

**LIVE BLACK. . .RETIRE POOR. . .DIE  
EARLY: HOW SOCIAL SECURITY AS AN  
INSTITUTION CONTINUES TO PERPETUATE  
THE SOCIAL RACISM OF THE 1930S**

*Joseph Robinson Jr.*

*Social Security has a disparate impact on minorities. The expected rate of return for a white twenty-year-old male is over twice the rate of return that an African-American twenty-year-old male can expect. Legislative history and the circumstances surrounding the passing of the Social Security Act of 1935 indicate that there was intent to discriminate against African-Americans inherent in the Act. The racist intent behind the Act is evidenced in its exclusion from retirement benefits for occupations in which most African-Americans worked, its stringent qualification standards many African-Americans could not meet, and its preservation of local autonomy. At the time the Act was passed over half of the African-Americans in the labor force were excluded from receiving retirement benefits due to occupational exclusions alone. Although there is evidence of racial animus, it is not likely sufficient to bring a successful constitutional challenge against the Act.*

*As a result, the Act continues to precipitate the institutional racism of the 1930s to this day. The Act was later extended to cover nearly all private employees. However, the use of a benefits structure that makes distributions based on earnings continues to incorporate a policy of social discrimination into the Act. Meaningful change that would alter the discriminatory effect is unlikely to occur. As a result, racial minority groups should be especially cautious in planning for their retirement future. Some of the holistic approaches to retirement that can be taken within the current Social Security framework include building wealth through home ownership, managing student loan debt, and using investment vehicles to gain entry to the financial market.*

---

Joseph Robinson, Jr. is Topics Editor 2016-2017, Member 2015-1016, *The Elder Law Journal*; J.D. 2017, University of Illinois, Urbana-Champaign; M.A. 2007, Southern Illinois University, Carbondale; B.A. 2005, Southern Illinois University, Carbondale.

"If the Senate and the House of Representatives in their long and arduous session had done nothing more than pass this bill, [Social Security Act of 1935] the session would be regarded as historic for all time."<sup>1</sup>

~President Franklin Delano Roosevelt

## I. Introduction

When President Franklin Delano Roosevelt uttered these words at the signing of the Social Security Act of 1935, he was just speculating that the program would have a lasting impact on American culture. President Roosevelt hoped that the program would serve as the cornerstone of his economic relief program in the wake of the greatest economic decline the nation had ever seen.<sup>2</sup> Assembled in a room full of cameras, the President proclaimed that, as the nation has industrialized, people have faced greater insecurity citing the new legislation as providing security to 30,000,000 citizens who "will reap direct benefits through unemployment compensation, through old-age pensions and through increased services for the protection of children and the prevention of ill health."<sup>3</sup> The question still remains today, has the Social Security Act of 1935 provided security for all?

This Note will focus on the Social Security Act of 1935 enacted by President Roosevelt on August 14, 1935. The particular focus of this Note will be an evaluation of the current state of the Social Security Administration benefits disbursement policy. The Social Security Administration has faced claims that its benefits disbursement policy has a disparate impact on racial minorities because of shorter life spans, compared to whites who have traditionally enjoyed longer lifespans. The resulting difference in lifespans spells out a higher total yield on investment for those who live longer. This Note recommends ways by which, if present, the Social Security Administration can adjust its benefits disbursement policy to remedy the disparate impact on racial minorities and ensure all Americans have equal access to the benefits bestowed by the Social Security Act of 1935.

---

1. *Social Security Bill is Signed; Gives Pensions to Aged, Jobless: Roosevelt Approves Measure Intended to Benefit 30,000,000 Persons When States Adopt Cooperating Laws—He Calls the Measure 'Cornerstone' of His Economic Program*, N.Y. TIMES, Aug. 15, 1935.

2. *Id.*

3. *Id.*

This Note proceeds in four parts. Part II frames the historical context and social climate of the period that ultimately led President Roosevelt to sign into law the Social Security Act of 1935. Furthermore, Part II suggests that the contemporary version of the Act suffers from the social climate of the past through specific provisions that intentionally kept minorities from participating in the Act from the start. Part III will look at disbursement trends over time, to ultimately conclude that there is currently a disparate impact among minorities who are eligible and receive Social Security benefits. Additionally, Part III will use the current framework employed by the Supreme Court to evaluate the likelihood of a disparate impact claim. Lastly, Part IV will provide recommendations for administrative policy changes that can alleviate the disparate impact and remove the institutional inequality currently present in the administration's present-day disbursement policy.

## II. History (Background)

The Social Security Act of 1935 was a landmark legislation enacted in an extremely short period of time. The bill was drafted fourteen months after President Roosevelt first indicated interest in a policy to provide security for the elderly and disabled.<sup>4</sup> The entire legislative process took only seven months—from January 17 to August 14, 1935—a remarkable achievement for such a broad and innovative creation.<sup>5</sup> The completed Act consisted of only thirty-two pages; its eleven titles encompassed eleven wide-ranging programs emanating from very different sources.<sup>6</sup> The Act was intended to accomplish several goals. Specifically, the Act sought to provide for the general welfare by establishing a system of federal old-age benefits.<sup>7</sup>

Additionally, the Act enabled the several States to make adequate provisions for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws.<sup>8</sup> Finally, the Act established a Social Security Board, empowered Congress to

---

4. Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 6 SOC. SEC. REP. SERV. 933 (M.D. Tenn. 1984).

5. *Id.*

6. *Id.* at 933-34.

7. *Id.* at 934.

