PROTECTION AGAINST THE ECONOMIC FEARS OF OLD AGE: SIX MICRO AND MACRO STEPS FOR BRIDGING THE GAP IN RETIREMENT SECURITY BETWEEN BLACKS AND WHITES

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INTRODUCTION AND PURPOSE OF STUDY

Retirement security is financial readiness. It exists when a worker, especially one on the cusp of retirement,[1] *subjectively* believes that he or she

1. *Retirement* is the state of withdrawal from one's occupation, business, or office. AMERICAN HERITAGE COLLEGE DICTIONARY 1541 (3d ed. 1992). *See also* Dana Anspach, *What Is Retirement?* ABOUT.COM: MONEY OVER 55, http://moneyover55.about.com/od/preretirementplanning/a/What-Is-Retirement.htm? (last visited Nov. 1, 2015) (portraying retirement as a life-station a worker enters into when he or she withdraws his or her occupation, business, office, or position from active working life). Stated differently, retirement "is achieved when [the worker doesn't] have to work to earn a living, but instead can count on reliable sources of passive income." Dana Anspach, *How to Get Passive Income in Retirement*, ABOUT.COM: MONEY OVER 55, http://moneyover55.about.com/od/postretirementplanning/a/How-To-Get-Passive-Income-In-Retirement.htm (last visited Nov. 1, 2015). Relativity, not absoluteness, is the spice of life. Accordingly, retirement is *not* the distinctive life-station, wholly free and separate from work, that the term connotes. Although the standard age for retirement is 65 years, the United States does not have a mandatory retirement age. Anspach, *supra*. Some old workers work for so long as their health permits and an increasing number of senior citizens in retirement return back to work in varying scopes, including full-time work. Little wonder that "employment stability and retirement savings opportunities" have evolved among the vocabulary of retirement security. TATJANA MESCHEDE ET AL., LIVING LONGER ON LESS: SEVERE FINANCIAL INSECURITY AMONG AFRICAN AMERICAN AND LATINO SENIORS, REPORT 3 (Institute on Assets and Social Policy ed., 2010), https://iasp.brandeis.edu/pdfs/2010/LLOL3.pdf. *See also* MCKINSEY & CO., RESTORING AMERICANS' RETIREMENT SECURITY: A SHARED RESPONSIBILITY 19 (2009), http://www.retirementmadesimpler.org/Library/Retirement_Security.pdf (including "working longer," even for retirees, as a viable option in retirement security); KE BIN WU, AARP POLICY INST., AFRICAN AMERICANS AGE 65 AND OLDER: THEIR SOURCES OF RETIREMENT INCOME IN 2005, at 1 (2007), http://assets.aarp.org/rgcenter/econ/fs137_aaincome.pdf (including "even income from work" among the sources of retirement income); Tom Sightings, *The New 3 Legged Retirement Stool*, U.S. NEWS & WORLD REPORT (Mar. 13, 2012, 10:11 AM), http://money.usnews.com/money/blogs/on-retirement/2012/03/13/the-new-3-legged-retirement-stool (including a readiness "to work in early retirement" among these new legs); and Mary Beth Franklin, *Time to Replace the Three-Legged-Stool Myth*, INVESTMENTNEWS (May 26, 2013, 4:00 PM), http://www.investmentnews.com/article/20130526/REG/130529945/time-to-replace-the-three-legged-stool-myth (including "part-time employment" among her proposal for a new retirement system to replace the current one). Indeed, consistent with this reality, the profile of older Americans in 2013 reveals that in that year, 8.1 million senior citizens, comprising 18.7% of all United States workers, were in the labor force, either working or actively seeking work. ADMIN. OF AGING, ADMIN. OF CMTY. LIVING & U.S. DEPT. OF HEALTH AND HUM. SERV., A PROFILE OF OLDER AMERICANS: 2013, at 11 (2013) [hereinafter ADMIN. OF AGING, A PROFILE OF OLDER AMERICANS] www.aoa.acl.gov/Aging_Statistics/Profile/2013/docs/2013_Profile.pdf.

has enough resources to guarantee a standard of living similar to that before retirement—and when in fact, *objectively*, a full complement of savings in Social Security, employer-sponsored benefits, and personal assets exists to guarantee that pre-retirement standard of living.[2] The economic difficulties of the past decade, signified by the Great Recession of 2007 to 2009[3] and an accompanying slow recovery,[4] have combined to synergistically inflict a negative effect on many financial investment resources, including Black retirement security.[5] To be sure, the recession did not create the situation that some commentators poignantly liken to a "crisis."[6] For example, "[f]rom

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2. *See* MESCHEDE ET AL., *supra* note 1, at 8 (identifying the three primary streams of income for seniors as Social Security, pension incomes, and current assets). For definitions of the three streams of retirement income, *see infra* Part III.A (analyzing each of these three "legs," as they are sometimes referred to in the literature).

3. Robert Rich, *The Great Recession of 2007-09*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), http://www.federalreservehistory.org/Events/PrintView/58. S*ee also* Robert C. Shelburne, Chief Economist, United Nations Econ. Comm'n for Eur., The Great Recession of 2007-09: Analysis and Prospects, Keynote Address to the UN-WTO Tourism Resilience Committee, Astana, Kazakhstan (Oct. 8, 2009), http://works.bepress.com/robert_shelburne/47 (putting the recession in a global perspective). The recession lasted from December 2007 to June 2009. It was the longest such economic slowdown since World War II. Rich, *supra*. Its features were severe and included a high national unemployment figure of 9.5% as of June 2009 (compared to 5% in December of 2007), reduced increases in the remuneration of private industry employees, and a steep fall in home prices, among other effects. *Id.*; *BLS Spotlight on Statistics: The Recession of 2007-2009*, U.S. BUREAU LABOR STAT., http://data.bls.gov/cgi-bin/print.pl/spotlight/2012/recession/audio.htm (last visited Nov. 24, 2015). There is also general agreement regarding the fact that, to date, in the aftermath of the recession, "many of the statistics that describe the U.S. economy have yet to return to their pre-recession values." *Id.* The effects of the economic upheaval were so deep-seated that some commentators actually likened it to a depression. PAUL KRUGMAN, END THIS DEPRESSION NOW!, at x (2012); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

4. *See* Heidi Shierholz, *Ten Facts about the Recovery*: *Issue Brief #307*, ECON. POL'Y INST. (July 6, 2011), http://www.epi.org/publication/ten_facts_about_the_recovery/ (noting that much of the recovery consists of a decline in layoffs, rather than an increase in hiring; racial and ethnic minorities have fared worse than Whites in both the recession and the recovery; and wage growth remains extremely low).

5. *See* Alicia H. Munnell & Matthew S. Rutledge, *The Effects of the Great Recession on the Retirement Security of Older Workers* (Nat'l Poverty Center, Working Paper No. 13-03, 2013), http://npc.umich.edu/publications/u/2013-03-npc-working-paper.pdf (discussing the Great Recession's impact on retirement security for older Americans). On a larger notion, real interest rates "declined from about 2.5 percent in 2006 to below 1 percent in 2010 and now may be negative." *Id.* at 6. As of April of 2015, some banks, such as J.P. Morgan Chase Bank, paid .01% interest on a savings account.

6. Andrew G. Biggs & Sylvester Schieber, *Is There a Retirement Crisis?*, 20 NAT'L AFFAIRS 55, 56 (2014) (suggesting that the crisis may be overblown and misattributed to potential causes for concern). *See also* Broken Eggs Film, *The Looming Retirement Crisis in America*, YOUTUBE (Aug. 5, 2013), https://www.youtube.com/watch?v=lgdzmAIJ9TE (video orchestrating "one of the gravest social issues facing an aging America," signified by the "irony" that as they "live longer, a growing number of Americans are falling short" of retirement security, a "prognosis . . . even worse for future generations"); *Broken Eggs Awakens America to the Looming Retirement Crisis*, BROKENEGGSFILM.COM, http://brokeneggsfilm.com/about/ (last visited Nov. 1, 2015). *See also About the Interview: The*

1979 to 2006, African-American private sector workers saw their overall pension coverage go down" by 8.3%, compared to Whites, who experienced a decline of just 3.7%.[7] However, the economic hard time and its aftermath have exacerbated the retirement unreadiness of many older Americans,[8] notably including Blacks.[9]

We argue that in the aftermath of the economic downturn, retirement security for Black people is predicated on micro steps comprised of *changes* in the tripod of Social Security, employer-sponsored pension plans, and personal assets,[10] implemented in tandem with macro steps in the form of a *reduction in disparities* between Blacks and Whites in education, healthcare, and housing.[11] These are three critical areas of American national life; without reducing disparities in these areas, the chances for Black retirement security may be bleak for many years to come. In developing our argument, we did three things. First, we highlighted the shape of the retirement security gap between Blacks and Whites in a discussion that integrates the six variables at the focus of this Article.[12] Second, we presented a historical narrative necessary for proper understanding of our research that, among other materials, draws on President Franklin D. Roosevelt's model of a right to adequate protection from the economic fears of old age, as part of a bill of economic rights meant to complement the original bill of political rights that the United States adopted in 1791.[13] Third and finally, we zeroed in our

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Characters, BROKENEGGS, http://brokeneggsfilm.com/about-the-interviews/ (last visited Nov. 1, 2015) (describing the characters in the video).

7. MESCHEDE ET AL., *supra* note 1, at 3 (citing LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2008/2009, at 150 tbl.3.13 (2009)). *See also* Michael Powell, *Wealth, Race, and the Great Recession*, N.Y. TIMES (May 17, 2010, 6:53 PM), http://economix.blogs.nytimes.com/2010/05/17/wealth-race-and-the-great-recession/?_r=0 (commenting on the heavy toll the recession wreaked on Blacks, indicated in jobs and housing assets, the latter considering that, compared to Whites, "the average black family has far more of its wealth wrapped up in a home"). As Professor William A. Darity from Duke University said, "Given differential employment rates, loss of wages, loss of health insurance, to the extent that all of these are worse for African-Americans, it has to make the wealth divide worse . . . . All the arrows are pointing down." *Id.*

8. *See* Munnell & Rutledge, *supra* note 5, at 1 (commenting on the negative effect of the economic bad times on retirement security of older workers).

9. *See infra* notes 33–46 and corresponding text.

10. *See infra* Part III.A for extensive discussion on these three steps and benefits. "Social Security" is the popular and colloquial name for what is today formalistically the Old-Age and Survivors Insurance. The formal name speaks to the transformation of the benefit plan from a retirement program for workers into a family-based economic security program, as a result of the 1939 Amendments to the Social Security Act. *See infra* note 95.

11. *See infra* Part III.B for extensive discussion related to these three steps and benefits.

12. *See infra* Part I (depicting the shape of the retirement security gap between Blacks and Whites).

13. *See infra* Part II (chronicling the background of the study).

attention on the six steps for closing the retirement gap between Blacks and Whites at the cynosure of this work. Of those six steps, we devoted extensive space and analysis to personal assets, commensurate with the threat that this benefit source poses for the retirement security regime, which is indicative of the shift in responsibility for retirement readiness to individual workers over many years that predated the economic difficulties of the past decade.[14]

The micro steps are measures that, by their nature, are not focused on Black people as such because they benefit all United States workers, without subscribing to the amorphous notion of a "rising tide lifts all boats."[15] In contrast, the macro steps focus more directly on Black people and Black seniors. As the ensuing analysis makes clear, the two sets of steps somewhat overlap. Studies on retirement security focus on United States seniors as a whole.[16] But there are equally many studies on minorities, among them Black people.[17] This Article belongs in the latter category, but at the same time

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14. *See, e.g.*, MCKINSEY & CO., *supra* note 1 (outlining the overall shift in retirement responsibility, and how employers, financial institutions, and governmental bodies can still play a role).

15. The expression stands for the notion that improvement in the general economy will benefit all demographic groups. *See* James Hines Jr. et al., *Another Look at Whether a Rising Tide Lifts All Boats* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 8412, 2001), www.nber.org/papers/w8412.pdf (indicating that its study confirms the hypothesis that maintenance of macroeconomic growth afforded marginal workers the opportunity to work).

16. *See, e.g.*, MCKINSEY & CO., *supra* note 1, at 2, 5–11 (analyzing the state of retirement preparedness or lack thereof in the United States among Americans of all ages and income groups—lower-income, middle-income, and high-income households—including the impacts of four policy principles on preparedness). The four principles are: improving the accessibility of retirement plans; boosting plan participation and savings rates for all Americans, especially lower- and middle-income households; helping Americans to better manage their in-retirement risks; and enabling Americans to work longer. *Id.* at 2, 13–19, 21–26. *See also* TATJANA MESCHEDE ET AL., FROM BAD TO WORSE: SENIOR ECONOMIC INSECURITY ON THE RISE 1, 3 (Inst. on Assets & Soc. Policy ed., 2011), http://www.demos.org/sites/default/files/publications/FromBadToWorse_Senior_Economic_Insecurity. pdf (failing to distinguish race among American seniors in discussing retirement security). Founded in 1926, McKinsey & Company is a "global management consulting firm that serves leading businesses, governments, non-governmental organizations, and not-for-profits." *About Us*, MCKINSEY & CO., http://www.mckinsey.com/about_us (last visited Nov. 1, 2015).

17. *See* MESCHEDE ET AL., *supra* note 1, *passim* (focusing on Black and Latino seniors). *See also* Clifton Linton, *Minority Retirement Savings Lags General Population*, MPOWER, https://www.expertplan.com/articles/a082100.jsp (last visited Nov. 1, 2015) (stating that, in 2000, only 62% of Blacks reported having saved money for retirement, compared to 80% of the general population); NARI RHEE, NAT'L INST. ON RETIREMENT SECURITY, RACE AND RETIREMENT INSECURITY 1 (2013), http://www.nirsonline.org/storage/nirs/documents/Race%20and%20Retirement%20Insecurity/ race_and_retirement_insecurity_final.pdf (focusing on disparities in employer-sponsored pension plans and retirement savings); Mark Miller, *Why Minorities Are Losing the Retirement Race*, REUTERS (Dec. 12, 2013, 8:33 AM), http://www.reuters.com/article/2013/12/12/us_column-miller-minority-idUSBRE9BB0KJ20131212 (instructively characterizing retirement preparation for Blacks and other minorities as "retirement inequality."); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 88, 98–99, 115 (10th

departs from those studies in that it is more specifically focused on Blacks,[18] in an integrated approach that assembles under one analytic bundle the key elements of changes and disparity reduction that we identify as critical for Black retirement security in the aftermath of the Great Recession and its accompanying slow recovery. Blacks and Whites are just two of several races in the United States' multiethnic society.[19] Accordingly, the measurement or

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Anniversary ed. 2006); THOMAS SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 37–40 & figs.1.1 & 1.2, 47–49 & figs.2.1 & 2.2 (2004).

18. There are over 42 million Black people in the United States, making up 13.6% of the country's population. U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf. In 2012, Blacks made up 9% of the 21% of persons 65 and above who were members of racial or ethnic minority populations. ADMIN. OF AGING, A PROFILE OF OLDER AMERICANS, *supra* note 1, at 6. Black people include Black immigrants to the United States from Africa and the Caribbean. *See* Philip C. Aka, *Shaping Their Better Character: Religion in African American Politics in the Age of Obama*, 16 RUTGERS J. L. & RELIGION 1, 10–16 (2014) (contending that the meaning of the term *African American* has "changed to include all categories of black Diasporas, original and recent alike"); Interview by Ari Kramer with James S. Jackson, Ph.D., Professor and Dir., Inst. for Soc. Research at Univ. of Mich. School of Pub. Health (Jun. 11, 2013), http://www.rwjf.org/en/blogs/culture-of-health/2013/06/african_americansl.html (positing that because of "the growing influx of Black immigrants to the United States" from Africa, the Caribbean and elsewhere, "to talk about the Black population as simply the historical African American population is going to become less and less true"); Jamilah King, *Black America Is Less Homogenous than You Think*, YAHOO! NEWS (Apr. 11, 2015, 10:04 AM), http://news.yahoo.com/black-america-less-homogenous-think-140415251.html (commenting on a study by the Pew Research Center showing that a growing number of Black people in the United States were foreign born); James Ragland, *Black Immigrants May Change the Way We Talk About Black America*, DALLAS MORNING NEWS (Apr. 14, 2015 10:39 PM), http://www.dallasnews.com/news/columnists/james-ragland/20150414-black-immigrants-may-change-the-way-we-talk-about-black-america.ece (citing the same Pew Research Center study to the effect that immigrants from Africa and the Caribbean islands may change the way Americans talk about Black America).

19. There are five races recognized in this country: African American, White, American Indian or Alaskan Native, Asian, and Native Hawaiian or Other Pacific Islander. A possible sixth category, Hispanic or Latino, is classified as an ethnicity, rather than as a race. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,782 (Oct. 30, 1997). Additionally, there are few countries or even groups in the world that are not represented within the United States' population of over 310 million people. *See, e.g.*, *United States*, ETHNOLOGUE, https://www.ethnologue.com/country/us (last visited Nov. 1, 2015) (indicating that there are 215 living or spoken languages in the United States).

comparison to Whites is a mostly heuristic tool[20] meant to facilitate analysis, focusing on the national government.[21]

I. DEPICTING THE SHAPE OF THE RETIREMENT SECURITY GAP BETWEEN BLACKS AND WHITES

A concern that animates this Article is "[t]he specter of downward mobility in retirement" for many middle-income and even higher-income workers,[22] embedded in the self-assessment that "they don't save enough when they're working, and in retirement their puny pension income forces them to rely on Social Security."[23] It is the realization that without "employment income, few seniors have assets that can provide security for

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20. This is consistent with the practice in textbooks on United States government and politics where discussions on civil rights center largely on the struggles Blacks and other minority groups in the country (including women of all races as one group) endured in an attempt to enjoy the same benefits White males take for granted. *See* THOMAS E. PATTERSON, THE AMERICAN DEMOCRACY 129–139 (11th ed. 2013) (documenting the struggle for equality by Black people, women, Native Americans, Hispanic Americans, Asian Americans, gays and lesbians, older workers, and persons with disability); STEFFEN W. SCHMIDT ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY 2004–2005 BRIEF EDITION 94–115 (2005) (covering Black people, women, older Americans, persons with disability, gays and lesbians, and juveniles). *See also* 42 U.S.C. § 1981(a) (2012) (providing that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white* citizens. . . ") (emphasis added); *The 1866 Civil Rights Act*, PUB. BROACASTING SERV. (Dec. 19, 2003), http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1866.html (stipulating that all citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . as is enjoyed by *white* citizens . . .") (emphasis added).

21. We do not by any means minimize the importance of retirement security events at the subnational levels of the United States system that include the states. *See* Pub. Broad. Serv., *Teresa Ghilarducci: Why the 401(k) Is a "Failed Experiment*," FRONTLINE (Apr. 23, 2013, 9:32 PM) www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/retirement-gamble/teresa-ghilarducci-why-the-401k-is-a-failed-experiment/ (commenting on initiatives "by state legislatures and by governors and by state treasurers," using as an illustration a California law that made it easier for state workers to save in a guaranteed retirement account). However, for analytic convenience, our focus is limited to the national government.

22. Teresa Ghilarducci, *Our Ridiculous Approach to Retirement*, N.Y. TIMES (July 21, 2012), www.nytimes.com/2012/07/22/opinion/sunday/our-ridiculous-approach-to-retirement.html?_r=0&pagewanted=print. Professor Ghilarducci estimated that about 49% of these workers "will be poor or near poor in retirement, living on a food budget of about $5 a day." *Id*.

23. Andrew G. Biggs, *A Retirement Crisis, By Definition*, AM. ENTER. INST. (Jan. 24, 2014, 11:03 AM), https://www.aei.org/publication/a-retirement-crisis-by-definition/. *See also* NAT'L ACADEMY OF SOC. INS., STRENGTHENING SOCIAL SECURITY FOR VULNERABLE GROUPS 6 (2009), http://www.nasi.org/sites/default/files/research/Strengthening_Social_Security_for_Vulnerable_Groups.pdf. (pointing out that "[d]espite a lifetime of hard work, many workers end up poor or near poor in retirement"); Broken Eggs Film, *supra* note 6.

even a much smaller number of years"[24]—at the very time life expectancy is increasing for those Americans who made it to 65.[25] The disparities between Blacks and Whites occur within the setting of the foregoing insecurities, further magnifying those disparities. These disparities exist in each of the six variables we highlight in this Article: Social Security, employer-sponsored pension plans, personal assets, education, healthcare, and home ownership.

Beginning with Social Security, not all minorities have access to this source of income. Instead, compared to Whites, many Blacks are less likely to receive Social Security benefits and among those that do, their disbursal amounts are less due to factors such as lower earnings during their work years.[26] Next is employer-sponsored pension plans. Compared to the general population, Black people can count less on pensions as a source of retirement income, given the fact that, relative to Whites, they are less likely to be covered by such plans.[27] In 2005, the proportion of Black men who received pensions was 32.1%, compared to 35% in the general population,[28] and a lower 24.2% for Black women.[29] In 2006, Congress passed the Pension

24. MESCHEDE ET AL., *supra* note 1, at 8. Seniors or older Americans are persons who are 65 years of age and above. *See* ADMIN. OF AGING, A PROFILE OF OLDER AMERICANS, *supra* note 1 (detailing facts, such as the size of the older American population, marital status, living arrangements, racial and ethnic composition, geographic distribution, income, poverty, housing, employment, education, health and healthcare, health insurance coverage, and disability). As of 2012, seniors numbered 43.1 million or 13.7% of the United States population (meaning about one in every seven Americans). *Id*. That year alone, an estimated 3.6 million persons turned 65. *Id.* Since 1900, the percentage of Americans 65 and above has more than tripled—from 4.1% that year to 13.7% in 2012. *Id*. Within this period, the older population itself is increasingly older. For example, in 2012, the 65–74 age group (24 million) was more than ten times larger than in 1900, the 75–84 group (13.3 million) was 17 times larger, and the 85 and above group (5.9 million) was 48 times larger. *Id.* And in the same year, the number of centenarians (persons 100 and above) was nearly 62,000 or 0.14% of seniors. *Id*.

25*.* *See* MESCHEDE ET AL., *supra* note 1, at 8 (estimating that seniors who made it to 65 can expect to live up to 83, i.e., 18 more years on average). *See also How Will Boomers Affect Social Security*, NAT'L ACAD. SOC. INS., http://www.nasi.org/learn/socialsecurity/boomers (last visited Oct. 28, 2015) (putting the numbers as 20.4 years for women and 17.9 years for men in 2012); ADMIN. OF AGING, A PROFILE OF OLDER AMERICANS, *supra* note 1 (putting the number in 2011 as 19.2 years, 20.4 years for females and 17.8 years for males).

26. MIKKI WAID ET AL., AARP PUB. POL'Y. INST., SOCIAL SECURITY: A KEY RETIREMENT INCOME SOURCE FOR OLDER MINORITIES (2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/ss-key-retirement-income-source-older-minorities-AARP-ppi-econ-sec.pdf (last visited Oct. 28, 2015) (pointing out that the median annual amount of family income from Social Security for older Black people and Hispanics in beneficiary families, at $14,400, is roughly 27% lower than that of older Whites, at $19,757).

27*.* *See* RHEE, *supra* note 17, at 1 (citing a National Institute of Retirement Security study showing that 62% of Whites had pensions, compared to 54% of Black people). *See also* Wu, *supra* note 1, at 2 (citing a study published in 2007 based on retirement income for 2005 that found that only 32.1% of Black men and 24.2% of Black women have pension income, compared to 35.5% for all seniors).

