

THE SOCIAL SECURITY EARNINGS TEST: TIME FOR FUNDAMENTAL CHANGE TO AID THE ELDERLY

I INTRODUCTION

One out of every eight Americans receives a substantial part of his income from the Social Security Act's Old-Age and Survivors Insurance (OASI) program.¹ In fact, OASI payments are the primary source of income for most elderly citizens.² Since the proportion of the population dependent on OASI is growing rapidly,³ it is important that the eligibility requirements for OASI benefits be equitable and related to well-defined goals.

1. Social Security Act, 42 U.S.C. §§ 401 *et seq.* (1970 & Supp. IV, 1974), *formerly* ch. 531, §§ 201 *et seq.*, 49 Stat. 622 (1935). This program is commonly known as Social Security or OASD-HI. The earnings test which is the subject of this Note is found at 42 U.S.C. §§ 403(b), (f) (1970 & Supp. IV, 1974), and applies only to the Old-Age and Survivors Insurance part of OASD-HI. Congress enacted the program of Old-Age Benefits in 1935 and added Survivors Insurance in 1939. The term old-age insurance will be used in discussing the program prior to 1939, while OASI will be used thereafter.

As of January 1, 1975 the United States' population was estimated to be 212,796,000; 27,036,000, or 12.8 percent, received OASI benefits. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 5, Table 2 (1975); 38 SOCIAL SECURITY BULL., June, 1975, at 48, Table M3, cols. 2, 7. Of those 27,036,000 OASI beneficiaries, 19,767,000 received old-age benefits. *Id.* Because three-quarters of the OASI recipients are elderly people, this Note will emphasize the earnings test as it applies to the elderly; the test's application to survivors is analogous.

Social Security represents over half of the income for two-thirds of aged single beneficiaries and one-half of the elderly couple beneficiaries. And it accounts for almost the entire source of support—90 percent or more of total income—for 30 percent of single elderly beneficiaries and 15 percent of older couples.

SENATE SPECIAL COMM. ON AGING, 93D CONG., 2D SESS., FUTURE DIRECTIONS IN SOCIAL SECURITY UNRESOLVED ISSUES: AN INTERIM STAFF REPORT III (Comm. Print 1975) [hereinafter INTERIM SENATE REPORT ON AGING]; *accord*, Bixby, *Income of People Aged 65 and Older: An Overview from 1968 Survey of the Aged*, 33 SOCIAL SECURITY BULL., April, 1970, at 3.

2. INTERIM SENATE REPORT ON AGING, *supra* note 1, at III; *see* Bixby, *supra* note 1, at 23-24.

3.

	OASI Beneficiaries (thousands)			U.S. Population (thousands)	Beneficiaries as a Per Cent of Population
	Retirement	Survivors	Total		
January 1, 1975	19767	7269	27036	212796	12.8
1970	17096	6468	23564	204878	11.5
1965	14175	4953	19128	194303	9.3
1960	10599	3558	14157	180671	7.8

38 SOCIAL SECURITY BULL., June, 1975, at 48, Table M3, cols. 2, 7 (OASI data); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 5, Table 2 (1975) (U.S. population data).

The amount of OASI benefits eligible individuals receive has always been determined by an "earnings" or "retirement" test.⁴ This earnings test currently specifies that only those individuals who earn \$2760 or less per year may receive full benefits.⁵ Earned income above that level reduces benefits proportionately.⁶ The earnings test does not apply to individuals aged 72 or older.⁷ This creates an unfortunate situation: people aged 72 or older receive benefits regardless of their earnings or other income; younger people receive benefits which are reduced as their earned income increases, but which are unaffected by other income. As a result, some people receive benefits they do not need, while others who need assistance receive reduced benefits. It is toward a resolution of this incongruity that this Note is addressed.

This Note will explain the workings of the present earnings test, and examine the considerations that led to the inclusion of an earnings test in the original Social Security Act. It will then trace the test's development to the present, analyze the effects of the current test and consider proposals for reform.

II THE PRESENT EARNINGS TEST

The earnings test applies to both old-age insurance and survivors insurance. A fully insured individual may apply for and receive old-age insurance benefits any time after reaching age 62.⁸ At age 62 or thereafter the spouse of an insured individual may receive the greater of: (1) spouse's benefits based upon the insured's benefits while the insured is alive and receiving benefits, or (2) benefits based upon the spouse's own old-age insurance coverage.⁹ Furthermore, children, dependent grandchildren and dependent parents can receive

4. Social Security Act, ch. 531, § 202(d), 49 Stat. 623 (1935), as amended, 42 U.S.C. §§ 403(b), (f) (1970 & Supp. IV, 1974). For a definition of eligibility, see note 8 and text accompanying notes 8-15 *infra*.

5. 42 U.S.C. § 403(f)(1) (Supp. IV, 1974); 1 UNEMPL. INS. REP. ¶ 12,459, at 1264 (1975).

6. 42 U.S.C. § 403(f)(3) (Supp. IV, 1974).

7. *Id.* §§ 403(f)(1)(B), (f)(3), (j) (1970 & Supp. IV, 1974).

8. *Id.* § 402(a). Section 414(a) defines fully insured individual as follows:

The term "fully insured individual" means any individual who had not less than—

(1) one quarter of coverage (whenever acquired) for each calendar year elapsing after 1950 (or, if later, the year in which he attained age 21) and before the year in which he died or (if earlier) the year in which he attained 62, except that in no case shall an individual be a fully insured individual unless he has at least 6 quarters of coverage; or

(2) 40 quarters of coverage; or

(3) in the case of an individual who died before 1951, 6 quarters of coverage; not counting as an elapsed year for purposes of paragraph (1) any year any part of which was included in a period of disability (as defined in section 416(i) of this title).

Id. § 414(a) (Supp. IV, 1974). Quarter of coverage generally means a calendar quarter in which the individual has been paid \$50 or more in wages or has been credited with \$100 or more self-employment income. *Id.* § 413(a)(2). The complete definition is set out in section 413.

9. *Id.* §§ 402(a)-(c), (k)(2)(B). Sections 416(b), (d) and (f) define spouse for OASI purposes. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), indicates that sex-differentiated prerequisites for OASI benefits are subject to constitutional attack.

benefits based on the insured's benefits.¹⁰ However, there is a limit on the total amount of benefits that may be received on account of any one beneficiary.¹¹ Survivors insurance benefits are payable to four categories of people who are related to a fully insured decedent: (1) widows and widowers aged 60 and older;¹² (2) dependent parents aged 62 and older;¹³ (3) unmarried dependent children under the age of 18, or 22 if they are still students;¹⁴ and (4) unmarried dependent children who were disabled before attaining 22 years of age.¹⁵

For OASI recipients under the age of 72, operation of the earnings test reduces benefits at the rate of one dollar for every two dollars of gross wages and net earnings from self-employment in excess of the annual exempt amount.¹⁶ Under the test, benefits are reduced by excess earnings in those months in which the beneficiary earned wages in excess of \$230 (one-twelfth of the annual exempt amount), or in which he rendered substantial services in self-employment.¹⁷ For example, if an individual earns \$3530 in 1976, distributed as follows: \$1000 in January, \$230 in each of the other eleven months, and does not render substantial services in self-employment during the year, that individual's benefits will be reduced only for the month of January. Earnings in the month in which an individual reaches age 72 and in all subsequent months are not included in determining if the individual has excess earnings; otherwise, all earnings for the whole year are included in this calculation.¹⁸ Excess earnings of the insured also reduce the benefits received by family members on account of their relationship to the insured.¹⁹ Excess earnings of a dependent reduce his benefits, but not those of the insured or other depen-

10. 42 U.S.C. §§ 402(d), (h) (1970 & Supp. IV, 1974). Section 416(e) defines children eligible for OASI benefits and includes grandchildren among others. Section 402(h)(3) defines parents for OASI purposes.