8. *Id.*

raise revenue, and enumerated other purposes as well.<sup>9</sup> The highlight of the Act came to be known as “social security.” Its official name is the Federal Old-Age, Survivors, Disability and Hospital Insurance Program (OASDHI).<sup>10</sup> Social Security has become the “largest income-maintenance program in the United States.”<sup>11</sup> The program provides monthly benefits to roughly fifty-nine million Americans totaling almost \$870 billion in overall benefits.<sup>12</sup> “Nationally, coverage is nearly universal: About ninety-six percent of the jobs in the United States are covered. Workers finance the program through a payroll tax that is levied under the Federal Insurance and Self-Employment Contribution Acts (FICA and SECA).”<sup>13</sup> Social Security is an important source of income for many Americans in retirement. Three out of five beneficiaries aged sixty-five or older depend on Social Security for at least fifty percent of their income.<sup>14</sup>

#### A. Funding

Social Security’s funding source is established as a pay-as-you-go system.<sup>15</sup> Funding for the trust fund is provided by today’s workers, and money flows back out as monthly income to beneficiaries.<sup>16</sup> This is different from many pension systems, which are “pre-funded.”<sup>17</sup> In pre-funded retirement programs, the money is accumulated in advance so that it will be available to be paid out to today’s workers when they retire.<sup>18</sup> The private plans need to be funded in advance to protect employees in case the company enters bankruptcy or goes out of business.<sup>19</sup> Financial advisors regularly inform clients that Social Security should be viewed as one of the three-legs in a

---

9. *Id.*

10. 42 U.S.C.A. § 402 (West 2015).

11. *Social Insurance Programs: Old-Age Survivors, and Disability Insurance*, SOC. SEC. ADMIN. (1996), <https://www.ssa.gov/policy/docs/progdsc/sspus/oasdi.pdf> (last visited Nov. 10, 2016).

12. *Fact Sheet: Social Security*, SOC. SEC. ADMIN. (Dec. 2015), <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> [hereinafter *Fact Sheet*].

13. *Id.*; see also 26 U.S.C.A. § 3101 (West 2014); 26 U.S.C.A. § 1402 (West 2014).

14. *Fact Sheet*, *supra* note 12.

15. *What is Social Security*, NAT’L ACAD. OF SOC. INS., <https://www.nasi.org/learn/socialsecurity/overview> (last visited Nov. 10, 2016).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

sound investment/retirement plan.<sup>20</sup> The first-leg should be Social Security, the second leg is company pension, and lastly, the third leg is personal savings.<sup>21</sup> The metaphor of the three-legged stool was intended to “convey the idea that all three approaches were needed to provide stable income security in retirement.”<sup>22</sup>

Currently, the Social Security retirement benefit is calculated using what the Social Security Administration refers to as “average indexed monthly earning.”<sup>23</sup> This is the average of thirty-five years of work history.<sup>24</sup> A formula is then applied to the indexed average to calculate the primary insurance amount (PIA).<sup>25</sup> “The PIA serves as the basis for the benefits that are paid to an individual.”<sup>26</sup> The formula that is used to calculate PIA also factors in changes in general wage levels over time through a system known as indexing.<sup>27</sup>

A retiree can start collecting Social Security anytime from age sixty-two to seventy and the later the start, the bigger the benefit.<sup>28</sup> Just how much bigger the benefit is depends on the year of birth. Americans born from 1943 to 1954 have a “normal” or “full” retirement age of sixty-six.<sup>29</sup> A retiree who decides to withdraw before the age of sixty-two has the effect of receiving “25% less than their normal benefit if they cash in at sixty-two and 32% more than their normal benefit if they wait until seventy.”<sup>30</sup>

Workers pay on average six percent of their earning annually into social security.<sup>31</sup> The Social Security Administration has established

---

20. *Research Notes & Special Studies by the Historian's Office: Research Note #1: Origins of the Three-Legged Stool Metaphor for Social Security*, SOC. SEC. ADMIN. (May, 1996), <https://www.ssa.gov/history/stool.html>.

21. *Id.*

22. *Id.*

23. *Social Security Benefit Amounts*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/Benefits.html> (last visited Nov. 10, 2016).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; see, e.g., *Benefit Calculation Examples for Workers Retiring In 2016*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/progdata/retirebenefit2.html> (last visited Oct. 3, 2016) (stating a more detailed description of the calculus involved in determining monthly Social Security benefits to be distributed based on income earned over the beneficiary's lifetime).

28. Janet Novack, *The Big Decision: When to Take Social Security*, FORBES (Feb. 15, 2011, 2:32 PM), <http://www.forbes.com/sites/janetnovack/2011/02/15/the-big-decision-when-to-take-social-security/>.

29. *Id.*

30. *Id.*

31. *Who Pays for Social Security*, NAT'L ACAD. OF SOC. INS., <https://www.nasi.org/learn/socialsecurity/who-pays> (last visited Nov. 10, 2016).

a cap on high-income earners for the year 2015; any income over \$118,000 was exempt from the Social Security wage tax.<sup>32</sup> Employers pay a matching contribution for a total combined contribution of twelve percent.<sup>33</sup>

In 2013, the average worker made \$44,888 a year. . . This worker and his or her employer will each pay \$2,783 this year [2014]. Approximately six percent of all workers will earn more than the \$118,500 tax cap. Earnings above the cap now account for seventeen percent<sup>34</sup> of the aggregate pay of all workers who pay into Social Security.

### B. Who Benefits?

Who benefits from Social Security has been the central focus of research for many years. As discussed above, both workers and employers pay for Social Security.<sup>35</sup> Additionally, the Social Security disbursement policy is established with the intent of being neutral to gender, race, and ethnicity.<sup>36</sup> However, research indicates that the outcome of the Social Security disbursement metric is not completely neutral.<sup>37</sup> For example, "African-American seniors are disproportionately dependent on Social Security for their retirement income."<sup>38</sup> Additionally, minority groups on average have disproportional wage earnings, combined with lower life expectancies over time, which dramatically affects the overall yield on investment in terms of full realization of Social Security benefits.<sup>39</sup> Furthermore, African-Americans and minorities have less retirement income from other sources on average than whites.<sup>40</sup>

This disparity in retirement income can be attributed to several causes. Traditionally, African-Americans lack other sources of income and have proportionately less income generating assets than their white counterparts.<sup>41</sup> Wealth in the form of income-producing assets

---

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Alexa A. Hendley & Natasha F. Bilimoria, *Minorities and Social Security: An Analysis of Racial and Ethnic Differences in the Current Program*, 62 SOC. SEC. BULLETIN 59, 59 (1999) [hereinafter Hendley].