28. Wu, *supra* note 1, at 2.

29*.* *Id.*

Protection Act (PPA), which allowed employers to automatically enroll their employees in 401(k) plans and offered target-date funds as a default option.[30] But the Great Recession and the lethargic economic recovery accompanying it hit these accounts hard. The economic downturn wiped out about $2 trillion of America's retirement nest eggs,[31] many of them accounts that belonged to Blacks.[32]

Next to personal assets that workers need to retire with dignity, Black people are a disproportionately poor segment of United States society;[33] on average, Black people hold only 10 cents in assets for every dollar held by White households,[34] an occurrence now complicated by the Great Recession and its aftermath.[35] "A lifetime of fewer assets leads to a much more vulnerable retirement for many households of color."[36] In 2013, the wealth of Black households was one-thirteenth the median wealth of White households, a decline from one-eighth the wealth in 2010.[37] In practical terms, Black families lag behind White households in net worth, sometimes by numerous folds—such as a median worth in 2013 for White households of $141,900 compared to a miserly $11,000 for Black households, and

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30. Tom Anderson, *Your 401(k): When It Was Invented—and Why*, LEARNVEST (Jul. 3, 2013), www.learnvest.com/knowledge-center/your-401k-when-it-was-invented-and-why/. For more on this law, see *infra* notes 85–86. For more on 401(k) plans, see *infra* note 167 and accompanying text.

31. Alyssa Fetini, *A Brief History of: The 401(k)*, TIME, Oct. 27, 2008, at 20.

32. *See* Phillip Jackson, *Majority of Black Americans Are Living Through Worst Economic Conditions*, SRI LANKA GUARDIAN (Feb. 10, 2015), http://www.slguardian.org/majority-of-black-americans-are-living-through-worst-economic-conditions/ (observing that the economic downturn has cost Black people more than $100 billion in losses inflicted on individual bank accounts and home equity).

33. *See* Wu, *supra* note 1, at 2. The story is ironic, given that, as one Black commentator and community activist points out, "Black Americans generate about $1 trillion [annually] within the U.S. economy." Jackson, *supra* note 32.

34. MESCHEDE ET AL., *supra* note 1, at 4 (citing THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 6 (2004), http://www.brandeis.edu/provost/diversity/Events/diversitypdfs/The_Hidden_Cost_of_Being_African_American.pdf.).

35. *See* Jackson, *supra* note 32 (lamenting that because of these economic downturns, many Black people "are third-world poor," floating "in an economic free-fall with no fiscal backstop," and doomed to live their entire lives without a positive net worth—little different from the sharecroppers of olden times who owned little of value and were seldom able to pay their debts).

36. MESCHEDE ET AL., *supra* note 1, at 4.

37. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR., (Dec. 12, 2014), www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/. White households had ten times the wealth of Hispanic households in 2013 and nine times in 2010. *Id.*; *see also* Richard Rothstein, *Why Did Ferguson and Baltimore Erupt? Look to the Government-Backed History of Housing Segregation*, IN THESE TIMES 3 (Apr. 30, 2015), http://inthesetimes.com/article/17897/why-did-ferguson-and-baltimore-erupt-look-to-the-government-backed-history (stating that Black households command only about 5% of the wealth of White households, even though the incomes of Black households are about 60% those of White families).

$23,000 median liquid wealth for Whites compared to a miniscule $200 held by Blacks.[38] A study published in 2010 by the Institute on Assets and Social Policy (IASP) of Brandeis University in Boston, Massachusetts, showed that regarding personal assets, 76% of Blacks were insecure or at risk with respect to their combined financial net worth.[39]

With specific interest to Black seniors, in 2005 this group ranked low on interest income and dividends, two important sources of the personal assets necessary for retirement security. For interest income, the number was a little over 22%, or less than one in four Black seniors, compared to 52% of all Americans who have this source of income.[40] For dividends, the number was only 5.2%, compared to 22.5% of all United States seniors.[41] A famous investment slogan is that individuals should "let [their] money work hard for [them]."[42] Given the shortage of interest income and dividends many Black households endure, this rule of thumb has little meaning for Blacks. This explains why in 2005 Black seniors formed only 8.4% of the United States senior population but made up 19.3% of all American seniors living below the poverty line.[43] The number translates into a poverty rate for Black seniors that is double the rate for other groups.[44] In a nutshell, compared to Whites in their gray years, many Blacks depend solely or vastly on the baseline of

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38. Rothstein, *supra* note 37; *see also* Kochhar & Fry, *supra* note 37. To counter some of these dismal statistics, Jackson proposed a range of targeted solutions for Black economic well-being, including starting their own businesses; investing in formal education, given that "[i]t usually translates into higher income"; owning a home, as opposed to renting; committing time and money to self-improvement and skill acquisition; owning stocks; managing their credit carefully and practicing thrifty living; using good food and exercise to promote longevity; staying married for the economic viability that comes from a two-person-headed household; opening savings accounts for their children and teaching them financial literacy; and creating a will or trust to pass on their accumulated wealth. Jackson, *supra* note 32; *see also* MESCHEDE ET AL., *supra* note 1, at 4 (citing THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 6 (2004), http://www.brandeis.edu/provost/diversity/Events/diversitypdfs/The_Hidden_Cost_of_Being_African_American.pdf) (identifying that Black people on average hold only ten cents in assets for every dollar held by White households).

39. MESCHEDE ET AL., *supra* note 1, at 8. Personal assets were calculated using income from all sources, including Social Security benefits and employer-sponsored pensions. *Id*. The study used data predating the start of the Great Recession of 2007. *Id*. at 1. This means, as the authors reasoned, that they may have "underestimate[d] the current economic vulnerabilities for seniors." *Id*.

40. Wu, *supra* note 1, at 2.

41. *Id.*

42. Joel Brown, *Robert Kiyosaki –Stop Working Hard for Your Money, Make It Work Hard for You*, ADDICTED 2 SUCCESS, http://addicted2success.com/success-advice/video-robert-kiyosaki-stop-working-hard-for-your-money-make-it-work-hard-for-you/ (last visited Nov. 11 2015).

43. Wu, *supra* note 1, at 2.

44. *Id.*

Social Security as retirement income.[45] The asset inequality between Blacks and Whites has widened since the end of the Great Recession in June of 2009.[46]

In education, although over the years and across this country the high-school graduation rate has steadily increased, the gap between Black and White males has widened recently. In the 2012–13 school year, the graduation rate for Black males was 59%, compared to 80% for White males.[47] The states with the lowest graduation rates for Black males, pegged at 51% or less, were Nevada, Nebraska, Mississippi, Indiana, and South Carolina.[48] Low graduation rates in Southern states are a cause for concern because a majority of Black students are enrolled in Southern schools.[49]

In healthcare, like many United States minority groups, a vast proportion of Blacks lack health insurance compared to Whites,[50] and also have little leftover money for out-of-pocket health expenses.[51] Because of unequal access to healthcare services, Blacks live sicker lives than Whites[52] and have a shorter life expectancy than Whites.[53] Even when adjusted for health insurance status, Blacks and other minorities still suffer worse health and receive lower-quality healthcare than Whites.[54] Furthermore, compared to

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45. MCKINSEY & CO., *supra* note 1, at 13 (referring to most Americans rather than Black people exclusively).

46. *See* Kochhar & Fry, *supra* note 37, at 2 (discussing the wealth gaps between Whites and Blacks since 2007).

47. *See* Denisa R. Superville, *Graduation Rates Rise; Gap Between Black and White Males Grows, Report Says*, EDUCATION WEEK: DISTRICT DOSSIER (Feb. 11, 2015, 9:21 AM), http://blogs.edweek.org/edweek/District_Dossier/2015/02/as_nation_graduation_rate_grew.html?print=1 (citing THE SCHOTT FOUND. FOR PUB. EDUC., BLACK LIVES MATTER: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 13 (2015), http://blackboysreport.org/bbreport2015.pdf).

48. *Id.*

49. *Id.*

50. *See also Disparities,* ROBERT WOOD JOHNSON FOUNDATION, http://www.rwjf.org/en/library/features/health-policy/disparities.html (last visited Nov. 11, 2015) (pointing out that "[a]t no time in United States history has the health status of minority populations equaled or approximated that of Whites").

51. MESCHEDE ET AL., *supra* note 1, at 8 (stating that 34% of Black people were at risk, based on their health expenses).

52. Vernellia R. Randall, *Inequality in Health Care Is Killing African Americans*, 36 HUM. RTS. 20, 20 (2009) (stating that "Black Americans are sicker than white Americans"); ROBERT WOOD JOHNSON FOUND., WHAT IS THE LINK BETWEEN HAVING HEALTH INSURANCE AND GETTING ADEQUATE HEALTH CARE? (2011), www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rwjf71437 (referring to persons without health insurance, and stating that ethnic minorities have worse health and health care than Whites). The reason, this brief elaborated, is that "[t]hey receive needed care later, if at all, and skip recommended preventive care." *Id.*

53. Randall, *supra* note 52, at 20 (stating that Blacks die "at a significantly higher rate" than Whites).

54. *Disparities, supra* note 50.

Whites, not only are Black people more susceptible to illnesses like heart disease, cancer, stroke, unintentional injuries, and homicide that rank among the top causes of death for Blacks, they are also more likely than Whites to die from those conditions.[55] These occurrences add up to diminished life expectancy for Blacks.[56] Specifically related to retirement security, although

55. U.S. DEP'T OF HEALTH AND HUM. SERVS., HEALTH, UNITED STATES 2010 WITH SPECIAL FEATURE ON DEATH AND DYING 138 (2010) (including the table on the top causes of death for Blacks for 1980 and 2007). *See also* Rosie Mestel, *Life Expectancy Gap Narrows Between Blacks, Whites*, L.A. TIMES (June 5, 2012), http://articles.latimes.com/print/2012/jun/05/science/la-sci-life-expectancy-gap-20120606 (reporting the observation of Dr. James McPherson, spokesman for the American Heart Association to the effect that "[s]tudies have documented that blacks are treated less aggressively than whites for heart problems."). As one database elaborates, "Even when the incident rate is lower for a particular disease, such as Leukemia, the Black death rates are higher due to lack of access to appropriate health care." *Health,* BLACKDEMOGRAPHICS.COM, http://blackdemographics.com/health-2/health/ (last visited Oct. 28, 2015); *see also* ROBERT WOOD JOHNSON FOUND., *supra* note 52, at 2 (stating that "[r]esearch shows that uninsured patients with cancer . . . are more likely to be diagnosed at an advanced stage, reducing the chances of a positive outcome," and that "[u]ninsured adults suffering from cancer, cardiovascular disease, respiratory failure and other serious injury are more likely to suffer poorer health outcomes, greater limitations in quality of life and premature death than adults with insurance."). Conversely, "[e]vidence demonstrates that when adults acquire health insurance, many of the negative health effects of uninsurance are mitigated." *Id.*

56. Life expectancy is a measure of "how long a newborn could expect to live if the mortality rates at birth prevailed for a lifetime." David Brown, *Life Expectancy Hits Record High in United States*, WASH. POST (June 12, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/11/AR2008061101570.html. Initially double digits when these statistics first became available over 100 years ago, the gap decreased into the single digits but has persisted even though it should be closing up. *See, e.g.*, Lauren F. Friedman, *This Chart Showing the Gap Between Black and White Life Expectancy Should Be a National Embarrassment*, BUSINESS INSIDER (Jan. 9, 2014, 4:30 PM), http://www.businessinsider.com/huge-racial-gap-in-life-expectancy-2014-1 (analyzing the Centers for Disease Control's 2012 and 2013 reports); Mary Camille Izlar, *Life Expectancy Gap Persists as Blacks Die Before Whites*, BLOOMBERG (July 18, 2013), http://www.bloomberg.com/news/print/2013-07-18/life-expectancy-gap-persists-as-blacks-die-before-whites.html (reporting on a government study that showed a "persistent gap in life expectancy" between Blacks and Whites, the result of higher death rates among Blacks due to heart disease, cancer, homicide, diabetes, and childbirth conditions); Mestel, *supra* note 55 (commenting on a study in a public health journal based on government data on United States deaths in 2008 that showed narrowed gaps in life expectancy between Whites and Blacks, but which the analyst nevertheless considered substantial); Brown, *supra* (reporting that the overall United States life expectancy in 2008 was 78.1 years, up 0.3 years from 2005); *Health, supra* note 55 (commenting on a variety of issues with bearing on Black health, including access to healthcare, life expectancy, and cigarette-smoking habits). To disaggregate a bit, from a 14-year difference in 1900, the gap between Black and White life expectancy had dropped to less than five years by 2007. *See id.* (including the table of life expectancy for selected birth years from 1900 to 2007); *see also* Mestel, *supra* note 55 (noting that in 1900, the lifespan of a Black man was 32.5 years and a Black woman 33.5 years, compared to 46.3 years for a White man and 48.3 years for a White woman). However, for all the improvement in the numbers over the years, a consistent element is the lower life expectancy rate for Blacks, compared to Whites. *Health, supra* note 55. In 2011, the life expectancy for Blacks was 75.54 years, compared to 78.86 years for all races in the United States and 79.12 years for Whites. *See* LeDuc Media, *USA Life Expectancy All Races*, WORLD LIFE EXPECTANCY, www.worldlifeexpectancy.com/usa/life-expectancy (last visited Oct. 28, 2015) (showing that, disaggregated, the numbers are 78.46 years for Black women versus a more

longevity after retirement has increased in general for Americans,[57] that is not the case with Blacks.[58]

Last but not least is housing. Despite the lifting of the formal barriers to residential integration signified by the Civil Rights Act of 1968, more popularly known as the Fair Housing Act (FHA),[59] "many African

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modest 72.29 years for Black men). For 2014, the CIA estimates the average person's life expectancy in the United States as 79.56 years, which places the country as number 42 in the world. *See Country Comparison: Life Expectancy at Birth*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html (last visited Oct. 28, 2015). However, the CIA data did not include separate information for groups.

57. *See Period Life Table, 2011*, SOC. SECURITY ADMIN., www.ssa.gov/oact/STATS/table4c6.html (showing that, as of 2011, 65 year-old males are projected to live an additional 17.66 years, compared to 20.22 years for women).

58. *See also* Steven Reinberg, *U.S. Blacks Still Lag Whites in Life Expectancy*, WEBMD (July 18, 2013), http://www.webmd.com/heart-disease/news/20130718/us-blacks-still-lag-whites-in-life-expectancy-study (indicating that "[d]espite a significant increase in life expectancy in recent decades, Black Americans still die almost four years earlier than white Americans do," due to a range of factors that includes heart disease, cancer, and homicide).

59. Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. § 3601–3619 (2012)). The law was intended as a follow-up to the Civil Rights Act of 1964 and is viewed as signifying the last great legislative event of the civil rights era. *Fair Housing Act of 1968*, HISTORY.COM, http://www.history.com/topics/black-history/fair-housing-act (last visited Oct. 28, 2015). The legislation prohibited discrimination regarding the sale, rental, and financing of housing based, initially, on race, religion, national origins, and, since 1974, gender, and subsequently since 1988, protects people with disabilities and families with children. 42 U.S.C. § 3601–3619. The Supreme Court upheld the law's constitutionality in 1968, Jones v. Mayer Co., 392 U.S. 409 (1968), basing its decision on the national government's power to regulate private housing under the Civil Rights Act of 1866, which guarantees all citizens the rights "to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.* at 422–37. In a decision written by Justice Stewart, the Court linked the law to the Thirteenth Amendment's guarantee to eliminate "badges and incidents of slavery," indicating that discrimination in housing "herds men into ghettos and makes the ability to buy property turn on the color of their skin." *Id.* at 439, 442–43. The passage of the law was preceded by several acts of residential segregation dating back to the early 20th century, as the Black population grew, that included collective neighborhood action by Whites against Blacks, racially restrictive covenants barring transfer of properties to Black people, and zoning restrictions, among other improper real estate practices. *See* Natasha M. Trifun, *Residential Segregation After the Fair Housing Act*, 36 HUM. RTS. 14, 15 (2009) (providing a background history preceding passage of the FHA). To use Baltimore as an example, the city government adopted a residential segregation ordinance, restricting Black people to designated blocks after a Black Yale Law School graduate purchased a home in a previously all White neighborhood. Rothstein, *supra* note 37, at 1. Baltimore's mayor justified the policy on the ground that "Blacks should be quarantined in isolated slums in order to reduce the incidence of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White majority." *Id.* As in other matters, the Supreme Court, through a less than progressive reading of the United States Constitution, gave its judicial imprimatur to residential segregation. For example, in 1917, the Court found housing segregation regulations, such as one that Baltimore adopted in 1910, unconstitutional, not because they abridged the rights of Blacks to live where they chose or could afford, but because such regulations restricted the property rights of White homeowners to sell to whomever they wished. *Id*. In Baltimore, the mayor effectively circumvented the Court's decision by "instructing city building inspectors and health

Americans still face limited housing choices"[60] that compel them to live in poor neighborhoods lacking infrastructure and environmental safety.[61] To make matters worse, "[r]esidential segregation also deprives [many Blacks of] equal access to quality education, employment, homeownership, and wealth accumulation."[62] Some perceptive commentators also finger housing segregation as among the underlying reasons for recent Black uprisings in some United States cities, particularly Ferguson, Missouri and Baltimore, Maryland.[63] Narrowing the searchlight to seniors, in 2010 44% of Black seniors had no home equity because they lived in rented homes.[64] On expenses related to housing, 60% of Black seniors were found to be at risk because of high housing expenses.[65]

Some of the foregoing were among the set of factors that led a commission headed by the preeminent Black historian John Hope Franklin, to conclude instructively that "the color of one's skin continues to affect an individual's opportunities to receive a good education, acquire the skills to get and maintain a good job, have access to adequate health care, and receive justice under the law."[66] Former President Bill Clinton set up the commission to investigate and advise him on race relations. So, although the recession and its slow recovery have magnified the gap between Blacks and Whites in retirement security as indicated before, the retirement troubles of Black people predated these economic woes.[67]

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department investigators to cite for code violations anyone who rented or sold [property] to blacks in predominantly white neighborhoods." *Id.*

60. Trifun, *supra* note 59, at 14.

61. *See id.* Note that, although the FHA is the primary federal statute on housing discrimination, it does *not* address three other issues related to residential discrimination: lack of infrastructure in Black communities, environmental injustice in Black neighborhoods, and racial disparities in subprime lending. *Id.* at 14–19.

62. *Id.* at 14.

63. Rothstein, *supra* note 37, *passim*.

64. MESCHEDE ET AL., *supra* note 1, at 13.

65. *Id.* at 8.

66. THE ADVISORY BOARD TO THE PRESIDENT'S INITIATIVE ON RACE, ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE 35 (1998). This statement calls to mind the findings of the National Advisory Commission on Civil Disorder, headed by then-Illinois Governor Otto Kerner, in 1968 to the effect that the United States "is moving toward two societies, one black, one white—separate and unequal." NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1967). The Commission was set up by then-President Lyndon Johnson to investigate a rash of riots in Black communities across the United States, notably Newark, New Jersey and Detroit, Michigan, and make recommendations designed to deal with both the immediate and remote causes of these uprisings. *Id.*

67. *See supra* notes 6–9.

II. HISTORICAL BACKDROP: PROTECTION AGAINST THE ECONOMIC FEARS OF OLD AGE

The United States made history in August 1935 when Congress enacted the Social Security Act.[68] Passed during President Franklin D. Roosevelt's first term in office,[69] the law "establish[ed] a system of Federal old-age benefits" in this country.[70] Except for veterans' pensions, before the passage

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68. Social Security Act, Pub. L. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C., §§ 301–1397mm (2012)). The bill was signed into law by President Franklin D. Roosevelt on August 14, 1935. Leading up to that moment, the House of Representatives approved the legislation on August 8 and the Senate on August 9. The law comprised ten titles, including grants to states for old-age assistance, federal old-age benefits, grants to states for unemployment compensation administration, grants to states for aid to dependent children, grants to states for maternal and child welfare, grants to states for aid to the blind, and taxes with respect to employment. *Id.* For a statement on the origin of the term *Social Security*, see *Research Notes and Special Studies by the Historian's Office: Research Note #24: Origins of the Term "Social Security," Agency History*, SOC. SECURITY ADMIN., http://www.socialsecurity.gov/history/termorigin.html (last visited Oct. 27, 2015). *See also* Larry DeWitt, *The Development of Social Security in America*, 70 SOC. SEC. BULL., www.ssa.gov/policy/docs/ssb/v70n3/v70n3p1.html (last visited Oct. 27, 2014) (explaining the origins of social insurance).

69. The law was drafted by the President's Committee on Economic Security, headed by Labor Secretary Frances Perkins, the only female then in FDR's Cabinet, and the only woman present when FDR signed the Act into law on August 14, 1935; all the rest were White males. *See Signing the Social Security Act of 1935*, SOC. SECURITY ADMIN., www.ssa.gov/history/fdrsign.html (last visited Oct. 27, 2015) (Frances Perkins is number 12 in the composite). Many members of the Republican Party opposed the law on the ground that it was socialistic. One opponent, Senator Frederick Hale, representing Maine, accused FDR of "filling Washington with 'socialistic agencies,'" adding that "if Mr. Roosevelt is re-nominated" in 1936 for president, "it will be unnecessary for the Socialist Party to put up a candidate." Robert C. Albright, *Security Bill's Passage Held Likely Monday: Hastings and Long Assail Measure; Few Changes Are Expected*, WASH. POST, June 15, 1935, at 2. To charges like this, FDR responded that "seeking for a greater measure of welfare and happiness," embodied in the Social Security Act, "does not indicate a change in values. It is rather a return to values lost in the course of our economic development and expansion." *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., http://www.ssa.gov/history/briefhistory3.html (last visited Oct. 27, 2015) (message of the President to Congress on June 8, 1934). The law was prepared and passed as part of FDR's New Deal program. *See id.* (discussing the passage and development of the Social Security Act). The New Deal consists of a series of domestic programs unveiled between 1932 and 1940, designed as a response to the economic meltdown of the Great Depression, from 1929 to 1933. The programs focused around the three "R's" of relief, recovery, and reform by the Roosevelt Administration that, in addition to the Social Security Act, included fiscal policy, banking reform, monetary reform, securities regulation, public works, labor relations, tax policy, and housing. *See generally* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940 (1963) (giving a standard interpretive history of the New Deal); *see also* KIRSTIN DOWNEY, THE WOMAN BEHIND THE NEW DEAL: THE LIFE OF FRANCES PERKINS, FDR'S SECRETARY OF LABOR AND HIS MORAL CONSCIENCE (2009) (documenting the influence of Secretary Perkins on the New Deal programs).

70. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (preamble). The law was equally designed to "enable[] the several States to make more adequate provision" for various economically vulnerable groups in United States society, including "aged persons." *Id.*

of the Social Security Act in 1935 support for the elderly was a local, state, and family matter that did *not* evolve into a concern of the United States government.[71] The Act changed all this. In signing the measure into law, Roosevelt became the first president to advocate for the protection of the elderly.[72] Going forward, in 1944 FDR unveiled the Economic Bill of Rights, complementary to the original Bill of Political Rights of 1791. The bill attempted to establish a new basis of security and prosperity, including "[t]he right to adequate protection from the economic fears of old age" for all irrespective "of station, race, or creed."[73]

Ever since retirement security has come into vogue in the framework of United States public policy as well as in the public agenda.[74] Other landmark

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71. *See Social Security Act (1935)*, OUR DOCUMENTS, www.ourdocuments.gov/doc.php?flash=true&doc=68 (last visited Jan. 29, 2015). *See also* DeWitt, *supra* note 68 (discussing "Civil War Pensions").

72. *See* ANDREW ACHENBAUM, SOCIAL SECURITY VISIONS AND REVISIONS 25–26 (1986) (examining the history of the Social Security system, including several attempts made to reform that system).

73. President Franklin D. Roosevelt, The Economic Bill of Rights, State of the Union Message to Congress (Jan. 11, 1944), http://www.fdrlibrary.marist.edu/archives/pdfs/state_union.pdf (transcript available in Franklin D. Roosevelt Presidential Library and Museum). FDR declared:

> We cannot be content, no matter how high that general standard of living may be, if some fraction of our people . . . is ill-fed, ill-clothed, ill-housed, and insecure . . . . In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed. Among these are . . . [t]he right to adequate protection from the *economic fears of old age* . . . .