11. *Id.* § 403(a); 20 C.F.R. §§ 404.403(a), .404 (1975). *See also id.* § 404.405.

12. 42 U.S.C. §§ 402(e), (f) (1970 & Supp. IV, 1974). Sections 416(c) and (d)(2) define widows eligible for OASI benefits. Eligible widowers are defined in section 416(g). *But see Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), regarding the constitutionality of sex-differentiated prerequisites for benefits.

13. 42 U.S.C. § 402(h) (1970).

14. *Id.* § 402(d)(1)(B)(i) (Supp. IV, 1974).

15. *Id.* § 402(d)(1)(B)(ii).

16. *Id.* §§ 403(f)(1)(B), (f)(3), (j) (1970 & Supp. IV, 1974). 20 C.F.R. § 404.430 (1975), provides illustrations of the operation of this section when the annual exempt amount was \$2400. The statute defines earnings as follows:

An individual's earnings for a taxable year shall be (i) the sum of wages for services rendered in such year and his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year.

42 U.S.C. § 403(f)(5)(A) (1970). Section 411 defines net earnings from self-employment, but is modified by section 403(f)(5)(B) for purposes of the earnings test. For 1976 the annual exempt amount is \$2760. 1 UNEMPL. INS. REP. ¶ 12,459, at 1264 (1975).

17. 42 U.S.C. § 403(f)(1) (Supp. IV, 1974); 1 UNEMPL. INS. REP. ¶ 12,459, at 1264 (1975). "In general, the substantial services test is one of whether, in view of all the services rendered by the individual and the surrounding circumstances, the individual can reasonably be considered retired in the month in question." 20 C.F.R. § 404.446 (1975). For a detailed definition, see *id.* §§ 404.446-447. The Secretary has express authority to define "substantial services" by regulation. 42 U.S.C. § 403(f)(4) (1970).

18. 42 U.S.C. §§ 403(f)(3), (j) (1970 & Supp. IV, 1974).

19. 20 C.F.R. § 404.434(b)(1) (1975).

dents.²⁰ The Government may recoup benefit overpayments in later years regardless of the individual's earnings in those years.²¹ The insured has the burden of establishing that his earnings are within the earnings test limitations.²²

III ORIGIN OF THE EARNINGS TEST

A. *Enactment of the Social Security Act*

The present earnings test is the product of legislative evolution which began in 1934. With the nation's unemployment rate around twenty percent,²³ the federal government realized the need for a national approach to the economic and social consequences of unemployment. The traditional reliance upon states, localities and the private retirement system to assist the needy was inadequate: only the federal government had the financial resources to assist the needy adequately.²⁴ Yet, even the federal government, with its budget of only \$7.6 billion for 1935, could not carry too great a burden.²⁵

President Franklin Roosevelt delegated responsibility for developing the programs and legislation necessary to deal with these problems to a group of nationally prominent citizens who formed the Committee on Economic Security.²⁶ The Committee drafted the Social Security Act, which Congress passed with minor modification and which President Roosevelt signed into law on August 14, 1935.²⁷ This Act included provisions for aid to state old-age assistance plans,²⁸ federal old-age insurance,²⁹ aid to dependent children,³⁰ public health services,³¹ and grants to states for maternal and child welfare,³² unemployment compensation,³³ and aid to the blind.³⁴

Problems facing the aged were addressed in the old-age assistance and old-age insurance titles of the Act. Congress intended that old-age assistance

20. *Id.* § 404.434(b)(2).

21. 42 U.S.C. § 404(a)(1) (1970); *see also id.* § 404(b). This procedure has been attacked for failure to provide a pre-recoupment hearing. *See* text accompanying notes 126-28 *infra*.

22. *Id.* § 403(f)(4) (1970 & Supp. IV, 1974).

23. Of 52.9 million civilians in the labor force in 1935, 10.6 million, or 20.1 percent were unemployed. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 175, Table 209 (1950).

24. H.R. REP. NO. 615, 74th Cong., 1st Sess. 4 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 4-6 (1935). The Senate and House reports estimated the cost of old-age assistance would be \$2 billion a year by 1960. *Id.* at 7; H.R. REP. NO. 615, *supra* at 5. The Committee on Economic Security seemed to indicate a potential cost of \$2 billion a year starting in 1935. *See* H.R. DOC. NO. 81, 74th Cong., 1st Sess. 21 (1935).

25. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 168, Table 177 (1940); *see* note 24 *supra*.

26. For an authoritative account of the work of this Committee, *see* E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962). The report of that Committee is set out in H.R. DOC. NO. 81, *supra* note 24.

27. Social Security Act, ch. 531, 49 Stat. 620 (1935). For a discussion of Congressional modifications, *see* WITTE, *supra* note 26, at 130-97.

28. Social Security Act, ch. 531, §§ 1-6, 49 Stat. 620 (1935).

29. *Id.* §§ 201-10, 49 Stat. 622.

30. *Id.* §§ 401-06, 49 Stat. 627.

31. *Id.* §§ 601-03, 49 Stat. 634.

32. *Id.* §§ 501-41, 49 Stat. 629.

33. *Id.* §§ 301-03, 49 Stat. 626.

34. *Id.* §§ 1001-06, 49 Stat. 645.

provide states with additional financial means to assist those elderly already in need,³⁵ while old-age insurance would compel workers themselves to provide for their later years, thereby reducing the number of elderly who would be dependent on future government assistance.³⁶ Old-age insurance was to be financed by payroll taxes levied upon employees and their employers. In general, benefits were to be paid in an amount based upon the past level of earnings taxed for Social Security purposes.³⁷ It was hoped that this future-oriented program would ease the tremendous financial burden that the old-age assistance program might place on government revenues and also help preserve the self-respect of those who might otherwise be forced to depend upon government handouts.³⁸ With these objectives in mind, Congress made old-age insurance compulsory and contributory.³⁹ However, the program's impact was limited because only about half of the labor force was covered by its provisions.⁴⁰

B. Inclusion of the Earnings Test

1. Legislative History

One of the conditions the Committee on Economic Security imposed on the payment of old-age insurance benefits was retirement from "gainful employment."⁴¹ The reasons for such a condition were not clearly articulated. However, the Committee gave little more than cursory consideration to the alternatives: all of the program's actuarial calculations were based on the assumption that an earnings test condition would be a part of the old-age insurance program.⁴²

The House Committee on Ways and Means objected to the inclusion of the earnings test because of the ill-defined concept of retirement in the report of the Committee on Economic Security.⁴³ When members of the House Committee could not agree on a satisfactory definition of retirement, they deleted the provision entirely. Subsequently the full House approved the old-age insurance program without the earnings test.⁴⁴

The old-age insurance program passed by the Senate Committee on Finance included what eventually became the earnings test—a provision which disqualified those who "received wages with respect to regular employment."⁴⁵ The full Senate adopted its Committee's version. The House, whose objection

35. H.R. REP. NO. 615, *supra* note 24, at 1, 5; S. REP. NO. 628 *supra* note 24, at 4-6.

36. H.R. REP. NO. 615, *supra* note 24, at 5-6; S. REP. NO. 628, *supra* note 24, at 7, 9.

37. Sections 210(a) and 811(a) of the Social Security Act provided that only the first \$3000 of a covered individual's earnings were earnings for old-age insurance purposes. Up to that level of earnings, benefits increased with increased earnings. Those with earnings in excess of \$3000 were not taxed on that excess and received benefits as if they had been earning \$3000 per year. Social Security Act, ch. 531, §§ 210(a), 801, 804, 811(a), 49 Stat. 625, 636, 637, 639 (1935).

