

## GENDER DISPARITY IN SOCIAL SECURITY

*Kathryn L. Moore*

*Facially neutral, the U.S. Social Security system structurally discriminates against women because it prefers those who successfully fulfill the traditional male breadwinner role rather than the traditional female caregiving role. Overall, women receive lower worker benefits, are much more likely to claim spouse and surviving spouse benefits, and are more dependent on Social Security for their retirement benefits than are men.*

*This Article assesses Social Security's disparate treatment of women and how Social Security might be reformed to enhance benefits for women. It begins by providing a broad overview of Social Security benefits. It then discusses how women and couples fare under Social Security. Finally, it addresses four different types of proposed reforms that have been introduced to address the disparate treatment of women and certain couples: (1) reforming surviving spouse benefits; (2) reforming the special minimum benefit; (3) providing recognition of caregiving through caregiver credits or dropping out years of caregiving in calculating benefits; and (4) replacing spouse and surviving spouse benefits with earnings sharing.*

---

Kathryn L. Moore is the Stites & Harbison Professor of Law, University of Kentucky J. David Rosenberg College of Law. The author would like to thank the conveners of the American Tax Policy Institute's Symposium, It's a Man's World: Revealing and Addressing Hidden Gender Bias in Tax Law and Policy, for inviting her to participate in the symposium and the participants in the symposium for their feedback. The author would also like to thank Katie Nipper for her research assistance.

## I. Introduction

When the Social Security system was originally enacted in 1935,<sup>1</sup> it provided for two general types of benefits for workers: (1) monthly old-age benefits,<sup>2</sup> and (2) lump-sum death benefits.<sup>3</sup> Four years later, Congress fundamentally transformed the system by replacing the lump-sum death benefits with two new categories of “auxiliary”<sup>4</sup> or “derivative”<sup>5</sup> benefits: (1) benefits for the wife and minor children of retired workers;<sup>6</sup> and (2) benefits for the widows, surviving dependent children, and surviving dependent parents of deceased workers.<sup>7</sup> At that time, “the family wage model of a male breadwinner and female [dependent] homemaker animated lawmaking.”<sup>8</sup>

When introduced, spouse and surviving spouse benefits were limited to wives and widows based on “the then generally accepted presumption that a man is responsible for the support of his wife and children.”<sup>9</sup> In 1950, Congress extended spouse and surviving benefits to men, but more restrictions were imposed on husband and widower

---

1. Social Security Act of 1935, Pub. L. No. 74-271, ch. 531, 49 Stat. 622.

2. *Id.* § 202.

3. *Id.* § 203.

4. See Robert J. Myers, SOCIAL SECURITY 57–58 (Pension Rsch. Council & Univ. of Penn. Press 4th ed. 1993) (referring to benefits received by family members of retired or disabled workers as auxiliary benefits); Jonathan Barry Forman, *Promoting Fairness in the Social Security Program: Partial Integration and a Credit for Dual-Earner Couples*, 45 TAX L. 915, 924–25 (1992).

5. Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209, 1214 (1997) (referring to benefits received by family members of retired, disabled, or deceased workers as derivative benefits); Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 233 (1980).

6. Social Security Amendments Act of 1939, Pub. L. No. 76-379, ch. 666, 53 Stat. 1362, 1364–65, § 202(b)–(c).

7. *Id.* at 1364–66, § 202(c)–(f).

8. Patricia A. Seith, *Congressional Power to Effect Sex Equality*, 36 HARV. J. L. & GENDER 1, 55 (2013). In 1939, only about twenty-five percent of women participated in the workforce. Burke & McCouch, *supra* note 5, at 1215 (citing Richard V. Burkhauser & Karen C. Holden, *Introduction*, in A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY 1, 10 (Richard V. Burkhauser & Karen C. Holden eds., 1982)).

9. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644 (1975) (quoting D. Hoskins & L. Bixby, WOMEN AND SOCIAL SECURITY: LAW AND POLICY IN FIVE COUNTRIES 77 (1973)); Lenore E. Bixby, *Women and Social Security in the United States*, 35 SOC. SEC. BULL. 3, 4 (No. 9, 1972). According to one commentator, considering the very low level of benefits at the time, the Advisory Council recommended wife benefits as a way to increase benefits and support “a greater number of needy people in a less expensive way than a general increase in the level of benefits.” Blumberg, *supra* note 5, at 240.

benefits than on wife and widow benefits.<sup>10</sup> Specifically, in order for a man to be eligible for husband or widower benefits, he had to satisfy a dependency requirement<sup>11</sup> and his wife had to be both fully insured, meaning she had to have worked long enough,<sup>12</sup> and currently insured, meaning she had to have worked recently enough.<sup>13</sup> In contrast, there was not a dependency requirement for wife and widow benefits,<sup>14</sup> and the husband only had to be fully insured in order for the wife or widow to qualify for benefits.<sup>15</sup> Without addressing the different dependency requirements, the Senate Finance Committee Report explained that the extension of benefits to dependent husbands was designed to make the “protection given to dependents of women and men more comparable.”<sup>16</sup> In a 1951 article in the Social Security Bulletin, a Social Security program analyst explained that “[t]he new law retained the concept of deemed dependency of the wife on the husband [because it] fit the usual family situation.”<sup>17</sup>

In 1967, Congress eliminated the requirement that working women be not only fully insured, but also currently insured, before their husbands, or widowers, could be eligible for benefits.<sup>18</sup> The Senate Report found it reasonable to retain the basic dependency requirement applicable to husband benefits because “men are not ordinarily

---

10. See Social Security Act Amendments of 1950, Pub. L. No. 81-734, ch. 809, § 101, 64 Stat. 477, 482–89 (amending § 202).

11. *Id.* at 483, 485 (amending § 202(c)(1)(D) & (f)(1)(E)). The man had to show he received at least one-half of his support from his wife to be eligible for the husband and widower benefit.

12. *Id.* at 505 (§ 214(a)). To be fully insured, the worker must have worked for at least 40 quarters or 10 years.

13. *Id.* at 505 (§ 214(b)). To be currently insured, the worker must have worked at least six quarters in the thirteen-quarter period ending with the quarter of the attainment of age sixty-two or actual retirement, if later.

14. According to the Social Security Advisory Council, the supplemental wife benefits were established in 1939 to “take account of [the] greater presumptive need of the married couple without requiring investigation of individual need.” Peter W. Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789, 796 (1978) (quoting ADVISORY COUNCIL ON SOCIAL SECURITY, FINAL REPORT, S. DOC. NO. 4, 76th Cong., 1st Sess. (1938)). In order to be eligible for benefits, until 1957, women did have to show that they were living with their husbands or at least financially dependent on them. *Id.* at 798, 805. A dependency requirement applied to spouse benefits for divorced women until 1975. *Id.* at 809.

15. *Id.* at 819.

16. S. REP. NO. 81-1669, at 19 (1950).

17. Naomi Riches, *Women Workers and Their Dependents Under the 1950 Amendments*, 14 SOC. SEC. BULL. 9, 11 (No. 8, 1951).

18. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1968).

dependent on their wives.”<sup>19</sup> It found, however, “no compelling reason”<sup>20</sup> to retain the currently insured requirement, stating that “[t]he fact that a woman supports her husband should be sufficient grounds for paying monthly benefits to him.”<sup>21</sup>

In 1977, Ruth Bader Ginsburg successfully challenged the dependency requirement applicable to widower but not widow benefits in *Califano v. Goldfarb*.<sup>22</sup> In that case, the Supreme Court held that the presumption that wives were usually dependent on their husbands, while husbands were not usually dependent on their wives, did not “suffice to justify a gender-based discrimination in the distribution of employment-related benefits” and thus violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.<sup>23</sup> Following this (and other decisions invalidating differential treatment of male beneficiaries of derivative benefits),<sup>24</sup> Congress

19. S. REP. NO. 90-744, at 79 (1967) (reprinted in U.S.C.C.A.N 2834, 1967 WL 4162, at 2934).

20. *Id.*

21. *Id.*

22. *Califano v. Goldfarb*, 430 U.S. 199 (1977). Commentators have described *Califano* as the culmination of Ruth Bader Ginsburg’s careful Supreme Court litigation strategy challenging laws and regulations with gender distinctions as violating the Equal Protection Clause. See Leonora M. Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 HARBINGER 149, 152 (2019). Ruth Bader Ginsburg first challenged gender-based discrimination in the Social Security system in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). In that case, she brought suit on behalf of a widowed father challenging a Social Security provision that provided benefits for surviving mothers caring for dependent children but did not extend to surviving fathers caring for dependent children. The Supreme Court found that in light of the law’s purpose of enabling the surviving parent to remain home to care for a child, its gender-based distinction was entirely irrational. Accordingly, the Court held that the failure to extend benefits for surviving spouses caring for dependent children to widowed fathers violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment of the United States Constitution. For additional discussion of Ruth Bader Ginsburg’s role in the development of the law governing constitutional challenges to sex discrimination and the Equal Protection Clause, see, e.g., Deborah Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 WOMEN’S RTS. L. REP. 335 (1992).

23. *Califano*, 430 U.S. at 201, 217.

24. See, e.g., *Weinberger*, 420 U.S. 636 (invalidating gender-based distinction where benefits for surviving mothers caring for dependent children did not extend to surviving fathers caring for dependent children); *Califano v. Silbowitz*, 430 U.S. 924 (1977), *aff’d* *Silbowitz v. Califano*, 397 F. Supp. 862 (S.D. Fla. 1975) (invalidating dependency requirement applicable to widower and not widow benefits); *Califano v. Jablon*, 430 U.S. 924 (1977), *aff’d* *Jablon v. Secretary of Health, Education & Welfare*, 399 F. Supp. 118 (D. Md. 1975) (invalidating dependency requirement applicable to husband benefits but not to wife benefits).

amended the Social Security Act in 1977 to eliminate most explicit gender differentiation.<sup>25</sup>

Social Security no longer facially discriminates on the basis of gender.<sup>26</sup> Nevertheless, critics have long argued that the Social Security system structurally discriminates against women because it prefers those who successfully fulfill the traditional male breadwinner role rather than the traditional female caregiving role.<sup>27</sup> This structural discrimination can be seen in the disparate impact it has on women. Overall, women receive lower worker benefits,<sup>28</sup> are much more likely to claim spouse benefits,<sup>29</sup> particularly surviving spouse benefits,<sup>30</sup> and are more dependent on Social Security benefits for their retirement income than are men.<sup>31</sup> Indeed, women are more likely to end their lives

---

25. Social Security Amendments of 1977, Pub. L. No., 95-216, 91 Stat. 1509; see Martin, *supra* note 14, at 791 n.9 (identifying specific changes in the 1977 Act); cf. Report of the 1979 Advisory Council on Social Security 380–84 (Jan. 2, 1980) (Appendix D: identifying the few remaining gender distinctions following the 1977 Act) [hereinafter 1979 Advisory Council Report].

26. See Martin, *supra* note 14, at 809–14.

27. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2059–66 (1996); Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law Commentary*, 89 COLUM. L. REV. 264, 276–88 (1989); Blumberg, *supra* note 5, at 242–44.

28. SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL SUPPLEMENT, 2023, 5.1, tbl.5.A1 (2023) [hereinafter 2023 SSA Statistical Supplement]. In December 2022, men received an average monthly retired worker benefit of \$2,020 compared to average monthly retired worker benefit of \$1,638 for women.

29. *Id.* In December 2022, 1,882,162 women received spouse benefits compared to 140,730 men.

30. *Id.* at 5.109 tbl.5.F8. In December 2022, 3,364,506 nondisabled widows received survivor benefits compared to 152,366 nondisabled widowers. 4.1, 15.