Id. (emphasis added). Often referred to as the "Second Bill of Rights," this statement is excerpted from President Roosevelt's message to Congress on the State of the Union. The protection against the insecurities of old age was part of FDR's "freedom from want," one of four "essential human freedoms" necessary to build peace at home and abroad "[i]n the future days, which we seek to make secure[,]" in the aftermath of the ravages of World War II from 1939 to 1945. *Id.* Expounding on the four freedoms, Professor Louis Henkin observed that:

> FDR spoke of *freedoms*, in the language of the U.S. Constitution, but he echoed the ideology of *rights*, found in the writings of John Locke and William Blackstone, in the American Declaration of Independence and the U.S. Bill of Rights, and in the French Declaration of the Rights of Man and the Citizen of 1789. Behind FDR's words were also 150 years of constitutionalism in the United States and the economic and social revolution of his New Deal.

Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect, in* REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 3, 4 (Samantha Power & Graham Allison, eds., 2000).

74. The public agenda consists of the set of topics of concern to policy elites (i.e., the President, members of Congress, Supreme Court justices, cabinet officers, heads of key departments and agencies, leading editorial writers, and influential columnists and commentators), the general public or both. *See* THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING 52–78 (2d ed. 2005) (analyzing official actors and their roles in public policy); *id*. at 79–107 (focusing on unofficial actors and their roles in public policy).

events in the movement toward retirement security in the United States include: the Internal Revenue Service (IRS) Revenue Ruling 56-693 of 1956,[75] the Employee Retirement Income Security Act (ERISA) of 1974,[76] the Revenue Act of 1978,[77] and the Pension Protection Act of 2006.[78] Revenue Ruling 56-693 forbade the availability of funds from a pension plan before "any severance of employment," such as "retirement, disability, or death," on the ground that allowing a distribution before any of these three events "is inconsistent with the accepted concept of a pension plan."[79] This and subsequent IRS rulings reinforced the agency's definition of retirement for pension plan purposes as essentially a permanent termination of employment.[80] ERISA was designed to minimize underfunding in defined-benefit plans,[81] and the law initiated a long line of legislation—leading up to

75. Rev. Rul. 56-693, 1956-2 C.B. 282, www.charitableplanning.com/document/677139.

76. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974).

77. U.S. Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2763 (1978).

78. Pension Protection Act of 2006, Pub. L. 109-208, 120 Stat. 780 (2006) ("provid[ing] economic security for all Americans").

79. Rev. Rul. 56-693, *supra* note 75, at 283.

80. *A Timeline of the Evolution of Retirement in the United States*, GEO. U. L. CTR. WORKPLACE FLEXIBILITY 2010, at 3 (Mar. 26, 2010), http://scholarship.law.georgetown.edu/legal/50.

81. Congress passed the law "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 374 (1980) (quoting STAFF OF S. COMM. ON LABOR, 94TH CONG., REP. ON EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 214 (statement of Sen. Lloyd Bentsen (Comm. Print 1976)). One classic case involving an underfunded pension plan, and one of the cases impelling Congress to act, was the shutdown in 1963 of Studebaker automobile operations in South Bend, Indiana, where 4,500 workers, some of whom served the company for periods of up to twenty years, lost 85% of their vested benefits. *Id*. at 22 (quoting Senator Williams, a sponsor for the Senate version of the Employee Retirement Income Security Act of 1974 (ERISA)); Teresa Ghilarducci, *Why The 401(k) Is a "Failed Experiment,"*, s*upra* note 21. *See also President Ford Signing ERISA of 1974,* PENSION BENEFIT GUAR. CORP., http://www.pbgc.gov/about/who-we-are/pg/president-ford-signing-erisa-of-1974.html (last visited Oct. 27, 2015) (statement by President Gerald R. Ford upon signing the law). Furthermore, Congressional findings underpinning passage of ERISA are revealing and instructive. These findings include: "the continued well-being and security of millions of employees and their dependents are directly affected by these plans"; due to lack of vesting provisions in these plans, many employees with long years of employment are losing anticipated retirement benefits; need for adequate standards to assess the soundness and stability of these plans regarding adequate funds to pay promised benefits; and terminating these plans before accumulation of requisite funds deprive employees and their beneficiaries of anticipated benefits, among others. ERISA, Pub. L. No. 93-406, § 2, 88 Stat. 829 (1974). Professor Ghilarducci disclosed that ERISA was designed to make companies set aside money to back up their pension promises—to ensure all companies did what some big companies were already doing, absent legal compulsion. This was a time when successful companies, to remain competitive, provided pensions to retain good workers. Teresa Ghilarducci, *Why the 401(k) is a "Failed Experiment,*" *supra* note 21. "ERISA rode that wave of employer-employee relationships that really valued skilled workers and some loyalty to the job." *Id*. Defined-contribution plans—by definition—are always "fully funded." *Id.* Thus Congress saw no need to provide insurance protection for participants in defined-contribution plans. *Id*.

the PPA in 2006—related to the labor and tax aspects of employee benefit plans.[82] The Revenue Act of 1978 established qualified deferred compensation schemes, popularly known as 401(k) plans, allowing pre-tax employee contributions into such plans or elective deferrals.[83] Equally important for our purpose here, these plans established 21 years of age as the minimum age in retirement planning.[84] Signed into law by President George W. Bush on August 17, 2006, the PPA represents "the most [comprehensive] reform" of the pension law and pension insurance system since the passage of ERISA in 1974.[85] The PPA was prompted by new problems in the

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This was until the Enron corporate scandal in 2001, which demonstrated one potential problem with these plans: the company had strongly encouraged its workers to invest their 401(k) plans in their employer itself, violating primary investment guidelines about diversification. The Enron scandal, named after Enron Corporation, a gigantic energy company, based in Houston, Texas, was an audit failure that led to the bankruptcy of Enron Corporation in 2001 and the loss of the assets of numerous investors. *Enron: The Real Scandal*, ECONOMIST (Jan. 17, 2002) www.economist.com/node/940091; Ken Silverstein, *Enron, Ethics, and Today's Corporate Values*, FORBES (May 14, 2013 7:12 AM) http://www.forbes.com/sites/kensilverstein/2013/05/14/enron-ethics-and-todays-corporate-values/ (stating that Enron Corporation's "failure in 2001 represents the biggest business bankruptcy ever while also spotlighting corporate America's moral failings"). Following the scandal, Congress passed the Sarbanes-Oxley Act, Pub. L. 107-204, 116 Stat. 745 (2002), designed to increase the accuracy of financial reporting for public companies.

82. Teresa Ghilarducci, *Why the 401(k) is a "Failed Experiment*," *supra* note 21. These include the Retirement Equity Act of 1984, which reduced the maximum age that an employer may require for participation in a retirement plan, and created spousal rights to retirement benefits via qualified domestic relations orders (QDROs) in the event of divorce, among other changes; and the Omnibus Budget Reconciliation Act of 1986, which eliminated the ability of employers to limit participation in their retirement plans for new employees who are close to retirement, and the ability to freeze benefits for participants over age 65. *Id*.

83. *A Timeline of the Evolution of Retirement in the United States*, *supra* note 80, at 4. Employees may withdraw their contributions from such plans when they turn 59½ years of age or upon "severance from employment," or because of hardship or disability. *Id. See also* Emily Brandon, *10 Important Ages for Retirement Planning*, US NEWS & WORLD REPORT (Feb. 21, 2012, 9:20 AM), http://money.usnews.com/money/retirement/articles/2012/02/21/10-important-ages-for-retirement-planning (explaining that "[t]he 10 percent early withdrawal penalty on [employer-sponsored benefits] withdrawals ends" when the worker turns 59½ years). For more discussion on 401(k) plans, *see infra* note 167 and corresponding text.

84. The occurrence is still valid even though it took place by default or incidentally rather than formalistically: employers sponsoring these plans may exclude employees younger than 21 from 401(k) plans, a step many companies take, effectively leaving 21 as the eligible starting age. Brandon, *supra* note 83. An IRS survey of 1,200 401(k) plans sponsors found that 64% require employees to be at least 21 before they can participate in the 401(k) plan. *Id*. Also, 61% of companies that offer 401(k) matching require employees to be at least 21 years old to qualify. *Id*. The logic behind this early age is that "it can make a tremendous difference because [the worker] ha[s] the growth in [his or her] investments accumulating for more years." *Id*.

85. *President Bush Signs H.R.4, the Pension Protection Act of 2006*, WHITE HOUSE (Aug. 17, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060817-1.html; PATRICK PURCELL, CONG. RESEARCH SERV., RL-33703, SUMMARY OF THE PENSION PROTECTION ACT OF 2006, at 1 (2006).

retirement security system that included defaults by several large defined-benefit pension plans and the diminished solvency of the Pension Benefit Guaranty Corporation (PBGC) created in 1974 under ERISA.[86]

The Social Security Act of 1935 did not cover all groups of workers.[87] To the contrary, it excluded many Blacks and other minority people from the benefits of unemployment insurance and old-age pensions.[88] The Act did not include occupational categories such as agricultural labor, domestic service, teaching, nursing, hospital employees, library services, social work, government employment, and intermittent (seasonal) workers.[89] Women were overrepresented in these categories,[90] but more so were Black people; nearly two-thirds of Black people in the labor force were uncovered and in some instances, such as in parts of the South, between 70 to 80% were not covered.[91] The effect of these exclusions of Blacks and other minorities was that "Social Security in its initial design was not equally available to all types of workers."[92] The exclusions led the National Association for the

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86. PURCELL, *supra* note 85.

87. *See* MESCHEDE ET AL., *supra* note 1, at 3 (noting that "[l]arge proportions of African Americans and Latinos were kept out of the [Social Security] system in its early years due to their occupational type"); Geoffrey Kollmann, *Social Security: Summary of Major Changes in the Cash Benefits Program*, SOC. SECURITY ADMIN. (May 18, 2000), http://www.ssa.gov/history/reports/crsleghist2.html (stating that "about 60% of the work force," encompassing "[n]early all workers in commerce and industry under age 65," were covered).

88. Principal groups excluded from the program were government workers, railroad employees, the self-employed, farm and domestic workers, and employees of nonprofit organizations. Kollmann, *supra* note 87. Blacks and other minorities were overrepresented in these job categories. The classification of employments that qualified for Social Security at this time reflected white-male bias of a kind that one writer argued sowed the seed of "inequality in the welfare state." GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942, at 127 (1995).

89. Kelly Anderson, *The History of Social Security in America*, INTUIT MINT, https://www.mint.com/the-history-of-social-security-in-america (last visited Oct. 27, 2015) (indicating that nearly half of all working Americans, most of them minorities and women, were initially excluded from Social Security). Part-time workers or those who worked intermittently (i.e., seasonally) were also excluded. *Id.*

90. In actual numbers, over 50% of all women at the time were not covered by Social Security. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA 131 (1st ed. 2001). To add insult to injury, Social Security reflected and mirrored traditional views of family life. Women generally qualified for benefits only through their husbands or children; and mothers' pensions, provided for in Title IV, based entitlements on the presumption that mothers would be unemployed; MINK, *supra* note 88, at 126–30.

91. KESSLER-HARRIS, *supra* note 90, at 181. For example, in 1940 women made up about 90% of the domestic labor force, which included about 67% of employed Black women. *Id*. at 146. Arguably, to date, the picture remains largely unchanged. *See* Kathryn Joyce, *Home Care in Crisis*, IN THESE TIMES (Oct. 9, 2014), http://inthesetimes.com/article/print/17228/home_care_in_crisis (pointing out that "[t]oday, the home care workforce looks in many ways like it has for a century: 90 percent women and 56 percent people of color.").

92. MESCHEDE ET AL., *supra* note 1, at 3.

Advancement of Colored People (NAACP) at the time to protest the Social Security Act as "a sieve with holes just big enough for the majority of Negroes to fall through."[93]

But time heals some wounds. Over time, slowly but surely, a number of the exclusions were repaired. In 1950, domestic laborers (household employees who work at least two days a week for the same person), nonprofit workers, and the self-employed were added; so too were hotel workers, laundry workers, all agricultural workers, and state and local government employees in 1954.[94] Other changes designed to strengthen Social Security or to adapt it to changing conditions were implemented. These included the incorporation of survivor and dependent benefits in 1939;[95] allowances for early retirement benefits at age 62 for women in 1956 and for men in 1961;[96] incorporation of disability payments in 1956;[97] incorporation of Medicare in

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93. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 47–48 (2005).

94. KESSLER-HARRIS, *supra* note 90, at 155–56. Black women historically had higher rates of participation in the labor force, but were overrepresented in traditional women's jobs, such as housekeeping and elder care, that were undervalued and underpaid until the passage of the Equal Pay Act in 1963 and Title VII of the 1964 Civil Rights Act. MARIKO CHANG, ET AL., INSIGHT CENTER FOR CMTY. ECON. DEV., LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA'S FUTURE 1 (2010), http://www.cunapfi.org/download/198_Women_of_Color_Wealth_Future_Spring_2010.pdf. Even after that, it was difficult for females to obtain credit or own property in their name (if married). They were denied based on sex and/or marital status until the Equal Credit Opportunity Act of 1974. *Id.* at 14.

95. Survivor benefits were payments to a family in the event of the premature death of a covered worker, while dependent benefits were payments to the spouse and minor children of a retired worker. *See Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., *supra* note 69. The change effectively transformed Social Security from a retirement program for workers into a family-based economic security program. *Id*. *See also* Lyle L. Schmitter & Betti C. Goldwasser, *The Revised Benefit Schedule under Federal Old-Age Insurance*, 2 SOC. SEC. BULL. (Sept. 1939), http://www.ssa.gov/history/reports/1939no2.html (explaining the conceptual basis for the 1939 changes in the Social Security Act).

96. Linda Richard, *Social Security Early Retirement Regulations*, EHOW, http://www.ehow.com/about_7308243_social-security-early-retirement-regulations.html (last visited Nov. 11, 2015).

97. *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL. (Aug. 2006), http://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.html (exploring the efforts of Social Security planners to establish a disability program in the United States and the history of the program over the 50 years preceding the publication of the article in 2005/2006; the OASDI acronym in the article refers to the Social Security Administration's Old-Age, Survivors, and Disability Insurance program); Edward D. Berkowitz, *Disability Policy & History*, SOC. SECURITY ADMIN. (July 13, 2000), http://www.ssa.gov/history/edberkdib.html (overview of Social Security and Social Security programs, along with their historical development by an expert on Social Security history). Only workers aged 50–64 initially qualified for disability payments. Kearney, *supra*. Social Security law defines disability strictly as a worker who is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months." National Academy of Social Insurance,

1965;[98] the introduction of automatic cost-of-living adjustments (COLA) in 1973;[99] provision for a gradual increase in the age of full retirement benefits to 67;[100] elimination of the retirement earnings test for people above the full-benefit retirement age in 2000;[101] the addition of an outpatient prescription drug benefit to Medicare in 2003;[102] and changes under President Obama's Affordable Care Act (ACA) of 2010. These changes are analyzed under Part III.B.2 below.

However, some of the initial damage proved hard to undo. Without discounting progress made over the years, Blacks and other minorities "face great barriers to economic opportunities which shape their life trajectories

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What is Social Security Disability Insurance?, *Social Security*, NAT'L ACAD. SOC. INS., http://www.nasi.org/book/export/html/159 (last visited Oct. 28, 2015).

98. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965). Just like Social Security, Medicare is a social insurance program funded through payroll taxes. Under the law, every worker from 18 to 80—including those who are 65 or older and have health insurance from their employer—pays Medicare taxes on all earnings from work, at a current tax rate of 2.9% (the worker pays half and the employer half, unless the worker is self-employed, in which case he or she pays the full amount). *Social Security History: History of SSA During the Johnson Administration 1963–1968*, SOC. SECURITY ADMIN., http://www.ssa.gov/history/ssa/lbjmedicare1.html (last visited Nov. 6, 2015). In 1972, the United States government extended the program to cover disabled persons. *See* Act of Oct. 30, 1972, Pub. L. No. 92-603, § 201, 86 Stat. 1370.

99. COST-OF-LIVING-ADJUSTMENT FACTSHEET, SOC. SECURITY ADMIN. (2013) [hereinafter SOC. SECURITY ADMIN., *Factsheet*], http://www.ssa.gov/news/cola/docs/factsheet.pdf. Designed to stem the erosion of Social Security benefits by inflation, the adjustments went into effect beginning in 1975. *History of Automatic Cost-Of-Living Adjustments*, SOC. SECURITY ADMIN., http://www.socialsecurity.gov/news/cola/automatic-cola.htm (last visited Aug. 30, 2015). Before 1975, Congress increased benefits on an *ad hoc* basis through special legislation. SOC. SECURITY ADMIN., *Factsheet*, *supra*.

100. Act of Apr. 20, 1983, Pub. L. No. 98-21, 97 Stat. 65. The law raised the age of eligibility for unreduced retirement benefits in two stages to 67 by the year 2027. Workers born in 1938 will be the first group affected by the gradual increase. Benefits will still be available at age 62, but with greater reduction. *Id.*

101. Alan L. Gustman & Thomas L. Steinmeier, *The Social Security Retirement Earnings Test, Retirement, and Benefit Claiming* 1 (Univ. of Mich. Retirement Ctr., Working Paper 2004-090 2004), http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp090.pdf. The law in question here is the Senior Citizens Freedom to Work Act of 2000, Pub. L. No. 106-182, 114 Stat. 198, which abolished the Social Security earnings test for individuals between the full retirement age and 70 years of age. There is a great deal of concern that the looming retirement of the baby boom generation and other demographic changes will adversely affect the solvency of the Social Security system. In response to this concern, Congress has taken a number of steps to encourage older Americans to postpone their retirement. The expectation was that abolishing the earnings test for those between the early and full retirement age would further encourage later retirement.

102. *See* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066. President George W. Bush signed the bill into law on Dec. 8, 2003. *See Fact Sheet: Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, WHITE HOUSE (Dec. 8, 2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031208-3.html.

and continue to shape their current economic realities."[103] Although this nation has striven hard to repair historical inequities in educational and employment opportunities,[104] "it has not cured them."[105] These disabilities, compounded by the lingering effects of past and continuing discrimination, add up to undermine retirement security for Black workers, vis-à-vis their White counterparts.[106]

In sum, retirement security was inspired by FDR's notion of a "right for all to adequate protection from the economic fears of old age"—regardless of "station, race, or creed."[107] Yet the concern for old age was a solicitude ancillary to the severe economic and social problems of the Great Depression. The New Deal, tailored to solve these problems, was couched in neutral language that did not discriminate against any group, but in every other respect benefitted only White males to the detriment of Black people and other minority groups.[108] Put differently, from the word go Social Security, a program designed for all senior Americans irrespective of class or racial origins, embodied disparity that endured over time—and remained even after social security crystalized as a human right in the International Bill

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103. MESCHEDE ET AL., *supra* note 1, at 3.

104. *See generally* THEODORE H. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT 1956–1980 (1982) (depicting the United States as a nation "in search of itself" in an ongoing attempt to realize its founding principles).

105. MESCHEDE ET AL., *supra* note 1, at 3.

106. *See id.*

107. Roosevelt, *supra* note 73.

108. Needing support from Southern lawmakers, President Franklin D. Roosevelt excluded Black people from the core programs of the Social Security Act. *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 53 (2010) (stating that the reason behind the provision excluding farm and domestic labor was because Southern Democrats in Congress, who were motivated "by racial animus," blocked Black people from participating in the Social Security program); Joyce, *supra* note 91 (pointing out that "due to racism," "[a]long with agricultural workers, domestic workers were deliberately excluded from New Deal minimum-wage and overtime laws, as a sop to Southern senators who wanted to keep the mostly African-American workers in a state of semi-slavery"). KATZNELSON, *supra* note 93, at 47–48 (contending that the key programs of the New Deal of the 1930s and 1940s enacted by a Congress dominated by Southern Democrats, favored Whites and excluded occupational categories like maids and farm workers in which Blacks were overrepresented). *See also* Norton History, *Eric Foner on the New Deal, Pt. 3: The Beneficiaries*, YOUTUBE (Nov. 3, 2011), https://www.youtube.com/watch?v=YTm6JuqSZds (arguing similarly, responding to the question: who benefitted from the programs of the New Deal and who was let down?). Elaborating on how New Deal programs benefitted White Americans and let Black people down, Professor Foner indicated that some of these programs, such as old-age benefits and unemployment insurance, enacted by a Congress composed largely of Southern White males, were "shaped so as to exclude African Americans," while others were implemented in a manner that excluded Blacks. *Id.*

of Human Rights,[109] in line with the "right to adequate protection from the economic fears of old age" FDR postulated in 1944.[110]

III. A PARADE OF SIX MICRO AND MACRO STEPS FOR CLOSING THE GAP IN RETIREMENT SECURITY BETWEEN BLACKS AND WHITES

To restate, our argument in this Article is that in the wake of the Great Recession of 2007 to 2009, whose chilly economic effects on vulnerable groups are still felt all across the United States, retirement security for Black people will be a product of *changes* in Social Security, employer-sponsored funded pension plans, and personal assets, implemented in tandem with

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109. Three human rights instruments make up the International Bill of Human Rights: the Universal Declaration of Human Rights (UDHR), adopted by the U.N. General Assembly in 1948; the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into force in 1976; and the International Covenant on Civil and Political Rights (ICCPR), which also entered into force in 1976. Of the three, only the first two provide for the right to social security. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (stating that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . the right to security in the event of unemployment, sickness, disability, widowhood, *old age* or other lack of livelihood in circumstances beyond his control") (emphasis added); International Covenant on Economic, Social, and Cultural Rights, art. 9, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (providing that "[t]he States Parties to the present Covenant recognize the right of everyone to *social security*, including social insurance") (emphasis added). The UDHR is "a common standard of achievement for all peoples and all nations" that applies to all members of the U.N. with no need for ratification, but the United States has yet to ratify the ICESCR, despite advice from many quarters, including former President Jimmy Carter, for it to be a State Party to the multilateral treaty. *See* Jimmy Carter, *The American Road to a Human Rights Policy*, *in* REALIZING HUMAN RIGHTS, *supra* note 73, at 49, 57 (expressing his hope "that the United States eventually will ratify the International Covenant on Economic, Social and Cultural Rights"). In urging the United States's ratification of the ICESCR, Carter has called our attention to the indivisibility and inseparability of all human rights. "Human rights are not only a matter of political and civil rights, . . . they also comprise basic rights to a peaceful existence, a job, food, shelter, medical care, and education." *Id.* at 57. The United States's committing itself to these rights through ratification of the ICESCR, he said, "would publicly commit our nation to strive toward securing basic standards of material existence, social justice, and cultural opportunities for our citizens[,]" among other benefits. *Id*. at 58.

110. Professor Sunstein has argued passionately for the United States government and Americans to reclaim President Roosevelt's "Second Bill of Rights" of socioeconomic guarantees, designed to complement the original Bill of Rights adopted in 1791. Cass R. Sunstein, *Economic Security: A Human Right, Reclaiming Franklin Delano Roosevelt's Second Bill of Rights*, AM. PROSPECT A24–A26 (Oct. 2004); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004). "Roosevelt, himself a victim of polio, believed that each of us is vulnerable to dangers that cannot be wholly prevented. Insofar as the Second Bill would ensure food, clothing, shelter, and health care for all, it would insure against the worst of those dangers." Sunstein, *Economic Security*, *supra*, at A25. Sunstein observed that "[m]ost Americans favor a right to education, a right to be free from monopoly, a right to *social security*; and in many polls, most Americans favor a right to a job and a right to health care." *Id*. at A26 (emphasis added). However, the United States government is only ambivalently committed to most of the rights FDR catalogued. *Id*.

reductions in disparities between Blacks and Whites in education, health, and housing. To support that argument, we have in the two preceding sections described the shape of the retirement security gap between Blacks and Whites that this country confronts, and provided a historical narrative rooted in FDR's notion of "[t]he right to adequate protection from the economic fears of old age" necessary to understand the problem.[111] This section, billed as the centerpiece of our work, analyzes the six steps we have isolated for bridging the retirement security gap between Blacks and Whites. Table 1 graphically encapsulates the achievement of this Article.

