

SOCIAL SECURITY BENEFITS FOR SPOUSES*

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The fundamental problem with the current social security system is its inability to cope with the employment patterns of the majority of women, who are neither full-time homemakers nor full-time employees.

*Staff Memorandum, Justice Department Task Force on Sex Discrimination.*¹

Social security is not something that is dealt with once and for all by just one bill. We will be voting on social security bills around here as long as we are Members of this body, I would think.

*Senator Russell B. Long on the floor of the Senate, December 15, 1977.*²

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¹ United States Justice Department Task Force on Sex Discrimination, Staff Memorandum 10 (Mar. 23, 1977). This memorandum figured prominently in the statement of Rep. Donald M. Fraser against the administration's 1977 dependent-benefit proposals. 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. 572 (1977)* [hereinafter cited as *1977 Hearings*].

² 123 CONG. REC. S19,505 (daily ed. Dec. 15, 1977).

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INTRODUCTION

Revision of the Social Security Act had high priority during the first session of the 95th Congress. In May 1977, President Carter proposed a set of amendments for restoring both the short- and long-term balance between the program's income and expenditures.³ The proposed amendments provoked widespread disagreement over means, but nearly unanimous assent that prompt legislative action was required. By the end of the year, Congress had passed and the President had signed the Social Security Amendments of 1977.⁴

From start to finish, a few highly controversial issues drew heavy public and congressional attention.⁵ In contrast, one important item in the President's original package—revision of spouse-benefit provisions—attracted little attention. In part, that seems to have been by design; the President's May message minimized the significance of this revision.⁶ Two months later, however, in an ap-

³ See President's Message to the Congress Proposing Measures To Restore the Financial Integrity of the System, 13 WEEKLY COMP. OF PRES. DOC. 683 (May 9, 1977). The bill containing the President's proposals (H.R. 8218, 95th Cong., 1st Sess. (1977)) was introduced in the House roughly two months later by Congressman James A. Burke, Chairman of the Subcommittee on Social Security of the House Ways and Means Committee.

⁴ Pub. L. No. 95-216, 91 Stat. 1509 (codified in scattered sections of 26, 42 U.S.C.A. (West Supp. 1978)).

⁵ Such proposals included the use of general revenues to offset part of the program's deficit, the removal or substantial relaxation of the retirement test, the inclusion of federal and state employees within the system, and the use of different wage bases to calculate the Social Security earnings tax paid by employer and employee.

⁶ The message spoke simply of correcting "certain technical provisions of the Social Security Act which differentiate on the basis of sex," and adding "a new eligibility test for dependent benefits." President's Message to the Congress Proposing Measures To Restore the Financial Integrity of the System, *supra* note 3, at 685.

parent effort to elicit greater support, the administration billed the same proposals as the "Social Security Equal Rights Amendments of 1977."⁷ The new label failed to push dependent benefits into the spotlight, and spouse-benefit revision remained an important but little noticed issue.

The administration's proposed new eligibility test for dependents found little congressional support and some intense opposition.⁸ As a consequence, it fell out of the bill at an early point. Nonetheless, nearly all parties to the legislative deliberations agreed that the dependent-benefit provisions required modification and, more broadly, that benefit equality for women was an important and timely issue. In one form or another, the matter received attention in both House and Senate. The lack of any simple resolution to this "problem," however, together with its relatively low political visibility and the tight timetable on which the 1977 amendments moved, led Congress finally to make only a few scattered changes in the dependent-benefit provisions.⁹

⁷ H.R. 8218, 95th Cong., 1st Sess. § 301 (1977).

⁸ To prevent windfall spouse benefits to nondependent husbands and widowers (*see* text accompanying notes 102-08 *infra*), the administration's bill imposed a test of actual dependency—measured by earnings over the preceding three-year period—on both men and women claiming spouse benefits. Opponents argued that this would arbitrarily cut off benefits to many deserving women. *See* 1977 Hearings, *supra* note 1, at 565-87.

⁹ Congress created an offset for pensions from uncovered public employment (*see* text accompanying notes 106-08 *infra*), dropped the remarriage penalty for most dependents 60 and over, and reduced the years-of-marriage requirement for divorced wives from 20 years to 10. The latter two changes do not take effect until January 1, 1979. *See* Social Security Amendments of 1977, Pub. L. No. 95-216, §§ 334, 336, 337, 91 Stat. 1509 (to be codified in 42 U.S.C. §§ 402, 416, 426).

The 1977 amendments increase the availability and value of spouse benefits to a modest number of women, but make no pretense of providing full benefit equality. Congress not only deferred more comprehensive review, but even put off the essentially symbolic step of removing all remaining explicit sex differentiation from the program. Instead, it turned to that common technique for dealing with hard questions—a study. The Act directs the Department of Health, Education, and Welfare, "in consultation with the Task Force on Sex Discrimination in the Department of Justice," to undertake

a detailed study . . . of proposals to eliminate dependency as a factor in the determination of entitlement to spouse's benefits . . . , and of proposals to bring about equal treatment for men and women in any and all respects under such program, taking into account the practical effects (particularly the effect upon women's entitlement to such benefits) of factors such as—

- (1) changes in the nature and extent of women's participation in the labor force,
- (2) the increasing divorce rate, and
- (3) the economic value of women's work in the home.

Id. § 341 (codified at 42 U.S.C.A. § 902 note (West Supp. 1978)). Even before the Act directed such a study, the administration had announced it would establish an HEW Task Force on the treatment of women under Social Security. *See* N.Y. Times, Nov. 23, 1977, at

The administration's proposal and Congress's response were not simply a product of the current social and political attention to the status of women; they followed directly from recent legal developments. In March 1977, the Supreme Court had struck down as unconstitutional the more important sex-based Social Security spouse-benefit differences.¹⁰ Regardless of the constitutional merit of those decisions, their cost impact spurred legislative action.¹¹ HEW Secretary Joseph A. Califano, Jr., presented the administration's dependent-benefit amendments as a necessary response to an immediate problem created by the Supreme Court.¹²

Those pressing most vigorously for equal treatment for women were themselves displeased with the Social Security status quo, even as altered by the Supreme Court. These proponents argued that sexually neutral treatment under Social Security would not be achieved by constitutional litigation or by legislative measures that merely desexed the benefit provisions.¹³ The current criteria for Social Security entitlement, when applied to the different average work-lives of men and women, assure that even removing all gender-based distinctions would still leave the system paying women inferior benefits far into the future. Characteristically, Congress submitted this question of benefit improvement for women to a study,¹⁴ while acting swiftly on the cost problem created by the 1977 Supreme Court decisions.¹⁵

38, col. 5. That group's report outlines the major issues and analyzes the diverse plans for dealing with them proposed by individuals or groups outside HEW. See HEW, REPORT OF THE TASK FORCE ON THE TREATMENT OF WOMEN UNDER SOCIAL SECURITY (1978) [hereinafter cited as HEW TASK FORCE REPORT]. Its release for comment in March 1978 constituted a first stage of the six-month statutory study. See *id.* at 72; 43 Fed. Reg. 10,734 (1978).

¹⁰ Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Silbowitz, 430 U.S. 924 (1977), *aff'g mem.* 397 F. Supp. 862 (S.D. Fla. 1975); Califano v. Jablon, 430 U.S. 924 (1977), *aff'g mem.* 399 F. Supp. 118 (D. Md. 1975). These decisions and their 1975 predecessor, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), are discussed at text accompanying notes 76-97 *infra*.

¹¹ By invalidating an actual-dependency test that the Act specified for men only, the Court opened benefit claims estimated at \$3.4 billion through 1982, thus adding significant financial stress to an already troubled system. See STAFF OF SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 95th CONG., 1ST SESS., BACKGROUND MATERIALS FOR HEARINGS ON SOCIAL SECURITY 33 (Comm. Print 1977); 1977 Hearings, *supra* note 1, at 10. Moreover, many persons granted benefits by the decisions did not seem deserving, most conspicuously, retired male public employees who were not and never had been financially dependent on their wives.

¹² See 1977 Hearings, *supra* note 1, at 10.

¹³ See *id.* at 565-87, 592-618, 623-25.

¹⁴ See note 9 *supra*.

¹⁵ See text accompanying notes 106-08 *infra*.

A few basic facts about the program's structure demonstrate why true Social Security benefit equality between men and women is so difficult to achieve and how spouse benefits relate to that problem. Two separate routes to entitlement exist: through one's own prior covered employment and through the prior covered work of a family member, most commonly a spouse or parent. Primary benefits, based on one's own work, become available upon retirement (as measured by advanced 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 both children and adults. Among adult dependents, 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 minimum period and must be old, disabled (and at least fifty), or caring for children under eighteen. 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.

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.¹⁶ Table 1 indicates the relative importance of primary and secondary benefits to men and women. Nearly all adult male beneficiaries receive primary benefits, but almost half of adult female beneficiaries receive secondary benefits.¹⁷ Average monthly payments to male retired workers are substantially higher than those to female retired workers, spouses of male retired workers, or widows.

¹⁶ Close to 8 million wives and widows currently receive secondary benefits; in contrast, fewer than 100,000 husbands and widowers collect such benefits. While the latter figure may grow modestly as a consequence of the recent Supreme Court decisions (*see* text accompanying notes 76-97 *infra*), spouse benefits and the eligibility requirements surrounding them will long continue to be of much greater importance to women than to men.

¹⁷ *See* HEW TASK FORCE REPORT, *supra* note 9, at 11-12:

In 1975, 93 percent of elderly men and 51 percent of elderly women received social security benefits as retired workers. . . . The women include 11 percent who received higher dependents' benefits in addition to their retired-worker benefits and 40 percent who received only retired-worker benefits. Most of the remaining 49 percent of elderly women were entitled to benefits as dependent wives or widows.

TABLE 1
*Adult Social Security Beneficiaries by Sex
 and Benefit Type, December 1976*

	Men		Women	
	N	\$	N	\$
Primary:				
Retired Workers	9,420,659	247.70	7,744,756	197.08
Disabled Workers	1,842,468 ^a	—	827,776 ^a	—
Total	11,263,127		8,573,532	
Secondary:				
Spouses of Retired Workers				
—without children ^b	6,996 ^d	106.63	2,686,234	116.90
—with children ^c	—	—	203,060	77.80
Spouses of Disabled Workers				
—without children ^b	550 ^d	65.45	69,355	86.35
—with children ^c	—	—	404,004	70.69
Surviving Spouses				
—without children ^b	3,278	187.92	3,991,743	207.14
—with children ^c	— ^e	—	578,780 ^e	159.78
Total	10,824 ^e		7,933,176 ^e	

N = Number receiving benefits.

\$ = Average monthly benefit.

Sources: *Current Operating Statistics*, SOC. SEC. BULL., Sept. 1977, Table M-12, at 38; *Quarterly Statistics*, SOC. SEC. BULL., Sept. 1977, Table Q-4 to Q-7, at 66-68, Table Q-9, at 70; SOC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1975, Table 98, at 129.

^a Derived from the December 1976 total using the 1975 male/female ratio.

^b Spouses eligible by virtue of age.

^c Younger spouses eligible because of eligible children.

^d This figure represents all husbands receiving that type of secondary benefit.

^e Prior to 1975, benefits were not payable to younger widowers caring for eligible children. The Supreme Court's decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), changed that (*see* text accompanying notes 76-83 *infra*). By December 1976, there were several thousand such widowers receiving benefits. The Social Security Administration includes them with the far more numerous younger widows receiving benefits; hence the female figure is too large by a few thousand and the male too small. In December 1975, there were 3,727 younger widowers receiving benefits. SOCIAL SECURITY ADMINISTRATION, HEW, RESEARCH & STATISTICS NOTE No. 20 (Oct. 26, 1976).

Under present circumstances, any major effort to improve benefits for women must involve modification of the spouse-benefit provisions, but the path of reform is far from clear. Recent proposals range from increasing the value and availability of such sec-

ondary benefits,¹⁸ to abolishing them.¹⁹

This Article focuses on the law that governs entitlement to and the amount of spouse benefits, tracing the present statutory provisions from their origin through 1977. It considers why spouse benefits continue to have such major importance for women despite substantial gains in female participation in the labor force. Although this study does not fully investigate alternative means of improving Social Security benefits for women, it does attempt to illuminate that larger issue by exploring the inherent limitations of dependent benefits as a means to that end. Comparison with a differing approach to marriage and benefits, modeled on state community-property law, highlights those limitations.

I

THE ORIGIN OF SPOUSE BENEFITS

Originally, 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.²⁰ In 1939, however, acting on the recommendation of the Social Security Board,²¹ Congress relaxed the benefit-contribution relationship in

¹⁸ For example, the Social Security package put forward by House Republicans in September 1977 contained a working-spouse's benefit proposal. See H.R. 9595, 95th Cong., 1st Sess. § 301 (1977), described in 123 CONG. REC. H12,983 (daily ed. Dec. 15, 1977). That package included two other examples of this approach, which, in modified form, were among the 1977 amendments passed by Congress: a reduction in the duration-of-marriage requirement for spouse-benefit eligibility by divorced women, and the elimination, for most spouse beneficiaries, of the cutoff or reduction in benefits upon remarriage. See Social Security Amendments of 1977, Pub. L. No. 95-216, §§ 336, 337, 91 Stat. 1509 (to be codified in 42 U.S.C. §§ 402, 416).