31. See, e.g., Irena Dushi, Howard M. Iams & Brad Trenkamp, *The Importance of Social Security Benefits to the Income of the Aged Population*, 77 SOC. SEC. BULL. 1, 7 (No. 2, 2017) (stating that “[i]n 2014, 55 percent of women and 48 percent of men lived in families receiving at least half of their income from Social Security benefits, and the corresponding estimates for the 90 percent threshold are 27 percent and 21 percent”).

in poverty than men.<sup>32</sup> This differential effect is not surprising in light of the different average work-lives of women.<sup>33</sup>

This Article assesses Social Security's disparate treatment of women and how Social Security might be reformed to enhance benefits for women.<sup>34</sup> The Article begins by providing a broad overview of Social Security benefits.<sup>35</sup> It then discusses how women and couples fare under the Social Security system.<sup>36</sup> Finally, it discusses four different types of proposed reforms that have been introduced to address the disparate treatment of women and certain couples.<sup>37</sup>

## II. Overview of Social Security Benefits

The Social Security system currently covers about ninety-four percent of the U.S. workforce.<sup>38</sup> It is financed principally by "contributions" or payroll taxes imposed on employers and employees.<sup>39</sup> The Federal Insurance Contributions Act<sup>40</sup> requires that employers<sup>41</sup> and employees<sup>42</sup> each "contribute" 6.2% of wages, up to a maximum taxable

32. Courtney Anderson & Shengwei Sun, *Social Security is Vital to Older Women's Financial Security*, NAT'L WOMEN'S L. CTR. (July 14, 2023), <https://nwlc.org/resource/social-security-is-vital-to-older-womens-financial-security/> [https://perma.cc/46Y2-3N6R] (stating that "[i]n 2021, women made up more than six in ten people aged 65 and older (61%) who lived in poverty. The official poverty rate for women 65 and older was 11.6% in 2021, compared to 8.8% for men").

33. Martin, *supra* note 14, at 792 (Proponents of equal treatment of women in Social Security in 1977 "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. 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.").

34. See discussion *infra* Parts III, IV.

35. See discussion *infra* Part II.

36. See discussion *infra* Part III.

37. See discussion *infra* Part IV.

38. 2023 SSA Statistical Supplement, *supra* note 28, at 8.

39. Social Security Administration, *Fast Facts & Figures about Social Security*, 2023, SOC. SEC. ADMIN, [https://www.ssa.gov/policy/docs/chartbooks/fast\\_facts/2023/fast\\_facts23.html](https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2023/fast_facts23.html) [https://perma.cc/Y93V-7RCJ] (last visited Feb. 11, 2025) ("In 2022, the Old-Age and Survivors Insurance and Disability Insurance Trust Funds collected \$1.22 trillion in revenues. Of that amount, 90.6% was from payroll tax contributions and reimbursements from the General Fund of the Treasury and 4.0% was from income taxes on Social Security benefits. Interest earned on the government bonds held by the trust funds provided the remaining 5.4% of income.").

40. 26 U.S.C. §§ 3101–3128. The self-employed are required to make similar contributions. *Id.* §§ 1401–1403.

41. *Id.* § 3111(a).

42. *Id.* § 3101(a).

wage base,<sup>43</sup> adjusted each year for changes in the national wage index and equal to \$168,600 in 2024,<sup>44</sup> to finance old-age, survivor, and disability insurance benefits.<sup>45</sup>

The Social Security system provides two basic types of benefits to workers: (1) old-age benefits<sup>46</sup> and (2) disability benefits.<sup>47</sup> These benefits, and indeed virtually all Social Security benefits,<sup>48</sup> are based on workers' earnings records.<sup>49</sup> Specifically, old age benefits are based on thirty-five years of earnings,<sup>50</sup> which are indexed to increases in the average national wage.<sup>51</sup> Average adjusted earnings are then plugged into a progressive benefit formula that replaces a higher percentage of earnings for lower career-average wage workers than for higher career-average wage workers.<sup>52</sup> This method of calculating benefits is said to balance two of Social Security's competing goals: equity<sup>53</sup> and social adequacy.<sup>54</sup> It promotes equity by basing benefits on wages and ensuring that workers who pay more into the system receive higher absolute benefits.<sup>55</sup> It promotes social adequacy by replacing a higher percentage of earnings of workers with lower career-average earnings than of workers with higher career-average earnings.<sup>56</sup>

Social Security old age benefits are pegged to a "full" or "normal" retirement age, which ranges from age sixty-five to sixty-seven,

---

43. *Id.*; 26 U.S.C. §§ 3111(a), 3121(a)(1).

44. *Contribution and Benefit Base*, SSA.GOV., <https://www.ssa.gov/OACT/COLA/cbb.html> [https://perma.cc/9NCH-3PKA] (last visited Feb. 11, 2025).

45. 26 U.S.C. §§ 3101(a), 3111(a).

46. Social Security Act § 202(a), 42 U.S.C. § 402(a).

47. *Id.* § 423(a).

48. An exception to this general rule is the special minimum benefit, which is not based on workers' earnings records. *See* discussion *infra* Section IV.B.

49. *Social Security Benefit Amounts*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/Benefits.html> [https://perma.cc/ZAD5-L72L] (last visited Feb. 11, 2025).

50. *Id.* Social Security Act § 215(b)(2)(A)(i), 42 U.S.C. § 415(b)(2)(A)(i).

51. *See* Social Security Act § 215(b)(3), 42 U.S.C. § 415(b)(3).

52. *See id.* § 415(a).

53. *See* Burke & McCouch, *supra* note 5, at 1211 (stating that "considerations of 'individual equity' dictate that all participants should receive an 'actuarially fair' return on their contributions").

54. *Id.* (stating that "in a program based on considerations of 'social adequacy,' benefits would be set at a level sufficient to ensure a minimally adequate standard of living for all participants").

55. *See id.*; Social Security Act § 215(a), 42 U.S.C. § 415(a).

56. For an analysis of Social Security's overall distributive effects, *see* Kathryn L. Moore, *Redistribution Under the Current Social Security System*, 61 U. PITT. L. REV. 955 (2000).

depending on the worker's year of birth.<sup>57</sup> Benefits are increased if workers delay receiving benefits; that is, if they begin receiving benefits after their full retirement age,<sup>58</sup> and decreased if workers begin to collect benefits before their full retirement age.<sup>59</sup> These adjustments are intended to ensure that workers receive approximately the same total lifetime benefits regardless of the age at which they begin to collect benefits, assuming workers live to average life expectancy.<sup>60</sup>

In addition to worker benefits,<sup>61</sup> Social Security provides auxiliary or derivative benefits to spouses, surviving spouses, children, and dependent parents of workers.<sup>62</sup> Although these benefits are based on a percentage of the worker's benefit, which is tied to the worker's earnings, they are intended to promote adequacy rather than equity.<sup>63</sup> This Part focuses on spouse and surviving spouse benefits.<sup>64</sup>

Spouse benefits are generally equal to fifty percent of the retired or disabled worker's benefit.<sup>65</sup> The spouse of a retired or disabled worker is typically eligible to receive a spouse benefit once the spouse reaches age sixty-two.<sup>66</sup> A spouse may receive a benefit at an earlier age if the spouse is caring for children under the age of sixteen or disabled children of any age.<sup>67</sup> Typically, in order to be eligible for spouse benefits, the spouse must be married to the retired or disabled worker at the time benefits commence.<sup>68</sup> Divorced spouses, however, may be eligible for spouse benefits if they were married to the worker for at least ten

57. See 42 U.S.C. § 416(l).

58. See *id.* § 402(w)(1).

59. See *id.* § 402(q)(1).

60. ZHE LI, CONG. RSCH. SERV., R47151, SOCIAL SECURITY: ADJUSTMENT FACTORS OF EARLY OR DELAYED BENEFIT CLAIMING 1 (2022).

61. For purposes of this Article, worker benefits refer to old age and disability benefits workers are entitled to receive based on their own earnings record.

62. 42 U.S.C. § 202 (b)–(h); *id.* § 402(b)–(h); ZHE LI, CONG. RSCH. SERV., R41479, SOCIAL SECURITY: REVISITING BENEFITS FOR SPOUSES AND SURVIVORS 2–6 (2021).

63. See *id.* at 1–2 (quoting reports by Social Security Board and Advisory Council in 1938 showing that spousal benefits were created to promote adequacy of household benefits).

64. For discussions of the evolution of spouse and surviving spouse benefits, see, e.g., John Jankowski, *Caregiver Credits in France, Germany, and Sweden: Lessons for the United States*, 71 SOC. SEC. BULL. 61, 62–63 (No. 4 2011); Martin, *supra* note 14, at 795–809.

65. See 42 U.S.C. § 402(b)(2) (wife benefits); *id.* § 402(c)(2) (husband benefits).

66. See Social Security Act § 202(b)(1)(B)(i), 42 U.S.C. § 402(b)(1)(B)(i) (wife benefits); *id.* § 402(c)(1)(B)(i) (husband benefits).

67. See 42 U.S.C. § 402(b)(1)(B)(ii) (wife benefits); *id.* § 402(c)(1)(B)(ii) (husband benefits).

68. See 42 U.S.C. § 402(b) (defining wife); *id.* § 416(f) (2018) (defining husband).



years.<sup>69</sup> Like worker benefits, spouse benefits may be reduced if the spouse claims the benefit before full retirement age.<sup>70</sup>

Surviving spouse benefits are generally equal to 100% of the deceased worker's benefit.<sup>71</sup> A surviving spouse is typically eligible to receive a surviving spouse benefit once the surviving spouse reaches age sixty.<sup>72</sup> A surviving spouse who is disabled may receive benefits as early as age fifty.<sup>73</sup> In addition, a surviving spouse with children under the age of sixteen or disabled children may receive a benefit until the child reaches age sixteen and/or is no longer disabled.<sup>74</sup> Divorced spouses may also be eligible for surviving spouse benefits if they were married to the worker for at least ten years.<sup>75</sup> Just as worker and spouse benefits are reduced if claimed before full retirement age, so are surviving spouse benefits.<sup>76</sup>

If any beneficiary of spouse or surviving spouse benefits is also eligible for a retired worker benefit based on his or her own work record (generally referred to as a "dually entitled" beneficiary), then the dependent benefit is reduced by an amount equal to the worker benefit so that the total benefit is never greater than the dependent benefit.<sup>77</sup> If an individual is eligible for a retired worker benefit on his or her own account that exceeds his or her dependent benefit, then the individual will only be eligible for his or her own worker benefit and will not be entitled to any dependent benefit.<sup>78</sup>

---

69. See *id.* § 416(d) (2018) (defining divorced spouse).

70. The rules are quite complex when the worker and/or spouse begin to receive benefits before and/or after their full retirement age. See Program Operations Manual System (POMS) RS 00615.020 Dual Entitlement Overview, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.NSF/lx/0300615020> [https://perma.cc/ZXS6-52BS] (last visited Feb. 11, 2025).

71. See 42 U.S.C. § 402(e)(1)(B)(i) (widow benefits); *id.* § 402(f)(1)(B)(i) (widower benefits).

72. See 42 U.S.C. § 402(e) (widow benefits); *id.* § 402(f) (2018) (widower benefits).

73. See 42 U.S.C. § 402(e)(2) (widow benefits); *id.* § 402(f)(2) (widower benefits).

74. See 42 U.S.C. § 402(g)(1) (mother's and father's benefit).

75. See *id.* § 416(d) (defining divorced spouse).

76. For an overview of the "widow(er)'s limit," see PAUL S. DAVIES, CONG. RSCH. SERV., IF12091, SOCIAL SECURITY: THE WIDOW(ER)'S LIMIT PROVISION (2022); see also David A. Weaver, *The Widow(er)'s Limit Provision of Social Security*, 64 SOC. SEC. BULL. 1, 1–2 (No. 1, 2001/2002) (describing the provision and evaluating options to change it).

77. See 42 U.S.C. § 402(k)(3)(A).

78. *Id.* § 402(b)(1)(D) (limit on wife benefit); *id.* § 402(c)(1)(D) (limit on husband benefit); *id.* § 402(e)(1)(D) (2018) (limit on widow benefit); *id.* § 402(f)(1)(D) (limit on widower benefit).