TABLE 1: RECAP OF THE STEPS IN THE ROADMAP FOR CLOSING THE RETIREMENT SECURITY GAP AGAINST BLACKS[112]

Step or Variable	Bridge Focus or Accent	Bridge Means or Device
Social Security	Adjustment to existing policies	Changes, not rooted in privatization, that stave off bankruptcy and extend access in a popular social insurance program
Employer-sponsored pension plans	Adjustment to existing policies	Changes designed to increase access to pension plans, promote savings, and ensure that employers keep their pension promises to workers
Personal assets	Adjustment to existing policies in multiple areas; individual responsibility complemented with contributions from plan sponsors and financial institutions	Automatic and default features, continued employment, helping retirees manage their in-retirement risks, financial education and literacy, promoting adequate income opportunities for workers to save for retirement, and increased access to health insurance
Education	Disparity reduction	Implementation of the Obama Administration's program on education from preschool to college
Healthcare	Disparity reduction	Implementation of the Obama Administration's Affordable Care Act program
Housing or homeownership	Disparity reduction	*Adaptation* of the Obama Administration's 2015 program relating to housing and homeownership

The six steps or variables overlap at some points. The first three factors, which we denominate micro, are variables traditionally associated with retirement security, while the last three, which we call macro, are broader

111. President Franklin D. Roosevelt, The Economic Bill of Rights, State of the Union Message to Congress (Jan. 11, 1944), http://www.ushistory.org/documents/economic_bill_of_rights.htm .fdrlibrary.marist.edu/archives/pdfs/state_union.pdf (transcript available in Franklin D. Roosevelt Presidential Library and Museum).

112. Table created by authors.

forces that, although not directly connected with the micros, nonetheless frame and negatively impact retirement readiness for Blacks. A noted approach in problem solving is to move from the known to the unknown, to begin the search for answers from an area with the most light, rather than from a point of darkness.[113] The micro factors, memorialized in the literature on retirement security as "the three-legged stool,"[114] embody that wisdom.

Solving the United States's retirement trouble is predicated on shared responsibility that recognizes the ultimate responsibility of individuals for their own retirement without minimizing the need for a concerted effort by the government, sponsors of retirement plans, and financial institutions to encourage individuals to prepare for retirement.[115] The macro factors—reducing disparities in education, healthcare, and housing, three fields that are ultimately critical to the well-being of Black Americans[116]—affect retirement security, contributing to that shared responsibility. By their nature, micro factors are tied to improvements in the three legs of the stool of retirement security—Social Security, pensions, and personal savings—that are not limited to any particular group. In contrast, the macro factors target differences between Blacks and Whites, all of which have their roots in a history of unequal access to many economic benefits that predate and, in some sense, shape today's economic difficulties.[117]

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113. *See* SCOTT GREER, THE LOGIC OF SOCIAL INQUIRY 128–29 (1969) (recounting the allegory regarding the proverbial drunk who looked for his keys under a lighted lamp post where he could see "clearly," rather than in the darkness where he lost them).

114. Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pension, and Personal Savings*, 91 MINN. L. REV. 938, 938 (2007); Kay Bell, *Rethinking Retirement as Traditional 3-Legged Stool Wobbles*, DON'T MESS WITH TAXES (June 24, 2013), http://dontmesswithtaxes.typepad.com/dont_mess_with_taxes/2013/06/rethinking-retirement-three-legged-stool.html; Thomas J. Mackell, Jr., *Bring Back the Three-Legged Stool!*, HUFFINGTON POST (June 26, 2008, 5:12 AM), http://www.huffingtonpost.com/thomas-j-mackell-jr/bring-back-the-three-legg_b_107958.html; ILANA BOIVIE, NAT'L INST. ON RET. SEC., ISSUE BRIEF: SHATTERING THE RETIREMENT GLASS CEILING: WOMEN NEED A THREE-LEGGED STOOL 1 (2009), http://www.nirsonline.org/storage/nirs/documents/Shatter%20The%20Retirement%20Glass%20Ceiling.pdf (explaining importance of three-legged-stool for retirement security, especially for women).

115. MCKINSEY & CO., *supra* note 1, at 21–26.

116. Instructively, the three variables are among the list of issues covered in an edition of the American Bar Association (ABA) magazine, *Human Rights*, devoted to a survey of "the Journey," as President Barack Obama took office in January of 2009. Gloria J. Browne-Marshall, *The African American Journey*, 36 HUM. RTS. 1, 24 (Fall 2009). The magazine is an official publication of the ABA Section of Individual Rights and Responsibilities. *Id*. at 2 (inside cover page). The three domains of disparity isolated for analysis in this Article are illustrative rather than exhaustive of the possibilities for a sizable group within the United States population like Black people.

117. *See, e.g.*, Rothstein, *supra* note 37, at 3.

> In Baltimore and elsewhere, the distressed condition of African American working- and lower-middle-class families is almost entirely attributable to federal policy that prohibited black families from accumulating housing equity during the suburban

A. Micro Steps

1. Social Security

The first port of call in the journey toward retirement security for Blacks is Social Security. The program is the ultimate social insurance arrangement with no investment risk, and "the foundation of retirement income security"[118] that gives employers what they want and workers what they need.[119] It is the sole source of income for a little over one in five (21%) Americans aged 65 and above,[120] and a little over one in three (36%) Black people.[121] The payout is modest: the average Social Security income for a retired worker is about $18,230 a year for a lifetime of "medium" earnings, pegged at $43,720 in 2012, and $11,070 for a "low" earner, defined as about $19,670 in 2012.[122] Still, the volatility of the United States' economy in the

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> boom that moved white families into single-family homes from the mid-1930s to the mid-1960s—and thus from bequeathing that wealth to their children and grandchildren, as white suburbanites have done.

Id.

118. Jo Ann Jenkins, *Financial Resilience for Our Longer Lives*, AM. ASS'N RETIRED PERSONS, http://member.aarp.org/politics-society/advocacy/info-2014/financial-resilience-for-our-longer-lives.html (last visited Oct. 31, 2015); *see also* NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 2 (calling Social Security a cache of "bedrock economic security for seniors"); Munnell & Rutledge, *supra* note 5, at 3 ("Social Security is the backbone of the U.S. retirement system.").

119. Hear the effusive words of the National Academy of Social Insurance, in a statement it published in 2009, for strengthening Social Security: The program

> has virtually all the features that pension experts find desirable in a retirement plan. It covers nearly everyone and is fully portable between jobs. Its retirement benefits are pegged to pre-retirement wages, last for life, keep up with the cost of living, and continue for widowed spouses. Coverage is automatic and workers face no investment risk. Social Security provides family life insurance and disability protection. And it is remarkably efficient, using less than 1 percent of income for administration. In brief, Social Security gives employers what they often want (freedom from financial risk and fiduciary obligations to their workers) and gives workers and families what they need (economic security).

NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 2.

120. *The Role of Benefits in Income and Poverty*, NAT'L ACAD. SOC. INS., https://www.nasi.org/learn/socialsecurity/benefits-role (last visited Oct. 31, 2015).

121. *Id; see also* WAID ET AL., *supra* note 26, at 1 (showing that about 84% of older Black people receive Social Security benefits, compared to roughly 90% of older Whites). In its statement on measures for strengthening Social Security, the National Academy of Social Insurance observed that "[w]ithout Social Security, nearly one in two seniors would be poor; with Social Security less than one senior in ten is poor." NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 2. Given their relative economic deprivations, the important role Social Security plays in keeping older Americans out of poverty is probably more axiomatic for Black people than any other United States group.

122. *How Do Benefits Compare to Earnings*?, NAT'L ACAD. SOC. INS., http://www.nasi.org/book/export/html/159 (last visited Nov. 1, 2015). The federal poverty threshold for 2012 was $11,170 for a household of one person for the 48 contiguous states and the District of Columbia,

past several years, indicated by the economic downturn evident in the Great Recession and its slow recovery, has underscored "the importance of Social Security as income insurance."[123]

Yet some issues of sustainability remain that are tied to the nature of Social Security as a pay-as-you-go system, meaning simply that the benefits retired workers receive in the course of their retirement are funded by payroll taxes derived from the salaries of current workers.[124] The arrangement threatens the long-term viability and solvency of the trust fund as workers live longer and fewer workers support those on retirement.[125] Whereas in 1950, 16 workers supported every retiree, as of 2012, that number is just three.[126] The Government Accountability Office (GAO) has indicated that going by current trends, the trust fund could run out by 2037 (even though, thanks to continuing payroll tax revenue, the program will be able to pay for about 75% of its promised benefits over the next 40 or 50 years).[127] This

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$13,970 for Alaska, and $12,860 for Hawaii. *2012 HHS Poverty Guidelines,* U.S. DEP'T HEALTH & HUM. SERVICES, http://aspe.hhs.gov/2012-hhs-poverty-guidelines#thresholds (last visited Nov. 1, 2015). The numbers hover close to the Social Security payouts, particularly the average benefit for low earners, which, at little over $11,000, is actually lower.

123. Munnell & Rutledge, *supra* note 5 (abstract). As Munnell and Rutledge elaborated, "workers who lost a job can expect lower earnings and more instability, and potentially poorer health. Even households that avoided job loss will have less money available for spending in retirement due to low interest rates and reduced home values." *Id.*

124. *What is Social Security?*, NAT'L ACAD. SOC. INS., http://www.nasi.org/book/export/html/159 (last visited Nov. 1, 2015). A pay-as-you-go system differs from "pre-funded" company systems. In the latter, the money is accumulated in advance so that it will be available to pay out to today's workers when they retire. *Id*. The private plans need to be funded in advance to protect employees in case the company becomes bankrupt or goes out of business. *Id*.

125. Insolvency portends bad news for retirees because "[s]olvency plans that reduce benefit outlays call for raising the eligibility age for retirement benefits, lowering benefits for new retirees, or lowering the cost-of-living increases for those receiving benefits." NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 3.

126. Sean Gorman, *Rep. Frank Wolf Says Fewer Workers Are Supporting More Social Security Beneficiaries,* POLITIFACT VIRGINIA (Mar. 16, 2012, 2:30 PM), http://www.politifact.com/virginia/statements/2012/mar/16/frank-wolf/rep-frank-wolf-says-fewer-workers-are-supporting-m/ (reporting the statement of Mr. Wolf, Republican Congressman then representing the 10th congressional district in Virginia, to the effect that whereas in 1950, "the average American lived for 68 years and 16 workers supported one retiree. Today [in 2012], the average life expectancy is 78 and three workers support one retiree"). Rep. Wolf made the statement before voting no on February 17 to a 10-month extension of the Social Security payroll tax credit. *Id*; *see also* Veronique de Rugy, *How Many Workers Support One Social Security Retiree*, MERCATUS CTR. (May 22, 2012), mercatus.org/publication/how-many-workers-support-one-social-security-retiree (pointing out that as of 2012, "there are just 2.9 workers per retiree," a figure "expected to drop to two workers per retiree by 2030").

127. GOV'T ACCOUNTABILITY OFFICE, CITIZEN'S GUIDE TO THE 2010 FINANCIAL REPORT OF THE UNITED STATES GOVERNMENT viii n.3 (2010), http://www.gao.gov/financial_pdfs/fy2010/10guide.pdf. The GAO is an arm of Congress, created under the Budget and Accounting Act of 1921, Pub. L. No. 67-

insolvency threat extends to Medicare, the healthcare arm of Social Security. On this front, Social Security experts are concerned that Medicare premiums, which are deducted from Social Security benefits, "will take a bigger bite out of [those] benefits."[128] Even with the passage of the Affordable Care Act, analyzed below, itself an attempt to stem rising healthcare costs, the Medicare trust fund is projected to remain solvent only until 2029, after which it may experience shortfalls ranging from about a tenth to nearly a fourth.[129] Given the threat of insolvency, there is a general consensus among policymakers and analysts that some adjustments need to be made to promote the sustainability of the program,[130] particularly given the anticipated spasm of baby-boomer retirements, which kicked off in 2011 when the first set of boomers turned 65[131] and is billed to go on for nearly two decades.

Different administrations nurse different ideas regarding the reforms necessary to avert bankruptcy. George W. Bush attempted unsuccessfully to wash the hands of the national government of the trouble by privatizing the

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13 § 301, 42 Stat. 20 (1921). Colloquially known as "the investigative arm of Congress," and "congressional watchdog," the agency, inter alia, helps improve the performance and ensure the accountability of the national government, through various means that include oversight of federal programs. Formerly known as the General Accounting Office, the GAO changed its name (while making sure to retain the same acronym) to its present name in July 2004. *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/about/index.html (last visited Nov. 1, 2015).

128. NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 3.

129. CITIZEN'S GUIDE TO THE 2010 FINANCIAL REPORT OF THE UNITED STATES GOVERNMENT, *supra* note 127, at viii.

130. U.S. GEN. ACCOUNTING OFF., GAO-03-1038, SOCIAL SECURITY REFORM: ANALYSIS OF A TRUST FUND EXHAUSTION SCENARIO ILLUSTRATES THE DIFFICULT CHOICES AND THE NEED FOR EARLY ACTION 1 (2003) (warning that "[a]bsent reform, the nation will ultimately have to choose between persistent, escalating federal deficits, significant tax increases, and/or dramatic budget cuts of unprecedented magnitude"); David C. John, *Time to Raise Social Security's Retirement Age*, HERITAGE FOUND. (Nov. 22, 2010), http://www.heritage.org/research/reports/2010/11/time-to-raise-social-securitys-retirement-age (proposing a "comprehensive overhaul of" Social Security that will "gradually increase Social Security's full retirement age from 67 to 68, and to increase the early eligibility age from 62 to 65."). Under this proposal, individuals physically unable to work longer will receive disability benefits until they reach retirement age. *Id.* at 1. And as an incentive to work longer, seniors who work past the full retirement age would be exempted from paying Social Security taxes. *Id*. According to the proposal, this solution "will reduce the program's deficit by about 35 percent." *Id*.

131. D'Vera Cohn & Paul Taylor, *Baby Boomers Approach 65—Glumly*, PEW RESEARCH CTR., (Dec. 20, 2010), http://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly/. Baby boomers are Americans born in the eighteen years from 1946 to 1964. *Baby Boomers*, HISTORY, http://www.history.com/topics/baby-boomers (last visited Nov. 1, 2015).

program.[132] In contrast, President Barack Obama opposes privatization.[133] Also, under Obama, Republican Party politicians have proposed solutions to the solvency issue that include imposing means testing on Social Security entitlement recipients.[134] Social Security benefits are paid to eligible recipients, irrespective of their financial statuses, but application of means testing to the program would link benefits to income and provide payments only to beneficiaries who are determined to be "truly disadvantaged."[135]

Social Security is an immensely popular program that a large majority of Americans would like to see mended rather than ended.[136] That number includes Blacks.[137] But exactly what set of adjustments is called for? The

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132. *See* William A. Galston, *Why the 2005 Social Security Initiative Failed, and What It Means for the Future*, BROOKINGS INST. (Sept. 21, 2007), http://www.brookings.edu/research/papers/2007/09/21governance-galston. Bush argued, "As we fix Social Security, we also have the responsibility to make the system a better deal for younger workers. And the best way to reach that goal is through voluntary personal retirement accounts." *Id*.

133. LARRY BERMAN & BRUCE ALLEN MURPHY, APPROACHING DEMOCRACY 498 (8th ed. 2013).

134. *See id.* (commenting on the failed attempt in 2011 by Republican Senator Lindsay Graham from South Carolina, to add a means test for Social Security).

135. *Id.*

136. *See* JASMINE V. TUCKER ET AL., NAT'L ACADEMY OF SOC. INS., STRENGTHENING SOCIAL SECURITY: WHAT DO AMERICANS WANT? 1 (2013), http://www.nasi.org/sites/default/files/research/What_Do_Americans_Want.pdf (online survey of 2,000 Americans aged 21 and older in September of 2012 to tap the attitudes of working and retired Americans toward Social Security and the importance of Social Security benefits to beneficiaries' incomes). The study found that eight out of every ten Americans have favorable views of Social Security, do not mind paying for Social Security, and are willing to pay more to strengthen the program. *See id.* at 2, 7–8, 10–11. Even more to our point here, 89% of Americans in the survey opined that Social Security is critically important but an equally high percentage (84%) expressed the opinion that the program could be improved. *Id*. at 9 tbl.3, 10. It is an agreement that cuts across generations (Silent, Baby Boomer, Generation X, and Generation Y), family incomes (from less than $30,000 to $100,000 and more), and political party affiliations (Democrats, Republicans, and Independents). *Id*. at 2, 7–8, 7 tbl.1. Still more to our point, seven in ten Americans prefer a package of policy changes that increases Social Security revenues in certain ways and improves benefits in certain ways. *Id*. at 1. The study defines the Silent Generation as people born before 1946, Baby Boomers as persons born from 1946 to 1964, Generation X as persons born from 1965 to 1979, and Generation Y as individuals born from 1980 and after. *Id.* at 2. Still on the popularity of the program, in 2011, only 3% of Americans would cut Social Security, and only 4% would cut Medicare (a benefit plan strongly allied to Social Security) as their "first step in balancing the federal budget." Donna Butts & Virginia Reno, *Keep Social Security Strong*, THE HILL (Mar. 3, 2011), http://thehill.com/blogs/congress-blog/economy-a-budget/147307-keep-social-security-strong.

137. JASMINE V. TUCKER, NAT'L ACADEMY OF SOC. INS., STRENGTHENING SOCIAL SECURITY: WHAT DO AMERICANS WANT?: VIEWS AMONG AFRICAN AMERICANS, HISPANIC AMERICANS, AND WHITE AMERICANS 1 (2013), http://www.nasi.org/sites/default/files/research/Views_Among_African_Americans_Hispanic_Americans.pdf (finding that support for strengthening the program by increasing revenues and improving the adequacy of benefits (rather than reducing them) is "particularly strong among African Americans and Hispanics."). Little over nine out of ten or 91% of Black people opine in surveys that they don't mind paying Social Security taxes because it provides security and stability to millions of Americans; 90% opine that it is critical to preserve Social Security for future generations, even if it means increasing Social Security taxes paid by working Americans; and 68% prefer a package of

proper balance, we submit, is one not rooted in privatization, which staves off bankruptcy and extends access to a popular social insurance program.[138] These adjustments include: protecting Social Security benefits from garnishment, attachment, and freezes when they are deposited in a bank;[139] helping homeless individuals with serious mental illness get disability benefits;[140] strengthening Social Security through a new law and stronger enforcement of existing laws; wage reporting for farm workers;[141] reducing eligibility for retirement benefits from the 40-calendar-quarter (or ten-year) requirement;[142] improving benefits for widowed spouses of low-earning, dual-earner couples;[143] and increasing the Social Security special minimum benefit while updating Supplemental Security Income (SSI).[144] Other adjustments are: creating a new Social Security minimum benefit for low lifetime earners;[145] creating a Social Security supplement for low-income working parents with limited earning records because of time spent caring for their children;[146] increasing Social Security benefits for family elder caregivers;[147] increasing Social Security benefits for single retirees with at least 30 years of covered employment and low lifetime earnings;[148]

Social Security changes that includes two revenue increases and two benefit increases. *Id.*; *Social Security*, NATI'L ACAD. SOC. INS., http://www.nasi.org/book/export/html/159 (last visited Oct. 27, 2015).

138. The discussion in this whole paragraph relies and draws heavily on a proposal for reform of Social Security issued in 2009 by the National Academy of Social Insurance (NASI). *See* NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 4–8 (report containing 12 policy proposals from independent scholars aimed at improving Social Security protections for low-wage workers, elderly widows, the oldest old, disabled individuals, farm workers, and low-paid workers with careers interrupted by caring for children or aging family members). The Rockefeller Foundation supports NASI in its effort to "develop a new generation of innovations that provide social security in the 21st century. Given the recent down-turn in the economy, it is even more critical that we find solutions that provide security for America's workers now." *Id.* at 1–2. After receiving a large number of applications from researchers in various disciplines, NASI supported committees and study panels with independent grants to propose stronger Social Security measures for vulnerable population groups. *Id.* at 3–4.

139. *Id.* at 5.

140. *Id.*

141. *Id.* Although at first sight, this reform does not apply to Black people, it does for those Blacks who are also Hispanics or have a Hispanic heritage. Kilolo Kijakazi, *Impact of Unreported Social Security Earnings on People of Color and Women*, 12 PUB. POL'Y & AGING REP. 9, 9 (2002).

142. NAT'L ACADEMY OF SOC. INS., *supra* note 23, at 6.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 7. This is justified by the fact that Social Security provides benefits for spouses and widowed spouses, but does not provide credit for raising children. *Id.*

147. *Id.* The logic that underpins this recommendation is twofold: "[i]nformal care provided by family members improves quality of life for frail elders, allows them to remain in the community instead of in nursing homes, and saves Medicaid dollars;" and "[p]roviding the care also imposes opportunity costs on caregivers that weaken their own retirement security." *Id.*

148. *Id.* at 7–8.

increasing Social Security benefits at advanced ages;[149] and easing the impact of increasing the retirement age on disabled workers who retire early because of occupational disability.[150]

Social Security was never meant to be the primary source of retirement income.[151] Overreliance on the benefit plan makes one wonder whether this program is all that is left of the much-acclaimed three-legged stool of retirement.[152] To the same extent that the Great Recession and its slow recovery demonstrated the importance of Social Security for older workers who lost a good deal of their incomes, the same imperatives of economic difficulties also counsel "the need for a more robust retirement income system"[153] that goes beyond overdependence on this singular benefit plan.

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149. *Id.* at 8. This is a "longevity insurance" designed to "improve financial security for individuals who live longer than the average life span." *Id.* The logic behind this proposal is that "[p]eople who live into their 80s and 90s face a growing risk of becoming poor. They rely more and more on Social Security because their other sources of income decline as they age: private pensions, if received, are eroded by inflation; income from work is very rarely an option; and financial assets may have been spent." *Id.*

150. *Id.* NASI indicated that making this occupational disability benefit "available at age 62 could protect recipients from retired-worker benefit reductions (or part of such reductions) due to increasing the full benefit age." *Id.* The issue at bar is a 1983 law that increased the age at which Social Security pays full retirement benefits from 65 to 67. *Id.* The law did not reduce the benefits for disabled workers, but they cannot get full benefits unless they are able to show an "inability to engage in any gainful activity." *Id.* The suggestion is to replace this test with "inability to perform the essential duties of one's current occupation." *Id.*

151. In a statement at the bill signing ceremony, President Roosevelt indicated that the goal in crafting the law was not to "insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life," but rather "to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and *against poverty-ridden old age*." *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., *supra* note 69 (emphasis added) (quoting President Franklin D. Roosevelt, Presidential Statement Signing the Social Security Act (Aug. 14, 1935), http://www.ssa.gov/history/fdrsignstate.html). *See also* MESCHEDE ET AL., *supra* note 1, at 10 (opining that "Social Security benefits are intended to be supplemented by other retirement resources.").

152. *Entitled to Know: Is Social Security All that's Left of Retirement's "3-Legged Stool"?*, NAT'L COMM. TO PRESERVE SOC. SECURITY & MEDICARE, http://www.ncpssm.org/EntitledtoKnow/entryid/1972/Is-Social-Security-all-that-s-Left-of-Retirement-s-3-legged-stool (last visited Oct. 28, 2015). *See also* Sightings, *supra* note 1 (proposing three "sturdy legs" additional to the traditional three, namely: plan to work in early retirement, live below your means, and pursue more aggressive investment by investing in some less conservative assets, such as stocks and bonds); *see also* Franklin, *supra* note 1 (proposing a multilevel pyramid, consisting of "Social Security, homeownership, employer-sponsored plans, individual retirement accounts and other assets," and maybe part-time employment, as a better analogy for retirement income).

153. Munnell & Rutledge, *supra* note 5 (abstract).

2. Employer-Sponsored Pensions

The next micro step we identify for bridging the gap in retirement security between Blacks and Whites is employer-sponsored pensions.[154] Two broad general forms of these pensions exist: defined benefits (DB), and defined contributions (DC).[155] A key element distinguishing DB and DC plans is who bears the risk for ensuring that adequate funding exists for payment of promised benefits when those benefits are due.[156] Under a DB plan the employer bears the risk, whereas under a DC plan that risk falls squarely on the employee.[157] Otherwise, many varieties exist in each of the two categories, as the reader will see shortly with DC plans.