38. H.R. REP. NO. 615, *supra* note 24, at 5-6; S. REP. NO. 628, *supra* note 24, at 7, 9.

39. H.R. DOC. NO. 81, *supra* note 24, at vi, 24.

40. S. REP. NO. 628, *supra* note 24, at 9.

41. H.R. DOC. NO. 81, *supra* note 24, at 25.

42. WITTE, *supra* note 26, at 159.

43. *Id.*

44. H.R. REP. NO. 615, *supra* note 24, at 19-20.

45. S. REP. NO. 628, *supra* note 24, at 10, 31. This later became the earnings test. Social Security Act, ch. 531, § 202(d), 49 Stat. 623 (1935).

was apparently definitional and not conceptual, agreed to the Senate's version after its Conference Committee was told that the earnings test was crucial to the old-age insurance program's only set of actuarial calculations.⁴⁶ President Roosevelt signed this version into law.⁴⁷

2. *Purposes of the Earnings Test*

The inclusion of the earnings test in the old-age insurance program meant that the program would not operate as an annuity for those individuals who reached age 65. The Committee on Economic Security, preoccupied with the country's pressing unemployment situation, never seriously considered paying old-age insurance benefits to the employed.⁴⁸ Rather they intended the program to be a form of unemployment insurance. The Senate Committee voiced similar concern, noting that individuals who continued to be employed would not need benefits.⁴⁹ However, the earnings test did not deny benefits to all individuals who continued to be employed: beneficiaries could receive earnings from occupations not considered "employment" for old-age insurance purposes without losing benefits.⁵⁰ This suggests that the concern with unemployment had a second dimension, namely, the desire to encourage older workers to leave occupations covered by old-age insurance, including most business and industrial jobs, thereby creating opportunities for the younger generation.⁵¹ Indeed, this was stated as a reason for the Senate's restoration of the earnings test to the program.⁵²

Cost considerations and the desire to avoid a means test in distributing benefits were of secondary importance in light of the concern with unemployment. Greater cost savings could have been achieved by including all of an individual's earnings in determining whether he had disqualifying earnings. But this was not necessary to encourage older workers to free jobs in business and industry for younger people. Thus, only when the earnings test is assessed in terms of the unemployment problems of the era is its inclusion in the old-age insurance program properly understood.

IV

EVOLUTION OF THE EARNINGS TEST

A. *1939 Amendments*

Originally, Social Security benefits were not payable until January, 1942, even though tax collection for that purpose began in January, 1937.⁵³ In 1939,

46. WITTE, *supra* note 26, at 160.

47. Social Security Act, ch. 531, § 202(d), 49 Stat. 623 (1935).

48. See WITTE, *supra* note 26, at 160.

49. S. REP. NO. 628, *supra* note 24, at 10.

50. Under section 210 only certain occupations were covered by old-age insurance. Wages earned in these jobs alone were considered "wages" for old-age insurance purposes. Social Security Act, ch. 531, § 210, 49 Stat. 625 (1935).

51. E. BURNS, *THE AMERICAN SOCIAL SECURITY SYSTEM* 87 (1949); P. DOUGLAS, *SOCIAL SECURITY IN THE UNITED STATES* 111 (1936); Williamson, *Cost Factors in Old-Age Insurance*, 1 *SOCIAL SECURITY BULL.*, July, 1938, at 3, 10. Section 210(b) defined employment by exclusion. Social Security Act, ch. 531, § 210(b), 49 Stat. 625 (1935).

52. 79 CONG. REC. 9268 (1935).

53. Social Security Act, ch. 531, §§ 202(a), 801, 804, 49 Stat. 623, 636, 637 (1935).

Congress responded to the continuing economic problems by extending Social Security coverage to survivors of insured individuals and by advancing the initial payment date of OASI benefits of January, 1940.⁵⁴ However, the specific meaning of the phrase “wages with respect to regular employment” had not been defined. With benefits to be paid shortly, prompt clarification of the earnings test was needed.

Congress defined “wages with respect to regular employment” to mean monthly earnings of \$15 or more.⁵⁵ Otherwise eligible individuals earning less than \$15 per month would be allowed to receive OASI benefits since that level of earnings indicated that the individuals were not full-time employees.⁵⁶ The earnings test was an all-or-nothing provision: an individual earning \$14.99 in a month for OASI purposes would receive full benefits for that month; another individual earning \$15 in the same month would receive no OASI benefits. Since earnings had been defined as including only those wages earned in occupations covered by the Social Security Act,⁵⁷ earnings of any amount in other occupations, as well as unearned income, would not disqualify a beneficiary.

B. 1950 Amendments

1. Increased Exempt Amount of Earnings

As the nation recovered from the depression of the 1930’s, the monthly exempt amount of \$14.99 became unrealistically low. Due to the rising level of wages, many individuals with earnings from part-time employment lost OASI benefits under the earnings test.⁵⁸ Nevertheless, there was general recognition of the need to have some employment to supplement OASI benefits.⁵⁹ In 1950 Congress increased the monthly exempt amount to \$50.⁶⁰ Earnings were still defined to include only earnings from occupations covered by OASI.⁶¹ However, since the 1950 Amendments also expanded OASI coverage to include many self-employed individuals,⁶² the opportunity to have earned income that was not included in earnings for OASI purposes was substantially reduced. The exempt amount remained an all-or-nothing limitation, with earnings exceeding

54. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1362 (amending §§ 202(a)-(f)); H.R. REP. No. 728, 76th Cong., 1st Sess. 6-7, 11 (1939); S. REP. No. 734, 76th Cong., 1st Sess. 11 (1939).

55. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1362 (amending §§ 203(d), (e)).

56. Myers, *Old-Age and Survivors Insurance: Retirement Test Experience*, 16 SOCIAL SECURITY BULL., Nov., 1953, at 14. For the present definition of eligibility, see text accompanying notes 8-15 *supra*.

57. See note 50 *supra*.

58. According to the United States Census Bureau the average weekly wages of production workers in manufacturing were:

1948	\$54.14
1943	\$43.14
1939	\$23.86

U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 203, Table 240 (1950).

59. H.R. REP. No. 1300, 81st Cong., 1st Sess. 1-2 (1949); S. REP. No. 1669, 81st Cong., 2d Sess. 1 (1950).

60. Social Security Act Amendments of 1950, ch. 809, § 103(a), 64 Stat. 489.

61. See *id.* § 104(a), 64 Stat. 492.

62. See text accompanying notes 63-64 *infra*.

\$50 per month disqualifying an otherwise eligible individual regardless of the amount of the excess.

2. *Expanded Coverage and Elimination of the Earnings Test for Those Aged 75 and Older*

It was also apparent that the OASI program was not keeping enough of the elderly from becoming dependent on public assistance.⁶³ Congress responded to this problem by extending OASI coverage to most self-employed individuals.⁶⁴ This extension was accompanied by an amendment which eliminated the earnings test for those aged 75 and older.⁶⁵ Congress recognized that a greater proportion of self-employed individuals worked beyond age 65 than did regular employees.⁶⁶ If these individuals were to be taxed, it was important to assure that they would eventually receive benefits. Elimination of the earnings test for those aged 75 and older made OASI more acceptable for the self-employed. This change also represented a compromise with those who sought total elimination of the test.⁶⁷ While the cost of total elimination would have been substantial, the cost of eliminating the test for those aged 75 and older was modest and more than offset by the reduction in dependency on government assistance that would accompany the extension of coverage to the large category of self-employed persons.