### III. How Women and Couples Fare Under Social Security

The Social Security Administration (SSA) describes Social Security as “neutral with respect to gender—individuals with identical earnings histories are treated the same in terms of benefits.”<sup>79</sup> Individuals, however, rarely have identical earnings history, and women tend to have lower lifetime earnings than men.<sup>80</sup>

Women’s lower earnings are the result of a number of different factors. First, women are less likely to participate in the paid workforce than are men.<sup>81</sup> To the extent that they participate in the paid workforce, women are more likely to work part-time than are men.<sup>82</sup> Similarly, women are more likely to take breaks from the paid labor force to provide unpaid care for children and other family members than are men.<sup>83</sup>

Second, although the pay gap between women and men has decreased over time, women, on average, still earn less than men.<sup>84</sup> For example, in 2023, among full-time year-round workers, women earned 82.7 cents for every dollar earned by men.<sup>85</sup> This wage gap is due, in

79. *Social Security Is Important to Women*, SSA (Sept. 2023), <https://www.ssa.gov/people/materials/pdfs/EN-05-10312.pdf> [<https://perma.cc/8NR4-B8QL>].

80. *See id.*

81. For example, in 2023, the labor participation rate of women between the ages of twenty-five and fifty-four was 77.4% compared to a participation rate of 89.1% for men in the same age range. *Civilian Labor Force Participation Rate by Age, Sex, Rate, and Ethnicity*, BUREAU OF LAB. STAT., 1, tbl.3.3 (Aug. 29, 2024), <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm>. [<https://perma.cc/7LEL-2LDR>].

82. For example, in 2020, 22.4% of women worked part-time while only 11.6% of men worked part-time. *Women in the Labor Force: A Databook*, BUREAU OF LAB. STAT. REP. (Mar. 2022), <https://www.bls.gov/opub/reports/womens-databook/2021/> [<https://perma.cc/3L4U-QCRG>]. Women represent 63% of the part-time workforce and only 43.6% of the full-time workforce. Men, in contrast, represent 37% of the part-time workforce compared to 56% of the full-time workforce. *Percent Distribution of Workers Employed Full- and Part-time by Sex*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/wb/data/latest-annual-data/full-and-part-time-employment> [<https://perma.cc/4DRK-GFWT>] (last visited Feb. 11, 2025).

83. *Spotlighting Women’s Retirement Security*, U.S. DEP’T OF TREAS. (Sept. 20, 2024), <https://home.treasury.gov/news/featured-stories/spotlighting-womens-retirement-security> [<https://perma.cc/7Y2W-TDLF>] [hereinafter *Spotlighting*]. For example, in 2022, 14% of women between the ages of twenty-five and fifty-four were full-time caregivers compared to 1.5% of men of the same age. David H. Montgomery, *Who’s Not Working? Behind the Full-Time Caregivers Leaving the Workforce*, FED. RESRV. BANK OF MINNEAPOLIS (July 5, 2023), <https://www.minneapolisfed.org/article/2023/whos-not-working-behind-the-full-time-caregivers-leaving-the-workforce> [<https://perma.cc/4CBU-7W7F>].

84. *See Spotlighting*, *supra* note 83.

85. *Id.*

part, to occupational segregation: women are overrepresented in lower-wage occupations (particularly child care and home health care) and underrepresented in higher-wage occupations (such as medical doctors).<sup>86</sup> Occupational segregation is not, however, the only explanation for the wage gap.<sup>87</sup> Studies suggest that the pay gap remains even for women and men in the same occupation.<sup>88</sup>

As a result of their lower lifetime wages, women receive on average lower Social Security retired and disabled worker benefits than do men.<sup>89</sup> For example, in December 2022, men received an average monthly retired worker benefit of \$2,020 compared to women who received an average retired worker monthly benefit of \$1,638, and men received an average monthly disabled worker benefit of \$1,628 compared to women who received an average monthly disabled worker benefit of \$1,338.<sup>90</sup>

Social Security benefits, however, are not limited to retired and disabled worker benefits. Social Security also provides auxiliary or derivative benefits to spouses and surviving spouses.<sup>91</sup> Women are far more likely to receive those benefits than are men. For example, in December 2022, over two million beneficiaries received benefits as spouses of retired workers, but only 140,730 of those beneficiaries were husbands,<sup>92</sup> and 90,972 beneficiaries received benefits as spouses of disabled workers, but only 8,368 of those beneficiaries were husbands.<sup>93</sup> Similarly, in December 2022, almost 3.4 million nondisabled widows

---

86. *Id.* (discussing reasons for occupational segregation); Aaron Young, Humayun Chaudhry, Xiaomei Pei, Katie Arnhart, Michael Dugan & Kenneth Simons, *FSMB Census of Licensed Physicians in the United States, 2020*, 107 J. MED. REG. 57, 59 tbl.1 (2021).

87. See *Understanding the Wage Gap*, U.S. DEP'T OF LAB. WOMEN'S BUREAU, Issue Brief (Mar. 2023), <https://www.dol.gov/sites/dolgov/files/WB/UnderstandingTheGenderWageGap.pdf> [<https://perma.cc/H4Q2-J44S>].

88. *Id.*; *Women Earn Less than Men Whether They Work in the Same or Different Occupations*, INST. FOR WOMEN'S POL'Y RSCH., 1 (Mar. 2023), <https://www.jstor.org/stable/resrep48424?seq=1> [<https://perma.cc/Y2RU-TBD7>].

89. *What Women Should Know*, SOC. SEC. ADMIN. (Oct. 2022), <https://www.ssa.gov/pubs/EN-05-10127.pdf> [<https://perma.cc/MTR8-LUCV>].

90. 2023 SSA Statistical Supplement, *supra* note 28, at 5.74 tbl.5.B4 & 5.91 tbl.5.D1.

91. Social Security also provides auxiliary or derivative benefits to dependent children and parents, but this Article focuses on spouse and surviving spouse benefits.

92. 2023 SSA Statistical Supplement, *supra* note 28, at 5.98 tbl.5.F1.

93. *Id.* at 5.99.

received benefits and only about 152,000 nondisabled widowers received benefits.<sup>94</sup>

Despite the fact that women are the overwhelming beneficiaries of spouse and surviving spouse benefits, the provision of those benefits does not equalize Social Security benefits between men and women.<sup>95</sup> Taking into account all types of benefits, women receive, on average, lower benefits than men.<sup>96</sup> For example, in December 2022, the SSA paid just over thirty-six million female beneficiaries an average Social Security monthly benefit of \$1,528 compared to an average monthly benefit of \$1,881 to just under thirty million male beneficiaries.<sup>97</sup>

The fact that spouse benefits do not equalize benefits between men and women is hardly surprising, given that spouse benefits are only fifty percent of the retired or disabled worker benefit, and Social Security prevents an individual from collecting both a full spouse or surviving spouse benefit and a full retired or disabled worker benefit.<sup>98</sup> Moreover, the spouse and surviving spouse benefits combined with the prohibition on receiving full worker benefits in addition to full spouse or surviving spouse benefits results in significant distributional impacts among single-earner and two-earner couples.<sup>99</sup> Specifically, single-earner couples receive a higher total benefit from Social Security than do two-earner couples with identical earnings.<sup>100</sup> In addition, the survivor of a two-earner couple receives a much smaller benefit than the survivor of a single-earner couple with identical earnings.<sup>101</sup> When a two-earner couple has higher total earnings than a single-earner couple but the higher earning spouse has the same earnings as the single-earner couple, the benefit of the lower earning spouse is only marginally

---

94. *Id.* at 5.109 tbl.5.F8. Of the 211,301 disabled surviving spouse beneficiaries, 193,175 were women and 18,126 were men. *Id.* at 5.1 tbl.5.A1.

95. *See id.* at 5.1 tbl.5.A.1.

96. *Id.*

97. *Id.* (including benefits to children and dependents).

98. *See* 42 U.S.C. § 402(k)(3)(A).

99. PAUL S. DAVIES, CONG. RSCH. SERV., R46182, SOCIAL SECURITY AND VULNERABLE GROUPS—POLICY OPTIONS TO AID WIDOWS 6 tbl.2 (2020).

100. *Id.*

101. *Id.*

higher than if that individual did not work at all.<sup>102</sup> The following table illustrates this phenomenon.<sup>103</sup>

TABLE 1: BENEFITS FOR THREE COUPLES WITH DIFFERENT EARNINGS SPLITS BETWEEN SPOUSES, 2017

	Couple 1: Single Earner with Earnings of \$50,000	Couple 2: Two Earners with Total Household Earnings of \$50,000 Evenly Split	Couple 3: Two Earners with Total Household Earnings of \$50,000 and \$25,000
Total Household Earnings	\$50,000	\$50,000	\$75,000
Spouse I Earns	\$50,000	\$25,000	\$50,000
Spouse II Earns	\$0	\$25,000	\$25,000
Total Monthly Benefit Paid to Couple at Retirement	\$2,655 total	\$2,240 total	\$2,890 total
	(\$1,770 worker benefit to Spouse I & \$885 spouse benefit to Spouse II)	(\$1,120 worker benefit to Spouse I & \$1,120 worker benefit to Spouse II)	(\$1,770 worker benefit to Spouse I & \$1,120 worker benefit to Spouse II)
Total Monthly Benefit Paid to Surviving Spouse	\$1,770	\$1,120	\$1,770
Total Monthly Benefit Paid to Survivor as Percentage of Couple's Benefit	67%	50%	61%

102. *Id.*

103. The table is drawn from an American Academy of Actuaries Issue Brief and Congressional Research Service Report. *See* AM. ACAD. OF ACTUARIES, *Issue Brief: Women and Social Security* 6 (May 2017), [https://www.actuary.org/sites/default/files/files/publications/Women\\_and\\_Social\\_Security\\_051217.pdf](https://www.actuary.org/sites/default/files/files/publications/Women_and_Social_Security_051217.pdf) [<https://perma.cc/W96F-97EC>]; DAVIES, *supra* note 99, at 6.

As the number of women in the workforce has increased,<sup>104</sup> so too has the number of dually entitled beneficiaries.<sup>105</sup> In 1960, about 5% of all female beneficiaries aged sixty-two and older (about 2% of all Social Security beneficiaries) were dually entitled while about 33% received spouse only benefits and 23% received surviving spouse only benefits.<sup>106</sup> The percentage of dually entitled beneficiaries increased over time until it reached its historical high in 2005 with 28% of female beneficiaries aged sixty-two and older (about 13% of all Social Security beneficiaries) dually entitled that year.<sup>107</sup> Since 2005, the share of dually entitled women has begun to decrease; it is expected to continue to decrease as more women have longer careers with higher career-average wages and thus receive only worker benefits.<sup>108</sup> As the number of women receiving worker benefits rather than spouse benefits increases, the disparity shown between Couple 1 and Couple 2 will happen less often.<sup>109</sup> Nevertheless, as long as women, on average, continue to earn less than men, women in two-earner couples will continue to depend on survivor benefits and the disparity shown between Couple 1 and Couple 3 will continue.<sup>110</sup>

---

104. In 1940, about 15% of married women (and 25% of all women) participated in the paid workforce. By 2019, the labor force participation rate had increased to 59% for married women and 57% for all women. ZHE LI, CONG. RSCH. SERV., IF10738, SOCIAL SECURITY DUAL ENTITLEMENT 2 (2021).

105. See LI, *supra* note 62, at 5–6 (“[T]he percentage of women aged 62 or older entitled to benefits based on their own work records—as retired workers or as dually entitled beneficiaries—grew from 43.3% in 1960 to 81.4% in 2020. More than half of this growth was in the percentage of dually entitled beneficiaries.”).

106. LI, *supra* note 104, at 2.

107. *Id.*

108. *Id.* (explaining that in 2020, about twenty-four percent of female beneficiaries aged sixty-two and older—and eleven percent of all beneficiaries—were dually entitled).

