SOCIAL SECURITY, 2012, at 6 (2012).

⁹⁹ See Melissa M. Favreault & C. Eugene Steuerle, *Social Security Spouse and Survivor Benefits for the Modern Family*, Center for Retirement Research at Boston College, CRR WP 2007-7, at 6 (2007), http://crr.bc.edu/wp-content/uploads/2007/02/wp_2007-71.pdf.

¹⁰⁰ 42 U.S.C. § 403(a) (2012). Each child and the wife or widow (wives or widows in those rare cases where multiple spouses qualify on the basis of state law) get their percentage of the basic benefit amount, up to the family maximum. *Id.*

¹⁰¹ See note 59 *supra*.

¹⁰² Social Security Amendments of 1977, Pub. L. No. 95-216, § 202, 91 Stat. 1509, *discussed and compared to prior law in* H.R. Rep. No. 702, 95th Cong., 1st Sess., pt. 1, at 28, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4155, 4185.

¹⁰³ See ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, CURRENT POPULATION REPORTS, P70-125, Table 6, at 16 (2011).

¹⁰⁴ See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5119, 104 Stat. 1388-278 (1990).

¹⁰⁵ See 42 U.S.C. § 403(a)(3)(D) (2012).

¹⁰⁶ Prior to full retirement age, an applicant is deemed to apply for both retirement and spouse benefits when he or she applies for either. See 20 C.F.R. § 404.623 (2012).

¹⁰⁷ See David Rando, *4 Unusual Ways to Boost Social Security Benefits* (2009), <http://www.investopedia.com/articles/retirement/08/unusual-social-security-strategies.asp>; Alicia H. Munnell, *et al.*, *Unusual Social Security Claiming Strategies: Costs and Distributional Effects* 13 (2009), <http://ssrn.com/abstract=1553187>.

¹⁰⁸ See Amy N. Shuart, *et al.*, *Widowed Before Retirement: Social Security Benefit Claiming Strategies*, FINANCIAL PLANNING JOURNAL, <http://www.fpanet.org/journal/CurrentIssue/TableofContents/WidowedBeforeRetirement/>.

¹⁰⁹ See generally Mathew Greenwald, *et al.*, *How Financial Advisers and Defined Contribution Plan Providers Educate Clients and Participants about Social Security*, PRC WP 2012-08 (2012), http://www.aei.org/files/2012/08/03/-biggs-pension-research-council-working-paper_140300887923.pdf.

¹¹⁰ 8.7 % of the marriages taking place in 2008 involved a man 55 or over. See ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, CURRENT POPULATION REPORTS, P70-125, Table 11, at 20 (2011).

¹¹¹ See *Harper v. Astrue*, No. 05-CV-924, 2008 U.S. Dist. LEXIS 77334 (E.D.N.Y. 2008) (claimant ineligible although couple lived together prior to ceremonial marriage and then again after their divorce which became final 13 days prior to the 10-year mark); *Flythe v. Astrue*, No. 10 Civ. 9069, 2012 U.S. Dist. LEXIS 2724 (S.D.N.Y. 2012) (claimant missed the duration requirement by 3 days since New York law dates the effectiveness of a divorce from the judge's signing of the order rather than the order's subsequent filing).

¹¹² See 42 U.S.C. §§ 402(b)(4)(A), 403(b)(2)(A) (2012). The tie to the timing of an ex-spouse's application for retired-worker benefits and the ex-spouse's continuing earnings is cut only after a divorce has been in effect for two years. *Id.*

¹¹³ See *Turner v. Barnhart*, 245 F. Supp. 2d 681 (E.D. Pa. 2003) (holding that the claimant and the deceased earner had met Pennsylvania's requirements for a valid common law marriage); *Thompson v. Barnhart*, No. 04-2080-KHV, 2005 U.S. Dist. 117 (D. Kan. 2005) (holding that the claimant had failed to satisfy the Kansas requirements for recognition of a common law marriage); *Weiner v. Astrue*, 09 Civ. 7088, 2010 U.S. Dist. LEXIS 18120 (S.D.N.Y. 2010) (holding that although New York has no common law marriage doctrine, its courts would recognize couple as married because of their travels to a fertility clinic in D.C.).