The earnings test continued to apply to beneficiaries under age 75. However, since the monthly exempt amount was an impractical measure of full-time employment for self-employed individuals, the extension of OASI coverage to the self-employed necessitated a new distinction between part-time and full-time employment. The 1950 Amendments provided that the insured could have net annual earnings from self-employment up to \$600 and still receive full OASI benefits. For each \$50 increment in net earnings above \$600 one month's benefits were lost.⁶⁸ This switch to an annual exempt amount for the self-employed delayed the determination of the correct amount of benefits paid. To avoid this delay, the earnings test continued to apply to regular employees on a monthly basis,⁶⁹ although this caused the earnings test to affect self-employed workers and regular employees differently. When a self-employed worker had net annual earnings of \$600, no benefits would be withheld, regardless of the actual distribution of that income. However, when regular employees had gross annual earnings of \$600, payment of benefits depended upon the actual monthly distribution of earnings; as many as eleven months' benefits could be lost. A self-employed individual with net annual earnings of \$610 would lose one month's

63. H.R. REP. NO. 1300, *supra* note 59, at 1-2; S. REP. NO. 1669, *supra* note 59, at 1.

64. Compare Social Security Act Amendments of 1950, ch. 809, § 104(a), 64 Stat. 492 (*amending* § 210) with Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1362 (*amending* § 209(b)). See H.R. REP. NO. 1300, *supra* note 59, at 5-6; S. REP. NO. 1669, *supra* note 59, at 5-6.

65. Social Security Act Amendments of 1950, ch. 809, § 103(a), 64 Stat. 489 (*amending* §§ 203(b)(1), (b)(2), (j)).

66. H.R. REP. NO. 1300, *supra* note 59, at 29; S. REP. NO. 1669, *supra* note 59, at 30.

67. See H.R. REP. NO. 1300, *supra* note 59, at 24; S. REP. NO. 1669, *supra* note 59, at 29; Myers, *Basis and Background of the Retirement Test*, 17 SOCIAL SECURITY BULL., March, 1954, at 14, 15.

68. Social Security Act Amendments of 1950, ch. 809, § 103(a), 64 Stat. 489.

69. See H.R. REP. NO. 1300, *supra* note 59, at 24-25; S. REP. NO. 1669, *supra* note 59, at 30-31; *Old-Age and Survivors Insurance: A Report on the Retirement Test*, 23 SOCIAL SECURITY BULL., Oct., 1960, at 4, 5 [*hereinafter Retirement Test Report*].

benefits. However, a regular employee with gross annual earnings of \$610 distributed equally throughout the year, would lose all of his benefits for that year.

Another anomaly created by the 1950 Amendments was that earnings from self-employment were treated independently of earnings from other employment.⁷⁰ A beneficiary with earnings exceeding the exempt amount might still collect full OASI benefits depending upon the distribution of earnings between the two types of employment.

C. 1954 Amendments

After increasing the exempt amount in 1952 to \$75 per month for regular employees and \$900 per year with \$75 increments for the self-employed,⁷¹ Congress substantially amended the earnings test in 1954. One of the problems which Congress examined was that different tests applied to the two groups of workers.⁷² The undesirability of this unequal treatment seemed to outweigh the monthly test's advantage of flexibility.⁷³ Therefore, the 1954 Amendments provided an annual earnings test for all beneficiaries. Full OASI benefits would be paid to those whose annual earnings did not exceed \$1200.⁷⁴ If earnings exceeded \$1200, beneficiaries would lose one month's benefits for each increment of \$80.⁷⁵ This liberalization of the earnings test was also a response to concern over the disincentive to work which occurred when a person's earnings approached the previous all-or-nothing ceiling.⁷⁶ Under the amended earnings test it was possible to exceed the exempt amount every month, but still not lose all OASI benefits.

Excess earnings reduced benefits in months in which a beneficiary earned in excess of \$80 from regular employment, or rendered substantial services in self-employment.⁷⁷ Hence, any beneficiary with annual earnings of \$2000 concentrated in one month would still receive eleven months of OASI benefits in that year. The beneficiary had the burden of establishing that he had not rendered substantial services and that his monthly earnings were \$80 or less.⁷⁸

The 1954 Amendments also changed the definition of earnings to include all earned income.⁷⁹ It was no longer possible to be "retired" for earnings test purposes and still be earning income in excess of the exempt amount from

70. Social Security Act Amendments of 1950, ch. 809, § 103(a), 64 Stat. 489, refers to the excess of wages "or" net earnings from self-employment. (emphasis added).

71. Social Security Act Amendments of 1952, ch. 945, § 4, 66 Stat. 773.

72. S. REP. NO. 1987, 83d Cong., 2d Sess. 18-19 (1954); H.R. REP. NO. 1698, 83d Cong., 2d Sess. 20-21 (1954).

73. See *Retirement Test Report*, *supra* note 69, at 5.

74. Social Security Amendments of 1954, ch. 1206, § 103(d)(2), 68 Stat. 1073. All earnings were to be included in the calculation of annual earnings. See text accompanying note 79 *infra*.

75. Social Security Amendments of 1954, ch. 1206, § 103(d)(2), 68 Stat. 1073.

76. See *Hearings on Social Security Amendments of 1954 (H.R. 9366) Before the Senate Comm. on Finance*, 83d Cong., 2d Sess. 204-07 (1954) [hereinafter *Senate Hearings of 1954*].

77. Section 103(d)(2) of the Social Security Amendments of 1954, ch. 1206, 68 Stat. 1073, provided in part:

Notwithstanding the preceding provisions of this paragraph, no part of the [beneficiary's excess earnings] shall be charged to any month . . . (D) in which such individual did not engage in self-employment and did not render services for wages . . . of more than \$80.

Id. (emphasis added). The concept of substantial services is explained in note 17 *supra*.

78. *Id.* § 103(d)(3), 68 Stat. 1074.

79. *Id.* § 103(d)(4).

employment not covered by OASI. This occurrence had become less common as the coverage of OASI had expanded and it was no longer considered administratively difficult to include all of a beneficiary's earnings.⁸⁰ A further refinement of the test closed up the double exemption for an individual who was both regularly employed and self-employed.⁸¹ Together, these two amendments required the insured to limit his total annual earnings to \$1200 in order to receive full OASI benefits.

The same year, Congress lowered the age at which the earnings test would no longer apply from 75 to 72.⁸² This change reflected continued discontent with the test as a whole.⁸³ Some critics of the test had advocated removing entirely the disincentive to work for those aged 65 and older.⁸⁴ Others were concerned that total elimination of the test would be very costly.⁸⁵ The result was a compromise in which the test was eliminated for those aged 72 to 74.

D. 1960 Amendments

The earnings test as amended in 1954 was still considered unsatisfactory, particularly in the way the incremental reduction of benefits actually functioned.⁸⁶ For example, an insured individual who worked all twelve months and earned \$1200 would receive full OASI benefits. Had he earned between one cent and eighty dollars more, one month's benefits would be lost. Thus it was possible to have a lower total income as a result of higher earnings. Moreover, the additional earnings were subject to federal and state income taxes and the Social Security tax, while OASI benefits were tax-free.⁸⁷

This disincentive to work created by the earnings test was addressed by Congress in 1960. Annual earnings between \$1200 and \$1500 were to reduce OASI benefits at the rate of one dollar for each two dollars of earnings. Every one dollar of earnings in excess of \$1500 reduced benefits by one dollar.⁸⁸ Under this test some incentive to work remained at the \$1200 to \$1500 earnings bracket. However, the dollar for dollar reduction above that level was a strong disincentive to a beneficiary's earning more than \$1500, especially since those earnings would also be taxable. Disposable income would therefore actually decline for those who earned slightly more than \$1500. The 1960 Amendments failed to resolve this basic inequity that had been present from the program's inception.

80. See H.R. REP. NO. 1698, *supra* note 72, at 21. In 1955, of 62.8 million workers, 53.1 million were actually covered by OASI. Another 3.5 million had an option to be covered by OASI but had not exercised it. SOCIAL SECURITY BULL. ANNUAL STATISTICAL SUPP., 1955, at 7, Table 2.