109. See AM. ACAD. OF ACTUARIES, *supra* note 103, at 6.

110. *Id.*

#### IV. Proposals to Reform Social Security

The Social Security system faces a long-term financing deficit,<sup>111</sup> and proposals to reform the system abound.<sup>112</sup> Some, though not all, of the proposals would exacerbate the disparity that women face.<sup>113</sup> Over the years, however, commentators and policymakers have introduced proposals that are intended to enhance retirement income security for women and/or reduce the inequality of treatment of single-earner couples relative to two-earner couples.<sup>114</sup>

This Part addresses four reform proposals. The first two proposals—reforming Social Security surviving spouse benefits<sup>115</sup> and reforming Social Security’s minimum benefits<sup>116</sup>—would tweak the system’s benefit formulas but would do nothing to address Social Security’s structural bias against women who perform traditional caregiving roles. The second two reform proposals—recognition of caregiving<sup>117</sup> and earnings sharing<sup>118</sup>—would reform Social Security in a more fundamental way, addressing its structural bias against women. At this point, all of the reform proposals remain just that: proposals.

---

111. The Social Security system currently collects less in contributions than it pays in benefits and has done since 2021. It is currently relying on its accumulated surplus to cover the shortfall. The Social Security Board of Trustees projects that the surplus will be depleted in 2035, and at that point in time, absent an intervening change in the law, the system will only have sufficient funds to pay eighty-three percent of promised benefits. THE 2024 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 118-137, at 6 (2024) (using intermediate assumptions and combined OASDI trust funds) [hereinafter 2024 TRUSTEES ANNUAL REPORT].

112. For an overview of a wide range of options to reform Social Security, see U.S. GOV’T ACCOUNTABILITY OFF., *Social Security Series Part 3: Options for Reform*, GAO-24-107240 (July 2024), <https://www.gao.gov/assets/gao-24-107240.pdf> [https://perma.cc/TB49-6RDG] (“focus[ing] on range of Social Security reform options based on proposals introduced in Congress, identified in literature, or suggested by Social Security experts”).

113. For a discussion of how the number of years upon which benefits are based impacts women, see *infra* Section IV.C.

114. For discussions of potential reforms, see LI, *supra* note 60; DAVIES, *supra* note 99; Melissa M. Favreault & Frank J. Sammartino, *The Impact of Social Security Reform on Low-Income and Older Women*, AARP PUB. POL’Y INST. 2002–11 (July 2002), <https://www.urban.org/sites/default/files/publication/60826/411169-The-Impact-of-Social-Security-Reform-on-Low-Income-and-Older-Women.PDF> [https://perma.cc/STA3-WPG7].

115. See *infra* Section IV.A.

116. See *infra* Section IV.B.

117. See *infra* Section IV.C.

118. See *infra* Section IV.D.

### A. Reforming Surviving Spouse Benefits

The American Social Security system is the country's most successful antipoverty program, lifting more people above the poverty line than any other program in the nation.<sup>119</sup> Absent Social Security benefits, 37% of people aged sixty-five or older would have income below the poverty line, while only 10% do when Social Security benefits are taken into account.<sup>120</sup> Social Security plays a particularly important role in lifting older women's income above the poverty line.<sup>121</sup> Without Social Security, 40% of women (and 34% of men) aged sixty-five and older would have income below the poverty line.<sup>122</sup> With Social Security 11% of women (and 9% of men) aged sixty-five and older have incomes below the poverty line.<sup>123</sup> Specifically, Social Security lifts 9.4 million women (and approximately 6.9 million men) aged sixty-five and older above the poverty line.<sup>124</sup>

Although Social Security lifts many older adults out of poverty, Social Security does not lift all older adults out of poverty.<sup>125</sup> For example, about six million individuals aged sixty-five and older lived in

---

119. Kathleen Romig, *Social Security Lifts More People Above the Poverty Line Than Any Other Program*, CTR. ON BUDGET & POL'Y PRIORITIES PUBL'N (Jan. 31, 2024), <https://www.cbpp.org/research/social-security/social-security-lifts-more-people-above-the-poverty-line-than-any-other> [https://perma.cc/W2DE-NLES]. For a discussion of the limitations of the official poverty measure, see ZHE LI & JOSEPH DALAKER, CONG. RSCH. SERV., R45791, POVERTY AMONG THE POPULATION AGED 65 AND OLDER 2-3 (2022), (using the supplemental poverty measure, Social Security still has a much greater impact on reducing the poverty rate of those age 65 and older than any other program). *Id.* at 20 fig.11. For a discussion of the differences between the official poverty measure and the supplemental poverty measure, see *id.* at 2-3.

The proportion of the aged population who lived in poverty has declined significantly in the past 50 years. In 1966, 28.5% of individuals aged 65 and older had family incomes below the poverty thresholds. By 2021, the poverty rate among the aged population had dropped to 10.3% . . . One study suggests that increased Social Security retirement benefits explained most of the decline in poverty among the aged that occurred during 1967-2000.

120. Romig, *supra* note 119, at 1 tbl.1.

121. *Id.*

122. *Id.* at 3 tbl.2.

123. *Id.*

124. *Id.*

125. Nancy Ochieng, Juliette Cubanski, Tricia Neuman & Anthony Damico, *How Many Older Adults Live in Poverty?*, KFF (May 21, 2024), <https://www.kff.org/report-section/how-many-older-adults-live-in-poverty-issue-brief> [https://perma.cc/Y2S2-KVLQ].



poverty in 2022.<sup>126</sup> Moreover, among the population aged sixty-five and older, poverty rates are higher among those aged eighty and older,<sup>127</sup> among women,<sup>128</sup> and among individuals living alone.<sup>129</sup> In addition, older married couples generally have much lower poverty rates than do individuals who are not married, and widowed and divorced women aged sixty-five and older are more likely to have incomes below the poverty line than are widowed and divorced men aged sixty-five and older.<sup>130</sup>

There are a host of reasons why older women face higher poverty rates.<sup>131</sup> Among those reasons is that widows face the risk of a

126. These figures are based on the official poverty measure. Using the supplemental poverty measure, 8.2 million adults aged sixty-five and older lived in poverty. *Id.*

127. For example, the poverty rate among those age eighty and over in 2021 was 12.9%, compared to a poverty rate of 9.5% among those aged seventy-five to seventy-nine, a 9.7% poverty rate among those aged seventy to seventy-four, and a 9.6% poverty rate among those aged sixty-five to sixty-nine. LI & DALAKER, *supra* note 119, at 6; see also Ochieng et al., *supra* note 125 (based on three-year averages for 2020–2022, the poverty rate was 12.1% for people aged eighty and over, compared to 9.1% for people aged seventy to seventy-nine and 9.3% for those aged sixty-five to sixty-nine).

128. Women aged eighty and over had the highest poverty rate, with a 14.7% poverty rate in 2021, compared to a 10.3% poverty rate among men aged eighty and over and a 10.4% poverty rate among women aged sixty-five to sixty-nine. LI & DALAKER, *supra* note 119, at 7; see also Ochieng et al., *supra* note 125 (based on three-year averages for 2020–2022, the poverty rate based on the official poverty measure was 14% among women aged eighty and over, compared to a poverty rate of 9.2% among men aged eighty and over; using the supplemental poverty measure, the poverty rate over the same time period was 14.3% among those age eighty and over, compared to 10.6% for those aged seventy to seventy-nine and 10.4% for those aged sixty-five to sixty-nine).

129. The poverty rate of older adults living alone is almost twice the poverty rate of those living with others. For example, the poverty rate in 2021 was 7.9% for men aged eighty or older if they lived with others and 16.2% if they lived alone. Women aged eighty or above living with others had a poverty rate of 10.6%, compared to a poverty rate of 19% if they were living alone. LI & DALAKER, *supra* note 119, at 8.

130. For example, in 2021, married women aged sixty-five and older had a poverty rate of 5.8% if they lived with their spouses, compared to a poverty rate of 15.5% for widows and 17.1% for divorced women. While poverty rates for widowed and divorced men aged sixty-five and older are lower than those of widowed and divorced women, the poverty rate of never-married men aged sixty-five and over (18.7% in 2021) is about the same as the poverty rate of never-married women aged sixty-five and over (19.5% in 2021). *Id.* at 10.

131. Those reasons include the fact that women tend to live longer than men and tend to have lower lifetime earnings and fewer retirement assets than men. See *Spotlighting*, *supra* note 83 (discussing “What Drives the Gender Gap in Retirement

substantial reduction in income from Social Security after their spouse's death.<sup>132</sup> As shown previously,<sup>133</sup> the monthly benefit paid to the survivor of a married couple receiving Social Security benefits ranges from 50% to 67% of the couple's total benefit, depending on how the earnings are distributed among the couple.<sup>134</sup> If the couple consists of a single earner, the survivor benefit is 67% of the couple's benefit.<sup>135</sup> If the couple consists of two equal earners, the survivor will receive a benefit equal to 50% of the couple's benefit.<sup>136</sup> If the couple consists of two spouses with unequal earnings, then the surviving spouse will receive a benefit that ranges between 50% to 67% of the couple's combined benefit.<sup>137</sup>

This differential treatment of surviving spouse benefits raises both equity and social adequacy concerns.<sup>138</sup> With respect to equity, the surviving spouse of a couple with a single earner receives a higher benefit than the surviving spouse of a couple with identical earnings and two workers.<sup>139</sup> Regarding social adequacy, undoubtedly, a single individual has lower consumption needs and thus requires less income than a couple.<sup>140</sup> How much lower the individual's consumption needs are depends upon the extent to which the couple benefits from

---

Security?"); LI & DALAKER, *supra* note 119, at 10–11 (discussing reasons why "[o]lder widowed and divorced women have a higher observed poverty rate than their male counterparts"); Michael A. Anzick & David A. Weaver, *Reducing Poverty Among Elderly Women*, 5–7 (Soc. Sec. Admin., ORES Working Paper No. 87, 2001), <https://www.ssa.gov/policy/docs/workingpapers/wp87.pdf> [<https://perma.cc/2GPA-RE A8>] (explaining that elderly women are at a higher risk of poverty because (1) they have lower lifetime earnings than men; (2) they spend fewer years in the workforce than men; (3) they live longer than men; and (4) they are less likely to receive a pension and have lower net worth).

132. LI & DALAKER, *supra* note 119, at 11.

133. *See supra* Part III, tbl.1.

134. *See* DAVIES, *supra* note 99, at 6 tbl.2.

135. Specifically, the survivor benefit is one hundred percent of the worker's benefit, which equals sixty-seven percent of the couple's combined benefit of the worker's benefit plus the spouse benefit of fifty percent of the worker's benefit. *Id.*

136. Specifically, the surviving spouse will continue to receive one hundred percent of her own worker benefit which was fifty percent of the couple's combined benefit of the surviving spouse's worker benefit and the deceased spouse's worker benefit. *Id.*

137. Specifically, the surviving spouse will receive a benefit equal to one hundred percent of the higher of the surviving spouse's worker benefit or the deceased spouse's worker benefit; the specific percentage depends on the relative earnings of the couple. *Id.*

138. *Id.* at 7–8.

139. *Id.* at 7.

140. *Id.* at 6.

economies of scale.<sup>141</sup> A comparison of the official poverty threshold for a single individual aged sixty-five or older with the threshold for a household of two people aged sixty-five or older suggests that a single older individual needs about seventy-nine percent of the income of an older couple.<sup>142</sup>

In order to address social adequacy, some analysts have recommended that surviving spouse benefits be increased to 75% (or even 85%) of the couple's benefit.<sup>143</sup> These proposals would potentially be quite costly increasing the surviving spouse benefit of a single earner couple from 67% to 75% of the couple's benefit and the surviving spouse benefit of two earner couple with equal earnings from 50% to 75%.<sup>144</sup> To cover the cost, some advocates recommend that the spouse benefit gradually be reduced from 50% to 33% of the working spouse's benefit.<sup>145</sup> In addition, to limit the cost and target the reform toward low-income beneficiaries, some analysts propose that the surviving spouse benefit be capped, for example, at an amount equal to the benefit of a retired worker with average career earnings.<sup>146</sup>

Increasing the surviving spouse benefit to seventy-five percent of the couple's benefit would do much to increase social adequacy for all surviving spouses, particularly if it were capped to target it toward low-income beneficiaries.<sup>147</sup> Increasing the benefit across the board, however, would do little to address the equity concerns raised by

---

141. *Id.*

142. According to the Census Bureau, the official poverty threshold for a single individual sixty-five and over was \$14,614 in 2023 compared to 18,418 dollars for a family unit of two people aged sixty-five and over, making the poverty threshold of the single individual seventy-nine percent of the couple (\$14,614/\$18,418 = 79%). See EMILY A. SHRIDER, U.S. CENSUS BUREAU, P60-283, POVERTY IN THE UNITED STATES: 2023 17 (2024) (identifying official poverty thresholds for 2023); see also DAVIES, *supra* note 99, at 6–7 (finding same ratio based on 2018 poverty thresholds).