¹⁹ See R. CAMPBELL, *SOCIAL SECURITY: PROMISE AND REALITY* 309-11 (1977).

²⁰ 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).

²¹ 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.

several ways, including the addition of secondary benefits.²² 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."²³ On similar "welfare" grounds, the amendments substituted survivor benefits to aged widows and children for lump-sum payments to the worker's estate.²⁴

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."²⁵ 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 one percent of the first \$3,000 of annual wages.²⁶

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.

²² 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 21, at 5-6. See generally A. ALTMAYER, THE FORMATIVE YEARS OF SOCIAL SECURITY 96-117 (1966).

²³ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 21, at 4. Although eligible retired workers could be of either sex, these spouse benefits were exclusively for "aged wives."

²⁴ 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 (adding § 202(c), (f)).

²⁵ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 21, 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 21, at 1014, 1218.

²⁶ The 1939 amendments halted a scheduled increase to 1.5%. See Social Security Act

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.²⁷ 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"²⁸ was maintained. 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.²⁹ 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 individual contributors resulting from the new secondary benefits.³⁰

In light of the current controversy over Social Security financing it is worth noting how Congress planned to finance the increments of greater "adequacy" added in 1939. Initially, the large imbalance between taxes and benefits provided a ready source of funds; the amendments were in large part a response to that surplus. But what of the future, when a significant percentage of the retired population would draw benefits? The Board's 1939 report dealt candidly with this issue:

The tax provisions embodied in the present law would probably cover the increased annual cost for the first 15 years. They would also probably provide a small reserve, which would be invested and earn some interest. But when future annual benefit dis-

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).

²⁷ The original legislation provided greater 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.

²⁸ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 21, at 2.

²⁹ The Board put it this way: "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.

³⁰ 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 (adding § 203(a)). See text accompanying notes 122-24 *infra*.

bursements exceeded annual tax collections plus interest earnings, some other provision would have to be made for the funds which, under the existing plan [established by the 1935 Act], would be secured from interest on accumulated reserves. It would then be necessary to do one of two things: increase the pay-roll tax, or provide for the deficiency out of other general taxes.³¹

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 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.³² 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.³³ 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.³⁴ Divorce ended a wife's entitlement; remarriage ended a widow's.³⁵ And 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.³⁶

On the other hand, it then 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.³⁷ The

³¹ SOC. SEC. BD. PROPOSED CHANGES, *supra* note 21, at 12.

³² 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 (adding § 209(i)). A widow had to be married for a year or the mother of a child of the deceased worker. *Id.* (adding § 209(j)).

³³ Section 201 limited wife benefits to those "living with" a husband receiving retired-worker benefits (*id.* (adding § 202(b))), but 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.* (adding § 209(n)). Identical limits applied to widows.

³⁴ *Id.* (adding § 202(b)).

³⁵ *Id.* (adding § 202(b)(1), (d)(1), (e)(1)).

³⁶ *Id.* (adding § 202(b)(2), (d)(2), (e)(2)).

³⁷ 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.* (adding § 209(i)). There cannot

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 fifty percent of her husband's benefits; a widow, seventy-five percent.³⁸ 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.³⁹ However, the number of points at which the 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 more closely balanced than at present, even during the forties elderly women outnumbered elderly men.⁴⁰ Very few older women had enough recent employment (post-1936) to qualify for Social Security retired-worker benefits.⁴¹ Poverty was

have been many workers retiring during the early forties who married their wives after January 1937 but before January 1939.

³⁸ *Id.* (adding § 202(b)(2), (d)(2), (e)(2)).

³⁹ 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 33 *supra*.

⁴⁰ The 1940 census reported 4,613,194 women 65 and over and 4,406,120 men. *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). The proportion of elderly women to elderly men has grown steadily since. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, DEMOGRAPHIC ASPECTS OF AGING AND THE OLDER POPULATION IN THE UNITED STATES 12-14 (Current Population Reports, Special Studies, Series P-23, No. 59, 1976).

⁴¹ For 1938, the ratio of male to female workers with taxable wages was 2.6 to 1. And 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).

so prevalent among the elderly that any program paying benefits to those 65 and over could reasonably have been called an antipoverty measure.⁴² Poverty hit hardest among elderly women,⁴³ particularly widows.⁴⁴

Under these circumstances, paying secondary benefits to wives and widows of Social Security contributors seemed a sensible way to provide limited amounts of monthly income to a class of needy people. In 1942, for example, only 13,000 women qualified for retired-worker benefits, compared to 87,000 men.⁴⁵ 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 65 were eligible because of young children of deceased workers.⁴⁶ Because payments were small,⁴⁷ the few cases where presumed need did not in fact exist represented neither serious fiscal waste to the system nor large windfall to the recipient.

Even with the new benefits, Social Security reached less than

⁴² 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).

In December 1940, 25% of those 65 and over had qualified for and were receiving Old Age Assistance, federal-state need-tested benefits for the elderly established by Title I of the Social Security Act of 1935. See SOCIAL SECURITY BOARD, SOCIAL SECURITY YEARBOOK 1940, at 274 (1941). Many were rejected or deterred from applying by relative responsibility provisions, asset disqualifications, and the like; many more lived in states with minimal OAA programs. Thus the 25% figure represents only a small portion of those "poor" by any reasonable national income or income-and-asset measure for 1940.

⁴³ In the 1940's, like today, 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 Sanders, *Family Composition in the United States*, 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).

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ See *id.*, Tables 89-90, at 135.

⁴⁷ 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.

twenty percent of the nation's elderly by the end of the forties (see Figure 1). 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.⁴⁸

TABLE 2
*Aged Social Security Beneficiaries by Sex
and Benefit Type, 1950-1974*

	Population ^{a,b}		All Soc. Sec. Beneficiaries ^{b,c}		Retired-Worker Benefits ^{a,b}			
	Men	Women	%	%	Men		Women	
					N	N	%	N
1950	5,857	6,541	16	25	(1,469)	5		(302)
1960	7,542	9,133	62	69	(5,217)	27		(2,487)
1970	8,405	11,680	86	85	(7,111)	43		(5,010)
1974	8,966	12,849	88	90	(8,046)	49		(6,285)

	Average Monthly Retired-Worker Benefits			Spouse Benefits ^{a,d}		Surviving-Spouse ^{a,e} Benefits	
	Men	Women	Ratio Women/Men	Men	Women	Men	Women
1950	\$45.67	\$35.05	.77	1	499	—	314
1960	81.87	59.67	.73	15	2,144	2	1,542
1970	130.53	101.22	.78	8	2,492	3	3,175
1974	206.56	165.47	.80	8	2,626	3	3,674

Sources: BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SOCIAL AND ECONOMIC CHARACTERISTICS OF THE OLDER POPULATION, 1974, Table 1, at 3 (Current Population Reports, Series P-23, No. 57, 1975); SOC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1975, Table 23, at 57, Table 84, at 121, Table 85, at 122, Table 100, at 131, Table 107, at 136. For the latest statistics, see HEW, REPORT OF THE TASK FORCE ON THE TREATMENT OF WOMEN UNDER SOCIAL SECURITY, Tables 9-10, at 91-92 (1978).

^a Numbers in thousands.

^b Figures represent those 65 years old and older.

^c Figures represent those receiving either primary or secondary benefits.

^d Figures represent those 62 years old and older receiving benefits based on the account of a retired worker.

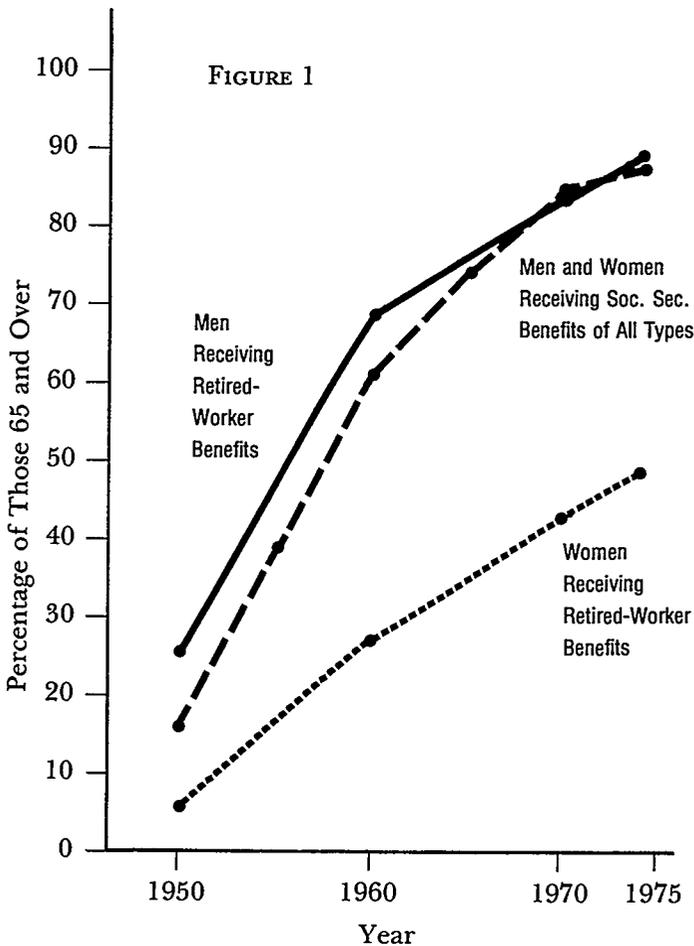
^e Figures represent those 60 years old and older.

⁴⁸ 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 SOC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1949, Sept. 1950, Table 19, at 35.

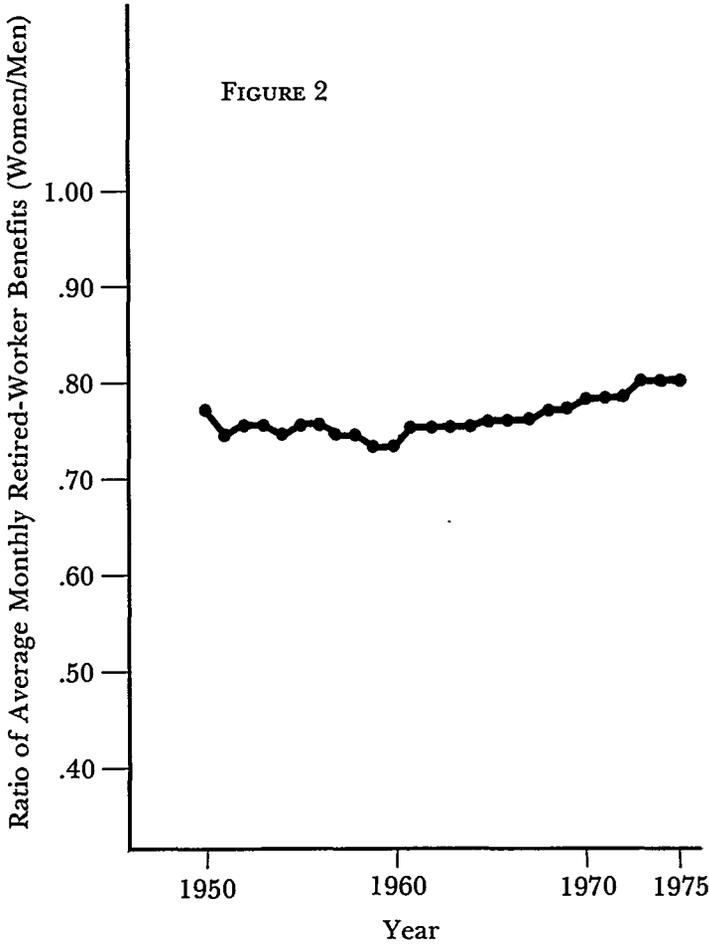
II

THE FAILURE OF RETIRED-WORKER BENEFITS
TO DISPLACE SPOUSE BENEFITS

Contrary to congressional expectations on enactment, spouse benefits have remained significant even as more women have become eligible for retired-worker benefits on their own account. Labor force participation by women has risen steadily since 1939,⁴⁹ yet spouse benefits have continued to grow in recipient number



⁴⁹ See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1975—REFERENCE EDITION, Table 2, at 30. See also SOC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1975, Table 39, at 72 [hereinafter cited as 1975 ANN. SUPP.].



and total dollar amount (see Table 2).⁵⁰ Many of the reasons for this paradoxical phenomenon could not have been foreseen in 1939. Under the 1939 formula, a woman retiring at age 65 in 1949 had only to have earned average monthly wages of \$37.00 for 12 years to receive benefits on her own account, so long as she was married to the average male beneficiary retiring the same year.⁵¹

⁵⁰ See generally Reno, *Women Newly Entitled to Retired Worker Benefits: Survey of New Beneficiaries*, Soc. SEC. BULL., Apr. 1973, at 3; Thompson, *Aged Women OASDI Beneficiaries: Income and Characteristics, 1971*, Soc. SEC. BULL., Apr. 1977, at 23.

⁵¹ The average monthly benefits awarded male retirees in 1949 were \$29.41. See 1975 ANN. SUPP., *supra* note 49, Table 62, at 93. To equal the wife benefits payable on such a primary amount, a woman needed retired-worker benefits of \$14.71 which in turn re-

The average monthly wages of a female worker in manufacturing in 1939 were almost twice that amount.⁵² The gradual disappearance of spouse benefits was thus a reasonable prediction assuming stable wage levels and no revisions of the benefit formula.