DB plans have a long history predating the United States' independence and encompassing both the public and private sectors.[158] Colonial militias and the United States' military get the credit for sponsoring the first pensions in this country. For the private sector, the history of these plans dates back to 1875 when the American Express Company, a railroad company, unveiled the first private sector pension plan in this country, driven by a desire to promote a stable, career-oriented workforce.[159] Many other railroad companies followed suit, as did non-railroad companies, such as American

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154. The appellation, *employer-sponsored pension plans*, is a misnomer since some plans, especially defined-contribution benefits (explained below shortly), integrate little such sponsorship in an era where the responsibility for retirement readiness, unlike in the past, is almost completely the employee's problem. But, for want of a better term, we retain the appellation in this Article.

155. Viewing them seamlessly, the seven most notable of these employer-sponsored plans are: the traditional DB plans, 401(k)s, Roth 401(1)s, 403(b) plans, 457 plans, Savings Incentive Match Plan for Employees (SIMPLE Plan), and Simplified Employee Pension (SEP) plans. Kevin Mercadante, *Seven Most Popular Employer-Sponsored Retirement Plans*, INVESTOR JUNKIE (Feb. 24, 2015), http://investorjunkie.com/39001/types-employer-sponsored-retirement-plans/. For a discussion of 401(k)s, see *infra* note 167. Contributions into a Roth 401(k) are not tax-deductible, but distributions from the plan are tax-free, as long as the employee is at least 59.5 years old, and has been in the plan for at least five years. Mercadanta, *supra*. 403(b)'s are virtually identical to 401(k) plans, except that they are designed for non-profits, including public school systems, hospitals, home health service agencies, and churches, among others. *Id*. 457s are 401(k)s for state and local government employees. *Id*. SIMPLE plans are generally offered by smaller employers. *Id.* SEP plans allow small businesses to have a simple method of administering a retirement plan for their employees. *Id*.

156. Stephen P. McCourt, *Defined Benefits and Defined Contribution Plans: A History, Market Overview, & Comparative Analysis*, 43 BENEFITS COMPENSATION DIGEST 1, 1 (2006); Befort, *supra* note 114, at 947.

157. McCourt, *supra* note 156, at 1. Since the passage of ERISA in 1974, the requirement has evolved that DC plans be fully funded to ensure that companies set aside money to back up their pension promises. Pub. Broad. Serv., *supra* note 21.

158. McCourt, *supra* note 156, at 1–2.

159. *See* Pub. Broad. Serv., *supra* note 21 (commenting on how before the passage of ERISA in 1974, to remain competitive, progressive companies provided pensions to retain skilled workers and/or engender loyalty among their employees).

Telephone and Telegraph (AT&T) in 1906.[160] By 1920, many large private companies had introduced pension plans for their workers.[161] The trend continued in the 1930s and 1940s.[162] Ironically, one of the occurrences that stimulated this trend was the Great Depression.[163] The tax benefits extended to corporations in response to the economic and financial disaster, provided an incentive for these companies to set up pension benefits for their workers.[164] Another occurrence was the adoption of Social Security, which reduced demands from workers for generous benefits.[165] This occurrence facilitated the payment of modest benefits to the especial boon of small employers.[166]

Compared to defined-benefit plans, DC plans are of a more recent vintage dating back only to the 1970s and 1980s when 401(k) programs[167] and related deferred-compensation initiatives for workers[168] came into vogue. Among DC plans, 401(k) plans rank as a "bedrock of the retirement savings system"[169] that, as indicated before, nine out of ten private companies

160. McCourt, *supra* note 156, at 1.

161. Lisa Breyer, *The Rise and Fall of Employer-Sponsored Pension Plans*, WORKFORCE (Jan. 24, 2012), http://www.workforce.com/articles/the-rise-and-fall-of-employer-sponsored-pension-plans.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. McCourt, *supra* note 156, at 2. Under the 401(k) arrangement, workers contribute a portion of their salaries to the plan, and if they choose to put those contributions in a traditional 401(k), it is not taxed until they withdraw the money, thus allowing their investments to grow over time without being taxed. But they pay penalties if they take the money out before the retirement age defined by the plan. As an added bonus, many employers match some contributions. In the early 1980s, 401(k) plans were available at a handful of large companies, such as Johnson & Johnson (where this system was first implemented by a benefits consultant), PepsiCo, and Honeywell. Subsequently, these plans became so popular and widespread that more than 9 out of 10 private employers offered them. *See* Anderson, *supra* note 30. 401(k) plans have an interesting (accidental) history. They are named after a section of the Internal Revenue Code, § 401(k) of the Revenue Act enacted by Congress in 1978, which allowed employees to avoid being taxed on a portion of income that they decide to receive as deferred compensation, rather than direct pay. Actually the idea was to limit executives at some companies from having too much access to the perks of cash-deferred plans. The accidental birth of the 401(k) is credited to Ted Benna, a benefits consultant, who, in 1980, used his interpretation of the law to create a 401(k) plan for his own employer, Johnson & Johnson, which allowed full-time employees to fund accounts with pre-tax dollars and matching employer contributions. Benna then asked the Internal Revenue Service to change some proposed rules under the law, which the agency did in 1981, leading ultimately to the widespread adoption of 401(k) plans by employers in the early 1980s. *Id.* "I knew it was going to be big, but I was certainly not anticipating that it would be the primary way people would be accumulating money for retirement 30 plus years later," Benna, now semi-retired and president of the 401(k) Association, indicated in an interview in an employment magazine. *See id*.

168. *Supra* text accompanying note 155.

169. Anderson, *supra* note 30.

offer their employees.[170] However, the downside is that as employers reduce "their obligations under traditional pension plans, the loss of secure pension protections for many workers in recent decades has hit minority families particularly hard."[171]

Like with Social Security, employer-sponsored pension plans are afflicted with solvency and related concerns.[172] For example, since 2013 there have been talks about reforming multi-employer pension plans.[173] The House of Representatives, since 2010 under Republican Party control (following the midterm elections of that year), has weighed in with hearings.[174] But many labor unions oppose the House Republicans' intervention, suspicious of the Republican Party's traditional privatization approach to these matters[175] and sensitive to the potentially negative effect of certain reforms on retired workers.[176] One such group, notably, is the

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170. *Id*. By 1996, investment in 401(k) plans had surpassed $1 trillion, with more than 30 million people participating in these schemes. *See also* Fetini, *supra* note 31 (explaining that investment in these plans grew into about $3 trillion in 2008, before the meltdown of the Great Recession that year hit home, wiping out about $2 trillion of that amount).

171. MESCHEDE ET AL., *supra* note 1, at 10.

172. *See* KELLY NILES-YOKUM & DONNA L. WAGNER, THE AGING NETWORKS: A GUIDE TO PROGRAMS AND SERVICES 54–56 (7th ed. 2011) (christening employer-sponsored pension plans "[t]he weakening second leg of the stool").

173. Multi-employer pension plans are benefit arrangements where "many employers contribute to a common fund, typically maintained jointly by unions and union employers under collective bargaining agreements." A. Barry Rand, *Protect Our Earned Pensions*, HUFFINGTON POST (Jan. 27, 2014, 7:56 AM), http://www.huffingtonpost.com/a-barry-rand/protecting-pensions_b_4655049.html. *See also* Marianne Levine, *Pension Crisis Looms*, POLITICO (Nov. 10, 2014, 2:07 PM), http://www.politico.com/story/2014/11/pension-crisis-looms-112748_full.html (describing these plans as defined-benefit pension schemes maintained by several companies, typically within a single industry and by at least one union). These plans are found in industries like construction, arts and entertainment, as well retail and communications, and, according to AARP estimates, cover 10 million United States workers. Rand, *supra*.

174. *See Strengthening the Multiemployer Pension System: What Reforms Should Policymakers Consider?: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and the Workforce,* 113th Cong. 3 (2013), http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81335/pdf/CHRG-113hhrg81335.pdf (reviewing possible reforms to multi-employer pension systems); *see also* Levine, *supra* note 173.

175. *See* Galston *supra* note 132 and accompanying text (regarding former President George W. Bush's unsuccessful attempt to privatize Social Security).

176. Rand, *supra* note 173. The American Association for Retired Persons (AARP), described in the next footnote, indicates that under the proposal Congress is discussing, "many retirees covered by these plans could see significant cuts to their benefits." *Id.* "The proposal . . . would change the law to allow severely underfunded plans to slash the benefits of people who are already retired and relying on their pensions. A pension earned by a lifetime of hard work would be reduced to an empty promise." *Id.* That scenario, it posited, "is unacceptable[,]" adding that "[t]here has long been a consensus that any proposed changes to retirement plans—whether public or private—should only be for future retirees, and that those in and near retirement should not have any reductions in benefits." *Id*.

American Association for Retired Persons (AARP), a prominent lobby group for retired workers.[177]

For this issue, our proposal is for changes that promote increased access to employer-sponsored pension plans, whether DB or DC, spur savings, and ensure that employers keep their pension promises to workers. It is one built on the Obama Administration's starter savings account for workers, known as myRA.[178] Started in late 2014, the initiative is primarily designed to help workers without a retirement plan set money aside each week, but workers with a current savings plan could also use it.[179] MyRAs will follow the rules for Roth IRAs and will be available to couples earning less than $191,000.[180] Earnings can be withdrawn tax-free after the individual is 59½ years old.[181] Under this saving plan, employees can open a Roth IRA for as little as $25, into which they contribute via payroll deductions of $5 or more.[182] The money will earn the same interest as a government securities fund in the federal workers' retirement plan, and principal cannot be lost.[183]

This and other progressive nongovernmental initiatives, such as an AARP campaign in 2015 that was designed to increase both the number of people who save and the amount that they save,[184] are consistent with the recommendation of the Institute on Assets and Social Policy that Congress work "to ensure that pension benefits are available to all workers by

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177. The AARP is a 40 million-member insurance giant and political lobby for people age 50 and above, whom the organization "deliver[s] value to . . . through information, advocacy and service." *About AARP*, AM. ASS'N RETIRED PERSONS, http://assets.aarp.org/www.aarp.org_/promotions/sem/member01.html?cmp=IVS-KNC-ACQ-PMD-ACQJOIN&keycode=U6TPM1&gclid=CNCI57aN5MMCFQKTaQodP00ABQ (last visited Oct. 28, 2015). Founded in 1958 by Ethel Percy Andrus, a retired educator from California, and headquartered in Washington, D.C., the AARP dedicates itself "to enhancing quality of life for all as we age[,]" by so doing, "lead[ing] positive social change." *Id*. The organization sets the national agenda on issues relating to senior citizens, including Social Security and Medicare. FREFERICK R. LYNCH, ONE NATION UNDER AARP: THE FIGHT OVER MEDICARE, SOCIAL SECURITY, AND AMERICA'S FUTURE 14–15 (2011).

178. Michelle Singletary, *Starter Savings Accounts: Obama's 'myRA'*, WASH. POST (Jan. 30, 2014), http://www.washingtonpost.com/business/economy/starter-savings-accounts-obamas-myra/2014/01/30/00600ec0-8930-11e3-a5bd-844629433ba3_story.html

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Jenkins, *supra* note 118. More elaborately, the AARP plans to focus on helping pass state laws to create tax-deferred payroll deduction savings plans to increase both the number of people who save and the amount they save. The initiative will include an educational campaign on the need for workers to save sufficient money for their retirements and how to do it. *Id.*

providing a publicly-supported pension plan that relies on pooled risk and requires contributions from both employees and employers."[185]

3. Personal Assets

Personal assets are a product of personal savings from numerous sources that may or may not include Social Security and employer-sponsored pension plans. Leaving out the two discussed categories, this income includes: health insurance from a current or previous employer; dividends from stocks not linked to a DB or DC plan; bonds; life or term insurance (i.e., a policy that pays a death benefit when a person dies); long-term care insurance; annuity for retirement income (i.e., a contract with an insurance company for a steady stream of income in retirement); certificate of deposit or savings account; disability insurance that is not job-related; and mutual funds other than a 401(k) or 403(b); real assets (such as net house value or home equity); real estate; business assets; and net value of vehicles. "Improving retirement security for Americans requires at its core individual responsibility for saving and investing."[186] Personal assets are important as a source of retirement income because of the limitations of the preceding two legs[187]—and attention to this source is also indicative of the shift in responsibility for retirement preparation to individuals.

Given the gap in racial wealth detailed in Part I of this Article on the shape of the retirement gap between Blacks and Whites, personal assets is an area of weakness for many African American seniors.[188] More than any other topic, it is also an area deserving of extensive treatment of a kind that matches the gravity of the situation. Because an exhaustive proposal is beyond the scope of this Article, the six suggestions that follow are meant to be

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185. MESCHEDE ET AL., *supra* note 1, at 10. *See also* MCKINSEY & CO., *supra* note 1, at 22 (recommending "universal IRAs with auto features, to encourage continuous contributions and ensure adequate retirement savings," as a way around the gap in DC plans against lower-income households). These proposals call to mind Professor Ghilarducci's recommendation of a *mandatory* pension plan along with the already mandatory Social Security. *See* Ghilarducci, *supra* note 22 (warning that "failure is baked into the voluntary, self-directed, commercially run retirement plans system" practiced in the United States).

186. MCKINSEY & CO., *supra* note 1, at 13.

187. *Id.* (pointing out that "Social Security is likely impossible to sustain at currently scheduled levels (let alone expanded levels), with trust fund reserves expected to run out in less than 20 years. DB plans are approximately 80 percent funded in the aggregate, have largely been frozen or terminated, and are in terminal decline . . .").

188. JACOB DUMEZ & HENOCH DERBEW, THE ECONOMIC CRISIS FACING SENIORS OF COLOR 5 (2011), http://healthpolicy.ucla.edu/publications/Documents/PDF/The%20Economic%20Crisis%20Facing%20Seniors%20of%20Color.pdf.

illustrative of broader problems, rather than comprehensive. They are tailored suggestions united on the principle, consistent with the United States' capitalist system, that workers *qua* private individuals have sole responsibility "for saving and investing" in readiness for their own retirements.[189] The suggestions are:

- improved access to retirement savings using auto and default features;
- continued employment even during retirement as a source of retirement income;
- helping individuals manage their in-retirement risks;
- financial education and literacy;
- promoting adequate income opportunities for workers and their families to help them meet ongoing basic needs and save for retirement; and
- increased access to health insurance.

(i) Improved Access to Retirement Savings Using Auto Features

The first proposal for asset building needed for dignified retirement will be to address the issues of low contribution to, and low participation in, 401(k) and related defined-contribution plans through improved access to retirement savings plans.[190] This could be done via "universal IRAs with auto

189. MCKINSEY & CO., *supra* note 1, at 13. More specifically, while "[i]n all cases, the initiative to save must come from the individual," "there is much that employers, financial institutions, and the government can do to nudge them in the right direction." *Id.* at 14. This is how the authors of this brilliant report arrived at their concept of "shared responsibility." *Id.* at 21–26. Next to the issue of consonance with the United States capitalist system, the McKinsey report contemplated a system of retirement security that "revers[ed] the trends of the past 25 years and embrac[ed] a more European model[,] whereby the government (through enhanced Social Security) and employers (through DB plans) play a greater role," but discounted these ideas as "not economically feasible for the foreseeable future in the U.S." *Id.* at 13.

190. *Id.* at 14–15. "Retirement savings inertia is not exclusive to Americans without access to workplace plans"—instead, even "[t]hose who have access to such plans underestimate the savings required" for retirement security. *Id.* at 15. "Over one-third of households with access to a qualified retirement plan do not take advantage of it," and those who participate do not contribute enough. *Id.* at 15. Compared to other industrialized countries (such as Germany with a rate of 12%), the rate of saving among Americans is low (5%), even as their debt burden as a percentage of disposable income has gone up. Workplace retirement plans are not immune from this United States trend. For many years up to the date of the publication of this report in 2009, average voluntary contributions to DC plans remained low at 7–8% of pre-tax income, unchanged over the past 10 years. *Id.* at 15. "While this could be adequate for an individual who consistently contributes from age 30 to 65, many Americans start saving past the age of 30 and retire at 62, which leaves them well short of their needs." *Id.* at 15–16. This situation is worse for low-income households who contribute on average "at rates 1.5 to 2 percentage points below their higher-income counterparts." *Id.* at 16. It gets worse. The challenge is not limited to contribution rates, but rather extends to participation rates—averaging 63% for workers with access to qualified plans, and

features" that spur individuals to contribute toward their own retirement accounts.[191] In addition to helping combat low contribution and low participation, auto features in retirement plans have the added advantage of "ensur[ing] that participants start saving earlier."[192] However, some retirement security legislation, such as the Pension Protection Act of 2006 referred to in Parts I and II of this Article, already incorporate these auto and default features. For example, the PPA stipulates a current default contribution rate of 3%. However, some experts, such as the authors of the McKinsey report, assess this rate as insufficient to ensure retirement security for many households, even if the worker started to save at age 25.[193] We share their assessment, along with their recommendation that the government "create further incentives for voluntary contributions to retirement savings plans"[194] tailored to income levels, rather than a one-hat-fits-all solution.[195]

Consistent with a principle of shared responsibility that is harmonious with the capitalist structure of the United States, sponsors of DC plans could join the campaign for increased access to retirement savings plans through a variety of means that include: systematically *implementing* auto features and

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lowest among low-income households, among whom only 27% for those with incomes of less than $30,000 participated. *Id.* Moreover, underutilization of retirement plans extends to IRAs (to which in 2007 34% of households made a contribution). *Id.* Households often view IRAs as a rollover device for other retirement savings plans, rather than as an additional opportunity to save. *Id.* Compounding an already bad situation is the problem of employee withdrawals from DC plans upon leaving a job, something known as leakage. According to the McKinsey report, "[l]eakage disproportionately impacts low-income households, who represent approximately 70 percent of the lump-sum distributions not reinvested in the retirement system, and is a major factor in their savings gap." *Id.* at 16–17.

191. *Id*. at 15, 22. *See also* MESCHEDE ET AL., *supra* note 16, at 12 (citing David C. John & J. Mark Iwry, *Pursuing Universal Retirement Security Through Automatic IRAs*, BROOKINGS INST. (June 26, 2008), http://www.brookings.edu/~/media/research/files/testimony/2008/6/26-ira-iwry/0626_ira_iwry.pdf) (referencing the automatic IRA promoted by some researchers at the Brookings Institute and the Heritage Foundation, designed to expand retirement savings options for workers currently without pensions, and advising "policymakers" to extend opportunities for low-income populations to participate in matched savings accounts (Individual Development Accounts, or IDAs) that provide incentives for long-term savings similar to the incentives available for higher income groups, as well as develop universal retirement savings accounts which will help all employees save for retirement, regardless of the pension offerings of their employers). The authors of the McKinsey report estimate that supporting the establishment of workplace retirement plans, particularly by small businesses, could help reach many of the 35 million American households, many obviously Black households, currently without plans. MCKINSEY & CO., *supra* note 1, at 22.

192. MCKINSEY & CO., *supra* note 1, at 24.

193. *Id.* at 17, 22.

194. *Id.* at 22.

195. *Id.* A pointed example the authors of the report gave was low-income households that they indicated "cannot be incented to save by tax deductions or credits, such as the Saver's Credit." *Id.* Instead, they argued, a better way to help these households to prepare for retirement would be, for example, to "require direct deposits into their individual 401(k)s or IRAs." *Id.* We consider such solutions a properly targeted retirement savings device with which we pick no holes.

ensuring an adequate default rate; matching employee contributions to DC plans; "simplifying investment options, reducing the number [of choices] and offering default choices[;] . . . reducing complexity for plan participants"; and putting a lid on leakage "by keeping a departing employee's retirement savings in their plan or auto-defaulting the employee to an IRA at job change."[196]

(ii) Continued Employment Even During Retirement

A second suggestion in the attempt to grow the personal assets necessary for retirement security is for Americans to work longer or, in the case of those already enjoying their retirement, to return to work.[197] While suggestion for continued employment, even during retirement, as a source of retirement income rings counterintuitive and contradicts the whole notion of retirement as we know it, the proposal also counsels against a view of retirement in absolute terms.[198] The logic behind continued employment as a source of retirement income is simple: "While younger generations will be able to rely on increased plan participation and savings rates to achieve retirement security, many American households are simply too short on time to address their retirement readiness gap. For these Americans, working longer will be the only solution."[199] Another group of Americans who could use this option are "low-income households regardless of age [that] realistically lack the disposable income to sufficiently raise their savings rate."[200]

The means to implement this recommendation are tax breaks for individuals or their employers and reducing barriers that discourage retirees from continuing to work.[201] The latter include incentives in DB plans and provisions restricting DB payments to active workers, and higher healthcare costs for older workers, which discourage employers from hiring and retaining these employees.[202] Also, policymakers and employers can work together to develop more opportunities for flexible work arrangements for

196. *Id.* at 24.

197. *Id.* at 19, 23.

198. *See supra* note 1, specifically our observation that "retirement is not the distinctive life-state, free and separate from all work, that the term connotes," which is supported, *inter alia*, by the statistics that in 2013, over 8 million senior citizens—nearly 19% of all United States workers—either participated or sought participation in the workforce.

199. MCKINSEY & CO., *supra* note 1, at 19.

200. *Id.* Moreover, working longer wreaks a positively magic effect on the index of retirement readiness. *See id.* (observing that "[t]he impact of working longer is dramatic: postponing retirement by four years increases an individual's R[etirement] R[eadiness] I[ndex] by 23 points.")

201. *Id.* at 19, 23.

202. *Id.* at 19.

older adults and working parents who want to be engaged in the workforce but find working full-time difficult.[203]

Taking due cognizance of the role of continued employment as a source of retirement income, the AARP has voiced its position that "anyone 50-plus who wants or needs to work should be able to work," adding: "It is not only essential to achieving financial security, it also benefits our economy and society."[204] The organization estimates that about 50% of employees aged 45–70 "envision working well into their 70s and beyond. For some this is a choice; for others, a necessity."[205]

That said, it is also critical to emphasize that the return-to-work option for retired people is fraught with severe constraints. As the AARP itself observed, between 2007 and 2013, the period spanned by the Great Recession and its slow-recovery aftermath, "the number of unemployed who are 55 and older increased more than any other age group. In 2013, it was 70 percent higher than it had been in 2007."[206] Accordingly, in 2014, the organization "worked to raise awareness of the changes taking place in today's workforce, influence employer perceptions and approaches to 50-plus workers, end age discrimination in the workplace and develop best-in-class skill-building resources oriented to the needs of 50-plus workers."[207] Building on these initiatives, in 2015 the organization pledged that it "will continue to expand [its] resources for people 50-plus on how to find a job, manage their careers, start a business and stay competitive in a workplace where technological savvy and quick adaptation are in demand."[208]

(iii) Helping Individuals Manage Their In-Retirement Risks

The third proposal for building the personal assets needed for dignified retirement is to help Americans draw a stable "retirement paycheck" by better managing their in-retirement risks—not often taken into adequate consideration, even though they should be, when planning for retirement.[209] One such risk that immediately springs to mind is investment failures. The losses in the stock market that many seniors endured in 2008 are a stark

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203. MESCHEDE ET AL., *supra* note 1, at 11.

204. Jenkins, *supra* note 118.

205. *Id.*

206. A. Barry Rand, *Offering Real Help for the Long-Term Unemployed*, AM. ASS'N RETIRED PERSONS, http://www.aarp.org/work/job-hunting/info-2014/help-for-unemployed-older-workers.html (last visited Nov. 24, 2015).

207. Jenkins, *supra* note 118.

208. *Id.*

209. MCKINSEY & CO., *supra* note 1, at 18.

reminder that no one, including retirees, is insulated from investment losses.[210] Another is inflation, which can lead to increases in the cost of living, especially in healthcare services.[211] These healthcare risks include possible long-term care and related medical expenses.[212]

To guard against risks that can militate against the buildup of personal assets, experts advise that within the investment idiosyncrasies of individual retirees and their respective tolerance for risk, sponsors of plans and financial institutions should allocate assets appropriately "taking into account each household's retirement risks."[213] This may be achieved through various targeted means that could include: parlaying products and features that will minimize employee in-retirement risks; guaranteed and income draw-down solutions; diversification of assets; caps on the percentage of savings held in employer stock; use of products and features that minimize exposure to in-retirement risks; and financial literacy that goes beyond the traditional techniques.[214] Financial literacy is discussed in the subsection below related to the topic.