37. Michael Tanner, *Disparate Impact Social Security and African Americans*, 61 CATO INST. 1, 1 (Feb. 5, 2001).

38. *Id.* at 2.

39. Hendley, *supra* note 36, at 59.

40. *Id.*

41. *Id.*

serves as a source of industrial financial or commercial resources.<sup>42</sup> Additionally, income producing assets allow for self-expansion in the form of education and other intangible experiences that allow for the possibility of additional income sources.<sup>43</sup> Most importantly, income producing assets allow for income in retirement and the ability to sustain future generations.<sup>44</sup> A strong portfolio of income generating investments results in overall greater security in retirement in addition to an accumulation of generational wealth.<sup>45</sup>

The results of limited access to this additional stream of capital in the form of asset generating income create a serious disparity overall in terms of calculating overall net-worth.<sup>46</sup> A decline in alternative form of retirement income places a greater need for the income that comes from Social Security.<sup>47</sup> As noted above, Social Security was intended to serve as one of three legs in a sound retirement system. However, for a disproportionate number of minorities, Social Security serves as the only leg of their retirement portfolio. Consequently, “[a]bout three-fourths of minority beneficiaries rely on Social Security for at least half their income, while only two-thirds of whites rely on it to the same extent.”<sup>48</sup> A more troubling statistic indicates that “[a]lmost half of the minority beneficiaries (forty-five percent of blacks and forty-four percent of Hispanics) relied on Social Security for ninety percent of more of their income, compared with twenty percent of whites.”<sup>49</sup>

### C. Who Lives Longer

In evaluating the disparate impact of Social Security, an analysis of the overall return on investment must be made.<sup>50</sup> Return on investment is a basic financial principle that serves as an important metric in

---

42. Richard Hogan & Carolyn C. Perrucci, *Producing and Reproducing Class and Status Differences: Racial and Gender Gaps in U.S. Employment and Retirement Income*, 45 SOC. PROBS. 528, 528 (Nov. 4, 1998).

43. *Id.* at 531.

44. *Id.* at 528.

45. *Id.*

46. *See id.* (discussing possible reasons for the overall disparity in net income between white and racial minorities).

47. Hendley, *supra* note 36, at 60.

48. *Id.*

49. *Id.* at 59.

50. LIQUN LIU & ANDREW J. RETTENMAIER, SOC. SEC. AND RACE, NCPA POLICY REPORT No. 236 (Oct. 2000).

determining if an investment is “sound.”<sup>51</sup> This determination is made through simply analyzing if a beneficiary will realize his or her full investment over time.<sup>52</sup> For many beneficiaries, this is where Social Security has received its biggest critique. Overall, scholars have noted that “most people who are currently working can expect to receive less in Social Security benefits than they have paid in payroll taxes. And there are differences in how the system affects racial groups.”<sup>53</sup>

For instance, “a black male can expect to pay \$61,645 in Social Security taxes during his working years, but will get back only \$20,666 in benefits (where both taxes and benefits are expressed in current dollars, measured at a four percent discount rate).”<sup>54</sup> The situation posited above spells out a loss of over forty-percent of the initial investment. “A twenty-year-old black male can expect a real rate of return on the payroll taxes he pays of only 0.73%; by contrast, a white male can expect a return of 1.82%—more than twice as much.”<sup>55</sup> It is important to note that even in a recession economy, a return on investment of 1.82% is not significant by any means. However, not to belabor the point, this is why Social Security is intended to serve as just one of three investment sources: primarily to serve as a gap filler between income from private pensions and personal savings. This situation presented is just one of many ways in which Social Security has what could be termed a disparate impact upon racial minorities.

### III. Analysis

There is no specific provision in the Constitution that declares that the federal government may not deny equal protection of the laws. However, in *Bolling v. Sharpe*,<sup>56</sup> decided on the same day as the more famous *Brown v. Board of Education*,<sup>57</sup> the Court held that equal protection of the laws extends to the federal government through the due process clause of the Fifth Amendment.<sup>58</sup> Through analysis, all equal protection challenges must address the same basic questions. Ultimately, an equal protection claim must demonstrate that, whatever-

---

51. *Id.*

52. *Id.* at 8.

53. *Id.*

54. *Id.* at 18.

55. *Id.*

56. *Bolling v. Sharpe*, 347 U.S. 497, 497 (1954).

57. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 294 (1955).

58. *Bolling*, 347 U.S. at 497.



er the government's classification, it is justified by a sufficient purpose.<sup>59</sup> More specifically, equal protection challenges can be broken down into three questions: What is the categorization?<sup>60</sup> What level of scrutiny should be applied?<sup>61</sup> Does the specific government action meet the level of scrutiny as outlined by the Court?<sup>62</sup>

#### A. SCOTUS-Classification Analysis

The disbursement portion of the Social Security Act<sup>63</sup> is written in a manner that renders it facially neutral. Therefore, it is necessary to look deeper into the statute and its implementation to tease out whether there is a discriminatory *impact* or discriminatory *effects* from the law's application.<sup>64</sup> The Supreme Court has communicated plainly that discriminatory impact is insufficient to prove a racial or gender classification.<sup>65</sup> If a law is facially neutral, determining a race or gender classification requires proof that there is a biased purpose behind the law.<sup>66</sup> Thus, in order to establish that the Social Security disbursement policy is discriminatory, a showing of intent must be established.<sup>67</sup>

The Court explained in *Washington v. Davis* that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is not unconstitutional *solely* because it has a racially disproportionate impact."<sup>68</sup> The Court goes on to explain that discriminatory impact, "[s]tanding along . . . [d]oes not trigger the rule that ra-

---

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. (a) Old-age insurance benefits  
Every individual who—

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained age 62, and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained retirement age (as defined in section 416(l) of this title); 42 U.S.C.A. § 402 (West 2015).

64. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273-74 (1979).

65. *Id.* at 279.

66. *See, e.g., id.* (indicating that discriminatory impact is not sufficient to succeed in proving a gender classification; there must be proof of discriminatory purpose.).

67. *Id.* at 279.

68. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

cial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."<sup>69</sup>

The Court has stated that laws that are facially neutral as to race and national origin will obtain a higher standard of review if there is proof of a discriminatory purpose.<sup>70</sup> The Court's reasoning for adopting this policy is that the Equal Protection Clause is intended to "prevent official conduct discriminating on the basis of race."<sup>71</sup> The Court moves on to further reason that allowing discriminatory impact to avail in supporting a racial classification "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."<sup>72</sup>

The crucial question when conducting a classification analysis then becomes: How can it be established that a facially neutral law is motivated by a discriminatory purpose? The Supreme Court has been adamant that showing such a purpose requires confirmation that the government took an action with the awareness that its actions would have discriminatory results.<sup>73</sup> In *Personnel Administration of Massachusetts v. Feeney*, the Court declared: "Discriminatory purpose, 'however; implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker. . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>74</sup>

The Supreme Court has recognized several ways in which a discriminatory purpose can be established. First, the impact of the law may be so clearly discriminatory as to allow no other justification than that it was implemented for impermissible reasons. The Court states that "the impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point."<sup>75</sup> Sometimes a clear pattern, unexplainable on grounds other than race,

---

69. *Id.* at 242.

70. *Id.* at 239.

71. *Id.*

72. *Id.* at 239.

73. *Pers. Adm'r of Mass.*, 442 U.S. at 279.

74. *Id.*

75. *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

emerges from the effect of the state action even when the governing legislation appears neutral on its face.”<sup>76</sup>

Another way of establishing discriminatory purpose is through the history surrounding the government’s action.<sup>77</sup> In *Arlington Heights*, the Court states “the historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”<sup>78</sup>

Lastly, discriminatory purpose may be recognized through the legislative or administrative history of a law.<sup>79</sup> The Court explained in *Arlington Heights* that “the legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports.”<sup>80</sup>

The Court has outlined a difficult standard in terms of demonstrating that a facially neutral law is motivated by a discriminatory purpose. However, this standard is not impossible. Moreover, the legislative history of the Social Security Act of 1935 provides great insight in establishing potential discrimination.<sup>81</sup> The Social Security Act was passed as a New Deal initiative; the New Deal as a whole faced many challenges. The policies of the New Deal, focusing on restoring economic prosperity or upsetting the delicate balance of southern white power, faced extremely tough criticism from Southern Democrats. The past shines a great light on the racially charged political culture of the 1930s. Additionally, the legislative history and the historical record of that period serve to connect the dots to further illustrate that the act is still highly segregated along racial lines.

## B. Roosevelt and the Beginnings of the Social Security Act

There were two primary risks to the racially segregated southern economy. First were initiatives that improved the economic standing

---

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO STATE L. J. 100, 102 (2011).

of blacks in relation to whites, which threatened to reduce the economic dependence of blacks.<sup>82</sup> The New Deal outlined several programs that stood to upset this delicate balance by promising to pay out benefit payments or unemployment insurance under the Social Security Act, equal and minimum wages under the Fair Labor Standards Act, or equalizing bargaining power under the National Labor Relations Act.<sup>83</sup> Furthermore, these programs called for a centralized federal administration as opposed to local control which certainly promised to disrupt the racist status quo of corruption and disparity for blacks.<sup>84</sup>

Early in his campaign, President Roosevelt laid out a vision of society safeguarded from economic turbulence.<sup>85</sup> However, the racial entrenchment of American politics at the time proved insurmountable.<sup>86</sup> What came out of Roosevelt's vision was a collection of social policies fragmented along racial, class, and regional lines.<sup>87</sup> The entire body of legislation known as the Social Security Act is tainted by the nasty racial politics of the time. The Act contains race-based exclusions that by design were intended to exclude African-Americans from fully benefiting from the Act.<sup>88</sup>

Ultimately, the combination of a labor-repressive agriculture system, a highly mechanized scheme of racial marginalization, and a racially segregated economy subdued African-Americans on both economic and political fronts.<sup>89</sup> The Act used several different means to achieve this racial imbalance; these *exclusions* were done in part by omitting the occupations in which most African-Americans worked, by drawing a stringent qualification standard that many African-Americans could not meet, and, most importantly, by preserving local autonomy.<sup>90</sup>

---

82. *Id.*

83. *Id.*

84. *Id.*

85. ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE RACE AND THE AMERICAN WELFARE STATE* 23 (1998) [hereinafter LIEBERMAN].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

Key Congressional leaders restricted Roosevelt and his administration from passing anything resembling a racial issue.<sup>91</sup> More importantly, this significant cadre of congressional leaders knew they controlled enough votes to make their threat credible.<sup>92</sup> Roosevelt was in a unique position; the economy was floundering and he needed the support of the southern leadership. Roosevelt often commented to his staffers that, "first things come first. . . I can't alienate certain votes I need for measures that are more important at the moment by pushing any measures that would entail a fight."<sup>93</sup>

The lack of support for racial inclusivity is most notable in the exception proposed for the Old-Age Insurance portion of the Social Security Act. Old-Age Insurance was proposed as a national program, the proposal for a national program was generally accepted after a recommendation was made from the Committee on Economic Security.<sup>94</sup> However, the committee immediately rejected the notion that all workers should be covered.<sup>95</sup> In order to garner congressional acceptance of Old-Age Insurance, the most distinguished portion of the Act, concessions to exclude domestic workers and agricultural workers were made.<sup>96</sup> These concessions immediately converted a national program into a racially segregated program.<sup>97</sup>

The committee members who brought up these exceptions to the insurance program were Southern Democrats.<sup>98</sup> Both chairmen of the Committee on Economic Security were very vocal when it came to discussions on whether to include agricultural and domestic workers.<sup>99</sup> The legislative history indicates that the drafters of the SSA originally intended for all to be covered.<sup>100</sup> Shortly after the original proposal, the language of the Act was amended.<sup>101</sup>

---

91. HARVARD SITKOFF, *A NEW DEAL FOR BLACKS, THE EMERGENCE OF CIVIL RIGHTS AS A NAT'L ISSUE: THE DEPRESSION DECADE 1*, 45 (Oxford Univ. Press, 30th ed. 1978).