Events soon upset these underlying assumptions. From 1940 on, wages and prices rose steadily and, beginning in 1950, Congress responded with periodic revisions of the benefit formula.⁵³ 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. In addition, the same motivations that led to the creation of dependent and survivor benefits later induced Congress to liberalize the terms on which secondary benefits were awarded. Congress passed at least ten such amendments between 1950 and 1977.

In 1950, for example, 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.⁵⁴ 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), or retired-worker benefits.⁵⁵ For widows, a 1965 amendment reduced the age to sixty;⁵⁶ two years later it was dropped to fifty for totally disabled widows.⁵⁷

quired average monthly wages of about \$37.00. See Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360 (adding § 209(e)).

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. This requirement, modified in 1950, tended to undercut the prediction that retired-worker benefits would gradually displace spouse benefits. See E. WITTE, SOCIAL SECURITY PERSPECTIVES 33 (1962).

⁵² 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.*

⁵³ See 1975 ANN. SUPP., *supra* note 49, at 18-19.

⁵⁴ Social Security Act Amendments of 1950, ch. 809, § 101(a), 64 Stat. 477 (current version at 42 U.S.C. § 402(b), (g) (1970 & Supp. V 1975)).

⁵⁵ Social Security Amendments of 1956, ch. 836, § 102(a), 70 Stat. 807 (current version at 42 U.S.C. § 402(a), (b), (c) (1970 & Supp. V 1975)). 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) (1970 & Supp. V 1975)).

⁵⁶ Social Security Amendments of 1965, Pub. L. No. 89-97, § 307, 79 Stat. 286 (codified at 42 U.S.C. § 402(e)(1)(B) (1970)).

⁵⁷ Social Security Amendments of 1967, Pub. L. No. 90-248, § 104, 81 Stat. 821

Congress dropped the "living with" requirement for both wives and widows in 1957, leaving marital status the sole test of "dependency"; the marital status definition was also clarified slightly.⁵⁸ Three years later, Congress again liberalized the wife-and widow-benefit provisions. Legislation reduced the durational requirement a wife had to meet from three years to one.⁵⁹ Moreover, a new purely federal test of marital status qualified those who, though not legally married under state law, had gone through a marriage ceremony in good faith.⁶⁰

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.⁶¹

The 1939 amendments pegged wife benefits at 50% of the worker's primary insurance amount and aged-widow benefits at 75%.⁶² In 1961, the latter figure was increased to 82.5% and in

(codified at 42 U.S.C. § 402(e)(1)(B) (1970)). 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 (codified at 42 U.S.C. § 402(f)(1)(B) (Supp. V 1975)).

⁵⁸ *See* Act of Aug. 30, 1957, Pub. L. No. 85-238, § 3, 71 Stat. 518 (current version at 42 U.S.C. § 402, 416 (1970 & Supp. V 1975)). 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 Rombauer, *Marital Status and Eligibility for Federal Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227 (1977).

⁵⁹ Social Security Amendments of 1960, Pub. L. No. 86-778, § 207, 74 Stat. 924 (codified at 42 U.S.C. § 416(b) (1970 & Supp. V 1975)). The three-year test for wives, itself a relaxation of the 1939 requirement (*see* note 37 *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 (codified at 42 U.S.C. § 416(c), (g) (1970 & Supp. V 1975)). In addition, a new provision allowed for waiver of the durational test in the event of accidental death and in certain other cases. *Id.* (codified at 42 U.S.C. § 416(k) (1970)). Congress modified this waiver provision in 1972. Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 115(b), 145(a), 86 Stat. 1329 (codified at 42 U.S.C. § 416(k) (Supp. V 1975)). *See generally* Weinberger v. Salfi, 422 U.S. 749, 767-85 (1975).

⁶⁰ *See* Social Security Amendments of 1960, Pub. L. No. 86-778, § 208, 74 Stat. 924 (codified at 42 U.S.C. § 416(h)(1)(B) (1970)). For example, a woman who married without knowledge of her husband's prior undissolved marriage could receive benefits.

⁶¹ *See* Social Security Amendments of 1958, Pub. L. No. 85-840, § 205, 72 Stat. 1013 (codified at 42 U.S.C. § 402(b) (1970 & Supp. V 1975)).

⁶² Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360 (adding § 202(b)(2), (d)(2), (e)(2)).

1972, to 100%.⁶³

Finally, the 1965 amendments extended the equivalent of wife and widow benefits to divorced women whose marriages had lasted twenty years and who met a test of continuing actual dependency on their former spouses.⁶⁴ Congress removed the actual-dependency requirement in 1972,⁶⁵ and reduced the durational requirement to ten years in 1977.⁶⁶

These numerous amendments, combined with the growth in Social Security coverage, made it increasingly easy for women to qualify for spouse benefits. The dramatic improvement in basic benefits and in the widow's entitlement as a percentage of the primary insurance amount have substantially raised the value of such secondary benefits. Although more women are qualifying for retirement benefits (see Figure 1), the present retired-worker formula, together with women's wage and work patterns, often keeps those benefits below wife or widow entitlements (cf. Figure 2). Over

⁶³ 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 (codified at 42 U.S.C. § 402(e)(2)(A) (Supp. V 1975)). Benefits for young widows caring for children have remained constant at 75% since 1939. See 42 U.S.C. § 402(g)(2) (1970).

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 (codified at 42 U.S.C. § 402(b)(2), (c)(3) (1970)).

⁶⁴ See Social Security Amendments of 1965, Pub. L. No. 89-97, § 308, 79 Stat. 286 (codified at 42 U.S.C. §§ 402(b)(1), (c)(1), 416(d) (1970)). 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) (1970 & Supp. V 1975)). 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.

⁶⁵ Social Security Amendments of 1972, Pub. L. No. 92-603, § 114, 86 Stat. 1329.

⁶⁶ Social Security Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1509 (to be codified in 42 U.S.C. §§ 402(b)(1)(G), 416(d)(1)-(2)).

twenty percent of the women currently receiving retired-worker benefits also receive secondary spouse benefits, compared to fifteen percent at the end of 1966 and less than ten percent at the end of 1956 (see Table 3).

Behind the many spouse-benefit amendments lay no clear scheme or consistent rationale. Indeed, Congress's incremental approach to modifying these provisions virtually guarantees that "[no] particular amendment fits with mathematical nicety into a carefully conceived overall plan for payment of benefits."⁶⁷

TABLE 3
Women Receiving Both Retired-Worker and Spouse Benefits

<i>Year</i>	<i>N^a</i>	<i>%^b</i>
1952	35,402	6.0
1953	53,631	6.8
1954	77,978	8.0
1955	106,320	8.7
1956	140,603	9.1
1957	190,951	9.6
1958	225,790	9.8
1959	264,434	10.2
1960	302,646	10.6
1961	330,727	10.5
1962	421,535	12.1
1963	496,639	13.2
1964	571,144	14.2
1965	611,610	14.3
1966	699,080	15.1
1967	760,950	15.7
1968	831,760	16.3
1969	909,720	17.0
1970	966,780	17.1
1971	1,060,120	17.7
1972	1,170,286	18.5
1973	1,361,360	20.2
1974	1,516,326	21.3
1975	1,660,451	22.4

Source: SQC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1975, Table 91, at 125.

^a Does not include those who receive no spouse benefits because their retired-worker benefits exceed their potential secondary benefit entitlement.

^b This figure represents women receiving both types of benefits as a percentage of all women retired workers.

⁶⁷ *Califano v. Goldfarb*, 430 U.S. 199, 225 (1977) (dissenting opinion, Rehnquist, J.).

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 (or occasionally men) excluded by existing eligibility rules should be included. The argument for their inclusion is simply that they are at least as deserving as those already receiving benefits. Because the line between eligibility and ineligibility is demonstrably arbitrary, it has proven, over time, to be particularly unstable.

Second, 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 had 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, to determine eligibility for wife benefits required ascertaining the validity of marriages and divorces under state law, and scrutinizing living and support arrangements. As a result, these secondary benefits accounted for a significant portion of Social Security administrative appeals and litigation⁶⁸ before Congress injected the more troublesome issue of "disability" into the system in 1956.⁶⁹ Removal of the "living with" test for wives and widows in 1957 and the support test for divorced wives in 1972 eliminated many difficult legal and factual issues.⁷⁰ The 1960 addition of a liberal federal definition of "spouse" also simplified marital status

⁶⁸ See generally R. LEVY, T. LEWIS, & P. MARTIN, *SOCIAL WELFARE AND THE INDIVIDUAL* 174-75 (1971); Fooner & Francis, *Relationship as a Problem in Old-Age and Survivors Insurance*, *SOC. SEC. BULL.*, Aug. 1941, at 24.

⁶⁹ 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 nondisability Social Security decisions from 1960 to 1965).

⁷⁰ See notes 58 & 65 *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).

determination in some cases.⁷¹

Any conclusion about what the many spouse-benefit amendments demonstrate is debatable; their cumulative effect, however, is clear: they assured that spouse benefits would not "wither away."

III

SPOUSE BENEFITS FOR MEN AND CONSTITUTIONAL EQUALITY

Congress provided some secondary benefits to aged husbands and widowers as early as 1950.⁷² Their entitlement, however, carried a test of "actual dependency" on the wage earner more stringent than any applied to wives or widows.⁷³ That test remained after the 1957 amendments eliminated the requirement that wives or widows either be living with or financially supported by their husbands.⁷⁴ It remained after 1972, when Congress deleted the requirement that divorced women be financially dependent on their retired or deceased former husbands.⁷⁵ Thus, by 1975, women received spouse benefits based solely on 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 sex-differentiated structure in *Weinberger v. Wiesenfeld*,⁷⁶ holding that Social Security had to furnish young widowers with benefits comparable to mother benefits. Two years later, the Court substantially

⁷¹ See note 60 and accompanying text *supra*.

⁷² Social Security Act Amendments of 1950, ch. 809, § 101, 64 Stat. 477 (current version at 42 U.S.C. § 402(c), (f) (1970 & Supp. V 1975)).

⁷³ 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) (1970 & Supp. V 1975)).

⁷⁴ See note 58 *supra*.

⁷⁵ See note 65 *supra*.

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

completed the job in *Califano v. Goldfarb*,⁷⁷ *Califano v. Silbowitz*,⁷⁸ and *Califano v. Jablon*,⁷⁹ ruling that Social Security must grant elderly widowers and husbands spouse benefits on the same terms as it does to widows and wives.⁸⁰

In *Wiesenfeld*, the Court examined the benefits paid young widows (but not young widowers) caring for children from both the contribution and benefit side. On the contribution side, the distinction denied "women [workers the] protection for their families which men receive as a result of their employment."⁸¹ On the benefit side, the Court rejected the view that benefits for young widows with children implemented a "policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."⁸² It interpreted mother benefits as a measure focused on the welfare of children rather than widows. This led directly to a finding of constitutional invalidity: "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."⁸³

Goldfarb posed a harder case for two reasons. First, aged widowers could receive benefits (young widowers with children could not) if they could show actual dependency. Second, the lack of such a dependency test for widows could more easily be characterized as "an attempt to provide for the special problems of women."⁸⁴ Nevertheless, by a 5 to 4 vote,⁸⁵ the Court held the differential treatment unconstitutional. The plurality opinion by Justice Brennan, joined by Justices White, Marshall, and Powell, focused first, like *Wiesenfeld*, on the contribution side. It suggested, how-

⁷⁷ 430 U.S. 199 (1977).

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

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

⁸⁰ Although those decisions struck down the sex distinctions that had the greatest impact on Social Security beneficiaries, many others still exist. For a full catalog, see HEW TASK FORCE REPORT, *supra* note 9, at 75-76. The decisions also created interesting questions about retroactive application. See *Crumpler v. Califano*, 443 F. Supp. 342 (E.D. Va. 1978).

⁸¹ 420 U.S. at 645.

⁸² *Id.* at 648 (quoting *Kahn v. Shevin*, 416 U.S. 351, 355 (1974)).

⁸³ 420 U.S. at 651.

⁸⁴ *Weinberger v. Wiesenfeld*, 420 U.S. at 653.

⁸⁵ In dissent, Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Blackmun, voted to uphold the distinction, viewing it as a permissible "classification which favors aged widows." *Califano v. Goldfarb*, 430 U.S. 199, 242 (1977).

ever, that analysis need not go further, that a provision denying women wage earners the protection enjoyed by male contributors to the system was necessarily infirm.⁸⁶ Yet the plurality did look at the benefit side:

We conclude . . . that the differential treatment of nondependent widows and widowers results not, as [the Government] asserts, from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent. . . . The only conceivable justification for writing the presumption of wives' dependency into the statute is the assumption, not verified by the Government . . . , but based simply on "archaic and overbroad" generalizations . . . , that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes. We [hold] . . . that such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.⁸⁷

Justice Stevens supplied the necessary fifth vote. His opinion, like that of the dissenting Justices, focused on the benefit side since he found no merit in the argument that the statute discriminated against women contributors:

At the same salary level, all workers must pay the same tax, whether they are male or female, married or single, old or young, the head of a large family or a small one. The benefits which may ultimately become payable to them or to a wide variety of beneficiaries—including their families, their spouses, future spouses, and even their ex-wives—vary enormously, but such variations do not convert a uniform tax obligation into an unequal one.⁸⁸

Justice Stevens concluded that the preferential treatment of widows was neither the result of a considered effort by Congress to achieve administrative ease nor "the product of a conscious purpose to redress the 'legacy of economic discrimination' against females."⁸⁹ Instead, he found "that this discrimination [was] merely the acci-

⁸⁶ *Id.* at 204-09.