81. See note 77 *supra*.

82. Social Security Amendments of 1954, ch. 1206, §§ 103(a), (b), (d)(2), 68 Stat. 1073.

83. This discontent was strong enough to prompt the President to urge liberalization of the test. Myers, *supra* note 67, at 14.

84. *Senate Hearings of 1954*, *supra* note 76, at 161-62.

85. *Id.* at 159-61.

86. See Knute, *Old-Age and Survivors Insurance: Operation of the Annual Retirement Test*, 19 SOCIAL SECURITY BULL., March, 1956, at 6; tenBroek & Wilson, *The New Look in Social Security—Utopia or Myopia?*, 6 HASTINGS L.J. 34 (1954). Cf. S. REP. NO. 1856, 86th Cong., 2d Sess. 18 (1960).

87. I.T. 3447, 1941-1 CUM. BULL. 191, *superseded by* Rev. Rul. 70-217, 1970-1 CUM. BULL. 12.

88. Social Security Amendments of 1960, Pub. L. No. 86-778, § 211(e), 74 Stat. 955.

E. Increased Exempt Amounts and More Gradual Reduction of Benefits

Recognition of the harshness of the earnings test has resulted in amendments since 1960 which have increased the annual exempt amount and expanded the bracket of gradual benefit loss.⁸⁹ The bracket in which benefits were reduced by one dollar for every two dollars in earnings was expanded to include earnings between \$1200 and \$1700 per year in 1961. The dollar for dollar reduction continued in effect for earnings above \$1700.⁹⁰ The earnings test was amended in 1965,⁹¹ and again in 1968,⁹² so that in 1968 the annual exempt amount was \$1680. There was a reduction of one dollar in benefits for every two dollars in earnings up to \$2880, and a one for one reduction thereafter.

Dissatisfaction with the dollar for dollar reduction at any level continued, however. In 1972 Congress eliminated the one for one formula from the earnings test by providing that all earnings exceeding the annual exempt amount reduced benefits at a two for one rate.⁹³ The same amendments also raised the annual exempt amount to \$2100 and provided for an automatic adjustment of the exempt amount to reflect increases in the general wage level.⁹⁴ This adjusting clause was designed to avoid the past problem of the exempt amounts becoming more restrictive as a result of Congressional inaction and an increasing wage level.⁹⁵ Congress still retained the right to make upward adjustments in the exempt amount,⁹⁶ and it exercised that power in 1973 by raising the 1974 exempt amount to \$2400.⁹⁷ At the beginning of 1975 and 1976, the annual exempt amount was increased by the automatic adjustment provision, first to \$2520, and then to \$2760.⁹⁸

V

PURPOSES AND EFFECTS OF THE PRESENT EARNINGS TEST

The present earnings test is intended to serve many of the same functions that led to its inclusion in the Social Security Act of 1935,⁹⁹ though cost considerations are presently of primary importance. These functions include mea-

89. See S. REP. NO. 1856, *supra* note 86, at 18.

90. Social Security Amendments of 1961, Pub. L. No. 87-64, § 108, 74 Stat. 140. Congress also provided that men could apply for reduced OASI benefits at age 62; in 1956 it had allowed women to apply for benefits at age 62. 42 U.S.C. § 402(a)(2) (1970), *originally enacted by Social Security Amendments of 1961*, Pub. L. No. 87-64, § 102(a), 75 Stat. 131; Social Security Amendments of 1956, ch. 836, § 102(a), 70 Stat. 809.

91. Social Security Amendments of 1965, Pub. L. No. 89-97, § 310, 79 Stat. 380.

92. Social Security Amendments of 1967, Pub. L. No. 90-248, § 107, 81 Stat. 834.

93. 42 U.S.C. § 403(f)(3) (Supp. IV, 1974).

94. Social Security Amendments of 1972, Pub. L. No. 92-603, § 105(a), 86 Stat. 1341; 42 U.S.C. §§ 403(f)(8)(A), (B) (Supp. IV, 1974).

95. H.R. REP. NO. 231, 92d Cong., 1st Sess. 41 (1971). See Ball, *Social Security Amendments of 1972: Summary and Legislative History*, 36 SOCIAL SECURITY BULL., March, 1973, at 3.

96. 42 U.S.C. § 403(f)(8)(C) (Supp. IV, 1974).

97. Renegotiation Amendments of 1973, Pub. L. No. 93-66, § 202, 87 Stat. 153.

98. 40 Fed. Reg. 42863-64 (1975); 1 UNEMPL. INS. REP. ¶ 12459, at 1264 (1975).

99. See text accompanying notes 48-52 *supra*.

surement of need without using a means test, removal of older workers from the labor force and reduction of the cost of OASI. This section will discuss these purposes in light of the current effects of the earnings test.

A. *Measuring Need Without a Means Test*

Despite changed economic conditions, the preoccupation of the 1930's with unemployment problems unduly influences the current operation of OASI. Through the earnings test OASI continues to provide financial support for those who have little or no earned income. A test which protects against unemployment in this contributory program is considered to be more in line with the objectives of OASI than the strict test of individual need traditionally associated with unearned welfare payments.¹⁰⁰ However, the earnings test actually functions as a means test. A majority of the elderly are supported primarily by earnings and OASI benefits.¹⁰¹ A test which measures earnings to reduce OASI benefits therefore approximates a means test for that majority. At the same time, individuals whose income is wholly unearned will receive full OASI benefits regardless of the amount of that income. Thus the earnings test functions as a means test, but has an uneven application.

B. *Removing Older Workers from the Labor Force*

The objective of removing older workers from the labor force was also based upon decisions made during the Depression. This objective is rarely articulated by the Social Security Administration, but the effect has been noted by others,¹⁰² and the concept of retiring the elderly to create jobs for younger workers has advocates today.¹⁰³ Statements that the earnings test protects the wage structure are consistent with this concept.¹⁰⁴ The argument is that if people are allowed to continue working while they are receiving OASI benefits, they will be willing to work for less than the prevailing rate and will thereby undercut the wage structure.¹⁰⁵ To avoid this effect, those receiving benefits must be removed from the labor force.

This objective must be assessed in light of the test's consequences. People between the ages of 62 and 71 with lower levels of earned income who want to continue working are most affected by the earnings test.¹⁰⁶ The availability of OASI benefits will not induce better-paid individuals to retire. But, an indi-

100. 1975 REPS. OF THE ADVISORY COUNCIL ON SOCIAL SECURITY 12, 13 [hereinafter ADVISORY COUNCIL REPORTS]; J. PECHMAN, H. AARON & M. TAUSSIG, SOCIAL SECURITY: PERSPECTIVES FOR REFORM 59 (1968).

101. INTERIM SENATE REPORT ON AGING, *supra* note 1, at III; see Bixby, *supra* note 1, at 10-14; Thompson, *Work Experience and Income of the Population Aged 60 or Older, 1971*, 37 SOCIAL SECURITY BULL., Nov., 1974, at 3, 16.

102. *Hearings on Future Directions in Social Security Before the Senate Special Comm. on Aging*, 93d Cong., 1st Sess. pt. 5 at 393 (1973) [hereinafter *Future Directions*]; MacIntyre, *How U.S. Social Security Fails—What Canada Can Learn*, 46 CANADIAN WELFARE, Nov.-Dec., 1970, at 8, 10; Sander, *The Retirement Test: Its Effect on Older Workers' Earnings*, 31 SOCIAL SECURITY BULL., June, 1968, at 3. Cf. L. GALLOWAY, THE RETIREMENT DECISION: AN EXPLORATORY ESSAY 18-23, 47 (U.S. Dep't of Health, Education & Welfare Research Report No. 9, 1965).