¹¹⁴ See *Brown v. Astrue*, No. 10-cv-04826, 2012 U.S. Dist. LEXIS 37714 (N.D. Cal. 2012).

¹¹⁵ Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360.

¹¹⁶ See Social Security Amendments of 1958, Pub. L. No. 85-840, § 307(b), (c), (d), 72 Stat. 1013 (codified at 42 U.S.C. § 402(c)(3), (f)(4), (g)(3) (2012)). See generally *Califano v. Jobst*, 434 U.S. 47 (1977) (rejecting argument that termination of "child" benefits to disabled individual upon marriage to another disabled individual, not a Social Security secondary beneficiary, violated fifth amendment).

¹¹⁷ See ROBERT J. LEVY, THOMAS P. LEWIS, & PETER W. MARTIN, SOCIAL WELFARE AND THE INDIVIDUAL 177-78 n.23 (1971).

¹¹⁸ Social Security Amendments of 1965, Pub. L. No. 89-97, § 333(a), (b), 79 Stat. 286. A subsequent amendment reduced the age for widowers to 60. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 107(a)(3), 86 Stat. 1329.

¹¹⁹ Social Security amendments of 1977, Pub. L. No. 95-216, § 336, 91 Stat. 1509. Congress limited the 1965 and 1977 amendments to widows and widowers. The original 1977 House bill would have removed the remarriage penalty for all spouse beneficiaries including divorced spouses. Furthermore, that bill carried no age threshold; younger widows and widowers, including those eligible for benefits because of young children, were permitted to remarry without effect on benefits or future eligibility. H.R. 9346, 95th Cong., 1st Sess. (1977). The Senate bill, however, did not contain these provisions or their equivalent, and the trimmed-down version emerged from conference. See H.R. REP. NO. 837, 95th Cong., 1st Sess. 73, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4308,4319 (Conference report).

¹²⁰ S. Rep. No. 404, 89th Cong., 1st Sess 109, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1943, 2049.

In addition, those still subject to a remarriage penalty – widows and widowers under 60 and divorced spouses – may be unaware of that fact or even affirmatively misled by the Social Security Administration because of a general belief that remarriage does not affect benefits. Two cases – *Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976) and *Terrel v. Finch*, 302 F. Supp. 1063 (S.D. Tex. 1969) – illustrate. Both involve spouse beneficiaries who remarried about two months before their sixtieth birthdays and lost their benefits as a consequence. The two women asserted that Social Security employees had told them that remarriage would not affect their benefits. Each woman argued estoppel, without success.

¹²¹ Bloomberg/BNA, Estates, Gifts and Trusts Portfolios: Estate Planning/Business Planning Portfolio 802-2nd: Community Property General Considerations. I. Introduction (2012).

¹²² WILLIAM DE FUNIAK & MICHAEL VAUGH, PRINCIPLES OF COMMUNITY PROPERTY 2-3 (2d ed. 1971)

¹²³ See I.R.C. § 6013(a).

¹²⁴ See generally JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION (1989). As Gregory explains: "Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute – directly and indirectly, financially and nonfinancially – the fruits of which are distributable at divorce." *Id.* ¶ 1.03, at 1-6.

¹²⁵ *Price v. Price*, 69 N.Y.2d 8, 14, 611 N.Y.S.2d 219, 222, 503 N.E.2d 684, 687 (1986).