⁸⁷ *Id.* at 216-17 (footnote omitted).

⁸⁸ *Id.* at 217-18 (concurring opinion).

⁸⁹ *Id.* at 221 (quoting *Kahn v. Shevin*, 416 U.S. 351, 359 (1974) (dissenting opinion, Brennan, J.)).

dental byproduct of a traditional way of thinking about females."⁹⁰ Conceding that the same reasoning applied to the statute upheld in *Kahn v. Shevin*,⁹¹ Justice Stevens nevertheless considered the more recent and factually closer *Wiesenfeld* case controlling.⁹²

Three weeks later, in *Silbowitz*⁹³ and *Jablon*,⁹⁴ the Court affirmed, without opinion, district court decisions that struck down on fifth amendment grounds the requirement of actual dependency imposed on husbands but not wives. The Court simultaneously upheld, in *Califano v. Webster*,⁹⁵ 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.⁹⁶ The Court characterized that formula as a permissible measure aimed at "redressing our society's longstanding disparate treatment of women."⁹⁷

IV

THE CONGRESSIONAL RESPONSE TO *Goldfarb*

By extending secondary benefits to men on the same terms as to women, *Goldfarb* and the other husband-benefit cases highlighted a growing problem with that scheme.⁹⁸ 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 match the facts. The payment of benefits to those for whom the presumption of need and dependency was invalid could no longer be dismissed, as it was in 1939, as involving

⁹⁰ 430 U.S. at 223.

⁹¹ 416 U.S. 351 (1974).

⁹² *Califano v. Goldfarb*, 430 U.S. at 224.

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

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

⁹⁵ 430 U.S. 313 (1977) (*per curiam*).

⁹⁶ *Id.* at 314-16.

⁹⁷ *Id.* at 317 (quoting *Califano v. Goldfarb*, 430 U.S. at 209 n.8). The four Justices who dissented in *Goldfarb* concurred in *Webster* but doubted that any tenable distinction existed between the two cases. 430 U.S. at 321 (concurring opinion, Burger, C.J.).

⁹⁸ 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 these recent Supreme Court decisions. Their clearly discernible compensatory purpose suggests that they would. *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.

neither significant waste to the system nor major windfall to the recipient.⁹⁹

Two features of the spouse-benefit provisions helped to contain the problem. First, greatly expanded Social Security coverage made it more likely that a wife's work outside the home would be reflected in a Social Security wage record. Wives with sufficient wage records to support retired-worker benefits received those benefits, which then offset spouse benefits dollar for dollar.¹⁰⁰ Second, the retirement test, applicable to both retired-worker and spouse benefits, blocked benefits to those who were non-needy because of continuing earnings of their own or their spouses, at least prior to age seventy-two.¹⁰¹

Nonetheless, spouses who have never been financially dependent on a covered worker can and do receive substantial spouse benefits. That was 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, many of them from "nondependent" men who lacked Social Security retirement coverage of their own, not because of insubstantial employment, but because they had been covered by a public pension scheme other than Social Security. (Federal employees and many state and local government workers are still uncovered by Social Security.¹⁰²) It was more than

⁹⁹ 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.

¹⁰⁰ Presently, Social Security covers over 90% of paid civilian employment. See 1975 ANN. SUPP., *supra* note 49, Table 7, at 44. The Social Security offset provision is contained in 42 U.S.C. § 402(k)(3)(A) (1970).

¹⁰¹ See 42 U.S.C. § 403(b) (1970). In 1977, Congress reduced to 70 the age at which the retirement test drops out. See Social Security Amendments of 1977, Pub. L. No. 95-216, § 302, 91 Stat. 1509 (to be codified in 42 U.S.C. § 403) (effective with respect to taxable years ending after Dec. 31, 1981).

¹⁰² The social security program now covers about 90 percent of the jobs in paid employment. The largest group of jobs excluded from social security coverage is about 5.7 million jobs in public employment, most of which are covered under public staff-retirement systems. (About 2.4 million jobs out of 2.7 million jobs in Federal civilian employment are excluded from coverage. Out of 12.3 million jobs in State and local employment, about 3 million jobs are not covered but could be covered if the States elected coverage for these employees and 0.3 million jobs are excluded from coverage.) In addition, some 210,000 jobs in employment for nonprofit organizations are not covered but could be covered if the nonprofit organizations elected to cover their employees. Most of the other jobs not covered represent irregular or part-time work.

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.

coincidental that all three men seeking spouse benefits in the cases decided by the Supreme Court in March 1977 were retired federal employees on pension.¹⁰³

Responding 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.¹⁰⁴ Opponents argued that the proposal threatened to deprive many deserving women of benefits. 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 come between ages fifty-five and sixty-five when the probability of health or employment problems was high.¹⁰⁵

Congress substituted a narrower and less controversial provision. It offsets pensions from uncovered public employment against secondary benefits in the same way the system has always offset retired-worker benefits. The provision, which does not extend to spouse benefits already applied for, creates a reduction in spouse benefits equal to

the amount of any monthly periodic benefit payable to such [spouse] 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].¹⁰⁶

Thus, an elderly civil servant's small or nonexistent Social Security wage record can be a spectacularly untrustworthy indicator of need or dependency.

¹⁰³ 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).

¹⁰⁴ See H.R. 8218, 95th Cong., 1st Sess. § 312 (1977).

¹⁰⁵ See 1977 *Hearings*, *supra* note 1, at 571, 577.

¹⁰⁶ Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(a)(2), (b)(2), (c)(2), (d)(2), (e)(2), 91 Stat. 1509 (codified at 42 U.S.C.A. § 402(b)(4)(A), (c)(2)(A), (e)(8)(A), (f)(2)(A), (g)(4)(A) (West Supp. 1978)).

The 1975 Advisory Council recommended an offset for *all* pensions based on uncovered work. See REPORTS OF THE ADVISORY COUNCIL ON SOCIAL SECURITY 38-39 (1975). In two respects, that recommendation was more inclusive than the version Congress ultimately enacted: (1) it applied to the small group of uncovered workers having pensions but not in public employment (principally, retired employees of nonprofit organizations (*see* note 102 *supra*)), and (2) it apparently applied to pensions earned during a period of uncovered work, even though the work with that employer later became covered before the individual's retirement.

Congress was primarily concerned with preventing a post-*Goldfarb* flow of spouse benefits to "non-needy" male spouses. It was also hesitant to upset the expectations of women facing imminent retirement. For these reasons, the amendment defers the effective date of the offset provision for all women but for only a few men. The sex distinction is drawn indirectly; an exception to the new scheme applies to those who meet 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*.¹⁰⁷ No offset applies to such individuals if they become entitled to pensions from uncovered public employment during the five-year period following enactment.¹⁰⁸ Once the phase-in period passes, spouse benefits will be limited to people without comparable public retirement benefits, in the form of either retired-worker benefits from work covered by Social Security or pension benefits from public employment.

V

THE ESSENTIAL ARBITRARINESS OF SPOUSE BENEFITS

Blocking the flow of spouse benefits to the largest visible group of "non-needy" recipients, although a constructive step, leaves untouched the principal source of arbitrariness in the spouse-benefit system. That arbitrariness lies in the provisions that establish which women (and men) have a sufficient connection to a covered former worker to qualify for spouse benefits, and in the related provisions that determine the amount of those benefits. Those provisions incorporate no coherent rationale for entitlement. A reasonable presumption of need, occasioned by the cessation of earnings on which the individual was dependent, no longer explains the statutory pattern. Many categories of spouses are eligible despite their lack of dependence on the insured's earnings at retirement, disability, or death. Similarly, constructive contribution for periods of work within the home, invoked from time to time to

¹⁰⁷ Congress recognized that incorporating (albeit for a more limited purpose) the very eligibility differences struck down by the Supreme Court jeopardized the constitutionality of the new provision (*see* text accompanying note 106 *supra*). It therefore provided that the exception alone would in that event become invalid. Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g)(3) (codified at 42 U.S.C.A. § 402 note (West Supp. 1978)).

¹⁰⁸ Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g)(1), 91 Stat. 1509 (codified at 42 U.S.C.A. § 402 note (West Supp. 1978)).

justify spouse benefits, finds no consistent expression in the eligibility rules.

Under any likely rationale, current spouse-benefit provisions distribute potentially large benefits to some who seem undeserving, while denying them to more appealing claimants. This flaw is not easily cured. The rules can be tinkered with; their history is one of constant tinkering. But so long as one set of principles determines contribution and entitlement to primary benefits, while a completely different set—focusing on family relationships at some later point or period—determines entitlement to spouse benefits, serious arbitrariness is inescapable. The following eligibility issues, which have troubled the spouse-benefit system ever since 1939, stem ultimately from that phenomenon.

A. *Should All Who Are Legally Married at Benefit Time Receive Spouse Benefits?*

The current legislation allows all those legally married to a covered worker at benefit time to receive spouse benefits, provided they meet a limited durational test. For wife (or husband) benefits, the marriage must have lasted at least one year at the time of application; for widow (or widower) benefits, at least nine months at the time of the worker's death.¹⁰⁹ The durational requirement has shrunk to its current insignificance over time.¹¹⁰ Earlier requirements that the legal spouse be living with or financially dependent upon the covered worker have also vanished.¹¹¹

This heavy reliance on marital status has two consequences that pose serious questions of "fairness." First, Social Security provides spouse benefits to people who have neither been married to workers over any significant period of contribution nor built up any significant financial dependence on their spouses' earnings by the point of eligibility determination. The second "fairness" problem involves the spouse who, though legally married at benefit time, has for years had no relationship with the covered worker. A

¹⁰⁹ 42 U.S.C. § 416(b), (c), (f), (g) (1970). Several categories of spouses need not meet the one-year or nine-month durational test. They include parents of workers' children and persons who already qualify for dependent benefits on the accounts of others. In addition, a widow or widower can qualify by adopting a worker's child under 18, or by joining with a worker to adopt a child under 18. They are also exempt from the durational test in the event the worker's death is accidental or in the line of military duty. *See* 42 U.S.C. § 416(b)-(e), (k) (1970 & Supp. V 1975). *See generally* Weinberger v. Salfi, 422 U.S. 749, 767-85 (1975).

¹¹⁰ *See* notes 37 & 59 and accompanying text *supra*.

¹¹¹ *See* notes 33 & 58 and accompanying text *supra*.

brief marriage, long since ended practically but never legally, provides a basis for ultimate benefit entitlement.¹¹²

Both cases involve a flow of benefits to individuals who have merely "won the marriage lottery." The losers include many others with far stronger "equitable" claims who have lived with covered workers over long periods, perhaps raised their children, and been financially dependent on their covered earnings. To have entitlement hinge completely on marital status seems at times grossly unfair. The contrast is particularly poignant when a legal spouse (with a poor equitable claim) and another with much stronger emotional and financial ties to the worker, who cannot, however, meet the marital status test, claim against the same worker's account. The next two issues derive ultimately from this sense of unfairness.

B. *Should Others—De Facto Spouses and Former Legal Spouses—Receive Spouse Benefits?*

The basic marital test for spouse benefits looks to state law. The appropriate state is the covered worker's domicile at the time of the spouse's application or, for survivor benefits, at the time of the worker's death. A person qualifies if the courts of that state would find either:

- (a) that the two were "validly married," or
- (b) that the person claiming spouse benefits, though not legally married for some purposes, would "under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a [spouse of the worker]."¹¹³

This test permits the happenstance of local marriage and divorce law to control benefit entitlement under a national program. Two people who have lived as husband and wife for thirty or forty years, under circumstances that would cause them to be "validly married" in some states or the equivalent of spouses for intestate succession purposes in others, can lose out on Social Security spouse benefits if they lived in the wrong place.¹¹⁴ Similarly,

¹¹² See, e.g., *Cammarota v. Secretary of HEW*, 329 F. Supp. 1087 (N.D.N.Y. 1971) (wife, whom wage earner left in 1930 after two years, eligible for widow benefits after his death in 1963 because Mexican divorce obtained in 1942 invalid under New York law).

¹¹³ 42 U.S.C. § 416(h)(1)(A) (1970).

¹¹⁴ Compare *Sanabria v. Secretary of HEW*, 390 F. Supp. 538 (D.P.R. 1975), *aff'd mem.*, 530 F.2d 961 (1st Cir. 1976), with *Goss v. Weinberger*, [1977-1978 Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 15,139 (10th Cir. 1977).