103. E.g., N.Y. Times, Dec. 13, 1974, at 1, col. 3; discussed in S. REP. NO. 250, 94th Cong., 1st Sess. 65-66 (1975). See Jaffe, *The Retirement Dilemma*, 14 IND. GERONTOLOGY, Summer, 1972, at 1, 65.

104. *Senate Hearings of 1954*, *supra* note 76, at 243.

105. *Id.* at 157-58, 243; Myers, *supra* note 67, at 14.

106. See *Future Directions*, *supra* note 102, at 391-92; Jaffe, *supra* note 103, at 56-59.

vidual who earns \$8000 a year will have the last \$5240 of his earnings taxed at a rate of 50 percent by the earnings test, to say nothing of federal, state and Social Security taxes. The alternative of tax-free OASI benefits may be sufficient to induce such a person to retire. The consequences can be more severe for those with less earned income. Furthermore, these people are not likely to have private savings, pension plans and other sources of support.¹⁰⁷ The earnings test forces those with low levels of earnings to choose between working and having little or no additional disposable income, and retiring and subsisting on OASI benefits.¹⁰⁸ Proponents of the earnings test who see it as a means of removing the elderly from the labor force should also consider its effect on third parties who are either dependent on the elderly or represent an important source of support for their elders.¹⁰⁹

At best, the policy of early retirement aids the worker while he is young, but works against him in later years. This policy of postponing one's economic difficulties to a time when he will be less able to bear them¹¹⁰ is inconsistent with OASI's goal of protecting individuals from the hardships of old age. Some of these hardships are being created and compounded by the very program that purports to relieve them.

C. Saving Cost

Since 1935 there has been increased emphasis on cost considerations as a reason for retaining the earnings test.¹¹¹ Proponents of the current test argue that elimination of the earnings test would add an estimated \$6 billion a year to the cost of OASI at a time when payments already exceed revenue.¹¹² This figure should be considered in the context of the total cost of OASI, which exceeded \$64 billion in 1975.¹¹³ Furthermore, it is not entirely clear how the Social Security Administration arrived at the \$6 billion figure. The only cost of eliminating the test would be the additional OASI benefits that would have to be paid. However, because of the earnings test, a number of individuals restrict their earnings to the annual exempt amount,¹¹⁴ while others conceal the true amount of their earnings to avoid losing OASI benefits.¹¹⁵ Elimination of the

107. ADVISORY COUNCIL REPORTS, *supra* note 100, at 30; Bixby, *supra* note 1, at 23-24.

108. ADVISORY COUNCIL REPORTS, *supra* note 100, at 30; Bixby, *supra* note 1, at 22-23.

109. A recent report indicates that 14 percent of the elderly would first look to their children for needed support. 15 IND. GERONTOLOGY, Fall, 1972, at 87-88. See Murray, *Living Arrangements of People Aged 65 and Older: Findings from 1968 Survey of the Aged*, 34 SOCIAL SECURITY BULL., Sept., 1971, at 3, 9.

110. Jaffe, *supra* note 103, at 37-47; see Mueller & Gibson, *Age Differences in Health Care Spending, Fiscal Year 1974*, 38 SOCIAL SECURITY BULL., June, 1975, at 3.

111. See, e.g., H.R. Doc. No. 40, 91st Cong., 1st Sess., IV, v, 25 (1969).

112. N.Y. Times, Mar. 5, 1976, at 20, col. 3; *id.* Mar. 6, 1976, at 50, col. 1.

113. See ADVISORY COUNCIL REPORTS, *supra* note 100, at 58, 143.

114. See GALLAWAY, *supra* note 102; Sander, *supra* note 102; H.R. Doc. No. 40, *supra* note 111, at 8.

115. E.g., Skalet v. Finch, 431 F.2d 452 (6th Cir. 1970) (pawnbroker's transfer of business to wife and son not valid and bona fide); Tyndall v. Gardner, 376 F.2d 746 (4th Cir. 1967) (farmer's contention that he left operation of farm to two sons dismissed); Herbst v. Finch, 342 F. Supp. 765 (S.D.N.Y. 1972) (sole stockholder who left management of corporation to sons but continued to work without pay deemed to have been paid constructive wages); Washburn v. Flemming, 189 F. Supp. 624 (D. Mass. 1960) (withdrawal of more than \$15,000 from corporate accounts as "loan" by president-treasurer of corporation, who continued to work after age 65 with reduced salary, considered in part as wages). Concern about unreported income has existed since the early years of the program. See, e.g., 4 SOCIAL SECURITY BULL., June, 1941, at 55-56.

earnings test would remove both the incentive to restrict earnings and a major incentive to cheat. Additional OASI and income tax revenues would accrue. While taxes were taken into account in computing the \$6 billion cost figure, it is not clear whether these include only additional OASI revenues or all tax revenues that would be produced.¹¹⁶ If, as is likely, taxes other than those earmarked for OASI are not included in determining the cost of eliminating the earnings test, the \$6 billion figure must be recalculated to determine the real cost.

In addition, this cost calculation apparently does not take into account the cost of enforcing the earnings test. This cost includes the administrative expenses of the Social Security Administration and the expense of frequent earnings test litigation.¹¹⁷ Unmeasured human and social costs of forcing some individuals to curtail their work should also be considered.¹¹⁸ Studies have shown that constructive activity is best for the morale and financial well-being of those individuals.¹¹⁹ The true financial and social costs should therefore be taken into account in assessing proposals to eliminate the earnings test.

The current purposes of the earnings test are the same as those which were advanced in favor of its inclusion in the original Social Security Act. Scrutiny of these purposes and the resulting effects has revealed the inequities and inconsistencies of the present test. This Note will now examine possible reforms.

VI REFORM OF THE EARNINGS TEST

A. *Judicial Reform*

The constitutionality of the earnings test as a whole has often been questioned. The bases for these challenges have been: (1) that the annual exempt amount is arbitrary, constituting invidious discrimination in violation of the due process clause of the fifth amendment;¹²⁰ (2) that an individual covered by OASI has a vested property right to benefits and that the earnings test, in limiting these benefits, violates the fifth amendment protection of such rights;¹²¹ and (3) that the distinction between earned and unearned income in reducing OASI benefits is a violation of equal protection.¹²² Cases based upon any of these theories might have stimulated judicial reform of the earnings test, but the lower courts have felt bound by the determination of the Supreme Court that the original old-age insurance program was valid in its entirety.¹²³

116. See, Myers, *Earnings Test Under Old-Age, Survivors and Disability Insurance: Basis, Background and Experience*, 27 SOCIAL SECURITY BULL., May, 1964, at 3, 12; Myers, *Old-Age and Survivors Insurance: Retirement Test Under the 1954 Amendments*, 17 SOCIAL SECURITY BULL., Dec., 1954, at 10, 15 (looking only to increased benefit payments).

117. See, e.g., cases cited in note 115 *supra* and in 1 P-H Soc. Sec. & UNEMPL. COMP. ¶ 32,653.3-11 (1975).

118. See S. REP. NO. 1856, *supra* note 86, at 18; Jaffe, *supra* note 103, at 48-59.

119. Jaffe, *supra* note 103, at 48-59; Thompson, *supra* note 101; see Barressi, *The Meaning of Work: A Case Study of Elderly Poor*, 1 IND. GERONTOLOGY (New Series), Summer, 1974, at 24.

120. E.g., *Canfield v. Ewing*, 108 F. Supp. 130 (E.D.N.Y. 1952).

121. E.g., *Bernstein v. Ribicoff*, 299 F.2d 248 (3d Cir. 1962), *cert. denied*, 369 U.S. 887.

122. E.g., *Gainville v. Richardson*, 319 F. Supp. 16 (D. Mass. 1970).

123. *Helvering v. Davis*, 301 U.S. 619 (1937).