A final risk category worthy of inclusion here is fraud against seniors. The AARP estimated that "[i]dentity theft, investment fraud and other scams cost Americans $18 billion" in 2014.[215] Many of these fraud victims were senior citizens.[216] But here, help appears to be on the horizon by way of a law that protects both seniors and the public more broadly from financial abuses. That law is the Consumer Financial Protection Act, otherwise known as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (named after the sponsors of the bill),[217] which President Obama signed into

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210. *Id.* Due to those losses, "[t]he ten million Americans who will be entering retirement in the next five years have incurred an average retirement portfolio loss of $20,000 per household." *Id.* Moreover, "[t]he magnitude of this loss has triggered a renewed appetite for market risk hedging products, including principal protection and guarantees." *Id.*

211. *Id.*

212. *Id.* (pointing out that "one in seven will develop a critical illness requiring long-term care and significant medical expenditures.").

213. *Id.*

214. *Id.* at 19, 24, 25.

215. Steve Hahn, *AARP and Fraud Watch Partners Keeping You Informed of the Latest Scams*, AM. ASS'N RETIRED PERSONS (Aug. 7, 2015), http://states.aarp.org/aarp-and-fraud-watch-partners-keeping-you-informed-of-the-latest-scams/.

216. *See* Tom Lauricella, *If You're Over 50, You're a Scam Target*, WALL STREET J. (Oct. 4, 2014, 8:09 PM), http://www.wsj.com/articles/if-youre-over-50-youre-a-scam-target-1412467756 (noting that "the 50-plus demographic has long been vulnerable to scams. Today, they make even more attractive targets because of their often sizable retirement savings.").

217. Senator Chris Dodd (D-CT) served in the United States Senate from 1981 to 2011. *A Career in Public Service*, CHRISTOPHER J. DODD, http://chrisdodd.com/career/ (last visited Nov. 2, 2015). Barnett "Barney" Frank, also a member of the Democratic Party, represented the 4th District of Massachusetts

law on July 21, 2010.[218] It was a legislative response designed to guard against a repeat of the Great Recession that many believed financial abuses in Wall Street, such as predatory lending practices, helped bring about.[219] The law created an agency, the Consumer Financial Protection Bureau, headed by a director and charged with responsibility for regulating financial products and services.[220] The director is empowered to establish four offices, two of which, bearing on this Article, are an Office of Financial Education—charged with educating consumers on financial decisions—and an Office of Financial Protection for Older Americans—charged with facilitating the financial literacy of individuals over 62 years of age.[221] Given the recency of this important legislation, the jury is still out regarding its effect in curbing investment and other abuses against older Americans, including Black seniors.

(iv) Financial Education and Literacy

A fourth proposal for building the personal assets necessary for retirement security is financial education and literacy. It is the tool for "changing the mindsets and behaviors of Americans regarding retirement over the long term."[222] Although financial management "is a complex and life-long activity," much learning in this area is still informal.[223] But such education is necessary to impress upon workers "the need to save and plan

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from 1981 to 2013. *Rep. Barney Frank [D]*, GOVTRACK.US, https://www.govtrack.us/congress/members/barney_frank/400140 (last visited Nov. 2, 2015).

218. The law comprises 16 titles. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010). One of them, Title XIV, is the "Mortgage Reform and Anti-Predatory Lending Act." *See* Annalyn Censky, *Obama on New Law: 'No More Taxpayer Bailouts'*, CABLE NEWS NETWORK (July 21, 2010), http://money.cnn.com/2010/07/21/news/economy/obama_signs_wall_street_reform_bill/ (discussing the enactment of the Wall Street reform bill.)

219. Censky, *supra* note 218.

220. The director is appointed by the President, confirmed by the Senate, and serves a five-year term. Pub. L. No. 111-203 § 1011, 124 Stat. 1367, 1383 (2010).

221. Dodd-Frank, 124 Stat. 1383, 1970, 1972–73 (2010). The two other offices are: the Office of Fair Lending and Equal Opportunity, charged with oversight and enforcement of federal laws intended to ensure access to credit; and the Office of Service Member Affairs, charged with developing and implementing initiatives for military service members and their families. *Id*. at 1970, 1972–1973. Additionally, the director is required to establish three specific functional units focusing on research, community affairs, as well as collecting and tracking complaints. *Id*. at 1968–69.

222. MCKINSEY & CO., *supra* note 1, at 23.

223. MESCHEDE ET AL., *supra* note 1, at 12.

for retirement"[224] as well as the advantage of starting early,[225] whether or not they are close to retirement. It should also be extended to persons of all ages,[226] not just individuals on the cusp of retirement, using all available avenues such as "schools, community centers, non-profits, churches, and senior centers as access points."[227]

For the most effect, the domain of such literacy needs to be broad. "In addition to traditional online and in-person tools, sponsors could consider solutions such as (1) a 'financial driver's license,' (2) [involving] a mandatory walk-through of recommended savings rates and asset allocations by age before allowing participants to make their allocation [decisions]."[228] And it should be broad enough to encompass the range of important financial decisions the typical person makes.[229]

Lack of such education is dire. The housing crisis is an example of what happens when decision making involving something as life-changing as owning a home is not preceded by proper financial education.[230] Many homeowners, particularly first-time homeowners, did not understand their options for financing before entering into the "abusive loan agreements" connected to their purchases.[231] Insufficent financial literacy causes problems like leakages, which occur when workers make early withdrawals from their retirement savings accounts.[232]

It is for this and other reasons that some laws enacted in response to the Great Recession include financial literacy. For example, the Consumer Financial Protection Act of 2010 created an Office of Financial Education to educate consumers on financial decisions.[233] More specifically for retirement

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224. MCKINSEY & CO., *supra* note 1, at 23.

225. *See 3 Reasons Americans Don't Save Enough for Retirement*, MOTLEY FOOL (Jan. 26, 2015, 9:03 AM), www.fool.com/investing/general/2015/01/26/3-reasons-americans-dont-save-enough-for-retiremen.aspx (identifying procrastination or putting off saving, among the three reasons why Americans don't save enough for retirement). One reason the article indicated that procrastination is bad "is that the earliest dollars you invest are the most powerful ones, as they have longest to grow." *Id.* After illustrating that over 31 years, a one-time $10,000 investment into the stock market can turn into $191,900, it added: "Procrastination is very costly when it comes to your financial security." *Id.*; *see also* Brandon, *supra* note 83 (commenting on the logic in the requirement to start saving from 21 years of age in many 401(k) plans).

226. MESCHEDE ET AL., *supra* note 1, at 12.

227. *Id.*

228. MCKINSEY & CO., *supra* note 1, at 25.

229. MESCHEDE ET AL., *supra* note 1, at 12 (noting that "[f]rom planning for educational loans and managing credit cards to saving for retirement, all of us make important financial decisions that will impact our future financial resources.").

230. *See id.* (explaining the need for first time homeowners to understand their financing options).

231. *Id*. (under the discussion on "Improv[ing] Regulations that Support Asset Protection").

232. MCKINSEY & CO., *supra* note 1, at 17.

233. Pub. L. No. 111-203, § 1013, 124 Stat. at 1970.

security, the law created an Office of Financial Protection for Older Americans to promote financial literacy for persons over 62 years of age.[234]

(v) Promoting Adequate Income Opportunities for Workers to Meet Ongoing Basic Needs and Save for Retirement

A fifth suggestion to build assets necessary for retirement security is to promote adequate income opportunities for workers and their families to help them meet their ongoing basic needs and save for retirement. This could be achieved through "[p]olicies which support living wages, job training[,] and career ladders" for workers.[235] As part of FDR's New Deal initiative, the national government for the first time assumed responsibility for managing the United States economy[236] among other objectives that, as we see, include economic protection from the vagaries of old age. Since then, the government has enacted two laws designed to promote full employment in this country. One is the Employment Act of 1946, which spelled out "the responsibility of the government to manage the economy in order 'to promote maximum employment, production[,] and purchasing power.'"[237] The other is the Full Employment and Balanced Growth Act of 1978, otherwise known as the Humphrey-Hawkins Act. The law was named after its sponsors, Senator Hubert Humphrey (former Vice President of the United States) and Representative Augustus Hawkins from California. As initially introduced, this bill guaranteed a job to each United States citizen and required Congress, if necessary, to create public-sector employment when an individual could not find a job in the private economy.[238]

However, by the time each of these bills was passed and signed into law, the provisions relating to full employment were deleted, effectively making each law "little more than a symbolic statement of principles."[239] The result has been that even in relatively good economic times, such as under President Bill Clinton from 1993 to 2001, when the nation experienced unemployment numbers of 5 to 5.5%, which economists generally consider natural rates of unemployment amounting to "full employment,"[240] "the African American

234. *Id.* at 1972–73.
235. MESCHEDE ET AL., *supra* note 1, at 12.
236. HANES WALTON JR. & ROBERT C. SMITH, AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM, 294–95 (6th ed. 2012).
237. *Id.* at 295 (quoting Employment Act of 1946, Pub. L. No. 79-304, § 2, 60 Stat. 23).
238. *Id.* at 219.
239. *Id.*
240. *Id.* at 219, 296.

community remain[ed] in a recession."[241] The long-term recession, worsened by the economic difficulties of the past decade, has had dire consequences for parts of the Black population, senior citizens included.[242] For Blacks more than for any other group, the "failure of universal employment"[243] spells the loss of opportunities necessary to generate the savings for retirement security and lends needless credence to the assertion by some Blacks that the only time that Black people had full employment was during slavery.[244]

In 2015, eight years from the onset of the Great Recession, opinion surveys across party lines, age, and race indicate that widespread economic insecurity still grips the country and diminishes retirement security.[245] More than six of every ten Black Americans (64%, compared to 54% for Whites) say that they do not have enough money to pay their bills; the same number (compared to 52% of Whites) worry about losing their job or a family member losing his or her job; close to six out of every ten Black Americans (compared to 53% of Whites) expressed concern regarding affordable health insurance; and a little over five out of every ten Black Americans (compared to just 41% for Whites) worry about losing their home.[246] Next, more specifically on retirement security, nearly seven out of ten Blacks (67%, compared to 62% of Whites) say that they do not have enough money to retire, and more than seven out of every ten (73% versus only 60% of Whites) worry that Social Security will not be available for them when they retire.[247]

These widespread economic anxieties dictate that the United States government shed some of its "ambivalen[ce]" to a Second Bill of socioeconomic rights, including the right to protection against the economic fears of old age, that President Roosevelt espoused.[248] True, American

241. *Id.* at 219.

242. *See id.* at 298 (linking unemployment to a range of individual and community pathologies, including murders, suicides, mental institutionalization, divorce and separation, child abuse, alcoholism, and wife battering); *see also id.* at 301 (discussing the negative influence of unemployment and accompanying poverty on the Black family, including Senator Daniel Patrick Moynihan's tie of high Black unemployment to a decline in the traditional Black family). Moynihan, then Assistant Secretary of Labor, argued in a report on the "Negro" family that the "fundamental overwhelming fact" in the decline of the traditional Black family is that "Negro unemployment with the exception of a few years during the Korean War, has continued at disastrous levels for 35 years." *Id.*

243. WALTON JR. & SMITH, *supra* note 236, at 295–96.

244. *Id*. at 299 (caption under photograph).

245. *See* Open Memorandum from Greenberg Quinlan Rosner Research to Interested Parties 1 (April 6, 2015) [hereinafter Greenberg Memo], https://icps.gwu.edu/sites/icps.gwu.edu/files/downloads/2015_04_06_GW_economic%20insecurity%20(1).pdf (summarizing national survey showing widespread concerns about economic insecurity).

246. *See id*. at 3 fig.2. (illustrating the areas of greatest economic concern).

247. *Id.*

248. Sunstein, *Economic Security: A Human Right, supra* note 110, at A26.

leaders since FDR who might want to pursue the path of a Second Bill of socioeconomic rights have nothing resembling the political stature that FDR enjoyed, "[b]ut they *do* have economic and social circumstances that are making millions of ordinary Americans increasingly uneasy about laissez-faire."[249]

(vi) Increased Access to Health Insurance

Last, but not least, among our suggestions on how to build up the personal assets necessary for retirement security is to address the lack of access to adequate health insurance. The cost of healthcare is a major issue and ranks "among the greatest risk factors for financial ruin in the United States," as shown by the incidence of medical bankruptcies.[250] Because the chance of sickness increases with age, and because the quality of medical attention depends on having health insurance (assuming equal treatment with such coverage), rising costs of healthcare and possession of health insurance to offset some of those rising costs are an issue of salience for older Americans, including Black seniors.

The jury is still out on whether the Affordable Care Act, discussed below, will fix this problem. Based on data from recent public opinion surveys, personal worries about "affordable health insurance" still exist even with the ACA. In the 2015 economic security survey that we cited above, "affordable health insurance" was among the issues of economic well-being that respondents worried about.[251] In interviews, nearly six out of every ten Blacks (55%, compared to 53% of Whites) expressed this concern.[252] Although more Black respondents expressed worry about having enough money to retire (nearly seven of every ten, compared to a little over six of every ten Whites), and more worried about having Social Security around when they retire (more than seven in ten, compared to just six out every ten of Whites),[253] 55% is a pretty high number. To address these worries we propose expanding long-term care insurance by developing a social

249. *Id.*

250. MESCHEDE ET AL., *supra* note 1, at 11. The report observed that "[b]ankruptcies in the United States are increasingly caused by medical bills leaving families who should be focused on getting well mired in financial disaster." *Id.* (citing Steffie Woolhandler, *Testimony of Steffie Woolhandler, M.D., M.P.H., on Medical Bankruptcy before the Subcommittee on Administrative and Commercial Law and the House Judiciary Committee* (July 28, 2009), http://www.pnhp.org/news/2009/july/testimony_of_steffie.php.

251. *See* Greenberg Memo, *supra* note 245, at 3 fig.2 (displaying statistics dealing with economic concerns).

252. *Id.*

253. *Id.*

insurance program for long-term care beginning, for example, with a program like the Affordable Care Act.[254]

B. Macro Factors

To promote retirement security for Blacks, it is imperative to reduce the disparities in education, healthcare, and housing that we group in this article under macro factors. Disparity means unlikeness or "[t]he condition or fact of being unequal."[255] There are two important observations that we will make regarding the macro factors or steps that we analyze here. First, focusing on disparities (as this Article does) does *not* discount progress made over the years in this country in tackling inequality between the different groups that make up the United States. Instead, it acknowledges advances over the years,[256] while also stressing the need for more progress designed to minimize lingering gaps.

Second, although the disparities highlighted in this section are analyzed separately, they are nonetheless seamless and interlinked. For example, the gaps in education and healthcare are interrelated in a manner that initially is not obvious to the naked eye. In a study by the Centers for Disease Control in 2012, the researchers bemoaned finding "two Americas" when they cross-referenced life expectancy for Blacks with educational level.[257] Black Americans are worse off than White Americans in lifespans, but Blacks who have not completed high school lag even further behind.[258] The study found that White men with 16 or more years of education can expect to live an average of fourteen years longer than Black men with fewer than twelve years of education, and ten years for Black women with the same educational difference.[259] The findings suggest that, while access to healthcare and other factors may be in play, improving educational opportunities for Blacks is a key factor in any attempt to minimize the disparities in healthcare between Blacks and Whites.[260] These and other disparities add up to depress the life expectancy of Black people, as indicated earlier in this Article.[261]

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254. MESCHEDE ET AL., *supra* note 1, at 10.

255. AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 1, at 536.

256. *See supra* notes 103–04 and accompanying texts.

257. Friedman, *supra* note 56 (citing S. Jay Olshansky et al, *Differences in Life Expectancy Due to Race and Educational Differences are Widening, and Many May Not Catch Up*, 30.8 HEALTH AFF. 1803 (2012)).

258. *Id.*

259. *Id.*

260. *Id.*

261. *See supra* note 56 and accompanying text.

1. Reducing the Disparity Between Blacks and Whites in Education

The fourth proposal to bridge the gap in retirement security between Blacks and Whites, and the first among the macro measures, is reducing the disparity in education. The story of American education begins with the Jim Crow practice of separate but equal facilities, which the Supreme Court validated in *Plessy v. Ferguson* in 1896.[262] For nearly 60 years, this doctrine governed the country's educational policy—in many ways as "separate and unequal"[263]—until the Supreme Court intervened again to invalidate it, by which time so much damage had occurred to Black education that the country would need an equal amount of time—or more—to fix the damage. That

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262. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (ruling that separate and unequal educational facilities in state public schools did not violate the United States Constitution).

> *Plessy* provided the judicial cornerstone of Jim Crow laws that prevailed all over the country, especially in the South. These were segregation laws, similar to the future policy of apartheid or separateness in South Africa, that provided for separate facilities for blacks and whites. These laws encompassed schools, playgrounds, swimming pools, beaches, parks, hotels, hospitals, libraries, restaurants, cemeteries, water fountains, toilets, buses and street cars, interracial sex, marriage, and love, and numerous other aspects of American life. They were strictly enforced by both legal and extra-legal means, and maintained by custom, depending upon the region of the country in question. Well into the first half of the twentieth century, blacks were forced to receive food from the back of restaurants, drink from separate water fountains, and ride in the back of the bus, among numerous other degradations. More seriously, especially in the South, blacks faced the constant threat of death for perceived crimes like a black male looking a white woman in the eye (known as "familiarity"), failing to yield the right of way to a white pedestrian, or addressing a white person in an impertinent tone. Avoiding the formal use of race, the South used many other measures, including white primaries, the grandfather clause, poll taxes, race riots designed to stamp out economic competition from blacks, and literacy tests, to disenfranchise blacks and reinforce acts of separation. Thus, along with the *Civil Rights Cases*, *Plessy* destroyed the movement toward complete equality that the Reconstruction inaugurated.

Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 B.Y.U. EDUC. & L.J. 1, 26–27 (citations omitted).

263. This calls to mind the "one shoe" testimony of an elderly Black man named Tom before a state commission created in a Southern state regarding his experience living under the separate but equal Southern way of life. To the leading question by the commission's chair: "Tom . . . you've lived in a rural area of this great state all your life. Now, you have a little farm, got a nice mortgage on it, sell your produce to black and white alike. You tell the commission and the national television audience. Tell them that separate but equal is not so bad," the elderly Black man responded: "Segregation is like the one-legged man who went into a shoe store. He only needed one shoe, but the store made him buy two. So, he put on the separate shoe and wore it and wore it till he wore it clean out. But you know Mr. Chairman, he never had a chance to wear that equal shoe at all." DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 13 (2004).

intervention came in *Brown v. Board of Education* in May 1954,[264] when the Court, in a unanimous opinion written by Chief Justice Earl Warren, declared that "[s]eparate educational facilities are inherently unequal,"[265] explicitly overruling the separate but equal doctrine.[266]

The Court preceded its holding with extensive insightful analysis on "public education in the light of its full development and its present place in American life throughout the Nation."[267] It first assessed that "[t]oday, education is perhaps the most important function of state and local governments," adding:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any

264. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). This was a consolidated opinion, involving cases from the States of Delaware, Kansas, South Carolina, and Virginia, "premised on different facts and different local conditions," yet tied together by a common legal question justifying their consolidation. *Id.* at 486 (summarizing the proceedings of Brown v. Board of Education, 98 F. Supp. 797 (D. Kan. 1951)). The cases include Gebhart v. Belton, 344 U.S. 891 (1952) (Delaware), Briggs v. Elliott, 342 U.S. 350, 350–51 (1952) (South Carolina), and Davis v. Cty. School Bd. of Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952). The Court extended its ruling in *Brown* to Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954), dealing with school desegregation in the District of Columbia. The case was decided under the Due Process Clause of the Fifth Amendment. *Id.*

265. *Brown*, 347 U.S. at 495 (holding that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal").

266. *Brown* was the last in a progression of cases that attacked separate but equal. *See Brown*, 347 U.S. at 491–92 (identifying six Supreme Court cases, the result of the Court's labor "for over half a century" grappling with the separate but equal doctrine). However, *Brown* is contrasted from those cases that limited themselves to proving that separate but equal was all separate but not equal, in that it signified a frontal attack or "re-examin[ation]" of the doctrine itself, as Chief Justice Warren said in his opinion for the Court. *Id*. at 492. Put differently, segregating children in public schools solely based on their race, even if the physical facilities and other "tangible" factors may be equal, deprives minority children of equal educational opportunities. *Id*. at 493. Like in *Brown*, the Court ruled in the companion case, involving the District of Columbia, that "[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Bolling*, 347 U.S. at 500.

267. *Brown*, 347 U.S. at 492–93.

> child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[268]

Given this importance, the Court said "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms."[269] The Court briefly summarized its ruling in two cases involving educational opportunities in professional and graduate schools, adding that the same considerations must "apply with added force to children in grade and high schools" because separation based solely on race will "[generate] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[270]

After the first *Brown* case, Chief Justice Warren wrote a second *Brown* decision[271] focusing on implementation, wherein the Court ordered district courts to ensure that Black children were admitted to schools on a nondiscriminatory basis "with all deliberate speed."[272] But it was not until 1969 after much resistance in parts of the United States, notably Arkansas and Mississippi,[273] that the Court finally demanded that states desegregate their schools at once.[274] Indeed,

> [t]oday, integration devices, such as busing, which in the past enjoyed some measure of support among Americans as legitimate

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268. *Id*. at 493.

269. *Id.*

270. *Id.* at 494. The Court cited approvingly a finding in one Kansas case, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951), regarding the devastating psychological effect of segregation on Black children from a court, which, despite the profundity of that finding, "nevertheless felt compelled to rule against the Negro plaintiffs." *Brown*, 347 U.S. at 494. The Court then purports to quote the Kansas court:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id.

271. Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*).

272. *Id*. (delegating the task of implementing school desegregation to district courts, which must pursue desegregation "with all deliberate speed."). In their desegregation orders, these district courts should consider devices, such as "the school transportation system, personnel, [and] revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis." *Id*. at 300–01.

273. *See* Aka, *supra* note 262, at 30–31 (detailing the resistance, along with the federal role to assure integration).

274. *See* Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969).

> remedial measures, have been all but abandoned. The result has been a resurgence of minority schools, and a growing fear that racial separation has become inevitable and legal. More than fifty years after *Brown*, the dream of a common, universal school system for all Americans without regard to race remains just a dream.[275]

In other words, for Blacks and other minorities, *de facto* segregation, instigated by nongovernmental conditions like segregated neighborhoods and housing, replaced *de jure* discrimination sanctioned by law.[276] It is a scenario compounded by a litany of dismal statistics, including the imbalance in the infant mortality rate for Black mothers versus White mothers,[277] imbalance between the numbers of Black males in higher educational institutions versus prisons,[278] and the imbalance in the unemployment rate of

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275. Aka, *supra* note 262, at 32 (citations omitted). On the matter of educational integration, *Brown's* legacy is mixed, marked by progress but also unfinished business. *See* Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, CIVIL RIGHTS PROJECT AT UCLA (May 15, 2014), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf (finding, among other things, that "[s]egregation is typically segregation by both race and poverty. Black and Latino students tend to be in schools with a substantial majority of poor children, but White and Asian students are typically in middle-class schools"). Three recent Supreme Court decisions reflect that unevenness. Meredith v. Jefferson Cty. Bd. of Educ., 551 U.S. 701 (2007) (ruling a voluntary integration plan a violation of the Equal Protection Clause under the Fourteenth Amendment in a decision that overruled the finding of the district court and the Sixth Circuit Court of Appeals that found the plan under challenge constitutional); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (setting aside the decision of a lower court which found the voluntary plan under challenge narrowly tailored); Ricci v. DeStefano, 557 U.S. 557, 562–63 (2009) (ruling in favor of a group of White firefighters that the Court decided were themselves discriminated against based on race when the city of New Haven, CT threw out a test for promotions that city officials feared might have discriminated against Blacks).