The measurement of marital status according to state law dates from the 1939

whether a first marriage, despite an attempted divorce and remarriage, leaves an eligible legal spouse depends on the state's divorce doctrines, including its recognition of foreign divorces.¹¹⁵

Resolving these state law questions is often not easy. They intertwine with influential, if not dispositive, evidentiary presumptions (the presumptive validity of a second marriage, for instance) and procedural doctrines (such as estoppel) of dubious relevance in the Social Security context. Finally, sorting out a deceased wage earner's personal history can be difficult.¹¹⁶

While preserving the basic test (with its attendant administrative difficulties), Congress has, on two occasions, granted spouse benefits to groups who do not meet it. In 1960, it established a purely "federal" marital status test that provides benefits to persons who have married in good faith, unaware of impediments to their marriages' validity.¹¹⁷ This special provision, however, contains two

amendments. There is no legislative history for the relevant provision, which is puzzling in light of the severe administrative problems that the Social Security Board had encountered under its apparent model. That model, a section of the 1935 Act, authorized the Board to by-pass paying the lump-sum award to the estate of a deceased worker when the amount was \$500 or less and to pay instead "the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled." See Rombauer, *supra* note 58, at 261 (quoting Social Security Act of 1935, ch. 531, § 205, 49 Stat. 620).

As early as 1941, the Social Security Board urged a more uniform national test. See Rombauer, *supra* note 58, at 267-68. Congress did not yield to this advice until 1960 and then with a provision more limited than an earlier veteran-benefit analog. See *id.* at 237-40, 270-73.

¹¹⁵ See, e.g., *Farias v. Secretary of HEW*, 390 F. Supp. 480 (D.P.R. 1975) (widow benefits awarded to Amelia, who lived with deceased from 1930-40, over second wife Ana with whom he spent many more years, including those up to his death, because of invalidity under New York law of deceased's Mexican divorce).

¹¹⁶ See, e.g., *Mott v. Secretary of HEW*, 407 F.2d 59 (3d Cir. 1969); *Magner v. Hobby*, 215 F.2d 190 (2d Cir.), *cert. denied*, 348 U.S. 919 (1954); *Cox v. Weinberger*, 404 F. Supp. 1384 (E.D. Mich. 1975); *Little v. Celebrezze*, 259 F. Supp. 9 (N.D. Tex. 1966); *Mincey v. Celebrezze*, 246 F. Supp. 447 (W.D.S.C. 1965), *subsequent decision after remand to administrative agency*, 249 F. Supp. 421 (W.D.S.C. 1966).

¹¹⁷ In any case where [the applicant for spouse benefits] . . . is not . . . the wife, widow, husband, or widower of a fully or currently insured individual [under the alternative state law tests] . . . , but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with [the wage earner] resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual or (if such insured individual is living) at the time such applicant files the application [for spouse benefits] . . . , such purported marriage shall be deemed to be a valid marriage. . . . For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dis-

provisos that the basic state law test does not include. First, such a "spouse" must be living with or supported by the wage earner at the time of death or application.¹¹⁸ Second, there must be no other spouse qualifying for benefits under the basic state law test.¹¹⁹

In 1965, Congress extended benefits to a second group of non-spouses—namely, "former spouses" legally married to workers for a substantial period (initially twenty years, now ten by virtue of a 1977 amendment) but later divorced.¹²⁰ Providing benefits to former spouses, who no longer have either the requisite marital status or actual financial dependency at benefit time, represents an implicit but marked shift in justification for spouse benefits. Participation in a marriage, presumably as mother/homemaker, during a period when the covered worker built up a wage record necessarily replaces "presumed" need arising from the interruption of the working spouse's earnings. This change, more than any other, raises issues of how to deal with multiple spouses.

C. *Should More Than One Spouse Receive Benefits on a Single Worker's Account?*

The 1939 amendments limited the total of dependent benefits, including those to a spouse, that might be paid on the account of

solution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

42 U.S.C. § 416(h)(1)(B) (1970) (emphasis added).

The good faith requirement receives further emphasis in a provision stating that this route to eligibility shall not apply "if the Secretary determines, on the basis of information brought to his attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage." *Id.*

¹¹⁸ See note 117 *supra*.

¹¹⁹ The provisions of the preceding sentence [excerpted in note 117 *supra*] shall not apply . . . if another person is or has been entitled to a [spouse] benefit . . . on the basis of the wages and self-employment income of such insured individual and such other person is (or is deemed to be) a wife, widow, husband, or widower of such insured individual under subparagraph (A) [the state law tests outlined in text accompanying note 113 *supra*] at the time such applicant files the application

42 U.S.C. § 416(h)(1)(B) (1970).

The benefits resting on this federal marital status test terminate if a person qualifying on the basis of subparagraph (A) later becomes eligible for spouse benefits. *Id. See, e.g.,* Farias v. Secretary of HEW, 390 F. Supp. 480 (D.P.R. 1975); Cammarota v. Secretary of HEW, 329 F. Supp. 1087 (N.D.N.Y. 1971). *But see* Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976). In *Rosenberg*, Judge Kaufman was so offended by the termination of substantial benefits to a longstanding "good faith" widow because of the monthly benefits of \$1.40 to which the "legal" widow became entitled (she had retired-worker benefits not quite sufficient to offset her entitlement as widow) that he twisted the language of § 416(h)(1)(B) to reach a contrary and insupportable conclusion. *Id.* at 490-91.

¹²⁰ See note 64 *supra*.

any contributing worker.¹²¹ Further, the reference to state law for determining marital status 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. Today, the basic spouse eligibility test still limits most workers to one beneficiary spouse. In addition, the "family maximum" limits the total of monthly benefits paid on one worker's account at any one time. Depending on the worker's benefit level, the present "family maximum" is between 1.5 and 1.88 times the worker's basic benefit.¹²² If the total amounts otherwise payable exceed the maximum, all benefits—with the exception of the worker's own retired-worker or disability benefits—are reduced proportionately to achieve that figure.¹²³

The 1965 addition of divorced wives carried with it a complete break with these constraints. It introduced a significant possibility of at least two spouses qualifying on a single worker's account and removed the family maximum as a limitation. Benefits paid to a divorced spouse are not subject to the worker's family maximum and do not count against the maximum when it is applied to other benefits paid on the worker's account.¹²⁴ In 1977, Congress reduced the duration-of-marriage test for divorced wives to ten years, substantially increasing the effect of the divorced-wife exception upon the family maximum. Theoretically, one worker may now leave a fair number of eligible divorced wives whose total claims, combined with those of diverse children and a current wife, far exceed the maximum.

Because the present provisions still limit most wage earners to one eligible spouse, except where there is an eligible divorced wife, entitlement must sometimes be determined in an adversarial setting with competing widows (or occasionally wives) pitted against one another.¹²⁵ The initial task in such cases is to determine the

¹²¹ See note 30 *supra*.

¹²² Social Security Amendments of 1977, Pub. L. No. 95-216, § 202, 91 Stat. 1509 (codified at 42 U.S.C.A. § 403 (West Supp. 1978)), *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.

¹²³ 42 U.S.C. § 403(a) (1970). Each child and the wife or widow (wives or widows in those rare cases where multiple spouses qualify) get their percentage of the basic benefit amount, up to the family maximum. *Id.*

¹²⁴ *Id.* § 403(a)(3).

¹²⁵ See, e.g., *Mellon v. Richardson*, 466 F.2d 524 (3d Cir. 1972); *Olmstead v. Weinberger*, [1977-1978 Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 15,322 (N.D.N.Y. 1977).

legal spouse under the appropriate law.¹²⁶ In a rare case, state law may grant someone not a "legal wife" intestate succession rights, causing her to be a wife for Social Security purposes.¹²⁷ This occasionally permits two "widows" to qualify for benefits on one wage account. As noted above, their benefits, along with those of any other eligible survivors, namely children, are subject to the worker's "family maximum."

Most states do not recognize a second marriage as valid when either of the parties has a prior marriage not legally dissolved.¹²⁸ As a consequence, widow benefits go to a first wife who lived with the worker for a short period, rather than to a subsequent "wife" who spent many more years with him including those immediately preceding his death.¹²⁹ The "good faith" spouse provision added to the Act in 1960 changes that result only where the first, "legal" spouse has not claimed spouse benefits. If the two are in competition, the "legal" spouse displaces the innocent, *de facto* spouse.¹³⁰

How these principles fit together and their ultimate arbitrariness are illustrated by the facts of a recent case.¹³¹ It concerned a wage earner, Samuel Hunter, and his four "wives." The district court summarized the relevant facts:

1) The deceased, Samuel Hunter, married Corinne prior to 1920. He left Corinne but was never divorced from her. Corinne died in 1950.

2) Samuel married Julia . . . on December 21, 1940. They lived together off and on until 1948 at which time [she] left Samuel after he threatened her and she never saw him or was in contact with him again. From 1940 to 1948 Julia had two or three children, one of whom was not Samuel's. There were never any divorce proceedings with respect to this marriage.

¹²⁶ See notes 113-19 and accompanying text *supra*.

¹²⁷ In states granting to putative spouses intestate succession rights comparable to those of legal spouses there can be both a putative and a legal widow. See, e.g., *Estate of Ricci*, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962). Both can, therefore, receive Social Security widow benefits. Cf. *Aubrey v. Folsom*, 151 F. Supp. 836 (N.D. Cal. 1957) (putative wife of deceased wage earner entitled to mother benefits, but child by her "former" spouse denied child benefits). See generally *Luther & Luther, Support And Property Rights Of The Putative Spouse*, 24 HASTINGS L.J. 311 (1973); Comment, *Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866 (1962); Comment, *The Putative Marriage Doctrine in Louisiana*, 12 LOY. L. REV. 89 (1965).

¹²⁸ See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.6, at 61 (1968).

¹²⁹ See note 115 and accompanying text *supra*.

¹³⁰ See note 119 *supra*.

¹³¹ *Hunter v. Richardson*, 346 F. Supp. 123 (M.D. La. 1972).

3) In 1944, Samuel married Rebecca but they separated at least eight or nine years before his death. There was no divorce.

4) In 1958, Samuel married again this time to Clara. He and Clara had had a child in 1953. They were living together at the time of Samuel's death.

5) Samuel died in 1964. All the events occurred in Louisiana.¹³²

Although not the typical wage earner's personal history, it is simpler than some for purposes of calculating spouse benefits. Samuel at least had the decency to do all of his marrying, divorcing, and dying in one state.¹³³ Furthermore, he apparently "married" each of the four women ceremonially.¹³⁴

Which of Samuel's four "wives" are eligible for widow benefits, assuming sufficient age (or age and disability) and low or non-existent retirement benefits on their own accounts?

Corinne? Corinne did not survive Samuel. Had she survived him, assuming her marriage was valid under Louisiana law, she would qualify for widow benefits. The duration of her marriage (being more than nine months before Samuel's death) is irrelevant, as is the fact that other wives stayed with Samuel longer or bore him children. The long separation, the subsequent "marriages," that she neither lived with Samuel nor was supported by him at the time of his death—none of these would have frustrated Corinne's claim had she survived Samuel.

Julia? Samuel was married to Corinne at the time he "wed" Julia. Under Louisiana law, therefore, Julia and Samuel were not validly married, and Julia is not Samuel's widow.

The alternate state law test is a possibility because Louisiana allows "putative spouses" intestate succession rights equivalent to those of the legal spouse. In this case, however, the Social Security Administration determined, on the basis of contradictory testimony, that Julia did not meet the "good faith" requirement of the Louisiana putative spouse doctrine.¹³⁵

¹³² *Id.* at 124.

¹³³ In contrast, see *Marek v. Flemming*, 192 F. Supp. 528 (S.D. Tex. 1961), in which the court had to pursue the claimant's marital status through the laws of Arkansas, Virginia, Missouri, and Texas.

¹³⁴ *Hunter v. Richardson*, 346 F. Supp. 123, 124 (M.D. La. 1972). Determining whether a ceremony occurred can be difficult. See, e.g., *Moots v. Secretary of HEW*, 349 F.2d 518 (4th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966). But even more difficult legal and factual questions surround nonceremonial "marriages." See, e.g., *Mellon v. Richardson*, 466 F.2d 524 (3d Cir. 1972). See generally H. CLARK, *supra* note 128, § 2.4.

¹³⁵ *Hunter v. Richardson*, 346 F. Supp. 123, 125 (M.D. La. 1972). Had Corinne survived Samuel, and had Julia qualified as a putative spouse under Louisiana law, both might

The "federal" marital status test also requires "good faith." Although conceivably more lenient than Louisiana's standard, the federal test cannot help Julia, for she was not living with Samuel at the time of his death.

Rebecca? Rebecca is in the same situation as Julia. If she meets the "good faith" test of the Louisiana putative spouse doctrine she can qualify for widow benefits; it is her only chance.¹³⁶

Clara? By the time Samuel married Clara, Corinne had died. Consequently, Samuel and Clara were validly married under Louisiana law. Even if Corinne were alive when Samuel married Clara, Clara might still have qualified as a putative spouse. Clara might also have met the "federal" good faith spouse test, for she alone lived with Samuel at the time of his death. But this test would require her to prove good faith and would also leave her claim vulnerable to the priority of widows (like Julia) claiming under Louisiana state law, including the putative spouse doctrine.¹³⁷

To conclude, as the system now stands, a woman who lived for years as the "wife" of a covered worker and depended upon his earnings as her only significant source of income, may not qualify for spouse benefits. Her eligibility rests on such accidents as where the two have lived and whether there is another woman, perhaps unknown to her, still legally married to the worker. If such a woman exists, further accidents, including that woman's age and Social Security earnings history, govern the later "wife's" entitlement.