143. See, e.g., ALICIA H. MUNNELL & ANDREW D. ESCHTRUTH, CTR. FOR RET. RSCH., MODERNIZING SOCIAL SECURITY: WIDOW BENEFITS 4 (2018), [https://crr.bc.edu/wp-content/uploads/2018/09/IB\\_18-17.pdf](https://crr.bc.edu/wp-content/uploads/2018/09/IB_18-17.pdf) [<https://perma.cc/JRN7-SRK6>]; S. REP. 111-187, at 62–63 (2010); Julia J. DiPasquale, *Social Security Reform: Keeping Elderly Women Out of Poverty*, 4 NAT'L ACAD. ELDER L. ATTY'S J. 183, 193–94 (2008); Anzick & Weaver, *supra* note 131, at 12; Favreault & Sammartino, *supra* note 114, at 11.

144. MUNNELL & ESCHTRUTH, *supra* note 143, at 4.

145. *Id.*

146. *Id.*

147. See *id.*

spouse and surviving spouse benefits.<sup>148</sup> In order to address equity concerns, some propose an alternative surviving spouse benefit that does not take into account spouse benefits.<sup>149</sup> For example, at least four bills introduced in the 118th Congress<sup>150</sup> and three bills introduced in the 117th Congress<sup>151</sup> include a provision providing that a surviving spouse is entitled to the greater of their benefit under current law or seventy-five percent of the couple's combined benefit if the couple received two worker benefits.<sup>152</sup> These bills promote equity by ensuring that the surviving spouse of a couple with two equal earners receives a greater survivor benefit than the surviving spouse of a couple with identical earnings but a single earner.<sup>153</sup> By capping the benefit at the worker benefit of a career-average earner,<sup>154</sup> they target it toward surviving spouses of two earner couples with the greatest need.<sup>155</sup> But they do nothing to promote social adequacy for the surviving spouse of a single earner couple.<sup>156</sup>

None of these reform proposals would provide any relief to older women who never married or who divorced after less than ten years of marriage because they are not eligible for spouse or surviving spouse

---

148. See DAVIES, *supra* note 99, at 16 ("Including spouse benefits in the alternative widow benefit calculation would magnify the favorable treatment of nonworking spouses under current law.").

149. See *id.*

150. H.R. 3926, 118th Cong. § 2. (2023) (proposing a standalone bill addressing only alternative widow benefit); H.R. 3261, 118th Cong. § 6 (2023) (proposing a bill with several provisions including alternative widow benefit); H.R. 4583, 118th Cong. § 105 (2023) (proposing extensive reforms including alternative widow benefit); S. 2280, 118th Cong. § 105 (2023) (proposing extensive reforms including alternative widow benefit).

151. H.R. 4851, 117th Cong. § 2 (2021) (proposing a standalone bill addressing only alternative widow benefit); H.R. 3915, 117th Cong. § 2 (2021) (proposing a bill with couple of provisions including alternative widow benefit); H.R. 4921, 117th Cong. § 6 (2021) (proposing a bill with several provisions including alternative widow benefit).

152. See bills cited *supra* notes 150–51.

153. See DAVIES, *supra* note 99, at 16 ("From the perspective of benefit equity, excluding the spouse benefit would allow the widow's own worker benefit to contribute to the alternative widow benefit on an equal footing with the deceased spouse's worker benefit.").

154. One bill caps the benefit at one and one-third of the average earner. H.R. 3926, 118th Cong. § 2 (2023).

155. See DAVIES, *supra* note 99, at 16–17.

156. *Id.*

benefits.<sup>157</sup> Some analysts recommend that the length of marriage requirement for eligibility of divorced spouse benefits be reduced to as little as five years to reduce the poverty rate among divorced older women.<sup>158</sup> Other analysts contend that increasing the special minimum benefit would be superior to reforming the spouse and surviving spouse benefit because an individual does not need to have been married for at least ten years in order to benefit from the special minimum benefit.<sup>159</sup>

## B. Reforming Special Minimum Benefit

Congress amended the Social Security system in 1972<sup>160</sup> to create a special minimum benefit “to increase the adequacy of benefits for regular long-term, low-earning covered workers and their dependents or survivors.”<sup>161</sup> Unlike regular Social Security benefits, which are based on workers’ career-average wages, the special minimum benefit is based on the number of years an individual works and has earnings at or above a designated threshold.<sup>162</sup> In order to be eligible for the special minimum benefit, the individual must have at least eleven years of earnings at or above the designated threshold, and the special minimum benefit increases with each year of eligible earnings up to thirty years.<sup>163</sup>

In 1973, more than 200,000 Social Security beneficiaries were entitled to the special minimum benefit.<sup>164</sup> By the end of 2022, that number had fallen to just over 23,000.<sup>165</sup> The number of beneficiaries has fallen dramatically for two reasons: (1) the special minimum benefit is only

---

157. Social Security spouse and surviving spouse benefits for divorced individuals are only available to individuals who were married for at least ten years. *See* 42 U.S.C. § 416(d) (defining divorced spouses).

158. *See* DAVIES, *supra* note 99, at 21–22 (discussing proposals).

159. *See id.*

160. Social Security Amendments of 1972, Pub. L. No. 92-603, § 101, 86 Stat. 1329, 1333–35; *see* ZHE LI, CONG. RSCH. SERV., R43615, SOCIAL SECURITY: MINIMUM BENEFITS 8–9 (2021) (discussing the original Social Security minimum benefit provision).

161. *See* Kelly A. Olsen & Don Hoffmeyer, *Social Security’s Special Minimum Benefit*, 64 SOC. SEC. BULL. 1, 2 (No. 2, 2001).

162. LI, *supra* note 160, at 2.

163. *Id.* at 2–3.

164. Olsen & Hoffmeyer, *supra* note 161, at 3.

165. 2023 SSA Statistical Supplement, *supra* note 28, at 5.19 tbl.5.A8.

paid if it is larger than an individual's regular Social Security benefit;<sup>166</sup> and (2) the special minimum benefit has grown slower than regular Social Security benefits because regular benefits are indexed to wages while the special minimum benefit is indexed to prices and wages have grown faster than prices.<sup>167</sup>

Some analysts and policymakers have suggested that the special minimum benefit be reformed in order to reduce the poverty rate among older women.<sup>168</sup> Proposals to reform the special minimum benefit may include: (1) a reduction in the number of years required to receive the maximum special minimum benefit;<sup>169</sup> (2) a reduction in the amount of earnings required to earn a year of coverage;<sup>170</sup> (3) credit for

---

166. Because the threshold for eligibility for a year of coverage under the special minimum benefit is much higher than the threshold for eligibility for quarters of coverage for social security benefits, it is generally harder for an individual with low wages to receive a year of coverage for Social Security minimum benefits than to receive four quarters of coverage for regular Social Security benefits. See LI, *supra* note 160, at 2 (noting that in 2021, the year of coverage threshold was \$15,930 compared to a quarter of coverage requirement of \$1,470).

167. Olsen & Hoffmeyer, *supra* note 161, at 1.

168. See LI, *supra* note 60, at 20; AM. ACAD. OF ACTUARIES, *supra* note 103, at 6; Joan Entmacher & Amy Matsui, *Addressing the Challenges Women Face in Retirement: Improving Social Security, Pensions, and SSI*, 46 JOHN MARSHALL L. REV. 749, 754–56 (2013); DiPasquale, *supra* note 143, at 196–97. For an overview of the options to reform the special minimum benefit, see generally ZHE LI, CONG. RSCH. SERV., R46589, SOCIAL SECURITY SPECIAL MINIMUM BENEFIT: POLICY OPTIONS (2020).

169. Under current law, a worker must have at least eleven years of coverage. LI, *supra* note 160, at 2.

170. Since 1991, the annual threshold for a year of credit (YOC) has been equal to fifteen percent of the “old law” contribution and benefit base, which is indexed to increases in the national average wage. The threshold in 2024 was \$18,765. Rachel Christian, *Social Security Minimum Benefit: What It Is and How Much It Pays*, BANKRATE.COM (July 18, 2024), <https://www.bankrate.com/retirement/social-security-minimum-benefit/> [<https://perma.cc/NX74-F9QS>]; *Old-Law Base and Year of Coverage*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/yoc.html> [<https://perma.cc/UT5F-EWZY>] (last visited Feb. 11, 2025). Proposals generally suggest reducing the YOC credit to the annual federal minimum wage for working 1,500 hours per year (or thirty hours per week for fifty weeks) or the amount required for earning four quarters of coverage for regular Social Security benefits. LI, *supra* note 160, at 15.

partial years of coverage;<sup>171</sup> and (4) tying the special minimum benefit to a percentage (such as 100 or 125) of the federal poverty threshold.<sup>172</sup>

Undoubtedly, reforming the special minimum benefit is intended to increase social adequacy rather than equity.<sup>173</sup> How cost-effective restructuring the special minimum benefit would be in reducing poverty depends in large part on how the reform is structured.<sup>174</sup> Proponents of such a reform contend that it can be better targeted to the needs of older women than reform of spouse and surviving spouse benefits because it would apply to individuals who do not qualify for spouse and surviving spouse benefits, such as those who never married or divorced before having been married for ten years.<sup>175</sup> Critics contend that poverty can be more effectively addressed by increasing benefits under the Supplemental Security Income program.<sup>176</sup>

---

171. In order to receive a YOC, a worker must earn an amount equal to or greater than the annual threshold. If the earnings are even one dollar short, the worker will not earn a credit for the year. LI, *supra* note 160, at 2–3. This reform may be considered a variation on reforms to reduce the amount of earnings required to earn a YOC. *See id.* at 15.

172. *See id.* at 17–18; *see, e.g.*, H.R. 4583, 118th Cong. § 103 (2023) (introducing the Social Security 2100 Act which would increase the special minimum benefit to 125% of the poverty threshold, effective from 2025 through 2034); S. 2280, 118th Cong. § 103 (2023) (same).

173. *See* SPECIAL COMM. ON AGING, SOCIAL SECURITY MODERNIZATION: OPTIONS TO ADDRESS SOLVENCY AND BENEFIT ADEQUACY, S. REP. NO. 111-187, at 56–57 (2010) (assessing effect of reform of special minimum benefit on adequacy).

174. *See id.* at 56 (discussing cost implications of reform of special minimum benefit).

175. *See* LI, *supra* note 160, at 12; *but cf.* ZHE LI, CONG. RSCH. SERV., IF11975, SOCIAL SECURITY: SPECIAL MINIMUM BENEFIT AND WINDFALL ELIMINATION PROVISION 2 (2021) (contending that it may be appropriate to extend the windfall elimination provision to the special minimum benefit if the special minimum benefit is extended).

176. *See, e.g.*, Jack A. Smalligan, *Increasing SSI Benefits Is a More Effective Approach to Reducing Poverty than an Enhanced Social Security Minimum Benefit*, BROOKINGS INST. (May 14, 2024), <https://www.brookings.edu/articles/increasing-ssi-benefits-is-a-more-effective-approach-to-reducing-poverty-than-an-enhanced-social-security-minimum-benefit/> [<https://perma.cc/EB7L-JN3X>] (critiquing reform proposed in Social Security 2100 Act); *but see* LI, *supra* note 160, at 11–14 (noting that “[s]ome research suggests restructuring the Social Security minimum benefit provision by equating the full special minimum benefit to the poverty level could be more effective in alleviating poverty than certain reforms to the SSI program” and discussing arguments in favor of and against phasing out the special minimum benefit).