-
- ¹²⁶ See DAVID CLAYTON CARRAD, *THE COMPLETE QDRO HANDBOOK* 3 (3d ed. 2009); JOHN DEWITT GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* ¶ 5.01 (1989); David L. Baumer & J. C. Poindexter, *Women and Divorce: The Perils of Pension Division*, 57 OHIO ST. L. J. 203 (1996); Mary A. Throne, *Pension Awards in Divorce and Bankruptcy*, 88 COLUM. L. REV. 194 (1988); Grace Ganz Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250, 1256-64(1986).
- ¹²⁷ See DAVID CLAYTON CARRAD, *THE COMPLETE QDRO HANDBOOK* 4 (3d ed. 2009).
- ¹²⁸ See *id.* at 175-87; Patricia K. Hinshaw, *Navigating the Uniformed Services Former Spouses' Protection Act*, 19 S. CAROLINA LAWYER 32 (2008)..
- ¹²⁹ See 5 U.S.C. §§ 8345, 8467 (2012); CARRAD, *supra* note 127, at 199-214.
- ¹³⁰ See Dalmer D. Hoskins, *U.S. Social Security at 75 Years: An International Perspective*, 70 SOC. SEC. BULL. 79, 85 (2010). For the details of the Canadian scheme, see HUMAN RESOURCES AND SOCIAL DEVELOPMENT CANADA, *CREDIT SPLITTING: A GUIDE FOR THE LEGAL PROFESSION* (2008), available at http://www.hrsdc.gc.ca/eng/publications_resources/service_providers/canada_pensions/creditsplittingeng.pdf.
- ¹³¹ WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 12 (7th ed. 2009)
- ¹³² See *General Comment, Elective Share of Surviving Spouse*, UNIF. PROBATE CODE, Part 2 (2010); *id.* §§ 2-201 – 2-214; Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1 (2003); Susan N. Gary, *Share and Share Alike? The UPC's Elective Share*, 12 PROBATE & PROPERTY, Mar./Apr. 1998, at 18.
- ¹³³ See 29 U.S.C. § 1055 (2012); CARRAD, *supra* note 127, at 4. For an argument that ERISA should do more to express equality within marriages that remain intact, see Paula A. Monopoli, *Marriage, Property and [In]Equality: Remedying ERISA's Disparate Impact on Spousal Wealth*, 119 YALE L.J. ONLINE 61 (2009).
- ¹³⁴ See JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 577-79 (3d ed. 2000); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses under ERISA*, 76 IOWA L. REV. 431, 449-91 (1991).
- ¹³⁵ *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).
- ¹³⁶ Marsha N. Cohen, *Federal Pension Benefits: The Reach of Preemption*, 34 HASTINGS L.J. 293, 294 (1982)
- ¹³⁷ See Stanley W. Welsh & Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. AM. ACAD. MATRIMONIAL LAW. 285 (2007).
- ¹³⁸ See IDAHO CODE § 15-2-203(a) (2012); VA. CODE § 64.1-16.1(D) (2012).
- ¹³⁹ Social Security Amendments of 1983, Pub. L. No. 98-21, § 343(b), 97 Stat. 65, 137 (1983). The HEW report, *Social Security and the Changing Roles of Men and Women*, was commissioned by the Social Security Amendments of 1977. See Pub. L. No. 95-216, § 341, 91 Stat. 1509, 1548-49 (1977). The resulting report was published as a Committee Print, SUBCOMM. ON SOCIAL SECURITY, H. COMM. ON WAYS AND MEANS, 99TH CONG., REPORT ON EARNINGS SHARING IMPLEMENTATION STUDY (Comm. Print 1985) [*hereinafter* REPORT ON EARNINGS SHARING IMPLEMENTATION]. The same provision called upon the Congressional Budget Office to review the methodology of the HHS report. Its report appeared in 1986. See CONGRESSIONAL BUDGET OFFICE, EARNINGS SHARING OPTIONS FOR THE SOCIAL SECURITY SYSTEM (1986).
- ¹⁴⁰ See H.R. 3247, 5319, 5320, 5321, 5323, 8784, 95th Cong., 1st Sess. (1977), described in 122 CONG. REC. E2874 (daily ed. June 1, 1976), 123 CONG. REC. E628 (daily ed. Feb. 8, 1977), 123 CONG. REC. E4717 (daily ed. July 21, 1977).