One can imagine improvements to the system that would make spouse-benefit entitlement less accidental, but how much less? The worker's insured status and basic benefit award usually rest on a lengthy period of work. During that time there may have been several spouses, legal and de facto. The inescapable dilemma is how to allocate spouse benefits among them. The original eligibility test expressed a clear choice. In specifying "legal spouse, living with or supported by the worker," it directed benefits to an individual likely to suffer income loss upon the worker's death, retirement, or disability. The abandonment of that principle leaves no compelling basis for choosing who among several "spouses" will receive benefits—assuming Congress retains an essentially all-or-nothing system. Nor does any administratively attractive way exist to divide

have received widow benefits—subject to the family maximum. See notes 126-27 and accompanying text *supra*.

¹³⁶ Note again that were Corinne still alive three widows might qualify.

¹³⁷ See note 119 *supra*.

spouse benefits among them. Finally, giving more than one of them full spouse benefits, currently allowed in the case of divorced ten-year wives, raises a serious question about the system's fairness to contributors with only one eligible spouse or none.

D. *The Remarriage Dilemma*

The remarriage dilemma poses a final example of the inherent arbitrariness of spouse benefits. Initially, benefits for surviving spouses, resting on the interruption of earnings on which the system presumed the individual to have been dependent, terminated upon remarriage.¹³⁸ 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 such secondary beneficiaries married each other—the marriage of a person receiving widow benefits to a person receiving widower benefits, for example.¹³⁹

That exception, however, did not significantly ameliorate the most troublesome feature of the remarriage provision—the financial loss it attached to the legal 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 “live in sin.”¹⁴⁰ Concern over the perceived inequity of treating married elderly couples less favorably than those cohabiting without marriage and the resulting discouragement of legal marriage created strong pressure for the removal or reduction of 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 substantially 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).

¹³⁸ Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360 (adding § 202(d)(1), (e)(1)).

¹³⁹ 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(e)(3), (f)(4), (g)(3) (1970)). 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).

¹⁴⁰ See R. LEVY, T. LEWIS, & P. MARTIN, *supra* note 68, at 177-78 n.23.

Continued attention to the "living in sin" problem led Congress, in 1965, to permit remarriage from sixty on for widows (sixty-two for widowers) with only a fifty percent reduction in benefits (based on the original spouse's primary insurance amount) rather than a complete loss.¹⁴¹ Then in 1977, Congress allowed remarriage for this age group without any effect on benefits.¹⁴² This solution inescapably results in a situation in which widow/retired-worker and widower/retired-worker married couples can receive "more than other couples would get where the husbands [or wives] had an identical record of covered earnings."¹⁴³

Inequity on one side or another is simply unavoidable; it inheres in a system of benefits tied neither to actual need nor to direct or derivative contribution.

VI

IMPROVING SPOUSE BENEFITS AS A TECHNIQUE FOR IMPROVING BENEFITS FOR WOMEN

When benefit improvement did not carry politically troubling tax consequences, Congress quite naturally responded to charges of "arbitrary" benefit denial by expanding the eligible class.¹⁴⁴ Al-

¹⁴¹ Social Security Amendments of 1965, Pub. L. No. 89-97, § 333(a), (b), 79 Stat. 286 (codified at 42 U.S.C. § 402(e)(4), (f)(5) (1970)). 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 (codified at 42 U.S.C. § 402(f)(5) (Supp. V 1975)).

¹⁴² Social Security Amendments of 1977, Pub. L. No. 95-216, § 336, 91 Stat. 1509 (to be codified in 42 U.S.C. § 402). Congress limited the 1965 and 1977 amendments to widows and widowers. The original 1977 House bill 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).

¹⁴³ 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 recent cases—*Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977), 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.

¹⁴⁴ See text accompanying notes 54-66 *supra*.

though those times are past, Congress continues to view the spouse-benefit structure as a device for improving the relative benefit status of women. Recent examples include the 1977 amendments which remove the remarriage penalty on spouse benefits after age 60 and reduce the divorced spouse durational test to 10 years. Along similar lines, House Republicans in 1977 proposed to modify the current full offset of retired-worker benefits so that all those potentially eligible for both spouse benefits and retired-worker benefits would receive more than either alone would provide.¹⁴⁵ Without question, such provisions can improve the total payout to women. Many more women than men receive spouse benefits. Accordingly, manipulation of the spouse-benefit system can easily achieve greater equality in gross—more nearly equal average payments for women. Moving from averages to individuals, however, reveals the deficiency of such measures. They do no more than pump additional revenue through a fundamentally inequitable system.

The preceding section explored some of the inequities on the benefit side. More troublesome still, in light of ever-rising Social Security taxes, are the inequities imposed on those contributors who reap no advantage whatsoever—either directly or through a spouse—from spouse benefits. Reforms that improve the value or availability of spouse benefits either add to those inequities or, at a minimum, shift their impact.

The Social Security tax is no longer a trifle. Discrepancies between contribution and return, disregarded at much lower tax rates, have become economically and politically important. Under these circumstances, a discrepancy biased against a growing majority of the contributing workforce is particularly troubling. Such is the case with spouse benefits. Social Security taxes workers, without regard to marital status, at a very high rate—currently 6.05% of the first \$17,700 of earnings.¹⁴⁶ The system pays handsome bonuses on behalf of some contributors legally married at the time of death, disability, or retirement. The terms of those extra benefits give preferential treatment to marriages that endure (including 10-year

¹⁴⁵ See H.R. 9595, 95th Cong., 1st Sess. § 301 (1977), described in 123 CONG. REC. H12,983 (daily ed. Dec. 15, 1977).

¹⁴⁶ See H.R. REP. NO. 837, 95th Cong., 1st Sess. 64-65, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4308, 4310-11. The 1977 amendments authorized still higher taxes starting in 1979. See *id.* Moreover, widespread agreement exists among economists that employees already indirectly bear the burden of their employers' tax as well as their own. See A. MUNNELL, THE FUTURE OF SOCIAL SECURITY 86-87 (1977).

former marriages) and to marriages in which one spouse has a Social Security earnings record while the other has none or one much smaller.

Once the national norm, that preferred group grows less typical each year. First, over much of their course, most marriages today are two-worker not one-worker marriages. Over half the married couples below normal retirement age now report earnings from both spouses.¹⁴⁷ Second, many marriages no longer endure from the parties' entry into the labor force until retirement. In 1940, when wife and widow benefits began, the ratio of divorces to marriages was about 1 to 6.¹⁴⁸ Currently, it is 1 to 2.¹⁴⁹ Of the generation currently receiving Social Security, only fourteen percent of women ever married saw their first marriage end in divorce.¹⁵⁰ For the present generation of young women, evidence indicates that as many as one-third "may eventually end their first marriage in divorce."¹⁵¹ And the heaviest incidence of divorce precedes the 10-year threshold set by the 1977 amendments.¹⁵² Many of those approaching retirement age are currently divorced or separated from their most recent spouse.¹⁵³ Third, increasing

¹⁴⁷ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CONSUMER INCOME, Table 73, at 149 (Current Population Reports, Series P-60, No. 101, 1976); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1975—REFERENCE EDITION, Table 28, at 85 (1975); Hayghe, *Families and the Rise of Working Wives—An Overview*, MONTHLY LAB. REV., May 1976, at 12. See also M. FLOWERS, WOMEN AND SOCIAL SECURITY: AN INSTITUTIONAL DILEMMA, Table 6, at 19 (1977); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CONSUMER INCOME, Table 28, at 116-19 (Current Population Reports, Series P-60, No. 105, 1977). Most data concern the number of two-worker marriages at a particular time. Such figures are, therefore, lower than the number of marriages that experience significant earnings from both spouses during their course. See Tauber & Sweet, *Family & Work: The Social Life Cycle of Women*, in WOMEN AND THE AMERICAN ECONOMY: A LOOK TO THE 1980s 31, 50 (J. Kreps ed. 1976).

¹⁴⁸ See NATIONAL CENTER FOR HEALTH STATISTICS, HEW, 3 VITAL STATISTICS OF THE UNITED STATES: 1973, MARRIAGE AND DIVORCE, Table 1-1, at 1-7, Table 2-1, at 2-5 (1977).

¹⁴⁹ See NATIONAL CENTER FOR HEALTH STATISTICS, HEW, 26 MONTHLY VITAL STATISTICS REPORT, BIRTHS, MARRIAGES, DIVORCES AND DEATHS FOR OCTOBER 1977, Jan. 1978, at 1.

¹⁵⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION CHARACTERISTICS: JUNE 1975, Table P, at 16 (Current Population Reports, Series P-20, No. 297, 1976) [hereinafter cited as POPULATION CHARACTERISTICS].

¹⁵¹ *Id.* at 6. Estimates aside, "[t]hree to four times as large a proportion of first marriages have ended in divorce among those now in their late twenties as among those of similar age 45 years ago." *Id.* at 11.

¹⁵² See *id.*, Table O, at 13-14.

¹⁵³ See Murray, *Family Structure in the Preretirement Years*, Soc. SEC. BULL., Oct. 1973, at 25, 26. The divorce rate among older persons is lower than in the adult population as a whole but it is both significant and growing. See Foster, *Marriage and Divorce in the Twilight Zone*, 17 ARIZ. L. REV. 462 (1975); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1202-03 (1974).

numbers of workers are single, the result of the higher divorce rate and a greater initial reluctance to marry.¹⁵⁴

Despite the inequity and administrative difficulty associated with spouse benefits, abolition standing alone is not a feasible or desirable reform. Notwithstanding the increasing number of women eligible for retired-worker benefits and the added support of spouse benefits, women fare less well under the present system than do men. They outnumber men among all Social Security beneficiaries (as they do among the elderly population), but they receive dramatically lower average benefits (see Table 1 and Figure 2).¹⁵⁵ Nearly half of these benefits are secondary (see Figure 1). Elimination of wife and widow benefits would exacerbate the present sex disparity.

VII

AN ALTERNATIVE: RECOGNITION OF MARRIAGE ON THE CONTRIBUTION SIDE

A. *Retired-Worker Benefits and Women*

An acceptable phase-out of spouse benefits requires simultaneous alteration of the method of calculating retired-worker benefits. 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 wages.¹⁵⁶ There is partial mitigation in

¹⁵⁴ See generally POPULATION CHARACTERISTICS, *supra* note 150, at 8; Grossman, *The Labor Force Patterns of Divorced and Separated Women*, MONTHLY LAB. REV., Jan. 1977, at 48.

¹⁵⁵ This discrepancy exists even at the bottom of the Social Security scale. The program of benefits for "needy" elderly (Supplemental Security Income or SSI) substantially overlaps Social Security. Of those 65 or over receiving SSI, 70% also receive Social Security. Women outnumber men among aged SSI beneficiaries more than 2 to 1, but only 67.1% of them receive Social Security compared with 76.0% for men. The average monthly Social Security benefits of female joint recipients are also lower. See *Income of SSI Recipients, December 1975*, SOC. SEC. BULL., June 1977, at 42, Table 5, at 45.

Because of their greater longevity women collect these lower benefits over a longer period, on average. The difference in average *lifetime* benefits between men and women is significantly less than the difference in monthly benefits. See M. FLOWERS, *supra* note 147, at 8.

¹⁵⁶ "[I]n every year between 1955 and 1974 the average earnings of women were significantly lower than those of men. In 1974, the median income for women who worked full time throughout the year was 57 percent that of men." M. FLOWERS, *supra* note 147, at 4-5.

The same disparity is reflected in Social Security taxable earnings. During 1975, the median covered earnings for women working all four quarters was 54% of that for men.

the system's "tilt"¹⁵⁷—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 the wage limit, as Congress did in 1977, increases the sex differential.¹⁵⁸

The treatment of years spent out of covered employment also affects the benefits retired women receive from Social Security. In the past, the work lives of women—in contrast to those of men—have incorporated significant periods out of the workforce, typically spent in the home caring for children.¹⁵⁹ The retired-worker benefit formula ignores up to five post-1950 years in calculating average covered wages.¹⁶⁰ Increasing that number substantially or ignoring all years of work at home would yield higher retired-worker benefits for a great many women.¹⁶¹ A step beyond ignoring years spent at home would be to treat them as producing credits toward eventual benefits—in old age or disability. A few have proposed, in this vein, that a constructive wage for Social Security purposes should attach to work in the home,¹⁶² but serious practi-

See 1975 ANN. SUPP., *supra* note 49, Table 39, at 72. See also Lingg, *Lifetime Covered Earnings and Quarters of Coverage of Retired and Disabled Workers*, 1972, SOC. SEC. BULL., Oct. 1977, at 3, 6-8. For a prediction as to the future see Fuchs, *Women's Earnings: Recent Trends and Long-Run Prospects*, MONTHLY LAB. REV., May 1974, at 23.

¹⁵⁷ As a consequence of this "tilt," current replacement rates (ratio of benefits to average earnings) are significantly better for women than men. See SOCIAL SECURITY ADMINISTRATION, HEW, RESEARCH & STATISTICS NOTE No. 13 (June 15, 1976).

¹⁵⁸ See 1975 ANN. SUPP., *supra* note 49, Table 40, at 73. See generally Mallan, *Women's Worklives and Future Social Security Benefits*, SOC. SEC. BULL., Apr. 1976, at 3.

¹⁵⁹ See Mallan, *supra* note 158, at 5-6. See also Lingg, *supra* note 156, at 3, 6; Fullerton & Byrne, *Length of Working Life for Men and Women, 1970*, MONTHLY LAB. REV., Feb. 1976, at 31.