276. *See* PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION ix (2002) (showing that the erosion of *Brown*, including by the Supreme Court's own rulings in the decades since the decision, has led to the "resegregation" of public education in the United States); *see also* Anthony Asadullah Samad, *Post-Raciality in Education: Revisiting Myrdal's "American Dilemma*," 36 HUM. RTS. 11, 22 (2009) (positing that "[d]e facto segregation . . . offers an inequality segue most reflected in educational outcomes," that the anticipated post-racial world of the Obama presidency has not changed).

277. William Julius Wilson, *Being Poor, Black, and American: The Impact of Political, Economic, and Cultural Forces,* 35 AM. EDUCATOR 10, 11 (2011) (showing that "[i]n 2007, the infant mortality rate for black mothers was more than twice as high as for white mothers.").

278. *Id.* at 17 (pointing out that "[i]n 2008, black males age 18 and older accounted for 5 percent of the college population, but 36 percent of the prison population."). *See also* GREGORY ACS ET AL., THE MOYNIHAN REPORT REVISITED 23 n.5 (Urban Institute ed., 2013) (showing that in 2000, there were 791,600 Black men incarcerated in federal state, and local facilities, compared to 635,000 enrolled in colleges and universities, but that by 2010, ten years later, the figures were 789,000 incarcerated versus a little over 1 million enrolled in degree-awarding educational institutions).

Black males versus White males.[279] Affirmative action programs which take "minority factors" like race, ethnicity, and gender into account for admission into public schools, among other issues of government decision making,[280] at one point seemed to hold the answer to reducing disparity in the educational field because of the "equality of result[s]" beyond the blandness of traditional equal opportunity these programs afford.[281] But race-conscious programs in this country are mired in controversy.[282]

Next on improvements, the policies of the current United States administration under President Barack Obama are progressive enough that we adopt them as our suggestion to reduce disparity in the education sector to promote retirement security for Blacks in the aftermath of the Great Recession and its accompanying slow recovery. President Obama supports an educational strategy spanning three aspects of the educational experience, from early childhood learning, to education for K-12, to support for higher education,[283] that improves education at home while maintaining global competitiveness.[284] For early childhood learning, the Administration

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279. Wilson, *supra* note 277, at 19 (showing that "[i]n the second quarter of 2010, among adults age 20 and older, the unemployment rate of black males was twice as high as that of white males.").

280. Philip C. Aka, *Affirmative Action and the Black Experience in America*, 36 HUM. RTS. 8, 8 (2009).

281. *See id.* at 8–9 (discussing two phases in "the evolution of affirmative action, the first [from] 1865 to 1965 marked by equal opportunity, and the second [from] 1965 to the present, [marked] by preferential treatment designed to secure 'equality of result.'").

282. *See id.* at 9 (commenting on the opposition to affirmative action programs leading up to the Supreme Court's decisions in two cases involving the University of Michigan). *See also* Juan Williams, *Affirmative Action, Age Forty-Five, Is Dead*, 36 HUM. RTS. 6, 22 (2009) (positing that from all available evidence, including the utterances and body language of President Obama, affirmative action is dead and that it is about time that the United States thought "about how to deal with racial inequity without affirmative action"). Part of President Obama's body language is his support for affirmative action programs that take economic circumstance into account, in effect expanding the range of beneficiaries to include poor White males. Aka, *supra* note 280, at 10. Running for president in 2008, Obama expressed his belief that his two daughters should *not* be entitled to any preferential treatment on account of their Blackness. *See* Rachel L. Swarns, *If Elected . . . Delicate Obama Path on Class and Race Preferences*, N.Y. TIMES (Aug. 3, 2008), http://www.nytimes.com/2008/08/03/us/politics/03affirmative.html?pagewanted=print (quoting a statement attributed to then-candidate Barack Obama to the effect that "his two daughters, Malia, then 10, and Sasha, then 7, 'who have had a pretty good deal' in life, should not benefit from affirmative action when they apply to college, particularly if they were competing for admission with poor white students").

283. *See Education*, WHITE HOUSE, http://www.whitehouse.gov/issues/education (last visited Nov. 1, 2015).

284. In the words of President Obama, "If we want America to lead in the 21st century, nothing is more important than giving everyone the best education possible—from the day they start preschool to the day they start their career." *Id.* To get a sense of this declining competitiveness, from No. 1 in the world in 1990, under Obama, the country ranked No. 12. *Higher Education*, WHITE HOUSE, http://www.whitehouse.gov/issues/education/higher-education (last visited Nov. 1, 2015). Worse still, the country "suffer[s] from a college attainment gap, as high school graduates from the wealthiest families in

proposed expanding access to quality education, including preschool and childcare, and working in close partnership with parents.[285] On education for K-12 students, the Administration committed itself to: redesigning and reforming No Child Left Behind, the governing law on this topic introduced by former President George W. Bush, in an attempt to eliminate some of its negative features, such as a focus on "absolute scores," putting punishing failures ahead of rewarding success, and prescribing "a pass-fail, one-size-fits-all series of interventions for schools that miss their goals" under the law; redesigning America's high schools and closing the achievement gap, in an attempt to challenge these high schools and their partners to rethink teaching and learning, including experimentation with learning models that are rigorous, relevant, and better focused on real-world experiences; and keeping teachers, a critical element the United States needs to build and maintain a world-class education system, in the classroom, rather than, for example, laying them off; and providing teachers (and their students) with the state-of-the-art technology (broadband and wireless connectivity) they need to get the job done.[286]

Finally on higher education, the Obama Administration has pledged to make this level of education "more accessible, affordable, and attainable for" every American "willing to work for it"[287] by: expanding federal support to help more students afford higher education, bearing in mind the shared responsibility in tackling rising college costs;[288] "strengthening community colleges" through programs like America's College Promise, under which "responsible students" receive the first 2 years of community college education free "whether they are completing the first half of a bachelor's degree or earning skills to go directly into the workforce";[289] and reining in

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[the] nation are almost certain to continue on to higher education, while just over half of [the] high school graduates in the poorest quarter of families attend college." *Id.* Furthermore, "while more than half of college students graduate within six years, the completion rate for low-income students is around 25 percent." *Id.* To reverse these dismal statistics, "President Obama challenged every American to commit to at least one year of higher education or post-secondary training." *Id.*

285. *Early Childhood Learning*, WHITE HOUSE, http://www.whitehouse.gov/issues/education/early-childhood (last visited Nov. 1, 2015).

286. *Education for K-12 Students*, WHITE HOUSE, http://www.whitehouse.gov/issues/education/k-12 (last visited Nov. 1, 2015).

287. *Higher Education*, WHITE HOUSE, *supra* note 284.

288. *Id.*

289. *Id.* The President first unveiled his America's College Promise on January 9, 2015, at Pellissippi State Community College in Tennessee. *See President Obama Remarks on Education*, C-SPAN, www.c-span.org/video/?323697-1/president-obama-vice-president-biden-remarks-tennessee (last visited Nov. 1, 2015). The logic underpinning this plan, as the White House explains, is that "[n]early a century ago, a movement that made high school widely available helped lead to a rapid growth in the education and skills training of Americans, driving decades of economic growth and prosperity." *Fact*

education costs, a matter outside the national government's sole control, but that Washington, the states, colleges, and universities will have to work in partnership to accomplish.[290]

Education is expected to bring enhanced skills that generate savings that, in turn, increase the chances for a dignified retirement. Although, in a recent survey, these anxieties also are present among educated people, there are huge gaps running into the double digits between college and non-college graduates[291] that speak to the importance of education in meeting basic needs and saving for retirement. Four out of every ten persons with a college degree (40%, compared to 65% of non-college graduates) indicated that they personally worry about money to pay their bills, over four of every ten (44% versus 60% for non-college graduates) personally worry that they or a family member will lose their job, a little over four out of every ten (41% versus 60% for non-college graduates) worry about affordable health insurance, and over three out of every ten (34%, compared to 50% for non-college graduates) worry that they will lose their home.[292] The downside to these data is that they do not indicate what proportion of these college and non-college graduates is Black.

Sheet-White House Unveils America's College Promise Proposal: Tuition-Free Community College for Responsible Students, WHITE HOUSE (Jan. 9, 2015), https://www.whitehouse.gov/the-press-office/2015/01/09/fact-sheet-white-house-unveils-america-s-college-promise-proposal-tuition. The implication is that this plan will do for higher education what the prior movement did for high school education. *Id.* The plan is estimated to cost about $60 billion over 10 years; 75% is to be borne by the federal government and 25% by states. *Id.* The plan is subject to Congressional approval and is not a shoo-in since the opposition Republican Party has control of both houses of Congress—the Senate since January 2015, and the House of Representatives which fell into Republican Party control in 2010. For differing perspectives on the plan, *compare* Valerie Strauss, *The Problem(s) with Obama's Community College Plan—and an Alternative*, WASH. POST (Feb. 8, 2015, 10:15 AM), www.washingtonpost.com/blogs/answer-sheet/wp/2015/02/08/the-problems-with-obamas-community-college-plan-and-an-alternative (criticizing the plan and proposing further expansion of the Pell Grant program and "eradicat[ing] labor market inequalities that reward white high school dropouts with greater access to jobs than black graduates with a community college degree"), *with* Mary Turck, *Obama's Free Tuition Proposal Advances Equality of Opportunity*, AL JAZEERA AMERICA (Feb. 6, 2015, 2:00 AM), http://america.aljazeera.com/opinions/2015/2/obamas-free-tuition-proposal-a-step-in-the-right-direction.html (praising the proposal as a step in the right direction); *and* AM. FED'N OF TEACHERS, OBAMA PROPOSES FREE COMMUNITY COLLEGE TUITION, 34 AFT ON CAMPUS 2, 2 (Spring 2015 (indicating that the program could expand the ladder of opportunity for low-income students). In a sense, these assessments are premature since the plan is subject to Congressional approval, of which there is little certainly since the President's party at this point does not control Congress.

290. *Higher Education*, WHITE HOUSE, *supra* note 284.

291. *See* Greenberg Memo, *supra* note 245, at 3 fig.2 (comparing the different levels of financial concern between college and non-college educated survey participants).

292. *Id.*

2. Reducing the Disparity Between Blacks and Whites in Healthcare

The second among the macro factors aimed at redressing the gap in retirement security between Blacks and Whites we analyze in this Article is reducing the disparity in healthcare. A gamut of social, economic, political, and legal forces "under which people live" amplify and complicate the disparity in healthcare between Blacks and Whites.[293] These social determinants of health include income or wealth, education, criminal justice, physical environment, housing, employment, stress, and racism or discrimination.[294] For example, due to discrimination—joined with limited educational opportunities—Blacks are overrepresented in low-paying, high-health-risk occupations, such as fast food workers, and garment industry workers.[295] Even controlling for income, Blacks are much more likely than Whites to have toxic materials and other unhealthy substances sited in their communities.[296]

There are some more examples. The stress of living in a discriminatory society accounts for some of the gap in health between Blacks and Whites.[297] Even controlling for economic status, Blacks have poorer health than Whites.[298] Stated differently, on average middle class Blacks have poorer health than middle class Whites.[299] Also, the healthcare system's managed care approach embodies built-in incentives that promote unconscious discrimination.[300] There are also policies, practices, procedures, and laws which cause institutional discrimination that protects White privilege at the expense of Black health.[301] Finally, racial discrimination exists in healthcare delivery, financing, and research in the United States. Manifestations of this discrimination include dispensation of healthcare based on ability to pay and

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293. Randall, *supra* note 52, at 20.

294. *Id.* A stubborn disease requires an aggressive or no-mercy treatment. Accordingly, the targeted solution Professor Randall prescribes for the disparity in healthcare was a Health Care Anti-Discrimination Act, with several elements, including recognition of multiple forms of discrimination, authorizing and funding testers, requirement to collect and report data using racial or ethnic categories, appropriate fines and regulatory enforcement, providing victims a private and organizational right of action against discriminators, imposition of punitive damage to fund monitoring and assessment programs, and requirement for a health scorecard/report for health agency, provider, or facility. *Id*. at 21.

295. *Id.* at 20.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

insufficient hospitals, physicians, and other healthcare facilities and providers.[302]

In the healthcare field, our suggestion to reduce disparity and bridge the gap in retirement security between Blacks and Whites centers on the Obama Administration's Affordable Care Act (ACA),[303] a denouement and full blooming of previous proposals on healthcare "by presidents from Theodore Roosevelt to Richard Nixon to Bill Clinton."[304] Aimed at curing many of the ills of the United States healthcare system, including inadequate access and affordability, the measure was signed into law by President Obama on March 23, 2010,[305] and took effect on January 1, 2014.[306] Partially upheld as constitutional by the Supreme Court on June 28, 2012,[307] the law is the most

302. *Id.* at 21.

303. The ACA actually refers to two separate pieces of legislation, namely, the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) and the Health Care and Education Reconciliation Act (HCERA), Pub. L. No. 111-152, 124 Stat. 1029 (2010). The ACA is sometimes colloquially called "Obamacare." It is a nickname the President said he endorsed, stating "I have no problem with people saying Obama cares. I do care." Lucy Madison, *On Bus Tour, Obama Embraces "Obamacare," Says "I Do Care,"* CBS NEWS (Aug. 15, 2011), www.cbsnews.com/news/on-bus-tour-obama-embraces-obamacare-says-i-do-care/. Nearly 1,000 pages long, the PPACA has ten titles, including: Title 1, dealing with "[q]uality [and] affordable health care for all Americans" including "individual responsibility," mandating the maintenance of "minimum essential coverage," and "[e]mployer responsibilities"; Title 3 on "[i]mproving the quality and efficiency of healthcare"; and Title 4 on "[p]revent[ing] chronic disease and improving public health." Pub. L. No. 111-148, 124 Stat. 119, 119, 130, 242, 353, 538 (2010). The HCERA has two titles: Title 1 dealing with individual and employer responsibilities, Medicare, Medicaid, reducing fraud, waste, and abuse, and revenue provisions; and Title 2 on education and health, including Federal Pell Grants, "investment in historically black colleges and universities and minority-serving institutions," and "student loan reform." Pub. L. No. 111-152, *supra*. For a walk-through of the two laws in one volume, see generally 1 CCH IN., LAW, EXPLANATION AND ANALYSIS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT INCLUDING RECONCILIATION ACT IMPACT (2010).

304. TERENCE BALL ET AL., POLITICAL IDEOLOGIES AND THE DEMOCRATIC IDEAL 92 (9th ed. 2014). *See generally* MONTE M. POEN, HARRY S. TRUMAN VERSUS THE MEDICAL LOBBY: THE GENESIS OF MEDICARE ix (1976) (examining proposals for national health insurance from 1914 to 1965 focusing on the presidency of Harry Truman from 1945 to 1953, including Truman's pithy reflection after leaving office that the one disappointment as president that troubled him "the most, in a personal way," was "the failure to defeat organized opposition to a national compulsory health-insurance program.").

305. *See Archive Video: Obama Signs Health Care Bill*, 10NEWS TAMPA BAY-SARASOTA (Mar. 23, 2010), http://www.wtsp.com/video/1711079319001/1/Archive-video-Obama-signs-health-care-bill.

306. *See, e.g.*, Stephanie Condon, *6 Key Obamacare Dates to Watch for in 2014*, CBSNEWS (Dec. 30, 2013, 5:51 AM), http://www.cbsnews.com/news/6-key-obamacare-dates-to-watch-for-in-2014/.

307. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012). Two provisions of the ACA under challenge in this lawsuit were the individual mandate for an individual to maintain "minimum essential" health insurance coverage, and the section requiring states to expand the scope of Medicaid beyond assistance to pregnant women, children, needy families, the blind, the elderly, and the disabled. *Id.* at 2580–82. A majority of the Court (5 members in an opinion written by the Chief Justice) upheld the first provision (under the taxing powers of Congress, rather than under the Commerce Clause), but not the second, which it found unconstitutional. *Id.* at 2608. Four Justices—Scalia, Kennedy, Thomas, and

far-reaching overhaul of the United States healthcare system since the passage of Medicare and Medicaid in 1965.[308] *If* properly implemented, this law will help Blacks[309] and promote dignified retirement security for Black

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Alito—all of whom were nominated to the high court by Republican Presidents, dissented. *Id.* at 2642–77 (Scalia, J., dissenting).

308. BALL ET AL., *supra* note 304, at 92. The ACA is designed to: increase the quality and affordability of health insurance, lower the rate of uninsured Americans by expanding public and private insurance coverage, and lower the costs of healthcare for individuals and the government. Pub. L. No. 111-148, 124 Stat. 119 (2010). The law mandates insurance companies to cover all applicants within the new minimum standards afforded by it and offer the same rates, irrespective of pre-existing conditions or sex. Pub. L. No. 111-148, 124 Stat. 119, 201 (2010). For all the progress it represents, a litany of paradoxes shrouds this landmark legislation. As Professor Ball and his colleagues point out,

> [i]ronically, [the law] is less extensive than the plan proposed by President Nixon, a Republican, and is modeled on a 1993 proposal by the conservative Heritage Foundation, which was subsequently implemented in Massachusetts by Republican governor Mitt Romney. More ironically still, the [ACA] is a distant descendant of Bismarck's Health Insurance Act of the mid-1880s and a markedly more conservative cousin of the single-payer health care coverage long available in the United Kingdom, Canada, and other Western democracies.

BALL, ET AL. *supra* note 304, at 92. Still on those paradoxes, because of the law, the proportion of Americans without health insurance as of the last quarter of 2014 dropped from 20% to 15%. Elizabeth Renter, *Uninsured Under the ACA: Millions of Americans Can't Afford Coverage*, U.S. NEWS (Dec. 15, 2014 3:15 PM), http://health.usnews.com/health-news/health-insurance/articles/2014/12/15/uninsured-under-the-aca-millions-of-americans-cant-afford-coverage. On the other hand, the same law effectively leaves millions without coverage. Elizabeth Renter, *Health Insurance Cancelled? Why You Shouldn't Panic*, U.S. NEWS (Dec. 9, 2014 9.00 AM), http://health.usnews.com/health-news/health-insurance/articles/2014/12/09/health-insurance-canceled-why-you-shouldnt-panic.

309. *The ACA Is Working for the African-American Community*, U.S. DEP'T HEALTH & HUM. SERVICES, http://www.hhs.gov/healthcare/facts-and-features/fact-sheet/aca-working-african-american-community/index.html (last updated Sept. 16, 2015) (showing how millions of African Americans across the country are already benefitting from the stronger coverage and consumer protections made possible by the Affordable Care Act). According to this statement, these include: nearly 8 million Blacks with preexisting health conditions no longer at risk of being denied coverage, since the ACA prohibits insurers from denying individuals coverage or charging them more because of preexisting conditions; more than half a million Black young adults between the ages of 19 and 26 who would have been uninsured, but now have coverage under their parents' employer-sponsored or individually purchased health insurance plans. *Id*. This statement claims that since the start of the ACA initial open enrollment period in October 2013 and as of June 2014, 2.3 million Black people aged 18–64 gained health insurance coverage, which number represents a 6.8% drop in the uninsured rate over that period. *Id. See also* Brianna Ehley, *Obamacare Will Shrink Racial Divide in Health Coverage*, FISCAL TIMES (Dec. 17, 2014), http://www.thefiscaltimes.com/2014/12/17/Obamacare-Will-Shrink-Racial-Divide-Health-Coverage (reporting that the provisions in the law that expanded Medicaid and created new health exchanges, among others, will serve to shrink the coverage gap between Whites and Blacks by 1.5%—provided states agree to expand their Medicaid programs). The Dept. of Health and Human Services stated that before the Act, Black people were 55%more likely to be uninsured than White Americans, but that under the Act, as of 2013, the proportion of Black people uninsured was 17%. *The ACA Is Working for the African-American Community*, *supra*.

seniors.[310] The big *if* is with implementation. Considerable controversy dogs the law, of a type and scale that leaves its whole future shrouded in uncertainty. First, in the aftermath of the Supreme Court's decision upholding the constitutionality of the law many groups have filed lawsuits challenging many aspects of the Act.[311] In addition, some of the oppositions to the law are the problems of implementation arguably not out of the ordinary in a complex federal system of government like the United States. For example, following the Supreme Court's decision that Medicaid expansion cannot be forced on states (i.e., each state can decide whether or not to expand coverage), 27 states and the District of Columbia have expanded Medicaid, 21 have not, and two are still debating the issue.[312] But there are also objections to the law based on sheer partisan jockeying, meant

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310. *See Health Reform for American Seniors*, WHITE HOUSE, www.whitehouse.gov/sites/default/files/rss_viewer/health_reform_seniors.pdf (last visited Oct. 27, 2015) (describing some of the benefits the White House attributes to the ACA: lower costs, including plugging some of the loophole in prescription drug coverage (the "donut hole") that millions of seniors faced in 2007; a voluntary long-term care insurance program, designed to help seniors and people with disabilities to remain in their homes and communities; quality and affordable health care, including improvement in the delivery of care for beneficiaries with chronic conditions; protecting seniors from abuse and neglect through the Elder Justice Act; improving the quality of care in nursing homes, including the requirement for states to establish processes for complaint resolution; and establishing a nationwide program for criminal background checks for employees in nursing homes.). *See also* President Barack Obama, *Presidential Proclamation—Older Americans Month*, WHITE HOUSE (Apr. 30, 2014), http://www.whitehouse.gov/the-press-office/2014/04/30/presidential-proclamation-older-americans-month-2014 (claiming that the ACA "lowered prescription drug costs, prohibited insurers from denying coverage to people with pre-existing conditions, and enabled seniors to receive recommended preventive health care at no out-of-pocket cost.") The Department of Health and Human Services also attributes five benefits to the Affordable Care Act, including that the individual's Medicare is protected (individuals do not have to replace Medicare coverage with marketplace coverage), receipt of preventive services for less, saving money on brand-name drugs, protection of Medicare until 2029, and savings on Medicare costs resulting from reductions in waste, fraud, and abuse. Dep't. of Health & Human Services, *The Affordable Care Act & Medicare*, MEDICARE, http://www.medicare.gov/about-us/affordable-care-act/affordable-care-act.html (last visited Oct. 27, 2015). In fairness to some of these claims, the ACA itself stipulates that nothing in the Act "shall result in a reduction of guarantee benefits" under Medicare. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 538 (2010). It is hard to say which of these benefits apply to Black seniors, since this source did not give that indication.

311. *See* Andrew Evans, *These Six Court Cases Could Cripple Obamacare*, WASH. FREE BEACON (Feb. 13, 2014, 11:00 AM), http://freebeacon.com/issues/these-six-court-cases-could-cripple-obamacare/ (commenting on 100 pending lawsuits against the ACA). Challenges target every aspect of the law, including: takings of private property; that the substance of the law took place in the Senate, then under the control of the Democratic Party, rather than originating from the House of Representatives, consistent with the provisions of the United States Constitution for bills involving expenditure of money; and the contraception mandate, the requirement that insurers offer women different kinds of birth control for free, are the sources of many of the challenges. *Id.*

312. *Renter, Uninsured Under the ACA: Millions of Americans Can't Afford Coverage*, *supra* note 308.

to block implementation of the law.[313] These oppositions include the choice of several states controlled by the Republican Party to reject the expanded Medicaid coverage provided for by the Act.[314] Add to this the number of states that in other ways have denied cooperation to the national government by opposing those elements of the law over which they have discretion.[315] Consistent with these partisan maneuvers by the Republican Party, dozens of attempts have been made to repeal the law. Talks and threats of repeal heated up following the November 2014 elections, when the Republican Party gained control of both chambers of Congress.[316] Obama has indicated he would veto any repeal of the ACA that reached his table.[317] There are still

313. In an Op-Ed piece in 2009, then Secretary of Health and Human Services Kathleen Sebelius claimed that an unnamed Republican senator stated, "If we're able to stop Obama on this, it will be his Waterloo. It will break him." Kathleen Sebelius, *Health Reform Will Empower Families Against Market Constraints*, MED. HEALTH PLANS AM. (Jul. 29, 2009), http://www.mhpa.org/published_pdf/newsletter_229_2031.pdf. A leading Republican Party political strategist, she indicated, urged fellow Republicans to "resist the temptation" to be "constructive or, at least responsible," but instead work to "kill" healthcare reform. *Id*.