An early proposal for combining incomes of husband and wife – without detailed attention to the problems posed by divorce – appears in the classic study of Social Security, JOSEPH PECHMAN, HENRY AARON & MICHAEL TAUSSIG, *SOCIAL SECURITY: PERSPECTIVES FOR REFORM* 79-91, 219 (1968).

¹⁴¹ Social Security Amendments of 1983, Pub. L. No. 98-21, § 343(b), 97 Stat. 65, 137 (1983).

¹⁴² See H.R. 3247, 95th Cong., 1st Sess. § 3(b) (1977). A plan that would have pooled earnings by spouses in enduring two-worker marriages, and then paid combined benefits equal to 150% of the amount payable to a single person with a wage record equal to the couple's passed the House in 1971, but was rejected by the Senate. See H.R. Rep. No. 231, 92d Cong., 1st Sess. 48-49, *reprinted in* (1972) U.S. Code Cong. & Ad. News 5034-35; H.R. Rep. No. 1605, 92d Cong., 2d Sess. 38-39, *reprinted in* (1972) U.S. Code Cong. & Ad. News 5371-72 (Conference Report).

¹⁴³ See REPORT ON EARNINGS SHARING IMPLEMENTATION, *supra* note 139, at 31-61, 152-59.

¹⁴⁴ ALICIA MUNNELL, *THE FUTURE OF SOCIAL SECURITY* 50 (1977).

¹⁴⁵ For a case that illustrates poignantly what this could mean for a spouse disabled while staying at home for a period to care for children, see *Collier v. Barnhart*, 473 F.3d 444 (2d Cir. 2007).

¹⁴⁶ See REPORT OF THE CONSULTANT PANEL ON SOCIAL SECURITY TO THE CONGRESSIONAL RESEARCH SERVICE, 94TH CONG., 2D SESS. at 34, 59-60 (Joint Comm. Print 1976); MUNNELL, *supra* note 144, at 50.

¹⁴⁷ Those who reject this form of earnings-splitting in favor of some other reform face major obstacles in dealing adequately with the problems of divorce. See *id.* at 38-39; MUNNELL, *supra* note 144, at 51.

¹⁴⁸ See, e.g., Resolutions Adopted by Delegates to the National Women's Conference 16 (Nov. 18-21, 1977):

Homemakers. The Federal Government and State legislatures should base their laws relating to marital property, inheritance, and domestic relations on the principle that marriage is a partnership in which the contribution of each spouse is of equal importance and value.

The President and Congress should support a practical plan of covering homemakers in their own right under social security and facilitate its enactment.

¹⁴⁹ See HUMAN RESOURCES AND SOCIAL DEVELOPMENT CANADA, *CREDIT SPLITTING: A GUIDE FOR THE LEGAL PROFESSION* (2008), *available at* http://www.hrsdc.gc.ca/eng/publications_resources/service_providers/canada_pensions/creditsplittingeng.pdf.

¹⁵⁰ See *id.* at 1-5.

¹⁵¹ See U.S. OFFICE OF PERSONNEL MANAGEMENT, *SURVIVOR BENEFITS UNDER CSRS AND FERS*, <http://www.opm.gov/retire/pre/election/benefits/survivor.htm>.

¹⁵² See *id.*

¹⁵³ This is reflected in the requirement that it be the “actuarial equivalent of a single annuity payable for the life of the [employee-spouse].” 29 U.S.C. § 1055(d)(1)(B) (2012).

¹⁵⁴ See C. EUGENE STEUERLE & JON. M. BAKIJA, *RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY* 216 (1994).

¹⁵⁵ See REPORT ON EARNINGS SHARING IMPLEMENTATION, *supra* note 139, at 34, 74.

¹⁵⁶ See *id.* at 147-61.

¹⁵⁷ *Id.* at 160-61.