Therefore, although one judge has remarked, "It must be confessed that there is an element of inherent justice in plaintiff's contentions . . .,"¹²⁴ the constitutionality of the earnings test has always been upheld. In light of the well accepted standards of review in cases involving economic regulation, it is clear that the courts have acted properly.¹²⁵

Recently, however, the overpayment recoupment provisions of OASI have been successfully challenged in the lower courts on constitutional grounds.¹²⁶ The statute and regulations provide that overpayment of OASI benefits resulting from the receipt of benefits while an individual had earnings in excess of the annual exempt amount may be recouped by the Government without a hearing when appropriate notice and opportunity to respond have been given to the recipient.¹²⁷ The failure to provide a hearing prior to recoupment of OASI benefits has been held to violate the due process clause of the fifth amendment.¹²⁸ In other cases challenging the earnings test, the courts have denied the relief requested, leaving reform to Congress.¹²⁹ While Congress has been greatly concerned with reform of the earnings test, it has not eliminated the test's inequities.

B. Present Legislative Proposals

Recent proposals for amending the earnings test have come from the Advisory Council on Social Security, the Senate Special Committee on Aging, the President and Congress. These proposals include: (1) increasing the annual exempt amount in varying degrees;¹³⁰ (2) increasing the annual exempt amount while including other sources of income in the computation of an individual's

124. *Canfield v. Ewing*, 108 F. Supp. 130, 132 (E.D.N.Y. 1952).

125. *Helvering v. Davis*, 301 U.S. 619 (1937), is in the line of cases in which the Supreme Court ceased to apply a strict standard of review in the area of economic regulation. In such cases the Court now looks only to the reasonableness of the statute as it relates to the Government's interest. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage law); *Nebbia v. New York*, 291 U.S. 502 (1934) (minimum and maximum retail prices for milk).

The modern Court has handled challenges to economic regulation with a broad "hands-off" approach. No such statute has been invalidated on substantive due process grounds since 1937. Only one law has been held to violate equal protection standards—*Morey v. Doud* [354 U.S. 457 (1957) (state excepted one company from regulation to which all others were subjected)]

G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 981 (8th ed. 1970).

126. *Elliott v. Weinberger*, 44 U.S.L.W. 2176 (9th Cir. Oct. 21, 1975), *aff'g in part* 371 F. Supp. 960 (D. Hawaii 1974); cf. *Mattern v. Weinberger*, 519 F.2d 150 (3d Cir. 1975), *aff'g in part* 377 F. Supp. 906 (E.D. Pa. 1974). *Contra*, *Frost v. Weinberger*, 515 F.2d 57 (2d Cir. 1974), *rev'g* 375 F. Supp. 1312 (E.D.N.Y.).

127. 42 U.S.C. § 404(a)(1) (1970); 20 C.F.R. §§ 404.905, .907-914 (1975). See also 42 U.S.C. § 404(b) (1970).

128. *Elliott v. Weinberger*, 44 U.S.L.W. 2176 (9th Cir. Oct. 21, 1975). The basis for this challenge has been *Goldberg v. Kelly*, 397 U.S. 254 (1970). For a thorough discussion of this approach, see Meyerhoff & Mishkin, *Application of Goldberg v. Kelly Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974). But see *Mathews v. Eldridge*, 96 S. Ct. 893 (1976), in which the Supreme Court declined to apply the *Goldberg v. Kelly* rationale to Social Security disability benefits.

129. E.g., *Bernstein v. Ribicoff*, 299 F.2d 248, 254 (3d Cir. 1962).

130. E.g., H.R. 8853, 94th Cong., 1st Sess. (1975) (poverty level); S. 1286, 94th Cong., 1st Sess. (1975) (\$5100); H.R. 6181, 94th Cong., 1st Sess. (1975) (\$7500).

earnings;¹³¹ (3) allowing persons to receive benefits without reduction up to the point at which the total of benefits plus earnings equals some fixed amount;¹³² (4) basing the measure of retirement solely on annual earnings;¹³³ (5) lowering the present withholding ratio of \$1 in benefits for every \$2 of earnings;¹³⁴ (6) reducing or eliminating Social Security taxes on individuals aged 65 and older;¹³⁵ (7) exempting from income tax liability those earnings that are equivalent to OASI benefits lost under the earnings test;¹³⁶ (8) lowering the age at which the test is no longer applicable;¹³⁷ (9) increasing the increment of benefits upon retirement for those who continue to work after reaching age 65;¹³⁸ (10) increasing the annual exempt amount in steps with eventual elimination of the test;¹³⁹ and (11) eliminating the test immediately.¹⁴⁰

Enactment of any of these proposals would reduce or eliminate the unfairness of the present test. While this effect is desirable, many of the proposed amendments would continue the confused development of the earnings test without having examined the test in the context of the present goals of OASI. Originally OASI was designed as supplemental unemployment insurance for the elderly which would encourage older workers to retire.¹⁴¹ The earnings test insured that benefits were distributed only to those individuals who were not employed. Subsequent modifications of the earnings test have blurred its focus on lack of employment, but not eliminated it entirely, except for those aged 72 and over. A more consistent and equitable solution would be achieved by looking to either the lack of income, or the attainment of a specific age alone. The next section will discuss these two reforms of the earnings test.

C. Two Proposed Reforms

1. Income Insurance for the Elderly

A program designed to protect beneficiaries against the lack of income would redistribute income more fairly than the present OASI program does. Moreover, this program would deal directly with the needs of the elderly. It is the lack of income, rather than the lack of employment that renders it difficult for most people, old or young, to deal with their problems.

This new focus could be achieved in part by changing the earnings test to

131. E.g., H.R. 5366, 94th Cong., 1st Sess. (1975); H.R. 7640, 94th Cong., 1st Sess. (1975).

132. INTERIM SENATE REPORT ON AGING, *supra* note 1, at 7.

133. ADVISORY COUNCIL REPORTS, *supra* note 100, at 31-32; N.Y. Times, Jan. 22, 1976, at 24, col. 1.

134. H.R. 8467, 94th Cong., 1st Sess. (1975); ADVISORY COUNCIL REPORTS, *supra* note 100, at 30-31.

135. INTERIM SENATE REPORT ON AGING, *supra* note 1, at 7. *Contra*, ADVISORY COUNCIL REPORTS, *supra* note 100, at 32-33.

136. INTERIM SENATE REPORT ON AGING, *supra* note 1, at 7.

137. H.R. 1063, 94th Cong., 1st Sess. (1975); H.R. 4713, 94th Cong., 1st Sess. (1975); INTERIM SENATE REPORT ON AGING, *supra* note 1, at 6-7. *Contra*, ADVISORY COUNCIL REPORTS, *supra* note 100, at 32.

138. INTERIM SENATE REPORT ON AGING, *supra* note 1, at 7.

139. H.R. 2195, 94th Cong., 1st Sess. (1975); *see* S. 1188, 94th Cong., 1st Sess. (1975).

140. E.g., H.R. 150, 94th Cong., 1st Sess. (1975); S. 361, 94th Cong., 1st Sess. (1975). During the first nine months of 1975 at least 80 bills to eliminate the earnings test were introduced in the House of Representatives. More than 110 members of the House took part in introducing these bills. Only three such bills were introduced in the Senate during that period.

141. *See* text accompanying notes 48-52 *supra*.

an income test based on total income regardless of its source. Earned and unearned income would then be treated equally. At the same time the annual exempt amount should be significantly increased so that the test would not affect individuals whose income is substantially below adequate levels. However, if this test were applicable only to beneficiaries aged 62 to 71, inconsistency would remain. The program would continue to operate as an annuity for those aged 72 and older while benefits would be determined for those aged 62 to 71 on the basis of total income. A focus on income entirely would require application of the proposed income test to all beneficiaries regardless of age.