### C. Recognition of Caregiving

Social Security worker benefits are based on a worker's highest thirty-five years of earnings.<sup>177</sup> Thus, individuals who engage in unpaid caregiving and either leave the workforce entirely or reduce their working hours—and thus their wages—to provide the unpaid care are likely to have reduced Social Security worker benefits.<sup>178</sup>

Facially, this appears gender neutral. It impacts the benefits of unpaid caregivers equally regardless of their gender. In fact, however, women are far more likely to be impacted than men because women are more likely to be full-time caregivers or work part-time to care for their children than men.<sup>179</sup> To illustrate, in 2022, 14% of women between the ages of twenty-five and fifty-four were full-time caregivers compared to 1.5% of men the same age.<sup>180</sup> Similarly, in March 2021, the labor force participation rate of women with children under the age of eighteen was 72% compared to the labor force participation rate of about 93% for men with children of the same age.<sup>181</sup>

According to an Urban Institute study prepared for the Department of Labor, the average lifetime employment cost to a woman of providing unpaid care is estimated to be \$295,000, with about 80% of the cost arising from lost earnings and the remaining 20% arising from lost retirement income (including Social Security benefits).<sup>182</sup>

177. See *Benefit Calculation Examples for Workers Retiring in 2025*, SSA.GOV, <https://www.ssa.gov/oact/progdata/retirebenefit1.html> [<https://perma.cc/3UZG-VBJH>] (last visited Feb. 11, 2025).

178. See, e.g., *READOUT: US Department of Labor Report Finds Impact of Caregiving on Mother's Wages Reduces Lifetime Earnings by 15 Percent*, U.S. DEP'T OF LABOR (May 11, 2023), <https://www.dol.gov/newsroom/releases/wb/wb20230511> [<https://perma.cc/25JT-5WEG>] (finding that unpaid caregiving reduces a mother's lifetime earnings by fifteen percent, leading to lower retirement income and long-term economic consequences).

179. See Sarah Jane Glynn, *An Unequal Division of Labor*, CTR. FOR AM. PROGRESS (May 18, 2018), <https://www.americanprogress.org/article/unequal-division-labor/> [<https://perma.cc/F2CU-2AF2>] (examining how working mothers perform significantly more unpaid caregiving and household labor than fathers, leading to work-family conflicts exacerbated by a lack of supportive workplace policies).

180. Montgomery, *supra* note 83.

181. *Women in the Labor Force: A Databook*, BUREAU OF LABOR STAT. (Mar. 2022), <https://www.bls.gov/opub/reports/womens-databook/2022/> [<https://perma.cc/KQH8-EE32>].

182. RICHARD W. JOHNSON, KAREN E. SMITH & BARBARA A. BUTRICA, URBAN INSTITUTE, *LIFETIME EMPLOYMENT-RELATED COSTS TO WOMEN OF PROVIDING FAMILY CARE* 30 (2023), <https://www.dol.gov/sites/dolgov/files/WB/Mothers-Families-Work/Key-Messages-Lifetime-caregiving-costs.pdf> [<https://perma.cc/TE3>].



According to a study for the Center for Retirement Research at Boston College (CRRBC), the median earnings of childless women is \$3,850 (in 2014 dollars) compared to median earnings of \$1,409 for women with children; in other words, women with children earn, on average, only 37% as much as childless women.<sup>183</sup>

Although the differential in median earnings between women with children and women without children clearly suggests that women with children bear a “motherhood earnings penalty,” Social Security helps offset this penalty in two ways.<sup>184</sup> First, its progressive benefit formula provides a higher replacement rate for women with lower earnings than those with higher earnings.<sup>185</sup> Second, married women with low earnings may receive spouse and surviving spouse benefits.<sup>186</sup> According to the CRRBC study, the median Social Security benefit for women with children is sixty percent (rather than thirty-seven percent) of the benefit of women without children.<sup>187</sup>

This reduced differential indicates that Social Security reduces the motherhood penalty but does not entirely eliminate it.<sup>188</sup> Indeed, a 2010 Urban Institute study of Social Security beneficiaries receiving Social Security benefits below the federal poverty level found that two-thirds

T-PD47]; *see also* Naomi Cahn, Clare Huntington & Elizabeth S. Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L.J. 1691, 1738 n.217 (citing studies on estimated lifetime wealth loss due to caregiving); TYLER BOND, JOELLE SAAD-LESSLER & CHRISTIAN E. WELLER, NAT’L INST. ON RET. SEC., STILL SHORTCHANGED: AN UPDATE ON WOMEN’S RETIREMENT PREPAREDNESS 19 (2020) (discussing how caregiving adversely affects women’s retirement savings).

183. MATTHEW S. RUTLEDGE, ALICE ZULKARNAIN & SARA ELLEN KING, CTR. FOR RETIREMENT RSCH. AT BOSTON COLL., NO. 21-11, HOW MUCH DOES SOCIAL SECURITY OFFSET THE MOTHERHOOD PENALTY? 2 (2021), [https://crr.bc.edu/wp-content/uploads/2021/06/IB\\_21-11.pdf](https://crr.bc.edu/wp-content/uploads/2021/06/IB_21-11.pdf) [<https://perma.cc/4CFB-NMMX>] [hereinafter RUTLEDGE ET AL., ISSUE BRIEF NO. 21-11]. For a full length version of the study, *see* Matthew S. Rutledge, Alice Zulkarnain & Sara Ellen King, *How Much Does Motherhood Cost Women in Social Security Benefits?* (Ctr. for Ret. Rsch., Working Paper No. 2017-14, 2017), [https://crr.bc.edu/wp-content/uploads/2017/10/wp\\_2017-14.pdf](https://crr.bc.edu/wp-content/uploads/2017/10/wp_2017-14.pdf) [<https://perma.cc/Z99A-L5ZW>].

184. *See* RUTLEDGE ET AL., ISSUE BRIEF NO. 21-11, *supra* note 183, at 2.

185. *See* ANDREW G. BIGGS, MARK SARNEY & CHRISTOPHER R. TAMBORINI, SOC. SEC. ADMIN, NO. 2009-01, A PROGRESSIVITY INDEX FOR SOCIAL SECURITY 1 (2009), <https://www.ssa.gov/policy/docs/issuepapers/ip2009-01.pdf> [<https://perma.cc/VY6E-4MLJ>].

186. *See* LI, *supra* note 60, at 3, 4.

187. RUTLEDGE ET AL., ISSUE BRIEF NO. 21-11, *supra* note 183, at 2 (stating that the benefit of a women without children is \$1,301 per month (in 2014 dollars) compared to a benefit of \$785 per month for childless women).

188. *Id.*

of those beneficiaries spent five or more years out of the labor force caring for children.<sup>189</sup>

Analysts and policymakers have recommended that the Social Security system be amended to address the impact of unpaid caregiving on workers' Social Security benefits in one of two ways.<sup>190</sup> Under the first approach, workers with years of low or no earnings would be granted a "caregiver credit" — that is, some level of Social Security earnings credit for caring for children (and sometimes other family members) during the year.<sup>191</sup> Under the second approach, years of caregiving would be excluded from the benefit computation used to calculate average earnings on which benefits are based.

### 1. CAREGIVER CREDITS

Legislators have been introducing caregiver credit bills for decades.<sup>192</sup> Indeed, at least six bills were introduced in the 118th<sup>193</sup> and 117th<sup>194</sup> Congress providing for a caregiver credit. To illustrate, the Social Security Caregiver Credit Act of 2023, introduced in both the House and the Senate,<sup>195</sup> provides a credit to caregivers who provide a

189. Melissa M. Favreault, *Why Do Some Workers Have Low Social Security Benefits?*, URB. INST. RETIREMENT POL'Y DISCUSSION PAPER 10-03, at 22 tbl.4 (June 2010), <https://www.urban.org/sites/default/files/publication/28951/412170-Why-Do-Some-Workers-Have-Low-Social-Security-Benefits-.PDF> [<https://perma.cc/H3EZ-AFNL>].

190. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 112, at 8; LI, *supra* note 60, at 21; ALICIA H. MUNNELL & ANDREW D. ESCHTRUTH, MODERNIZING SOCIAL SECURITY: CAREGIVER CREDITS, CTR. FOR RETIREMENT RSCH. AT BOSTON COLL., NO. 18-15, at 5 (Aug. 2018), [https://crr.bc.edu/wp-content/uploads/2018/08/IB\\_18-15-1.pdf](https://crr.bc.edu/wp-content/uploads/2018/08/IB_18-15-1.pdf) [<https://perma.cc/VC9A-N6G9>].

191. See LI, *supra* note 60, at 21 (providing an overview of caregiver credit options).

192. See, e.g., H.R. 4126, 116th Cong., 1st Sess. (July 30, 2019); H.R. 2290, 112th Cong., 1st Sess. (June 22, 2011); H.R. 5936, 109th Cong., 2d Sess. (July 27, 2006); H.R. 4743, 107th Cong., 2d Sess. (May 15, 2002). Indeed, many, though not all, of the bills have been introduced by Nita Lowey, a Democratic Representative from New York.

193. See, e.g., S. 2280, 118th Cong. § 107 (2023) (extensive reforms including caregiver credit provision); H.R. 4583, 118th Cong. § 107 (2023) (extensive reforms including caregiver credit provision); S. 1211, 118th Cong. (standalone bill) (2023); H.R. 3729, 118th Cong. (May 25, 2023) (standalone bill). Multiple caregiver credit bills were introduced as part of the Economic Equity Act between 1981 and 1996. See Seith, *supra* note 8, at 77–85 (summarizing major categorical provisions of Economic Equity Act including Social Security caregiver credit bills).

194. S. 1955, 117th Cong. (2021) (standalone bill); H.R. 3632, 117th Cong. (2021) (standalone bill).

195. Both titled "Social Security Caregiver Credit Act of 2023," S. 1211 and H.R. 3729 are virtually identical. S. 1211, 118th Cong. (2023); H.R. 3729, 118th Cong. (2023).

minimum of eighty hours of unpaid care per month to children under the age of twelve,<sup>196</sup> as well as dependent relatives who cannot perform daily living activities without assistance.<sup>197</sup> Caregivers can claim the credit for up to sixty months.<sup>198</sup> It is available to caregivers who earn no wages as well as caregivers whose wages are less than the average national wage.<sup>199</sup> Caregivers with no wages receive a maximum credit equal to half of the average national wage.<sup>200</sup> For caregivers with wages, the credit is progressive and varies on an income-based sliding scale (decreasing as the caregiver's earnings reach the average national wage).<sup>201</sup>

Despite the fact that proposals to provide caregiver credit have been introduced for decades, the proposals in the U.S. have not gained much traction.<sup>202</sup> Virtually all other developed nations, in contrast, grant caregiver credits.<sup>203</sup> The countries do not follow a uniform approach to providing credits.<sup>204</sup> Rather, there is considerable variation in both the structure and the goals of these programs.<sup>205</sup> For example, the period of eligibility ranges from one year per child to up to sixteen years per child.<sup>206</sup> Reference wages can be a percentage of actual wages,<sup>207</sup> average wages,<sup>208</sup> or a minimum wage.<sup>209</sup> Depending on the country,

---

196. S. 1211, 118th Cong. § 235(a)(1)(A) (2023).

197. *Id.* § 235(a)(2) (defining dependent relative).

198. *Id.* § 235(b)(1)(B).

199. *Id.* § 235(b)(1)(A).

200. *Id.* § 235(b)(1)(A)(i).

201. *Id.* § 235(b)(1)(A)(ii).

202. See Jankowski, *supra* note 64, at 67.

203. See ELAINE FULTZ, *PENSION CREDITING FOR CAREGIVERS: POLICIES IN FINLAND, FRANCE, GERMANY, SWEDEN, THE UNITED KINGDOM, CANADA, AND JAPAN*, INST. FOR WOMEN'S POL'Y RSCH. 1 (2011) (noting that in 2009, only four of the 30 OECD countries did not provide caregiver credits the four were the United States, Turkey, Mexico, and Australia); Jankowski, *supra* note 64, at 65 (noting that "caregiver credits have become a near-universal component of public pension systems in higher-income OECD countries").