92. *Id.*

93. *Id.*

94. LIEBERMAN, *supra* note 85, at 23.

95. *Id.* at 39.

96. *Id.*

97. *Id.*

98. *Id.*; see also *Econ. Sec. Act on the S. Comm. on Fin.*, 74th Cong. 219-20 (1935).

99. LIEBERMAN, *supra* note 85, at 23.

100. Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70, SOC. SEC. BULLETIN, No. 4, Off. of Ret. and Disability Pol. (2010).

101. *Economic Security Act: Hearings on H.R. 4120 on the H. Comm. on Ways & Means*, 74th Cong. 108 (1935) (statement of Dr. E.E. Witte, Executive Director,

---

Committee on Economic Security) (emphasis added) [hereinafter *Economic Security Act*].

Mr. Jenkins. I was interested in the statement the gentleman made that practically 25 percent of the people over 65 in his State would be within one class. Would the gentleman state what class he means by that?

Mr. Smith. Of course, in the South we have a great many colored people, and they are largely of the laboring class.

Mr. Jenkins. That is what I thought the gentleman had in mind. I should like to ask the gentleman, and also any member of this committee, whether in this law it is contemplated that there be any loophole by which any state could discriminate against any class of people?

Mr. Smith. No, sir; I do not think so, and you will not find in my remarks any suggestion to that effect. It just so happens that that race is in our State very much of the laboring class and farm laboring class. But you will find no suggestion in my remarks of any suggested amendment that would be unconstitutional, if I may use that expression.

Mr. Jenkins. I am glad that the gentleman did not intend that. I can see that there might be a possibility, if too much leverage is given to the States in their enacting a law to provide funds to match our \$15 contribution, that they might specify that the old-age pension should be distributed according to groups.

Mr. Vinson. Do you think that that would be seriously considered? constitutional?

Mr. Smith. Of course not.

Mr. Vinson. They do not do that in Ohio, do they?

Mr. Jenkins. No, and we do not keep them from voting in Ohio, either.

Mr. Smith. We do not keep them from voting in Virginia. There is an educational qualification, and a great many of them vote who are qualified.

Mr. Jenkins. I was interested in the statement the gentleman made that practically 25 percent of the people over 65 in his State would be within one class. Would the gentleman state what class he means by that?

Mr. Smith. Of course, in the South we have a great many colored people, and they are largely of the laboring class.

Mr. Jenkins. That is what I thought the gentleman had in mind. I should like to ask the gentleman, and also any member of this committee, whether in this law it is contemplated that there be any loophole by which any state could discriminate against any class of people?

Mr. Smith. No, sir; I do not think so, and you will not find in my remarks any suggestion to that effect. It just so happens that that race is in our State very much of the laboring class and farm laboring class. But you will find no suggestion in my remarks of any suggested amendment that would be unconstitutional, if I may use that expression.

Mr. Jenkins. I am glad that the gentleman did not intend that. I can see that there might be a possibility, if too much leverage is given to the States in their enacting a law to provide funds to match our \$15 contribution, that they might specify that the old-age pension should be distributed according to groups.

Testimony given by Representative Howard W. Smith of Virginia and Representative Thomas Jenkins of Ohio makes clear that the committee was well informed that the people being excluded from the Act were largely from “the colored class.”<sup>102</sup> Rep. Smith’s testimony before Congress also establishes that he was highly aware that excluding the laboring class, particularly the farm labor class, would exclude a disproportionate number of African-Americans.<sup>103</sup> Ultimately, the methodical prohibition of blacks through occupational classifications was fundamental to the final passage of the Act.<sup>104</sup>

The removal of these occupational classifications came in light of testimony from African-American representatives that the exclusion of these two groups would be detrimental to black retirees. The most prominent of those speakers was Charles Hamilton on behalf of the NAACP. Hamilton testified that the law as amended would only be available to persons in recognized employment relationships.<sup>105</sup>

[I] call the committee’s attention to the fact that the definition of those who are to benefit under the unemployment-insurance provision is left up to the respective States. Now, where the Negro population is in the majority, or in largest numbers, you have the Negroes in occupations which, either under workmen’s compensation acts or any other sort of legislation or other economic-insurance protection, are excluded from the benefits of the [A]ct. In these States, where your Negro population is heaviest, you will find the majority of Negroes engaged either in farming or else in domestic service, so that, unless we have some provisions which

---

Mr. Vinson. Do you think that that would be seriously considered constitutional?

Mr. Smith. Of course not.

Mr. Vinson. They do not do that in Ohio, do they?

Mr. Jenkins. No, and we do not keep them from voting in Ohio, either.

Mr. Smith. We do not keep them from voting in Virginia. There is an educational qualification, and a great many of them vote who are qualified.

102. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 59 (2005) (quoting U.S. COMMITTEE ON ECONOMIC SECURITY, *REPORT TO THE PRESIDENT*, 18, 49 (1935)). When statutory reform occurred in 1954, Smith opposed the extension of old-age pension benefits to blacks. See LIEBERMAN, *supra* note 85, at 113-16. Smith also prominently obstructed passage of civil rights legislation in 1964; see generally, *Economic Security Act*, *supra* note 101.

103. Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 514-15 (1995).

104. *Economic Security Act*, *supra* note 101.

105. *Id.*

will expressly extend the provisions of the bill to include domestic servants and agricultural workers.<sup>106</sup>

Grossly unresponsive to the effects that such an amendment might have on blacks and seeking to gain the Southern Democrat voting block, Congress passed the SSA with an exclusion that exempted a very significant portion of African-Americans from receiving Old Age Insurance.<sup>107</sup> The restrictions, in the end, meant that over half of the African-American population in the labor force and over three-fifths of black southern workers were excluded from receiving benefits.<sup>108</sup>

This adamant desire to exclude a large portion of the African-American population from enjoying the benefits provided under the Social Security Act is just one of two ways that many scholars argue that the segregated legacy of Social Security still lives on. The Act was authored in 1935 to pass constitutional muster. However, many scholars contend that the end result of the bill was a policy that highly favored the white male working population to the exclusion of both African-Americans and women.<sup>109</sup>

The second way in which the SSA is organized to exclude minorities is through its state-centered distribution plan. Southern Democrats fought to create an institutional structure that allows for the states to control the distribution of benefits.<sup>110</sup> There were heated debates in both the House and the Senate about how much control the states should have.<sup>111</sup> Scholars have long agreed that Southern Democrats were largely motivated by a desire to attract business investment in the south.<sup>112</sup> President Roosevelt's New Deal legislation was used as a catalyst to ensure that wages for working southerners were suppressed to spur economic growth.<sup>113</sup> The exclusion of African-

---

106. For purposes of receiving old-age benefits, § 210(b) of the SSA provided that the following industries are excluded even though performed within the United States: (1) agricultural labor; and (2) domestic service in a private home. See Social Security Act, ch. 531, tit. II, § 210(b)(1)–(2), 49 Stat. 620, 625 (1935). With respect to unemployment compensation, § 907(c) provided, "The term 'employment' means any service . . . performed within the United States by an employee for his employer, except – (1) Agricultural labor; (2) Domestic service in a private home." Social Security Act, ch. 531, tit. IX, § 907(c)(1)–(2), 49 Stat. 620, 643 (1935).

107. LIEBERMAN, *supra* note 85, at 514-15.

108. *Id.*

109. Howard L. Reiter, *The Building of a Bifunctional Structure: The Democrats in the 1940s*, 114 POL. SCI. QUARTERLY 107, 114 (2001).

110. *Id.*

111. *Id.*

112. *Id.*

113. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L. J. 1, 5 (2011-2012).



Americans began as traditional racism—an effort by those in power to suppress African-Americans economically and politically.<sup>114</sup> The impact of New Deal policies and government organizations has had a long lasting impact. As the country moved slowly away from the Jim Crow era, the political institutions created during that time remained.<sup>115</sup>

### C. Contemporary Issues

The SSA has undergone many changes in the years since the original bill was passed.<sup>116</sup> These changes have attempted to correct the underlying racial tension the Act was founded upon. Some argue that the tensions of the past have been alleviated through these amendments while others proclaim that more sweeping changes need to be made.<sup>117</sup> This section of the Note serves to highlight a few of the most critical changes in the SSA in the years since its original inception. In addition, it is also a goal of this Note to flesh out ways in which additional changes can be made to create a more balanced investment vehicle for African-American's while still maintaining the structure of the Act as envisioned in 1935. Finally, this section seeks to provide advice to African-Americans and others racial minorities who find themselves disadvantaged by the SSA on how to structure a retirement plan in light of the historical challenges faced by the long-standing racial animus built into the SSA.

In 1950, the Act extended to cover nearly all private employees, including farm workers and those involved in domestic work.<sup>118</sup> The inclusion of these important groups left out by the original Act increased the number of total Americans covered by ten million people,<sup>119</sup> bringing the total percentage of Americans covered by the SSA to ninety-three percent.<sup>120</sup> Some scholars have argued that the changes in Social Security implemented in the 1950s did not do enough to re-

---

114. *Id.*

115. *Id.*

116. Michael D. Bordo et al., *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century*, NAT'L BUREAU OF ECON. RES., 297, 312 (Jan. 1998).

117. *Id.* at 311-12.

118. *Id.*

119. *Id.*

120. Phoebe Weaver Williams, *Social Security Reform: Creating Transformative Opportunities for African Americans*, 3 MARQ. ELDER'S ADVISOR 23, 24 (2001).

solve the racial discrepancies of the past.<sup>121</sup> These scholars argue that the reporting requirements for those working in African-American dominated industries were lenient, consequently negating the coverage for those occupations.<sup>122</sup> Furthermore, Social Security benefits were still calculated by reported earnings in employment.<sup>123</sup> Using a benefits structure that makes distributions based on earnings effectively incorporates a policy of social discrimination into the Act itself.<sup>124</sup> This systematic discrimination has been best characterized as, "Congress incorporat[ing] the effects of. . . discrimination against African-Americans into the very program designed to ameliorate the economic devastation caused by old age, disability, or early death of the wage earner."<sup>125</sup>

The effects of the Social Security benefits formula results in those who are low-income earners receiving benefit amounts that are completely different than those with higher incomes.<sup>126</sup> Lawmakers have acknowledged that the distribution method is flawed and continues to perpetuate a system of discrimination.<sup>127</sup> However, instead of altering or amending the Act to reflect a more racially neutral distribution policy, the legislature declared that "the ultimate remedies for such discrimination will come through the Congress, the courts, the schools, the job market, and the political forum."<sup>128</sup>

African-Americans did find a potential remedy in an amendment to the SSA that was made in an effort to alleviate some of the tension created in the disbursement of funds to women. Policy drafters acknowledge that the structure of the SSA created a level of inequity that

contributes to the differential distribution of financial security between women and men by affording much better financial security in old age to those who have successfully fulfilled traditional male breadwinner roles than to those who have fulfilled female roles. It thereby contributes to the subordination of individual women to individual men.<sup>129</sup>

---

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 27.