¹⁶⁰ See 42 U.S.C. § 415(b)(2)(A) (1970).

¹⁶¹ 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). Such a step would run counter to the present trend. 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 a gradually lengthening wage-averaging base which will peak at 35 years (forty minus the five excludable years) by the end of the century. See A. MUNNELL, *supra* note 146, at 55-57, 146.

In addition to the five years, which all earners can drop, periods of "total disability" are excludable in calculating average covered wages. 42 U.S.C. § 415(b)(2)(C) (1970). Congress could legitimately grant the same treatment for education, work within the home, or other activities. But the difficulties of administering such a policy seem severe.

¹⁶² In 1973, 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 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).

cal problems and theoretical objections surround such an approach.

B. *The Community-Property Model*

A far more promising reform, which would both yield credits for years in the home and tend to offset the male-female wage differential, derives from an existing legal model—community property. Applying the community-property concept to Social Security would require splitting earnings credits between spouses as they are created. Married men and women would accumulate equal wage records regardless of their respective wage rates or whether one devoted substantial or full time to nonmarket, “community” affairs: cleaning, meal preparation, or child rearing. 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.

The community-property states¹⁶³ have long treated married couples, legally, as economic partnerships, presuming that income earned by either spouse is the product of a joint effort. As a result, earnings belong to both spouses in equal shares.¹⁶⁴ Since 1948, federal income tax law has contained a comparable principle within the joint return, which permits income splitting between husband and wife.¹⁶⁵ The marital deduction in the federal estate and gift tax reflects the same pattern.¹⁶⁶ Similarly, divorce law reform in many

For some of the objections to this approach, see A. MUNNELL, *supra* note 146, at 49; REPORTS OF THE ADVISORY COUNCIL ON SOCIAL SECURITY 42, 189-90 (1975), *reprinted in* R. CAMPBELL, *supra* note 19, at 103, 107; M. FLOWERS, *supra* note 147, at 22-23; 1977 *Hearings*, *supra* note 1, at 580-84 (statement of N. Gordon, Urban Institute).

¹⁶³ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington currently recognize community property.

¹⁶⁴ The leading treatise on community-property law, W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971), explains:

Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth acquired 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.

Id. at 2-3. See also Vaughn, *The Policy of Community Property and Inter-spousal Transactions*, 19 *BAYLOR L. REV.* 20 (1967).

¹⁶⁵ See I.R.C. § 6013(a).

¹⁶⁶ See I.R.C. § 2056(a). In addition, the Tax Reform Act of 1976 changed the treatment of certain joint interests held by spouses so as to presume equal shares, in express

noncommunity-property states has brought the notion of equal shares or at least "equitable division" to the dissolution of marriages.¹⁶⁷

Although applying community-property doctrine to retirement plans has proven difficult,¹⁶⁸ logic and practical considerations have compelled the courts in community-property states to take that step.

Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. . . . A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent that equal division of community property contemplated by [the statute].¹⁶⁹

recognition of the non-monetary contribution of a non-wage-earning spouse. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(c), 90 Stat. 1520 (codified at I.R.C. § 2040(b) (West Supp. 1978)).

Welfare programs, including the one most relevant to Social Security recipients, Supplemental Security Income (SSI), also typically treat couples as economic units. See 42 U.S.C. §§ 1382(a)(2), 1382c(f)(1) (Supp. V 1975).

¹⁶⁷ The Uniform Marriage and Divorce Act provides in § 307 *Alternative A* that the court "may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both." UNIFORM MARRIAGE & DIVORCE ACT § 307 (Supp. 1974-77). *Alternative B* is for use in community-property states.

Although only a handful of states have adopted the Uniform Act, the principle of equitable division between divorcing spouses without regard to title is now the law in the majority of noncommunity-property states. See Foster & Freed, *From a Survey of Matrimonial Laws in the United States: Distribution of Property Upon Dissolution*, 3 COMM. PROP. J. 231 (1976). Two recent decisions have gone so far as to provide cohabitants with similar divisions. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); *Carlson v. Olson*, ___ Minn. ___, 256 N.W.2d 249 (1977).

In states retaining the common-law approach in its unaltered form, the spouses' respective assets are not subject to division upon divorce. See, e.g., *Fischer v. Wirth*, 38 A.D.2d 611, 326 N.Y.S.2d 308 (3d Dept. 1971). But some states use the award of alimony to achieve the goal of equitable division of property without regard to title. See TENN. CODE ANN. § 36-821 (1977).

¹⁶⁸ Applying community-property concepts to retired-worker benefits involves such difficult problems as determining the point when future and contingent benefits are subject to inclusion; calculating respective shares in the accrued benefits when the period of marriage, domicile in the community-property state, and employment are not co-extensive; and equitably dividing a contingent stream of future periodic payments. See Comment, *The Identification and Division of Intangible Community Property: Slicing the Invisible Pie*, 6 U. CAL. D.L. REV. 26 (1973).

¹⁶⁹ *In re Marriage of Brown*, 15 Cal. 3d 838, 847, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976) (Tobriner, J.).

All community-property states hold that pension rights resting in part on employment by one of the spouses during marriage are community property.¹⁷⁰ The issue most often arises during division of community property upon divorce. It is likely also to arise in cases of disagreement over the exercise of pension options in states that provide for joint management of community assets.¹⁷¹ Higher courts in community-property states have thus far treated the pension plan terms—shaped by the employee-spouse's actions and elections—as a given. They have limited their task to dividing up the plan's benefits without altering its terms.¹⁷² Community-

¹⁷⁰ See *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977); *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *De Revere v. De Revere*, 5 Wash. App. 741, 491 P.2d 249 (1971). See generally Dutton, *The Wife's Community Interest in Her Husband's Qualified Pension or Profit-Sharing Plan*, 50 TEXAS L. REV. 334 (1972); Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447 (1950); Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F.L. REV. 635 (1975).

Courts in noncommunity-property states that divide spouses' property upon divorce without regard to title have also included pensions. See, e.g., *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977); *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 226 N.W.2d 518 (1975). But see *In re Ellis' Marriage*, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd sub nom. Ellis v. Ellis*, ___ Colo. ___, 552 P.2d 506 (1976). In addition, pension benefits are considered in setting alimony. See generally Annot., 22 A.L.R.2d 1421 (1952).

It has been suggested that the Employee Retirement Income Security Act of 1974 (ERISA) (principally codified at 29 U.S.C. §§ 1001-1381 (Supp. V 1975)) may now block such treatment of benefits covered by that federal regulatory scheme. Section 514 of ERISA (29 U.S.C. § 1144(a) (Supp. V 1975)) provides: "[T]he provisions of [Title 1 and 1V of the Act] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." Arguably superseding provisions include §§ 205 and 206, 29 U.S.C. §§ 1055, 1056 (Supp. V 1975). See Note, *The Employee's Retirement Income Security Act of 1974—The Spouse's Interest or Non-Interest in a Community Property Asset*, 12 CAL. W. L. REV. 560 (1976). But see Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 U.C.L.A. L. REV. 417, 511-25 (1978).

¹⁷¹ See CAL. CIV. CODE § 5125(e) (West Supp. 1977), discussed in Wagner, *California's New Community Property Law—Its Effect on Interspousal Mismanagement Litigation*, 5 PAC. L.J. 723 (1974); WASH. REV. CODE § 26.16.030 (Supp. 1977), discussed in Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527 (1973).

¹⁷² See, e.g., *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976):

As to the claim that our present holding will infringe upon the employee's freedom of contract, we note that judicial recognition of the nonemployee spouse's interest in vested pension rights has not limited the employee's freedom to change or terminate his employment, to agree to a modification of the terms of his employment (including retirement benefits), or to elect between alternative retirement programs. We do not conceive that judicial recognition of spousal rights in nonvested pensions will change the law in this respect. The employee retains

property doctrine has thus not given the nonemployee-spouse or former spouse a survivor's interest in a pension where the terms of that pension, combined with the employee-spouse's election, have not provided any.¹⁷³ The timing of the plan's payout has also been left to the employee's discretion.¹⁷⁴ To the extent that courts move into these areas in the future, they will compound the practical problems of treating pensions as divisible community property.

Courts have subjected not only private plans but both state and federal public employment pensions to community-property treatment. Social Security is the conspicuous exception. The California Supreme Court recently held that the Railroad Retirement benefit program—a federal scheme which is, in effect, a single-industry Social Security program—falls within that state's community-property law.¹⁷⁵ However, the same decision suggests—as the few courts to face the question have held—that Social Security benefits are not subject to community-property treatment, that they are the separate property of the employee-spouse.¹⁷⁶

the right to decide, and by his decision define, the nature of the retirement benefits owned by the community.

Id. at 849-50, 544 P.2d at 568, 126 Cal. Rptr. at 640 (footnote omitted). *But see* Phillipson v. Board of Admin., 3 Cal. 3d 32, 38, 473 P.2d 765, 768, 89 Cal. Rptr. 61, 64 (1970) (“[W]e hold that when the court renders an interlocutory judgment of divorce after the employee has terminated state service, but before he has elected the form of retirement benefits, the divorce court has jurisdiction to require that benefits be cast in whatever form is most useful to the community.”); *In re* Marriage of Sommers, 53 Cal. App. 3d 509, 126 Cal. Rptr. 220 (1975) (permitting joinder of plan as defendant and ordering it to pay worker's nonemployee former wife her share directly).

¹⁷³ *See, e.g.*, *Benson v. Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963); *Packer v. Board of Retirement*, 35 Cal. 2d 212, 217 P.2d 660 (1950). Where federal statutory benefits are involved this result has been held to follow from the supremacy clause. *See, e.g.*, *Harris v. Harris*, 94 Idaho 358, 487 P.2d 952 (1971); *Fleming v. Smith*, 69 Wash. 2d 277, 418 P.2d 147 (1966).

¹⁷⁴ There are reports, however, of lower court judges employing more radical measures including ordering the plan trustees to make a lump-sum payment to the nonemployee-spouse years before the plan provides for retirement payments to the employee-spouse. *See Pensions Land in Divorce Court*, BUSINESS WEEK, Nov. 7, 1977, at 104.

¹⁷⁵ *In re* Marriage of Hisquierdo, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), *cert. granted sub nom.* *Hisquierdo v. Hisquierdo*, 98 S. Ct. 1644 (1978).

¹⁷⁶ *In re* Marriage of Hisquierdo rejects the argument that Railroad Retirement benefits must be treated as separate property because of their similarity to Social Security:

Nor are we persuaded by husband's analogy to benefits payable under the Social Security Act. . . . He claims that the right to railroad retirement pensions is a statutory right granted by Congress, not a contractual benefit awarded for services rendered and that, therefore, his pension does not constitute community property. He declares that the act is in many respects similar to the Social Security Act, that the two pension systems are coordinated with one another, that social

Congress assuredly has the power to immunize federal employment-based benefit schemes from state property doctrines. To determine whether it has done so with any particular program involves searching for legislative intent and investigating the compatibility of the federal benefit pattern with the state doctrines in question.¹⁷⁷ With Social Security, the evidence compels the conclu-

security annuities have been held to be statutory rather than contractual in nature (*Flemming v. Nestor* (1960), 363 U.S. 603, 611 . . .), and therefore a similar result must follow with respect to railroad retirement pensions.

The foregoing proposition is unsupported by authority. Although there are some similarities between social security benefits and railroad retirement pensions, the same may be said regarding military retirement pensions which we held in *Fithian* and its progeny to constitute community property. Thus, we are not convinced by husband's argument.

Id. at 618-19, 566 P.2d at 227, 139 Cal. Rptr. at 593.

Note that it is possible to read that passage as suggesting that Social Security benefits themselves might be community property if contrary congressional intent is not found in the federal scheme. In the one recent case to confront the question, *In re Marriage of Nizenkoff*, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1977), the court had no difficulty finding such contrary intent:

The sweep of the Social Security Act is not to be interpreted by the variations and idiosyncrasies of local law. . . . As Congress expressly provided for the interests of a divorced wife in the social security system, it did not intend that they rely on state family law concepts of support, alimony and community property.

....

. . . A ruling that social security benefits are divisible community assets would seriously interfere with the express statutory scheme of the Social Security Act and is forbidden by the supremacy clause of the United States Constitution (art. VI, cl. 2).

Id. at 140-41, 135 Cal. Rptr. at 191-92. *Nizenkoff* also concluded that Social Security benefits, being neither a "contractual right [n]or property interest [*Flemming v. Nestor*]," could not qualify as a divisible community asset. *Id.* at 138, 135 Cal. Rptr. at 190.

In *Adair v. Finch*, 421 F.2d 652, 654 (10th Cir. 1970), the court summarily rejected an argument "that since contributions to the Social Security account of the husband were derived from community earnings the denial of benefits to [a divorced wife who failed to meet the then governing support test] is a deprivation of property without due process of law." *But see Guerrero v. Guerrero*, 18 Ariz. App. 400, 502 P.2d 1077 (1972) (insurance policy paid for, in part, out of husband's Social Security disability benefits held community property).