The present OASI program would not be the best vehicle to effect this change. First, the present Social Security taxes are levied only on earnings. Revenue for income insurance would be more appropriately raised by means of a tax on total income. Second, since some who pay for benefits would not receive income insurance because their income would be too high, the earned benefit principle of OASI would no longer operate universally. Given these factors and the regressive nature of the Social Security tax,¹⁴² income insurance could be better effected by a guaranteed minimum income program for the elderly financed by general tax revenues.

2. Real Old-Age Insurance

Substantially different implications flow from a focus on age rather than on income or on retirement as the key factor in old-age insurance. Such a proposal recognizes that greater protection is needed for the elderly.¹⁴³ This could be achieved by eliminating the present earnings test for the elderly. The program would then really function as old-age insurance without the weaknesses of the present earnings test. The program would remain contributory; only proof of age and OASI coverage would be required of potential beneficiaries.

If the objective of removing older workers from the labor force is discarded,¹⁴⁴ the only major obstacle to eliminating the earnings test would be cost.¹⁴⁵ The *actual* cost of eliminating the test¹⁴⁶ could be financed by general tax revenues, an increase in the amount of wages covered by old-age insurance, an increase in the rate at which wages are taxed, or various combinations of the three. However, an increase in the OASI tax rate is undesirable, because the Social Security tax is regressive and already consumes a substantial portion of wages. The use of general revenues for OASI and an increase in the wage base both have historical support and would tend to offset the regressiveness of the present program.

The present wage base of \$15,300 should be increased substantially so that

142. For the year 1976, a Social Security tax of 5.85 percent is imposed on the first \$15,300 of an individual's gross earnings. As a result, those with earnings in excess of \$15,300 will pay a smaller proportion of their earnings in Social Security taxes. The true picture is clouded because only earned income is taxed and because the individual's employer also pays a tax of 5.85 percent of the employee's earned income up to \$15,300; the employer's payments are deductible on the employer's tax return. Self-employed persons pay a tax of 7.90 percent of their first \$15,300 of net earnings. For detailed analysis, see Deran, *Income Redistribution Under the Social Security System*, 19 NAT'L TAX J. 276 (1966).

143. Congress appears to have recognized this in the income tax area, where individuals aged 65 and older receive an extra personal exemption. INT. REV. CODE OF 1954, § 151(c).

144. See text accompanying notes 102-10 *supra*.

145. See text accompanying notes 111-12 *supra*.

146. See text accompanying notes 114-19 *supra*.

it includes the total earnings of almost all individuals covered by OASI. The original Social Security Act taxed individuals on the first \$3000 of their earnings.¹⁴⁷ Ninety-seven percent of the potential beneficiaries had earnings of \$3000 or less.¹⁴⁸ Since Congressional action has lagged behind increases in earnings, the present wage base includes the full earnings of only 85 percent of the individuals who are taxed.¹⁴⁹ By increasing the wage base to \$30,000, almost all individuals under the old-age insurance program would be taxed on all of their earnings.¹⁵⁰ Such an increase would be accompanied by the payment of increased benefits to individuals who pay the additional taxes. However, the benefit scale could be set so that more revenues are taken in than benefits paid out.

Despite the acknowledged arbitrariness of the present wage base,¹⁵¹ the Social Security Advisory Council dropped a proposal to increase the wage base to \$24,000 because such an increase would "interfere with the private savings element" in the individual's provision for his old age.¹⁵² The Advisory Council apparently considered raising revenue by greater taxation of individuals with lower levels of earnings to be preferable to "enforced" saving at higher levels of income.¹⁵³

General revenues should also be used as needed to finance current costs of OASI. The program was actuarially designed to be self-supporting until 1965 at which time the use of general revenues was contemplated.¹⁵⁴ Yet to date, the program has continued to operate almost exclusively out of its own trust fund. It is time to change that policy.

One argument against the use of general revenues is that "indirect financing would tend to obscure the true cost of additional benefit liberalizations and could easily lead to pressures for unwarranted increases in benefits."¹⁵⁵ However, under the present scheme the true cost of OASI is already obscured. In addition to direct deductions from the employee's earnings, the employer matches the employee's payments.¹⁵⁶ Furthermore, since OASI payments are not deductible for income tax purposes, the employee pays taxes on his Social Security taxes. Opponents of the use of general revenues propose reliance on increased Social Security tax rates to finance the increasing cost of OASI.¹⁵⁷ This approach makes the tax even more regressive, whereas the use of general

147. Social Security Act, ch. 531, §§ 801, 804, 49 Stat. 636, 637 (1935).

148. ADVISORY COUNCIL REPORTS, *supra* note 100, at 107; Resnick, *Annual Earnings and the Taxable Maximum for OASDHI*, 29 SOCIAL SECURITY BULL., Nov., 1966, at 38, 40.

149. ADVISORY COUNCIL REPORTS, *supra* note 100, at 108.

150. *Id.* In 1974, 11.5 percent of all families in the United States had *income* in excess of \$25,000. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 393, Table 639 (1975).

151. ADVISORY COUNCIL REPORTS, *supra* note 100, at 78.

152. *Id.*

153. *See id.* But *see id.* at 84.

154. H.R. DOC. NO. 81, *supra* note 24, at 25-28; *see* H.R. DOC. NO. 128, 78th Cong., 1st Sess. pt. 3 at 522-23 (1943); INTERIM SENATE REPORT ON AGING, *supra* note 1, at 5.

155. ADVISORY COUNCIL REPORTS, *supra* note 100, at 77.

156. INT. REV. CODE OF 1954, §§ 3101, 3111. Self-employed persons pay one tax on their net earnings from self-employment. *Id.* §§ 1401, 1401(a), (b).

157. *See* N.Y. Times, March 8, 1975, at 28, col. 1; *id.*, Jan. 17, 1976, at 1, col. 6. "Those who support the [earnings] test point out that its abolition would cost the equivalent of a one-half of 1% increase in the combined employer-employee contribution rate." INTERIM SENATE REPORT ON AGING, *supra* note 1, at 21.

revenues would have the opposite effect. The Advisory Council itself recognized the inequity of increasing the tax rate when it advocated the use of general revenues to help finance Medicare. The Advisory Council justified its position by citing an anticipated implementation of a national health insurance program, the financing problems of Social Security as a whole, and the present regressiveness of the Social Security tax.¹⁵⁸

OASI can be financed without an earnings test.¹⁵⁹ Use of both an increased wage base and general revenues would enable the program to meet its present costs as well as those that would result from elimination of the earnings test. The equities of the situation favor these changes if real old-age insurance is considered to be the appropriate approach.

VII CONCLUSION

The number of people depending on OASI is growing rapidly. At present, however, there is no coherent, thoughtful policy behind the program. Rather, OASI continues the economic and social policies of the 1930's with fragmented changes. Since substantial interest has been shown in reforming the earnings test, removal of some or all of the test's inequities is now possible. However, in reforming the earnings test, Congress should do more than merely build on the policies of the past. Intelligent reform of the earnings test will only be brought about by considering the objectives of OASI as a whole in light of the way the program presently functions.

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158. ADVISORY COUNCIL REPORTS, *supra* note 100, at 83-84.

159. On February 10, 1975, five former Health, Education and Welfare Secretaries and three former Social Security Commissioners issued a report entitled, *Social Security: A Sound and Durable Institution of Great Value*. With regard to the earnings test under the present OASI program that report stated in part, "[A]bolition of the retirement test would aggravate somewhat the problem of financing, but it would no more spell the doom of the program than does retention of the test." INTERIM SENATE REPORT ON AGING, *supra* note 1, at 15, 22.

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