126. *Id.*

127. *Id.*

128. *Id.*

129. Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law Commentary*, 89 COLUM. L. REV. 264, 271 (1989) [hereinafter Becker].

The acknowledgment that the SSA created a system of inequity was rather surprising to many. Additionally, this acknowledgment, although not directly targeted at African-Americans, opened the door to challenging the distribution method. The discussion over women and work, "reveal[ed] tension between the goal of eliminating disincentives for women's participation in the workforce and that of protecting women in traditional homemaker roles."<sup>130</sup>

The distribution system disadvantaged women for a variety of reasons. Aside from favoring those men who have fulfilled traditional breadwinner roles over those women who have made the conscious decision to serve as home-makers,<sup>131</sup> the bias in the distribution system can be placed into three broad categories.

First, a worker's primary benefits are linked to wages. Since women tend to earn lower wages than men, they also receive lower primary benefits. Second, the social security system does not directly take account of uncompensated housework (including child care) in calculating wages and benefits. To the extent that women substitute unpaid housework for paid work outside the home, their wages and benefits are correspondingly reduced. Finally, derivative benefits based on spousal status are 'smaller and more contingent' than primary benefits based on wages.<sup>132</sup>

Additionally, the wage-based structure of the SSA further highlights the underprivileged station of women in the workforce. The issues with the SSA distribution policy mirrors the same issues faced by African-Americans. Many women's rights activists saw it as a welcomed relief when the legislature sought to amend the distribution policy to better account for the conflict that women face in terms of joining the workforce as opposed to maintaining traditional roles within the home.<sup>133</sup> Although these changes provided some hope for many who advocated similar changes for African-Americans, these changes never occurred. In a series of constitutional challenges, the Supreme Court held changes in the distribution policy of the SSA unconstitutional under the Fourteenth Amendment.<sup>134</sup>

---

130. Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209, 1210 (1997).

131. *Id.* at 1218.

132. *Id.*

133. See generally Ruth Bader Ginsberg, *Sex Equality and The Constitution*, 52 TUL. L. REV. 45 (1978) (discussing the evolution of the Supreme Court's jurisprudence as it related to issues of gender).

134. Danny Vinik, *The Alarming Retirement Crisis Facing Minorities in America*, NEW REPUBLIC (Feb. 17, 2015), <https://newrepublic.com/article/121084/urban-institute-study-minorities-have-built-less-wealth-whites>.

This Note seeks to primarily critique the flaws in the SSA past and present, in addition, to adding to the scholarship on racial and gender equality. It is difficult for any theoretical standard of equality to eliminate a bias favoring a group outside of the majority within the Social Security system. However, the inescapable deficiencies of a constitutional standard should not bind us to current inequalities but should serve to challenge us to understand the need for legislative change. In light of the shortcomings of the Social Security system, it is still imperative that African-Americans adequately prepare for retirement, understanding that they face a “diminished” return on their social security investment.

#### D. Preparation

The Federal Reserve released a report discussing the growing retirement crisis in America. Their report revealed that a growing number of Americans are not prepared for retirement,<sup>135</sup> citing that “nearly a third of Americans over the age of eighteen have no retirement savings.”<sup>136</sup> A team of researchers from the Urban Institute attributes this crisis to the fact that Hispanics and African-Americans have less wealth than white families over their lifetime.<sup>137</sup> This study reveals some very staggering numbers. It was reported that in 2013, the median white family had twelve times the wealth of the median African-American family.<sup>138</sup> The Federal Reserve analysis attributes a few reasons minority families have difficulty saving for retirement. First, African-American and Hispanics have very low rates of home ownership.<sup>139</sup> Second, African-American families have on average a higher level of student loan debt.<sup>140</sup> More importantly, the Urban Institute notes that “‘people of color disproportionately attend for-profit schools, which have low graduation rates.’ That means that African-Americans aren’t just taking on more in debt. They also aren’t always

---

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (“More than 20 percent of Americans over the age of 60 have savings in real estate or land. But homeownership rates for whites is more than 50 percent larger than the rate for African-American and Hispanic families—and the gap has stayed constant for the past 30 years.”).

139. *Id.*

140. *Id.*

getting a degree for that debt."<sup>141</sup> Lastly, minorities groups have less participation in retirement savings accounts.<sup>142</sup>

In light of the information mentioned above, many have debated whether Social Security as a program still remains a viable option for minority investors.<sup>143</sup> Proponents of change champion an argument that illustrates that the money paid into Social Security by lower income Americans (primarily African-American and Hispanic-Americans) would be best if invested in a private savings account in lieu of Social Security.<sup>144</sup> Opponents of privatization have called this logic flawed and suggest that it would be foolish to invest primarily in the market.<sup>145</sup>

A hypothetical market analysis conducted by William Shipman and Peter Ferrara reveal that privatization may not be as risky as many have originally thought.<sup>146</sup> Shipman and Ferrara analyze a hypothetical senior citizen, who retired at the end of 2009 at age sixty-six, and set up a personal retirement savings account upon entering the workforce in 1965 around the age of twenty-one.<sup>147</sup> If they were to pay into his personal account what he and his employer would have paid into Social Security, investing his entire portfolio in the stock market for all his working years he would have fared better in the market than he would have through the Social Security tax.<sup>148</sup> Additionally, this example accounts for the market downturn of 2009.<sup>149</sup> Shipman and Ferrara theorize that their investment strategy would have paid seventy-five percent more in retirement than Social Security.<sup>150</sup> Furthermore, the money that was saved is personal wealth and can be

---

141. *Id.*

142. *Id.*

143. William G. Shipman and Peter J. Ferrara, *Private Social Security Accounts: Still a Good Idea*, WALL ST. J., at 1 (Oct. 27, 2010), <http://www.cato.org/publications/commentary/private-social-security-accounts-still-good-idea> [hereinafter Shipman].