At the point of contribution the present Social Security system rejects the community-property concept. The system allocates wages solely to the earner's account, without regard to state community-property law. An even more dramatic rejection occurs with self-employment income, which presumptively belongs entirely to the husband "unless the wife exercises substantially all of the management and control of [the] trade or business." 20 C.F.R. § 404.1057 (1977). The latter is one of the points of sex differentiation which the original administration bill would have eliminated. *See* H.R. 8218, 95th Cong., 1st Sess. § 310 (1977).

¹⁷⁷ The leading decision is *Wissner v. Wissner*, 338 U.S. 655 (1950), which held four to three that National Servicemen's Life Insurance purchased with community funds was, nonetheless, separate property because of federal preemption:

Congress has spoken with force and clarity in directing that the proceeds belong

sion that Congress intended to specify the distribution of benefits between spouses at time of death or divorce, putting such questions beyond state control. Because Social Security already provides for certain divorced spouses, it is not possible to argue, as did the California court with regard to the Railroad Retirement program,¹⁷⁸ that Congress left the distribution of Social Security benefits to divorced spouses to local law. Social Security spouse benefits do, of course, rest in part on state law, but the federal scheme's reference is to *status* not state marital-property doctrines.

The result in community-property states and others in which division of marital property is the principal method of providing for a divorced or surviving spouse is that one of the most potentially valuable assets of the marriage—Social Security entitlement—falls outside that division.

*In re Marriage of Hisquierdo*¹⁷⁹ illustrates the point. Jess and Angela Hisquierdo married in 1958. They separated in 1972 and dissolved their marriage three years later—three years short of the then existing threshold for divorced spouse protection under the Social Security program. Jess worked for a railroad throughout the marriage and would have qualified for benefits under the Railroad Retirement Act upon attaining age sixty. (He was only fifty-five in 1975.) Angela worked for a variety of employers and apparently

to the named beneficiary and no other. Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money.

Id. at 658-59.

But *Wissner* simply frames the issue for federally administered or regulated pension schemes. Since that case, the Supreme Court has declined to review decisions from community-property states finding federal military and civil service pensions subject to division under state law. See *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Ct. App.), cert. denied, 409 U.S. 1028 (1972).

Courts in community-property states have tended to read *Wissner* as involving "unique" federal legislation. See, e.g., *Ramsey v. Ramsey*, 96 Idaho 672, 674, 535 P.2d 53, 55 (1975). See generally Comment, *Lump Sum Division of Military Retired Pay*, 12 IDAHO L. REV. 197 (1976).

The Supreme Court's grant of certiorari in *Hisquierdo* (see note 175 *supra*) is thus a significant event.

¹⁷⁸ See *In re Marriage of Hisquierdo*, 19 Cal. 3d 613, 618, 566 P.2d 224, 227, 139 Cal. Rptr. 590, 593 (1977), cert. granted *sub nom.* *Hisquierdo v. Hisquierdo*, 98 S. Ct. 1644 (1978). But see Reppy, *supra* note 170, at 499-507.

¹⁷⁹ 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), cert. granted *sub nom.* *Hisquierdo v. Hisquierdo*, 98 S. Ct. 1644 (1978).

had fully insured status under Social Security so that when she reached sixty-two she could claim retired-worker benefits. (She was fifty-three in 1975.)¹⁸⁰ The California Supreme Court held that Jess's Railroad Retirement benefits were community property—as a pension arising out of employment for the state or for a private employer in some other industry would unquestionably have been. As a result, Angela received a share of Jess's railroad pension, while hers, being Social Security, was not subject to division.

In marriages with sufficient divisible property and in states permitting a court some leeway, such inequity can be avoided by taking Social Security entitlement into account in dividing up a private pension or other community assets.¹⁸¹ Even where such indirect division of Social Security is possible, direct division would generally be preferable from the standpoint of both the parties and the court.

C. *Earnings-Splitting Applied to Social Security*

Ample reasons exist for Congress to retain full control over the allocation of Social Security benefits. The suggestion advanced is not that Social Security be made subject to state community-property or divorce law, but rather that Congress should itself rework the system to internalize the community-property or marital-property concept. This would align the program with current legal and social trends,¹⁸² while avoiding most of the practical problems that have accompanied state court efforts to divide pen-

¹⁸⁰ See *In re Marriage of Hisquierdo*, 63 Cal. App. 3d 231 (opinion omitted), 133 Cal. Rptr. 684 (1976), *rev'd*, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), *cert. granted sub nom.* *Hisquierdo v. Hisquierdo*, 98 S. Ct. 1644 (1978). For a helpful overview of the current structure of the Railroad Retirement program, see Skolnik, *Restructuring the Railroad Retirement System*, Soc. Sec. BULL., Apr. 1975, at 26.

¹⁸¹ See, e.g., *Daniels v. Daniels*, 490 S.W.2d 862 (Tex. Ct. App. 1973). The same rationale applies in those noncommunity-property states providing for "equitable division" of "marital property" upon divorce. Social Security entitlement is surely relevant to a spouse's "economic circumstances," one of the factors that typically governs such equitable division. See, e.g., *Cool v. Cool*, 203 Kan. 749, 457 P.2d 60 (1969); *Conrad v. Bowers*, 533 S.W.2d 614 (Mo. App. 1975); *Claunch v. Claunch*, 525 S.W.2d 788 (Mo. App. 1975). See generally Foster & Freed, *supra* note 167.

¹⁸² 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.

sions between spouses. Those difficulties derive in no small part from the disparity between the judicially applied "community" concept and the terms of most pension plans, which treat benefits and the exercise of benefit options as belonging exclusively to the worker. Social Security, as an essentially universal national program, can feasibly avoid this tension by incorporating the community-property approach directly within its benefit structure. The change would, of course, pose difficulties of transition, as do nearly all significant Social Security benefit revisions. But the resulting scheme would be fairer and easier to administer than the present dual system of worker benefits and supplemental spouse benefits.

In the 95th Congress, Representatives Donald Fraser and Martha Keys introduced a bill that would split Social Security earnings records between spouses who elect to file a joint federal income tax return.¹⁸³ By mid-1977, the bill had gained fifty-eight sponsors and the support of the National Organization for Women.¹⁸⁴

The proposal envisions the eventual elimination of spouse benefits, including those for widows and widowers. Instead, each spouse would have an independent entitlement to old-age and disability benefits. Periods without paid employment that a spouse devotes to child rearing, other work in the home, or education would not leave blank years for Social Security if the parties chose to report split earnings. Discrepancies between sexes in work pat-

¹⁸³ See H.R. 3247, 5319, 5320, 5321, 5323, 8784, 95th Cong., 1st Sess. (1977), described in 122 CONG. REC. E2984 (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 of divorce—appears in the classic study of Social Security, J. PECHMAN, H. AARON, & M. TAUSSIG, SOCIAL SECURITY: PERSPECTIVES FOR REFORM 79-91, 219 (1968). See also REPORT OF THE CONSULTANT PANEL ON SOCIAL SECURITY TO THE CONGRESSIONAL RESEARCH SERVICE, 94TH CONG., 2D SESS. 33-40 (Joint Comm. Print 1976) [hereinafter cited as CONSULTANT PANEL REPORT].

A plan that allowed combination of earnings by spouses in enduring two-worker marriages, with combined benefits equal to 150% of the amount payable to a single person having a wage record identical to the couple's combined wages, 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).

For some of the arguments supporting annual splitting of a couple's combined earnings, see 1977 Hearings, *supra* note 1, at 572-74, 580-84; United States Department Task Force on Sex Discrimination, Staff Memorandum 35-76 (Mar. 23, 1977) (outlining an earnings-splitting plan somewhat different from that in the Fraser-Keys bill).

¹⁸⁴ See 1977 Hearings, *supra* note 1, at 572, 592-93.

terns and wage rates would, upon spousal election, balance out. Divorce or separation 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.

Housewives (or househusbands) becoming totally disabled would, in most cases, have sufficient recent wage entries to qualify for disability benefits. Under the present system, a brief period out of covered work, including a period of work in the home, causes loss of the insured status necessary for disability benefits.¹⁸⁵

Aside from the complexities of transition,¹⁸⁶ such a proposal poses several difficult issues. One spouse, for example, may earn well above the contribution base, the other far below it. Should the split bring more of the high income spouse's earnings under the tax? The Fraser-Keys bill provides only for splitting the amount that, on an individual basis, falls under the taxable wage ceiling.¹⁸⁷ As that ceiling increases, as it will dramatically under the 1977 amendments, this issue diminishes in importance.¹⁸⁸

The system's present benefit bias toward enduring one-earner marriages, vis-a-vis single persons and couples with comparable earnings histories, poses a potential political problem of larger dimensions. Straight income splitting would likely mean benefit reduction for that currently preferred group. The Fraser-Keys bill retains the present preference by allowing couples who file joint returns to receive individual wage credits equal to fifty percent of their joint wages or seventy-five percent of the wages of the higher paid spouse, if that is more.¹⁸⁹ The latter option assures the enduring one-earner marriage of retired-worker benefits based on 150% of the average wage of the high income spouse, just as the present system yields spouse benefits of fifty percent in addition to the worker's retirement benefit. Although that preference may seem a political necessity, Congress ought to be able to ease it out of the system over an adequate transition period, particularly in view of

¹⁸⁵ See 42 U.S.C. § 423(c)(1)(B) (1970).

¹⁸⁶ The Fraser-Keys bill sets a 20-year transition period. See H.R. 3247, 95th Cong., 1st Sess. § 3(a) (1977). Nonetheless, the plan hurries the transition by counting certain Social Security benefits received by one spouse toward the other's wage record. *Id.*

¹⁸⁷ See *id.* § 3(b).

¹⁸⁸ Under the 1977 amendments, the taxable earnings base increases from \$17,700 in 1978, to \$22,900 in 1979, \$25,900 in 1980, and \$29,700 in 1981, with automatic adjustments thereafter as average wage levels rise. See Social Security Amendments of 1977, Pub. L. No. 95-216, § 103, 91 Stat. 1509 (codified at 42 U.S.C.A. § 430(c) (West Supp. 1978)).

¹⁸⁹ See H.R. 3247, 95th Cong., 1st Sess. § 3(b) (1977).

the growing rarity of the enduring one-earner marriage.

The final issue raised by an earnings-splitting approach involves marriages in which one spouse, typically the spouse with higher earnings (the husband), is several years older than the other. Alicia Munnell puts the problem quite concisely:

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 to and thus may not be able to afford retirement until [his wife is older].¹⁹⁰

This situation poses difficulty for earnings-splitting schemes, but the problem is not, as a few studies would imply, insurmountable.¹⁹¹ Congress could lower the retirement age for the younger low-earning spouse or offer an optional allocation of more than half the enduring couple's combined credits to the older spouse. Workable devices for alleviating the hardship are far from unimaginable.¹⁹² Conversion to earnings-splitting would no doubt require coordinated changes in other features of the Social Security benefits system; it would, in fact, re-form that system. The need for such ancillary changes is not a legitimate ground for rejecting the approach if the proposed system promises fairer recognition of both earnings and marriage and if the transition from the present worker/spouse dual-benefit approach is administratively and politically feasible.

Earnings-splitting does not necessarily remove from Social Security difficult questions of fact and law bearing on whether two persons are "validly married." If constructed carefully, however, conversion would drastically reduce the importance of such questions. The Internal Revenue Service, for example, primarily relies on the parties' own declaration of status in determining eligibility to file a joint return.¹⁹³ The current Social Security system stresses

¹⁹⁰ A. MUNNELL, *supra* note 146, at 50.

¹⁹¹ See CONSULTANT PANEL REPORT, *supra* note 183, at 34, 59-60; A. MUNNELL, *supra* note 146, at 50.

¹⁹² 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 CONSULTANT PANEL REPORT, *supra* note 183, at 38-39; A. MUNNELL, *supra* note 146, at 51.

¹⁹³ As a consequence, few litigated cases deal with the test of marriage for the joint return. Among those, disagreement exists over the test. Compare *Lee v. Commissioner*, 550 F.2d 1201 (9th Cir. 1977), with *Borax' Estate v. Commissioner*, 349 F.2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966). 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*

such questions because so much—eligibility for spouse benefits—rides on the answer.

A system constructed without the current heavy bias in favor of couples with widely disparate incomes might allow splitting on an optional basis, without regard to marital or family connection. Any two persons might split their wage credits. Tying the election to the federal income tax return, however, as the Fraser-Keys bill does, is not a bad solution. It is particularly attractive if the marital status on which any year's split record rests will, after a short period, enjoy a strong statutory presumption of validity.¹⁹⁴

CONCLUSION

Spouse benefits responded quite reasonably to the mores as well as the practicalities of another era. 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 years, 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 current system—primary benefits based on the worker's prior employment set off against secondary benefits based on marriage to a covered worker—functions awkwardly. Its allocation of noncontributory 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 does not receive them. Moreover, the system's failure to produce benefits for women comparable to those it yields for men can no longer be lightly dismissed. To respond adequately to these developments, Congress must revise the Social Security benefit scheme substantially. Among available reforms, the incorporation of the community-property concept in the form of an equal division of earnings between spouses, year by year as they are obtained, deserves particularly serious consideration.

Steffke v. Commissioner, 538 F.2d 730 (7th Cir. 1976); Estate of Goldwater v. Commissioner, 539 F.2d 878 (2d Cir.), *cert. denied*, 429 U.S. 1023 (1976).

¹⁹⁴ See 42 U.S.C. § 405(c) (1970).