204. See FULTZ, *supra* note 203, at 13–21.

205. *Id.*

206. FULTZ, *supra* note 203, at 1 (noting eligibility period of one year per child in Greece, Japan, and Korea up to 16 years per child in the United Kingdom and Switzerland and describing three- to five-year periods as common).

207. *Id.* at 9 (noting that reference wage in Japan is "[a]ctual earnings in the year prior to taking leave" while the reference wage in Finland is about eighty percent of salary for various parental benefits).

208. *Id.* (noting that in Germany, the reference wage for three-year credit is average covered wage).

209. *Id.* (noting that in France, the reference wage for old-age insurance for parents with little or no earnings is the minimum wage).

caregiver credits may enable individuals to establish eligibility for benefits,<sup>210</sup> increase the amount of benefits,<sup>211</sup> and/or accelerate the date on which they may be eligible for benefits.<sup>212</sup> Alleviating poverty is a common goal;<sup>213</sup> other goals include increasing women's participation in the paid workforce, increasing birth rates, and promoting gender equity.<sup>214</sup>

The failure of caregiver credit proposals to gain traction in the United States may be attributable, at least in part, to the fact that caregiver credits may break from the structure of the American Social Security system in three significant ways.<sup>215</sup> Caregiver credits (1) would grant credit for unpaid labor, (2) could impose significant administrative costs, and (3) could call for general revenue financing.

Since its inception, Social Security has only granted workers credit for paid labor. The late Robert Ball, longtime Commissioner of Social Security, described "earned right" as one of the nine guiding principles of Social Security.<sup>216</sup> Specifically, he declared that:

---

210. *Id.* (noting that in Germany, caregiver credits are counted in calculating whether an individual is eligible for a pension).

211. *Id.* (noting that in Sweden, caregiver credits add to pension adequacy after individual has met eligibility requirements).

212. *Id.* at 15 (noting that caregiver credits in France permit some women to retire earlier with full benefits).

213. *Cf. id.* at 7 (noting that all seven countries studied target all or part of their caregiver credit systems to caregivers with low income suggesting that poverty alleviation is a common goal); Jankowski, *supra* note 64, at 65 (noting that primary objective of caregiver credits in OECD countries is "to improve benefit adequacy for women, whose separations from the labor force to provide care for dependent children and sick or elderly relatives often lead to lower average earnings and lower benefits at retirement").

214. FULTZ, *supra* note 203, at 5; *see also* Jankowski, *supra* note 64, at 62 (noting that throughout the European Union, countries have used caregiver credits "to pursue a number of objectives, including improving benefit adequacy for caregivers—primarily women but also men—promoting higher fertility rates, facilitating the return to the labor force following childbirth, and simply rewarding the act of providing unpaid care").

215. *Cf.* Jankowski, *supra* note 64, at 67 (identifying three major challenges caregiver credit proposals face that may explain the lack of enthusiasm they receive in the U.S.: (1) design issues; (2) administrative challenges; and (3) financing challenges); Alstott, *supra* note 27, at 2063–64 (discussing difficulties raised by caregiver credits); Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 14 (1990) (offering reasons why caregiver credit bills have received little political support).

216. ROBERT M. BALL, *INSURING THE ESSENTIALS: BOB BALL ON SOCIAL SECURITY: A SELECTION OF ARTICLES AND ESSAYS FROM 1942 THROUGH 2000* 6 (Thomas N. Bethell ed. 2000).

Social Security is more than a statutory right; it is an earned right, with eligibility for benefits and the benefit rate based on an individual's past earnings. This principle sharply distinguishes Social Security from welfare and links the program, appropriately, to other earned rights such as wages, fringe benefits, and private pensions.<sup>217</sup>

Of course, feminist critics of the Social Security system contend that unpaid caregiving labor is worthy of credit and the failure to grant credit for unpaid labor is, in fact, a fundamental flaw of the current system.<sup>218</sup> Under this view, granting credit for unpaid caregiving to promote social adequacy is superior to providing spouse and surviving spouse benefits because caregiver credits acknowledge and respect the contributions of caregivers, rather than providing caregivers with contingent and secondary benefits.<sup>219</sup>

Administrative costs for retired worker benefits<sup>220</sup> (including spouse and surviving spouse benefits) are remarkably low. In 2023, the administrative costs of the Old Age and Survivors Insurance Fund were only 0.4% of the total cost and total income of the Fund.<sup>221</sup> Granting caregiver credits would add administrative complexity to Social Security and thus necessarily increase administrative cost.<sup>222</sup> To what extent the complexity and cost would add to administrative costs depends on how the credits were structured.<sup>223</sup> If automatic credit were given for childcare, there would undoubtedly be administrative costs at the outset because the SSA does not currently have the necessary data to

---

217. *Id.*

218. See Seith, *supra* note 8, at 54–59 (explaining how Economic Equity Act, which included Social Security caregiver credit bills, sought to revise and reconstruct federal laws “grounded in gendered notions of women’s role in society”); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1573 (1996) (seeking to obliterate the “false and gendered distinction between paid work outside the home and unpaid work inside of it” and proposing that homemakers pay tax on their imputed income and receive independent Social Security benefits upon retirement); cf. Naomi Cahn et al., *supra* note 182, at 1759 (endorsing proposed Social Security Caregiver Act of 2021 that would treat familial caregiving as work for purposes of Social Security); Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2018 (2018) (noting that seventy-three percent of respondents to an Associated Press survey support granting Social Security caregiver credits); Laura C. Bornstein, *Homemakers and Social Security: Giving Credits Where Credits are Due*, 24 WIS. J.L. GENDER & SOC. 255 (2009) (proposing elective homemaker credit program).

219. See Seith, *supra* note 8, at 54–56.

220. That is, old age benefits.

221. 2024 TRUSTEES ANNUAL REPORT, *supra* note 111, at 40.

222. See Jankowski, *supra* note 64, at 72.

223. *Id.*

automatically administer a childcare credit program.<sup>224</sup> Over time, however, an infrastructure could be developed to make granting childcare credits virtually automatic, as they are in France, Germany, and Sweden.<sup>225</sup> Providing caregiver credits for caring for other relatives would necessarily be more administratively complex because it would require a method of proving that care was actually provided.<sup>226</sup> Of course, the SSA already operates a more administratively complex program, the disability program, which requires verification of disability.<sup>227</sup> Administrative costs of the Social Security Disability Insurance Fund are more than three times the administrative costs of the Old Age and Survivors Insurance Fund.<sup>228</sup> Proponents of caregiver credits, no matter how structured, could argue that the addition of caregiver credits is not a significant break from the administrative cost structure of the Social Security program as a whole because Social Security includes the administratively more costly disability benefits program.<sup>229</sup>

Undoubtedly, introducing caregiver credits would add to the cost of the Social Security system. How much cost they would add depends on how the credits were structured. No matter how structured, the credits would have to be funded. Many countries that offer caregiver

---

224. *See id.* at 72 (discussing administrative difficulties U.S. Social Security Administration would initially face in establishing caregiver credits).

225. *See id.* at 70–71 (describing administrative systems in France, Germany, and Sweden).

226. *See id.* at 70 (“Determining an individual’s eligibility can be extremely complex to administer, especially in the case of caregiver credits for care provided to sick or elderly relatives (where determining eligibility requires verification that care has been provided).”). While, at first blush, it might seem that the process for claiming Social Security caregiver credit for non-child dependents could be streamlined by providing credit when the relative is claimed as a dependent on the caregiver’s income tax return, a closer look suggests this would not be appropriate because dependency for purposes of the federal income tax is based on financial dependency while dependency for purposes of the caregiver credit depends on actual time caring for the individual.

227. *See* Robert Thorpe, *Nearly 300,000 Americans Are Waiting to Dispute Social Security Decisions*, NEWSWEEK (Feb. 26, 2025), <https://www.newsweek.com/nearly-300k-americans-await-social-security-decision-2036815> [https://perma.cc/S4KJ-HFX6].

228. *See* 2024 TRUSTEES ANNUAL REPORT, *supra* note 111, at 40 (showing that in 2023, administrative costs of the Disability Insurance Fund were 1.5% of income and 1.8% of the total cost of the program, compared to administrative costs of 0.4% for the OASI Fund).

229. *See id.*

credits fund them from general revenues or other taxes.<sup>230</sup> To the extent that caregiver credits are intended to reduce poverty, it might be appropriate to finance them with general tax revenue.<sup>231</sup> Such financing, however, would constitute a significant break from the current system. The current Social Security system is financed principally through dedicated payroll taxes.<sup>232</sup> Indeed, one of Ball's guiding principles of Social Security is that it be contributory and self-financed.<sup>233</sup> This method of financing reinforces the concept that Social Security benefits are an earned right and "gives contributors a moral claim on future benefits above and beyond statutory obligations."<sup>234</sup> As President Roosevelt explained:

Those taxes were never a problem of economics. They are politics all the way through. We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program.<sup>235</sup>

Of course, caregiver credits would not have to be funded with general revenues.<sup>236</sup> They could, like the rest of the program, be funded with payroll taxes. Two countries, Canada and Japan, finance their caregiver credits with pension contributions.<sup>237</sup> If caregiver credits were financed with payroll contributions and/or offsetting benefit reductions, financing caregiver credits would not constitute a significant break from the financing structure of the current program.<sup>238</sup> Moreover, financing caregiver credits with payroll contributions would be another

---

230. See Jankowski, *supra* note 64, at 71 (stating that "almost all countries are similar in their response to the funding issue, choosing to pay for caregiver credits out of general revenues or other taxes"); but see FULTZ, *supra* note 203, at 11 (noting that five countries studied finance caregiver credits from five sources, including entirely from pension contributions).

231. Cf. Blumberg, *supra* note 5, at 274 (noting that Abzug bill directs that cost caregiver credit be paid out of general revenue).

232. *Id.*

233. See *supra* note 40 and accompanying text.

234. See *supra* note 40 and accompanying text.

235. Arthur Schlesinger, Jr., *THE COMING OF THE NEW DEAL* 308–09 (1958).

236. Jankowski, *supra* note 64, at 72.

237. FULTZ, *supra* note 203, at 11.

238. See discussion *supra* Part II.

way to acknowledge the value of caregiving as equivalent to paid labor.<sup>239</sup>

## 2. DROP OUT YEARS

As noted above, Social Security worker benefits are based on a worker's highest thirty-five years of earnings.<sup>240</sup> Some commentators<sup>241</sup> and policymakers<sup>242</sup> have proposed that recognition be given for unpaid caregiving by reducing the number of work years that are considered in calculating Social Security benefits for caregivers. For example, H.R. 865, introduced in the 1st Session of the 102nd Congress proposed that up to five years be "disregarded in determining average annual earnings on which benefit amounts are based upon a showing of preclusion from remunerative work during such years occasioned by need to provide child care or care to a chronically dependent relative."<sup>243</sup>

Arguably, dropping out years in calculating benefits would be less of a break from the current Social Security system than caregiver credits because the Social Security disability program currently permits caregivers to exclude up to three years of earnings in calculating their Social Security disability benefits.<sup>244</sup> Moreover, like caregiver credits,

239. A creative (but perhaps administratively burdensome) way to finance caregiver credits would be to impose a payroll tax solely on the caregiver's spouse's employer in recognition of the benefit the employer receives from the caregiver's spouse's ability to work with less distraction due to the caregiver's work in the home.

240. For a discussion of the computation period and its history, see ZHE LI & BARRY F. HUSTON, CONG. RSCH. SERV., R47330, SOCIAL SECURITY: POTENTIAL IMPACTS OF CHANGES IN COMPUTATION YEARS 3–5 (2022).

241. See, e.g., DAVIES, *supra* note 99, at 24; MUNNELL & ESCHTRUTH, *supra* note 190, at 5.

242. See, e.g., 1979 Advisory Council Report, *supra* note 25, at 119 (noting that council considered childcare drop out years proposals but did not recommend adoption of proposal; narrow majority of council urges "that serious consideration be given to introducing childcare dropout years at some future date").