¹⁵⁸ As a consequence, relatively few litigated cases deal with the test of marriage for the joint return. Among those, some disagreement exists over the test. Compare *Lee v. Commissioner*, 550 F.2d 1201 (9th Cir. 1977) with *Borax v. Comm’r*, 349 F.2d 666 (2d Cir. 1965). Death is more likely to bring a competing spouse forward, raising the issue in terms of the estate tax marital deduction. See, e.g., *Estate of Steffke v. Comm’r*, 538 F.2d 730 (7th Cir. 1976); *Estate of Goldwater v. Comm’r*, 539 F.2d 878 (2d Cir. 1976).

¹⁵⁹ See 42 U.S.C. § 405(c) (2012).

¹⁶⁰ Weinberger v. Wiesenfeld, 420 U.S. 636, 651 (1975).

¹⁶¹ *Id.* at 651.

¹⁶² See 2011 ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2011, *supra* note 45, Table 5.B9, at 5.35-5.36. The poverty level for an elderly individual in 2010 was approximately \$871.50 per month. See U.S. Census Bureau, Poverty Data – Poverty Thresholds, <http://www.census.gov/hhes/www/poverty/data/threshld/index.html>.

¹⁶³ *Id.*

¹⁶⁴ See SOC. SEC. ADMIN., SSI ANNUAL STATISTICAL REPORT, 2010, Table 5, at 22 (2011).

¹⁶⁵ The median annual earnings of full-time women workers in 2010 was 77.4% of that for men. See Catalyst, *Women’s Earnings and Income* 1 (2012). In 2009 the median earnings in work covered by Social Security for women was 72.0 % that for men. See ANNUAL STATISTICAL SUPPLEMENT, 2012, SOC. SEC. BULL., Table 4.B3, at 4.17 [hereinafter ANNUAL STATISTICAL SUPPLEMENT, 2012].

¹⁶⁶ As a consequence of this “tilt,” current replacement rates (ratio of benefits to prior earnings) are significantly better for women than men. See Soc. Sec. Admin., *Fiscal Year 2004 Social Security Administration Performance and Accountability Report* 128 (2004), http://www.ssa.gov/finance/2004/Full_FY04_PAR.pdf (2003 replacement rates: 35.7% for men, 50.0% for women).

¹⁶⁷ See ANNUAL STATISTICAL SUPPLEMENT, 2012, *supra* note 165, Table 4.B4, at 4.19 (percentage of covered workers with income above the maximum in 2008: men 7.9%, women 2.7%).

¹⁶⁸ See U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement*, Table POV04: Families by Age of Householder, Number of Children, and Family Structure: 2010 (2011), http://www.census.gov/hhes/www/cpstables/032011/pov/new04_100_01.htm (single mothers 78.5% of single parent families).

¹⁶⁹ See 42 U.S.C. § 415(b)(2)(A) (2012).

¹⁷⁰ See TASK FORCE ON WOMEN AND SOCIAL SECURITY, SENATE SPECIAL COMM. ON AGING, 94TH CONG. 1ST SESS. WOMEN AND SOCIAL SECURITY: ADAPTING TO A NEW ERA 28-29 (Comm. Print 1975). Women formerly enjoyed three more excludable years than men, but the 1972 Social Security Amendments eliminated that difference. See *Califano v. Webster*, 430 U.S. 313, 320 (1977). The present structure utilizes an indexed earnings averaging base which peaks at 35 years (forty minus the five excludable years). See 42 U.S.C. § 415(b)(2) (2012)..

In addition to the five years, which all earners can drop, periods of “total disability” are excludable in calculating average indexed earnings. 42 U.S.C. § 415(b)(2)(C) (2012). Congress could legitimately grant the same treatment for education, work within the home, or other activities. Canada’s social security program excludes years of no or reduced earnings during which the individual cared for a child under the age of seven. See SERVICE CANADA, THE CANADA PENSION PLAN CHILD-REARING PROVISION (2011), <http://www.servicecanada.gc.ca/eng/isp/pub/factsheets/ISPB-235-03-11-eng.pdf>.