314. Robert Pear, *States' Policies on Health Care Exclude Some of the Poorest*, N.Y. TIMES (May 24, 2013), http://www.nytimes.com/2013/05/25/us/states-policies-on-health-care-exclude-poorest.html (pointing out that "[a]t least 25 states—mainly those with Republican governors or Republican-controlled legislatures—have balked at expanding the [Medicaid] program, in part because of concerns about long-term costs."). These states include Alabama, Florida, Georgia, Kansas, Louisiana, Mississippi, and Texas. *Id*. As a result of this opt-out, over half of the people uninsured nationally, conceivably many of them Blacks and other minority groups, live in these states. *Id*.

315. *See* Sandhya Somashekhar, *States Find New Ways to Resist Health Law*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/national/health-science/states-find-new-ways-to-resist-health-law/2013/08/28/c63f8498-0a93-11e3-8974-f97ab3b3c677_story.html?hpid=z3 (discussing ways states thwarted the law, including "refusing to enforce consumer protection . . . restricting federally-funded workers hired to help people enroll in coverage," and barring local officials "from doing anything to help" enforce the law); Robert Pear, *Two States Reflect Divide on Obama's Health Plan: A Coverage Effort Faces Hurdles in Missouri*, N.Y. TIMES (Aug. 3, 2013), http://www.nytimes.com/images/2013/08/03/nytfrontpage/scan.pdf (commenting on the "significant obstacles" that Missouri has put up against the ACA, including "refus[ing] to create an insurance exchange," and "forbid[ding] state and local government officials to cooperate with the federal exchange."); Jonathan Cohn, *The Right's Latest Scheme to Sabotage Obamacare*, NEW REPUBLIC (July 25, 2013), http://www.newrepublic.com/article/114028/obamacare-sabotage-watch-conservative-campaign-gets-real (among other things, commenting on how some conservatives are "launching campaigns designed to discourage young people from using [the ACA] to get insurance.").

316. Deirdre Walsh, *House Votes—Again—to Repeal Obamacare*, CNN, (Feb. 3, 2015, 9:29 PM), http://www.cnn.com/2015/02/03/politics/obamacare-repeal-vote-house/ (pointing out that "[t]his latest vote marked the 67th time the House [of Representatives] has voted to entirely repeal, defund or change some provisions" of the ACA).

317. Robert Pear, *House G.O.P. Again Votes to Repeal Health Care Law*, N.Y. TIMES (Feb. 3, 2015), http://www.nytimes.com/2015/02/04/us/politics/house-gop-again-votes-to-repeal-health-care-law.html (noting that millions of Americans have already obtained coverage through Obamacare). Assuming successful repeal of the Act, what would a replacement of the ACA be like? To this question, the Republican Party has disclosed that such a law will include three integral components: reforming of the malpractice and medical-liability system, selling insurance across state lines, and individuals assuming

critics in the United States who question the notion of universal healthcare,[318] a notion that goes back to President Theodore Roosevelt.[319] Last but not least, some major corporations choose to hire workers part-time so they are not obligated to cover them under the law.[320]

In the final analysis, for the major change that the ACA portends,[321] it is still uncertain whether it will actually reduce the healthcare disparity between Blacks and Whites.[322] To the extent that it has been implemented,[323] despite

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personal responsibility for their own health. *See* Linda Bergthold, *How the GOP Plans to Replace ObamaCare*, HUFFINGTON POST: THE BLOG (Jan. 5, 2015, 6:40 PM), http://www.huffingtonpost.com/linda-bergthold/how-the-gop-plans-to-repl_b_6419722.html?ncid=txtlnkusaolp00000592 (including rebuttals of each of these arguments).

318. *See* Michael F. Cannon, *The Anti-Universal Coverage Club*, CATO INST. (June 6, 2007, 4:33 PM), http://www.cato.org/blog/anti-universal-coverage-club-manifesto (list of citizens and scholars who challenge the idea that universal coverage is the best way to protect and promote health). The group advances principles in opposition to universal coverage, which it repeatedly enclosed in quotes, including that "in a free society, people should have the right to refuse health insurance." *Id.* For a contrarian position, see, *e.g.*, Jonathan Chait, *Health Care as a Privilege: What the GOP Won't Admit*, DAILY INTELLIGENCER, (June 25, 2012, 9:15 AM), http://nymag.com/daily/intelligencer/2012/06/health-care-as-privilege-what-gop-wont-admit.html (taking some members of the Republican Party to task for defending "main[tenance] of health care as an earned privilege rather than a right.").

319. *Supra* note 304 and accompanying text.

320. Doine Chiacu et al., *Obama Slams Staples, Big Companies on Healthcare: 'Shame on Them'—BuzzFeed*, REUTERS (Feb. 11, 2015), http://www.reuters.com/article/2015/02/11/us-obama-healthcare-staples-idUSKBN0LF1FA20150211 (reporting the criticism of the President directed against large corporations that use the health insurance issue as excuse for cutting wages). The ACA requires companies with more than 50 employees to pay health insurance for employees who work 30 hours or more per week. Some businesses, such as the office supplies retailer, Staples, criticized in this story, are keeping staffing numbers below 50 or cutting the work week to less than 30 hours to avoid providing their employees' health insurance. *Id*. Staples reportedly told its employees not to work more than 25 hours per week. *Id*.

321. *See, e.g.*, Ehley, *supra* note 309 (reporting that the provisions in the law that expanded Medicaid and created new health exchanges, among others, will serve to shrink the coverage gap between Whites and Blacks by 1.5%—assuming states agree to expand their Medicaid programs).

322. The prediction of a shrink in coverage gap indicated in the previous footnote is conditional, predicated on the assumption that many states would expand their Medicaid programs. Christopher Weaver, *Millions Trapped in Health-Law Coverage Gap*, WALL STREET J., http://www.wsj.com/articles/SB10001424052702304851104579363621009670740 (last modified Feb. 18, 2014, 3:39 PM). More than 50% of Black people live in states that did not expand Medicaid in 2014. Ehley, *supra* note 309. However, many states, especially those governed by the Republican Party, have refused to expand their Medicaid coverage. *Id.* As this report summarizes, "Under the ACA, the federal government is responsible for 100 percent of the cost of expanding Medicaid for the first three years of the program, then it's required to pick up 90 percent of the tab after that. Still, the governors in states that haven't expanded say their budgets couldn't handle the extra costs." *Id.*

323. The program debuted with an embarrassing website snafu. *See* Maggie Fox, *Obamacare Website Fails as Deadline Arrives*, ABC NEWS (Mar. 31, 2014, 7:53 AM), http://www.nbcnews.com/storyline/obamacare-deadline/obamacare-website-fails-deadline-arrives-n67666; S.A. Miller, *ObamaCare Website Glitches Freeze Out Public on Deadline Day*, N.Y. POST (Mar. 31, 2014, 9:26 AM), http://nypost.com/2014/03/31/obamacare-website-goes-down-on-morning-of-deadline/.

reported beneficence from the Obama Administration,[324] the jury is still out on whether the ACA has corrected problems of access and affordability, including with respect to seniors.[325]

3. Reducing the Disparity Between Blacks and Whites in Housing

The third and last macro factor designed to promote increased retirement security for Blacks is reducing the housing disparity between Blacks and Whites. We identified some of those gaps in Part I wherein we highlighted the contours of the retirement security gap between Blacks and Whites.[326] To add to the chronicle, predatory lending makes homeownership more expensive for Black and poor families than for White and middle-class families.[327] Even Black people from high-income households "were almost twice as likely to end up with subprime mortgages as low-income whites, even if they qualified for prime loans and offered a down payment."[328]

There are various reasons why Blacks and other minority borrowers are more likely to end up with subprime mortgages. First, due to discrimination, Blacks and other minority borrowers with similar attributes as Whites, such as income and credit history, receive less favorable treatment from mortgage institutions.[329] Second, still bordering on discrimination, whether knowingly or unknowingly, is the existence of a "dual mortgage market," as indicated by the fact that *subprime* lenders had a larger market share of low-income and minority communities while *prime* lenders were most active in White, especially upper-income, communities.[330] So, while it is possible at times that subprime lenders did *not* intend to engage in predatory lending practices,

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324. *See supra* notes 309–10 and accompanying text.

325. *See* PATTERSON, *supra* note 20, at 417 (pointing out that while the health reform bill lengthened the solvency of the Medicare program—otherwise projected to run out of money within a few years—and while it reduced the restrictions regarding eligibility and the amount of the benefit, it did not eliminate those restrictions entirely).

326. *See supra* notes 59–65 and accompanying text.

327. Trifun, *supra* note 59, at 17 (citing U.S. DEP'T. OF HOUSING AND URB. DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000), http://archives.hud.gov/reports/subprime/subprime.cfm).

328. *Id.*

329. *See id.* at 18 (explaining a HUD pilot study conducted in 2004).

330. *Id.* There are a number of plausible possibilities here. Some subprime mortgage lenders target "low-income and minority borrowers who may have been vulnerable to deceptive, high-pressure marketing tactics because of their limited options." *Id.* Mortgage lenders may have viewed Blacks and other minorities with bad credit histories as riskier borrowers, but there may also be other evidence that makes it hard to separate "race from risk." *Id.* Finally, "concentration of subprime mortgage lenders in low-income and minority communities" may be a factor in the "racial disparity in subprime mortgage lending" communities. *Id.*

for some reason "predatory lenders are generally found within the subprime market, making home buyers in these communities more vulnerable to predatory practices."[331] In short, for all the barriers that the Fair Housing Act has broken down, "the real estate and mortgage-lending industries still engage in practices that produce racially disparate outcomes, regardless of their motivation."[332]

Like people in other lands, many Americans make a distinction between a house and a home.[333] Specifically, many citizens associate home ownership with the American Dream,[334] and for many poor people it is a milestone in the journey of social mobility into middle class rank. Homeownership carries several benefits for low-income and minority households that include the following: they can lease out part of their home and receive rents; they can sell the home and gain returns in form of equity (profit over the purchase price for the house); and individuals who pay off the mortgage on their home can live in the home and save money on rent.[335] Compared to other assets in the arsenal of retirement security, homeownership is an area where Blacks made strides in wealth accumulation before the housing crisis integral to the economic downturn of 2007 to 2009 wiped out that gain. This is devastating

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331. *Id.* at 19.

332. *Id.*

333. By one typical definition, a house is a place of shelter where people live. In contrast, a home is the place of "emotional warmth and security" where one's family lives. Ramabadran, *What is the Difference Between Home and House?*, ENG. FOR STUDENTS (June 23, 2007), http://www.english-for-students.com/Home-and-House.html. "Usually people buy a home and sell a house. People who are away from their home often complain about being homesick, not housesick. What they lack is not a roof over their head, but the emotional warmth and security." *Id.*

334. *See* CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOMEOWNERSHIP 1–2 (William M. Rohe & Harry L. Watson eds., 2007) (commenting on a shift of emphasis in housing from affordable rental units to affordable ownership that occurred during the period of the Clinton and second Bush presidencies). The American Dream means different things to different people. One of the popular expression of the term is by James Truslow Adams who in 1931 described it as:

> that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement. . . . It is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.

JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 404 (1931).

335. *See* CHRISTOPHER E. HERBERT ET AL., IS HOMEOWNERSHIP STILL AN EFFECTIVE MEANS OF BUILDING WEALTH FOR LOW-INCOME AND MINORITY HOUSEHOLDS? (WAS IT EVER?) 3–5, 9–10 (2013) (listing five factors through which low-income and minority households create wealth in their homes, namely: forced saving that results from the use of amortizing mortgage, appreciation in home value, increased returns arising from use of leverage, benefits from federal income tax, and protection from unanticipated hikes in rent).

given that, compared to Whites "the average black family has far more of its wealth wrapped up in a home."[336] Put differently, although the economic downturn of 2007 to 2009 negatively affected people of all ethnicities and races who lost their homes, Blacks were "disproportionately affected."[337]

In January 2015, the Obama Administration unveiled a plan to reduce the annual premiums on mortgage insurance by 0.5% in an avowed attempt "to make mortgages more affordable and accessible for creditworthy families."[338] We adapt this as our own proposal to reduce disparity in housing or homeownership necessary to promote retirement security for Blacks in the aftermath of the Great Recession and the slow recovery that marked the official end of that economic downturn. Under the announced plan, the Federal Housing Administration (FHA), the federal agency charged with responsibility for insuring mortgages, will reduce the premiums that it charges on mortgage insurance from 1.35% to 0.85%.[339] The White House explained that for the typical first-time homebuyer, this translates into a $900 reduction in annual mortgage payments, and that similar reductions will also take place in the mortgages of existing homeowners who refinance into an FHA loan.[340]

The key words for us in this proposal are *accessible* and *sustainable homeownership*. Reducing annual premiums on mortgage insurance "is part of the President's broader effort to expand responsible lending to creditworthy borrowers and increase access to sustainable rental housing for families not ready or wanting to buy a home."[341] We are keen to note that this is a two-pronged proposal for sustainable homeownership, including, to use the language of the White House, "sustainable rental housing."[342] We are unimpressed that President Obama's plan involved a higher rate than the

336. Powell, *supra* note 7.

337. Trifun, *supra* note 59, at 17.

338. *Fact Sheet: Making Homeownership More Accessible and Sustainable*, WHITE HOUSE (Jan. 7, 2015), http://www.whitehouse.gov/the-press-office/2015/01/07/fact-sheet-making-homeownership-more-accessible-and-sustainable; *see also* Andrew Soergel, *Obama Announces Cut in Federally Issued Mortgage Premiums*, U.S. NEWS (Jan. 8, 2015, 4:49 PM), http://www.usnews.com/news/articles/2015/01/08/president-barack-obama-announces-federal-housing-administration-mortgage-insurance-premium-cut (discussing the 0.5% reduction in FHA mortgage insurance premiums). In announcing the plan, the President instructively reasoned that it is "about investing in savings and building a family and planting roots in a community." *Id*.

339. *Fact Sheet: Making Homeownership More Accessible and Sustainable, supra* note 338. The rate was 0.55% in 2010 before the FHA increased it ostensibly to recover from losses suffered during the housing crisis in 2007 before Obama took office. Soergel, *supra* note 338.

340. *Fact Sheet: Making Homeownership More Accessible and Sustainable, supra* note 338.

341. *Id.*

342. *Id.*

0.55% the FHA charged on mortgage insurance in 2010.[343] We choose to *adapt*, rather than adopt, the President's measure. Our view of a lasting solution is a legislative, human rights-sensitive approach, involving a "comprehensive housing finance reform legislation that will secure a stable and resilient housing finance system," as the White House intended.[344] To assist low-income people who are unable to afford a home, Congress should also streamline means that include better funding of programs, such as the Section 8 Housing Choice Vouchers scheme established in 1974, which subsidizes rents to accommodate low-income families, the elderly, and the disabled in the private market.[345]

Only a comprehensive approach stands any real chance of contributing the savings from homeownership (and for renters, minimizing the hardship from housing) necessary to promote retirement security for Blacks. Congress must set aside partisanship to formulate a comprehensive solution that the Executive Branch must faithfully implement. Federal government-backed history of housing discrimination, which direly hurts Blacks, is an underlying

343. *Soergel*, supra note 338.

344. *Fact Sheet: Making Homeownership More Accessible and Sustainable*, *supra* note 338. On human rights sensititivity, *see* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (1st ed. 2004) (laying out Professor Sunstein's analysis regarding the exigency of a Second Bill of socioeconomic rights in the United States that includes the right to shelter and social security). *See also supra* note 109 (reporting on former President Jimmy Carter's campaign for the United States government to ratify the ICESCR, a multilateral treaty, that will obligate our government to provide these socioeconomic rights, including shelter and retirement security). The exigency of housing is probably the reason why former President Jimmy Carter and his wife Rosalynn have participated in the work of Habitat for Humanity, a nonprofit ecumenical Christian housing organization, headquartered in Americus, Georgia, since 1984. *See FAQ's, "How is Jimmy Carter Involved with Habitat for Humanity?"*, HABITAT FOR HUMANITY PHILADELPHIA, www.habitatphiladelphia.org/faqs (last visited Oct. 29, 2015). The organization praises Carter as "our most famous volunteer!," indicating that since 1984 when he joined the work of the organization, Carter and his wife "give a week of their time each year to build homes and raise awareness of the critical need for affordable housing." *Id.* Carter's campaign for affordable housing rhymes with his advocacy for socioeconomic human rights.

345. *Section 8 Voucher Funding and Reform*, NAT'L ALLIANCE TO END HOMELESSNESS, www.endhomelesssness.org/pages/section_8 (last visited Oct. 30, 2015); *Housing Choice Vouchers Factsheet*, U.S. DEPT. OF HOUSING & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Oct. 30, 2015); *see also* George E. Peterson, *Housing Vouchers: The U.S. Experience, in* VOUCHERS AND THE PROVISION OF PUBLIC SERVICES 139, 142 (C. Eugene Steuerle et al. eds. 2000). The program is named after Section 8 of the Housing Act of 1937, Pub. L. 75-412, 50 Stat. 888 (1937), which authorized the benefit. As of 2015, the program provides support for over 2 million Americans. *Section 8 Voucher Funding and Reform*, *supra*. Participants in the program contribute 30% of their incomes toward housing costs, while the government makes up the balance, up to a set maximum amount. *Id.*

factor in the rash of protests that has rocked many cities in the United States recently, including Ferguson, New York, and Baltimore.[346]

CONCLUSION

Nearly one decade since the onset of the Great Recession in 2007, Americans still nurse anxieties in opinion surveys regarding economic security that impinges directly or indirectly on some of the variables we have analyzed in this Article. These include Social Security, the ability to save for retirement, affordable healthcare, homeownership, and education.[347] Ongoing economic and financial difficulties have impeded retirement security for many Americans, particularly Black people, who are at the focus of this Article. While Black retirement insecurity troubles predate present economic hard times, economic difficulties have worsened insecurity on all fronts of the three legs of the proverbial stool of retirement security, leaving a huge burden on Social Security benefits that, even so, not all Blacks receive.

We have shown how in light of these difficulties, retirement security for Blacks must be predicated on *changes* in the micro tripods of Social Security income, employer-sponsored pensions, and personal savings. These must be pursued in tandem with a *reduction in disparities* across education, healthcare, and homeownership—three areas of national life outside the traditional three legs of retirement security, with particular resonance for the Black experience that we denominate macro variables. Among these variables, we devoted extensive space to personal assets commensurate with that variable's exigency—given the scarcity of personal assets in the Black community—and the singular risk that lacking personal assets poses for

346. *See* Rothstein, *supra* note 37. The acts of federal discrimination that Rothstein points out, focusing on Baltimore, include the policy of the Federal Housing Administration in refusing to insure mortgages for Black families in White neighborhoods, and refusing to insure mortgages in Black neighborhoods, the latter known as "redlining" (colloquially describing the action of the officials perpetrating the discrimination of marking in red color on their paperwork those neighborhoods deemed poor credit risks because Black people live in or near those neighborhoods). In Baltimore and elsewhere, Rothstein argued, these federal policies contributed immensely to "prohibit[] black families from accumulating housing equity during the suburban boom that moved white families into single-family homes from the mid-1930s to the mid-1960s—and thus from bequeathing that wealth to their children and grandchildren," just like White suburbanites did. *Id.*

347. Greenberg Memo, *supra* note 245. The interviews involved 1010 American landline and cell phone users selected from across the United States and were conducted by Orc International, a survey organization, between March 18 and 22, 2015. *Id.* The data is subject to a margin of error of +/-3% at a 95% confidence level. *Id*. Greenberg Quinlan Rosner Research, headquartered in Washington, D.C. analyzed the data. *Id.* n.1.

Black retirement security. To stand a good chance of success, the measures highlighted in this Article must be synchronized or pursued in tandem. Experts and policymakers have made numerous proposals on how to reform Social Security and employer-sponsored pension plans to keep them solvent and increase beneficiary access. However, the tragedy of retirement security in the United States is that there is either little attention assigned to reducing disparities in critical areas that still mar(k) several aspects of American national life, *or*—where they exist—the measures adopted to address such disparities, such as affirmative action programs and the ACA, are mired in controversy such that they are unable to cure the ills they were initially designed to tackle.

This Article has substantial policy relevance and salience. The first set of baby boomers[348] retired in 2011, after turning 65.[349] Starting in 2011, and over the next 15–17 years, some 79 million men and women will enter into retired life,[350] a good number of whom "will not have enough money to stay out of poverty" in their retirement years.[351] The impending retirement of an unprecedented number of baby boomers in a period of massive government deficits, at a time of widespread public anxiety about the social and economic well-being of an aging nation, will haul the politics and economics of growing older in the United States to the fore.[352]

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348. In the United States, about 75 million persons, constituting about 29% of the nation's population, fall into this generation born between 1946 (in the aftermath of World War II) and 1964 (in the heat of the Civil Rights Movement). *See* Karen Hill, *What Are Baby Boomers, How Many Are There in the United States, and How Old Are Baby Boomers?* SUPER BEEFY (September 23, 2010), http://superbeefy.com/what-are-baby-boomers-how-many-are-there-in-the-united-states-and-how-old-are-baby-boomers/ (putting the number of boomers at 76 million as of 2006). *See also* STEVE GILLON, BOOMER NATION: THE LARGEST AND RICHEST GENERATION EVER, AND HOW IT CHANGED AMERICA (2004) (reflecting on how this numerous and omnibus group changed America).

349. Cohn & Taylor, *supra* note 131.

350. *Id.* The number breaks down into an estimated 10,000 baby boomers retiring every day until 2030, when the last set of boomers turns 65.

351. Teresa Ghilarducci, *Why the 401(k) Is a "Failed Experiment*," *supra* note 21, at 22. As Professor Ghilarducci elaborates, "[h]alf of middle-class workers will be poor or near poor the day they hit 65 . . . because they don't have enough money saved in their retirement accounts and because their house values have fallen so severely." *Id*. To get around this problem, these retired workers will "try to work longer," but will be "meeting a labor market that is much more hostile to older workers than it has been in the past. They're also meeting a labor market with very high unemployment." *Id*.

352. *See* JAMES H. SCHULTZ & ROBERT H. BINSTOCK, AGING NATION: THE ECONOMICS AND POLITICS OF GROWING OLDER IN AMERICA 13 (2008) (chronicling the contentious policy debates on a range of issues, including subsidized public housing, medical services, and "saving" Social Security and other entitlement programs). The authors posit that there is considerable cause for concern, but disagree with the doom forecasts of certain policymakers and pundits, whose doomsday scenarios include elderly people being put to pasture with inadequate health care and financial resources facing a crumbling social welfare system that implodes under the strain of intergenerational conflict. *Id*. at 13.

This is a mammoth challenge which mandates us all—the government and every stakeholder alike—to feel our way, in the spirit of "shared responsibility,"[353] to "solutions that protect all of us from risk."[354] Specifically, we must "find a way to help people save—adequately and with little risk—for their old age[,]"[355] guided by the logic that "[p]romoting lifelong sustainable well-being for seniors benefits all citizens and strengthens the nation."[356] In its 2010 report, the Institute on Assets and Social Policy warned that "[t]oday's challenging trends will lead to less secure years for all older adults if structural changes in policy" in all three legs of retirement planning "are not developed."[357] This study contributes to the search for those structural solutions, in a human rights-sensitive manner, all within the context of the right to protection against the economic fears of old age that FDR set forth in 1944.

353. *See* MCKINSEY & CO., *supra* note 1, at 2, 21–26 (commenting on the role of the government, employers, and financial institutions in promoting retirement security for individuals). As this report argued, "[t]he shift of retirement risks to the individual has created a new challenge for the government, plan sponsors, and plan providers alike: How can Americans be motivated to save enough and educated to make the right decisions to ensure a secure and dignified retirement?" *Id.* at 21. *See also* Ghilarducci, *supra* note 22 (warning that "failure is baked into the voluntary, self-directed, commercially run retirement plans system" practiced in the United States).

354. Ghilarducci, *supra* note 22.

355. *Id.*

356. MESCHEDE ET AL., *supra* note 1, at 2.

357. *Id.* at 3.