243. H.R. 865, 102nd Cong. (1991).

244. See *Program Operations Manual System (POMS)*, SOC. SECURITY ADMIN. (Dec. 4, 2023), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0300605235> [<https://perma.cc/52BB-HW9T>]; William R. Morton, *Social Security Disability Insurance (SSDI): Becoming Insured, Calculating Benefit Payments, and the Effect of Dropout Year Provisions* 3–4, CONG. RSCH. SERV. (Jan. 24, 2014), <https://crsreports.congress.gov/product/pdf/R/R43370> [<https://perma.cc/WF48-CHZV>]; *The Social Security Administration's Application of the Childcare Dropout Year Provision*, OFF. OF THE INSPECTOR GEN. (Jan. 24, 2014), <https://www.oversight.gov/sites/default/files/oig-reports/A-01-18-50660.pdf> [<https://perma.cc/BFA8-TX8D>].



there is precedent for drop out years in public retirement systems in other countries.<sup>245</sup>

Yet, like caregiver credits, proposals for drop out years have not gained much political traction in the United States.<sup>246</sup> According to an SSA study in the 1990s, drop out years would increase the retirement benefits for some women, but the gains would generally be small, decrease over time, and are more likely to benefit women in higher socio-economic groups.<sup>247</sup>

#### D. Earnings Sharing

In a variety of contexts, federal law treats couple's earnings and property as community property. For example, since 1948, the federal income tax has used a joint income tax return to split income between husband and wife.<sup>248</sup> The federal estate and gift tax marital deduction reflects a similar concept.<sup>249</sup> Similarly, the requirement that qualified pension plans distribute benefits in the form of a qualified joint and survivor annuity, absent spousal consent, also reflects a community property concept.<sup>250</sup>

245. See FULTZ, *supra* note 203, at 9 (stating that in Canada "[e]ach year of child-care is excluded from both the averaging period in the first-tier pension calculation, and from the contributory period under the second-tier earnings-related scheme").

246. See, e.g., *id.* (reporting the potential relevance of different policy designs for the United States).

247. Howard M. Iams & Steven H. Sandell, *Changing Social Security Benefits to Reflect Child-Care Years: A Policy Proposal Whose Time Has Passed*, 57 SOC. SEC. BULL. 10, 13 (No. 4, 1994).

248. I.R.C. § 6013(a). For feminist critiques of the joint income tax return, see, e.g., Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 65 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Biases in the Code*, 40 UCLA L. REV. 983, 989-90 (1993); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 18 (1980) (explaining the joint income tax return split between husband and wife).

249. I.R.C. § 2056(a).

250. I.R.C. § 417(b); ERISA § 205(d), 29 U.S.C. § 1055(d); see, e.g., *Qualified Joint and Survivor Annuity Requirements*, DEP'T OF THE TREASURY (Apr. 1, 2006), [https://www.irs.gov/pub/irs-tege/joint\\_survivor.pdf](https://www.irs.gov/pub/irs-tege/joint_survivor.pdf) [<https://perma.cc/H5GK-ZXVX>] (stating that "[t]he legislative history of [the Retirement Equity Act of 1984 which introduced mandatory spousal rights in pension plans] reflects that Congress viewed the marriage relationship as a partnership, and the retirement benefit resulting from that partnership as derived from the contributions of both parties").

Over the years, a host of policymakers,<sup>251</sup> analysts,<sup>252</sup> and commentators<sup>253</sup> have proposed and/or analyzed proposals that community-property concepts, referred to as “earnings sharing,” be applied to Social Security.<sup>254</sup> Earnings sharing views marriage as an economic partnership and replaces the current system of spouse and surviving spouse benefits with an allocation of contributions and benefits between spouses based on community property principles.<sup>255</sup> On the contribution side, each spouse is credited with one-half of the couple’s combined earnings during marriage.<sup>256</sup> On the benefit side, at retirement age, each spouse is treated as an independent beneficiary with a benefit based on an earnings record that reflects: (1) his or her share of the couple’s combined earnings during marriage; and (2) all of his or her own earnings for the years he or she was not married.<sup>257</sup>

Proponents assert that earnings sharing can address a number of weaknesses in Social Security’s spouse and surviving spouse benefit

251. See, e.g., *Social Security: Options to Protect Benefits for Vulnerable Groups When Addressing Program Solvency*, U.S. GOV’T ACCOUNTABILITY OFF. (Dec. 7, 2009), <https://www.gao.gov/assets/gao-10-101r.pdf> [<https://perma.cc/N9WN-P4LW>]; *Earnings Sharing Options for the Social Security System*, CONG. BUDGET OFF. (Jan. 1986), [https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/doc04b-entire\\_1.pdf](https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/doc04b-entire_1.pdf) [<https://perma.cc/3KSA-D8J3>]; *Earnings Sharing Implementation Plan: Hearing Before the Task Force on Social Security and Women of the Subcomm. on Retirement Income and Employment and the House Select Comm. on Aging*, 98th Cong. 23 (1984); 1979 Advisory Council Report, *supra* note 25, at 97–119; see also H.R. 203, 101st Cong. (1989); S. 1480, 101st Cong. (1989).

252. See, e.g., Howard M. Iams, Gayle L. Reznik & Christopher R. Tamborini, *Earnings Sharing in Social Security: Projected Impacts of Alternative Proposals Using the Mint Model*, 69 SOC. SEC. BULL. 1, 1 (No. 1, 2009); *Earnings Sharing Options for the Social Security System*, *supra* note 251.

253. See, e.g., Melissa M. Favreault & C. Eugene Steuerle, *Social Security Spouse and Survivor Benefits for the Modern Family* (Mar. 2007), <https://www.urban.org/sites/default/files/publication/46231/311436-Social-Security-Spouse-and-Survivor-Benefits-for-the-Modern-Family.PDF> [<https://perma.cc/6K2L-8YXS>]; Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WISC. L. REV. 1, 63–64 (acknowledging that earnings sharing would be superior to current system of spouse and surviving spouse benefits but identifying a number of weaknesses in earnings sharing and proposing a form of earnings sharing that assigns independent value to non-wage work); Burke & McCouch, *supra* note 5, at 1232–37 (analyzing earnings sharing and its limitations); Blumberg, *supra* note 5, at 278–90 (analyzing four different “income-splitting” plans); Martin, *supra* note 14, at 830 (describing earnings sharing as far more promising than caregiver credits).

254. Burke & McCouch, *supra* note 5, at 1232.

255. *Id.* at 1235.

256. *Id.* at 1232.

257. *Id.*

system, including the inequality of treatment between one-earner and two-earner couples, limitations divorced spouses face in collecting spouse and surviving spouse benefits, the wage differential women face in the labor market, and the economic burdens of caregiving that women are more likely to face.<sup>258</sup> Like caregiver credits, earnings sharing would fundamentally restructure Social Security in a way that would address feminist critiques of the system.<sup>259</sup> It would treat the contributions of both spouses with equal respect, whether they work in the paid labor force or contribute unpaid labor in the home.<sup>260</sup>

Nevertheless, earnings sharing is not a panacea<sup>261</sup> and raises its own set of concerns.<sup>262</sup> Undoubtedly, it raises serious transition issues.<sup>263</sup> In addition, it has distributional effects.<sup>264</sup> Inevitably, some beneficiaries, such as divorced women with fewer than ten years of marriage, may receive more benefits, while other beneficiaries, such as widows, may receive fewer benefits.<sup>265</sup> These distributional effects may give rise to the need for political compromise.<sup>266</sup> Moreover, some

---

258. See, e.g., Burke & McCouch, *supra* note 5, at 1232–33 (noting that commentators see earnings sharing as resolving many of the problems in the current Social Security structure and describing those views); Liu, *supra* note 253, at 26 (describing virtues of earnings sharing); Blumberg, *supra* note 5, at 278 (listing benefits of “income-splitting plans”); Martin, *supra* note 14, at 637–38 (listing advantages of earnings sharing); cf. Jonathan Barry Forman, *Making Social Security Work*, 65 OHIO ST. L.J. 145, 176–77 (recommending earnings sharing principally as a means of increasing work incentive).

259. See, e.g., Burke & McCouch, *supra* note 5, at 1232 (analyzing earnings sharing “[m]oreover, earnings sharing would eliminate existing disparities between one-earner and two-earner married couples, so that couples with identical total wages would receive the same benefits”).

260. *Id.*

261. Liu, *supra* note 253, at 24 (stating that “[d]espite its virtues, however, earnings sharing is not a panacea”).

262. *Id.*

263. See, e.g., *Earnings Sharing Options for the Social Security System*, *supra* note 251, at 21–24 (describing four transition options); 1979 Advisory Council Report, *supra* note 25, at 101–02 (suggesting transition plan); Martin, *supra* note 14, at 837–38 n.186 (noting that Fraser-Keys bill provides for a twenty-year transition period).

264. See Iams et al., *supra* note 252, at 1 (discussing distributional impact of earnings sharing).

265. See *id.*; Favreault & Steuerle, *supra* note 253; *Earnings Sharing Options for the Social Security System*, *supra* note 251, at 31–62.

266. See Iams et al., *supra* note 252; Alstott, *supra* note 27, at 2065–66 (noting tradeoffs raised by earnings sharing); Liu, *supra* note 253, at 24 (noting that earnings sharing would involve “politically sensitive distributional effects”); Martin, *supra* note 14, at 838 (describing political compromise of Fraser-Keys bill).

contend that, at a structural level, earnings sharing raises adequacy and equity concerns.<sup>267</sup>

Proponents of earnings sharing recognize that it is not a panacea and have proposed a variety of modified earnings sharing programs to address the concerns described above.<sup>268</sup> Nevertheless, earnings sharing has never gained much political traction.<sup>269</sup> While earnings sharing proposals were quite popular from the late 1970s until about 2000, they are discussed much less frequently now.<sup>270</sup>

## V. Conclusion

When derivative benefits were introduced in the Social Security system in 1939, they were explicitly discriminatory.<sup>271</sup> The derivative benefit rules applied differently to women than to men.<sup>272</sup> Over the years, the facial discriminatory aspects of derivative benefits were eliminated so that the Social Security system now appears facially neutral.<sup>273</sup> Yet, Social Security's fundamental structure discriminates against women because it prefers those who successfully fulfill the traditional male breadwinner role to those who fulfill the traditional female caregiving role. This structural discrimination results in disparate impact with women receiving lower benefits than men.

Over the years, commentators have proposed four different types of reform to improve Social Security's treatment of the women.<sup>274</sup> Two

---

267. See, e.g., Liu, *supra* note 253, at 27–34 (discussing adequacy and equity concerns raised by earnings sharing); SUBCOMMITTEE ON SOCIAL SECURITY OF THE COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 99TH CONG., REPORT ON EARNINGS SHARING IMPLEMENTATION STUDY 40–41 (identifying adequacy concerns).

268. Liu, *supra* note 253, at 24.

269. See, e.g., Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, 99TH CONG., REPORT ON EARNINGS SHARING IMPLEMENTATION STUDY 40–41 (1985), <https://babel.hathitrust.org/cgi/pt?id=uc1.31822017609702&seq=75> [<https://perma.cc/C4ZR-W2CJ>] (Political subcommittee analyzing earnings sharing).

270. In fact, a GAO report identifying a large number of potential reforms includes caregiver credits but does not include earnings sharing. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 112; but see, Caroline Lewis Bruckner & Jonathan Barry Forman, *Women, Retirement, and the Growing Gig Economy*, 38 GA. ST. U. L. REV. 259, 386 (2022) (listing earnings sharing as a way to increase Social Security benefits for women).

271. See discussion *supra* Part II.

272. See discussion *supra* Part II.

273. See discussion *supra* Part II.

274. See *supra* Part IV.

of the proposed reforms—reforming the surviving spouse benefits and reforming the special minimum benefit—would enhance Social Security benefits for some women but would do nothing to alter its structural bias against women.<sup>275</sup> Two of the proposed reforms—recognizing caregiving and earnings sharing—would address the system’s bias against unpaid caregiving work.<sup>276</sup> Neither of those proposals, however, has received much political traction.<sup>277</sup> At this point, it appears that Social Security’s structural bias against women is unlikely to change anytime soon.

---

275. *See supra* Part IV.

276. *See supra* Part IV.

277. *See supra* text accompanying note 270.