¹⁷¹ See Joan Entmacher, National Women’s Law Center, Testimony, Senate Special Committee on Aging 4-5 (July 25, 2012). Nearly 40 years ago Rep. Bella Abzug introduced a bill containing such a proposal. See H.R. 252, 93d Cong., 1st Sess., 119 CONG. REC. 44 (1973). For a description, see Martha S. West, Note, *Sex Classifications in the Social Security Benefit Structure*, 49 IND. L. J. 181, 198-99 (1973). Several similar bills were introduced in the 94th Congress. See, e.g., H.R. 10750, 94th Cong., 1st Sess. (1975).

For some of the objections to this approach, see MUNNELL, *supra* note 144, at 49; REPORTS OF THE ADVISORY COUNCIL ON SOCIAL SECURITY 42, 189-90 (1975), reprinted in RITA RICARDO- CAMPBELL, SOCIAL SECURITY: PROMISE AND REALITY 103, 107 (1977); MARILYN R. FLOWERS, WOMEN AND SOCIAL SECURITY: AN INSTITUTIONAL DILEMMA 22-23 (1977); 1977 *Hearings*, *supra* note 86, at 580-84 (statement of N. Gordon, Urban Institute).

¹⁷² See 42 U.S.C. § 415(a)(1)(C) (2012).

¹⁷³ In 2010, fewer than 70,000 recipients of retired-worker benefits had amounts based on the special minimum formula. 2011 ANNUAL STATISTICAL SUPPLEMENT, *supra* note 45, Table 5.A8, at 5.16.

¹⁷⁴ See, e.g., *Strengthening Social Security and SSI to Improvement Women's Retirement Security, Hearing on Improving Women's Retirement Security Before the S. Special Comm. on Aging* (2012) (statement of Joan Entmacher, Vice President for Family Economic Security, National Women's Law Center), available at <http://aging.senate.gov/events/hr250je.pdf> [hereinafter Entmacher].

¹⁷⁵ The reports of the Simson-Bowles Commission and a bi-partisan group chaired by Domenici and Rivlin both contained such a recommended boost for the very old. See THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM, *THE MOMENT OF TRUTH 50* (2010) (Simson-Bowles); THE DEBT REDUCTION TASK FORCE, *BIPARTISAN POLICY, RESTORING AMERICA'S FUTURE 80* (2010) (Domenici-Rivlin).

¹⁷⁶ SOCIAL SECURITY ADMINISTRATION, *FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2012*, at 33 (2012)

¹⁷⁷ See Entmacher, *supra* note 174, at 8.

¹⁷⁸ For a brief moment during President Clinton's second term there was a chance for bi-partisan resolution of Social Security's long-term fiscal imbalance. An agreement between Clinton and House Speaker Newt Gingrich that would have provided the framework fell apart when the Monica Lewinsky scandal broke. See STEVEN GILLAN, *THE PACT: BILL CLINTON, NEWT GINGRICH, AND THE RIVALRY THAT DEFINED A GENERATION*, xi-xvi, 223-238 (2008).

¹⁷⁹ See Edward D. Berkowitz, *Family Benefits in Social Security*, in *SOCIAL SECURITY AND THE FAMILY 19*, 41-42 (Melissa M. Favreault et al. eds., 2002).

¹⁸⁰ See, e.g., Letter from the National Council of Women's Organizations to John Boehner *et al.*, July 12, 2011, <http://socialsecurity-works.org/wp-content/uploads/2011/07/NCWO-Budgetler-Final-1.pdf> (arguing against raising Social Security's retirement age or switching to a different price inflation index); OLDER WOMEN'S ECONOMIC SECURITY TASK FORCE, NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS, *RAISING THE SOCIAL SECURITY RETIREMENT AGE IS DANGEROUS*, http://www.socialsecuritymatters.org/Get_the_Facts_files/WhitePaperRetirementAge.pdf.