144. *Id.*

145. Greg Anrig, *Twelve Reasons Why Privatizing Social Security is a Bad Idea*, CENTURY FOUND. (Dec. 14, 2004), <http://tcf.org/content/commentary/twelve-reasons-why-privatizing-social-security-is-a-bad-idea>.

146. Shipman, *supra* note 143.

147. *Id.*

148. *Id.*

149. Shipman and Ferrara base their calculation on several assumptions. (1) This person is married and invested with a partner; (2) They both invested in an index portfolio of 90% large-cap stocks and 10% small-cap stocks, which earned the returns reported each year since 1965; (3) they both had average income for a male and female.

150. *Id.*

liquidated at any time.<sup>151</sup> Additionally, even more important, for the concept of family wealth which is a serious problem in minority communities, this money can be passed onto future generations, unlike Social Security which ceases upon death. Shipman and Ferrara present a hypothetical that is common among wealthy Americans. Investment in the market and stock ownership is how generational wealth is accumulated; however, it is low-income Americans that need the capital to make these investments.<sup>152</sup>

Although Shipman and Ferra make a very persuasive point, they fail to account for the simple fact that, when implemented, Social Security was not intended to account for the sole source of retirement savings.<sup>153</sup> Social Security was originally intended to serve as one of the three-forms of retirement income; a system the Social Security Administration coined as the three-legged stool of retirement.<sup>154</sup> The core idea of Social Security was that Social Security would not undertake to furnish a comprehensive defense to all whom it protected.<sup>155</sup> The social insurance approach is to assure that benefits would provide minimum coverage.<sup>156</sup> The individual accepts the obligation of obtaining supplementary protection and investing through private sources.<sup>157</sup> Additionally, although persuasive, it does not account for the large discrepancy in income over lifetime between African-Americans and whites in terms of net income. What remains clear, however, in the Shipman and Ferra study is that unconventional thinking is important and critical to developing solutions to the retirement issues that African-Americans face in their later years.

As noted above, Social Security was only intended to serve as one of the three-legs of retirement income for Americans.<sup>158</sup> Therefore, sole reliance on Social Security in retirement is far beyond the scope of the program as originally drafted. Thus, any solutions proffered should account for the systems capacities to supplement additional

---

151. *Id.*

152. Star Parker, *Replace Social Security With Personal Retirement Accounts*, URBAN CURE (Feb. 21, 2015, 4:30 PM), <http://www.urbancure.org/mbarticle.asp?id=338&t=replace-social-security-with-personal-retirement-accounts>.

153. *Fact Sheet*, *supra* note 12.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Luis A. Aguilar, Commissioner, U.S. Sec. and Exch. Comm'n, Speech at The American Retirement Summit: Improving the Quality and Outcomes of Retirement by Planning (Nov. 3, 2011) [hereinafter Aguilar].

income sources in retirement. Planning for retirement has several important components and requires years of preparation. African-Americans and minorities are faced with unique challenges in retirement and those challenges must be understood when developing a retirement plan. A consistent challenge many policy advisors and economists mention when describing issues regarding minority populations and retirement are access to quality information regarding retirement.<sup>159</sup> This lack of information serves as an obstacle in terms of making sound financial decisions.<sup>160</sup> Furthermore, with the shift from defined benefit to defined contribution pensions, knowledge on how much to save and how much to invest is critical.<sup>161</sup>

In a speech given at the American Retirement Summit, the Commissioner of the SEC warned Americans about the changing nature of retirement planning.<sup>162</sup> Commissioner Aguilar states that retirement decisions,

have to be made in a financial market that has become exponentially more complex with financial products and investment strategies unheard of just a few years ago. . . . A significant issue remains whether investors are at an information asymmetry disadvantage when it comes to these products and what the solution should be.<sup>163</sup>

Commissioner Aguilar stresses the importance of “demystify[ing] the retirement planning process and the risks associated with investment products.”<sup>164</sup> Most importantly, Commissioner Aguilar acknowledges that training around financial literacy is not common practice in grade school, high school, or offered at the university level.<sup>165</sup> The Commissioner stresses the need for government officials to develop clear and concise information regarding financial literacy education.<sup>166</sup>

---

159. Parker, *supra* note 152.

160. AGUILAR, *supra* note 158.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

#### IV. Recommendation

Mounting a constitutional challenge on disparate impact grounds is extremely challenging and less than likely to succeed. As mentioned above, the Supreme Court, in the wake of *Mass. v. Feeny*, has made any constitutional challenge on the basis of disparate impact nearly unachievable.<sup>167</sup> The influence of this standard means that the institutional racism of the 1930s remains in effect to this day. Attempts have been made to correct the sins of the past; however, these amendments only serve as a band-aid and make a superficial attempt to address the deep-seeded imbalance of equity present in the Social Security system.

In order to see complete equity in the Social Security system, drastic changes must be made. However, these changes are also unlikely. Social Security is one of the most politicized bureaucracies in the country.<sup>168</sup> Moreover, any attempt to alter or change Social Security has been referred to as the third-rail of politics,<sup>169</sup> offering career ending consequences to those who dare mention modifying or challenging the status quo. However, in light of those challenges, it is important to discuss what can be done within the framework of the current system. The numbers are staggering: African-Americans and minorities are very unprepared for retirement. What can be done on a holistic level to ensure that African-Americans and other minorities groups are able to build a nest egg for themselves in anticipation of retirement?

This next section discusses what African-American and minority investors can do to prepare for retirement. This strategy takes a holistic approach to retirement and accounts for the primary reasons why African-Americans face such a high level of retirement insecurity in their older age. This model accounts for homeownership as a vehicle for retirement security, managing student-loan debt and making informed educational decisions, and finally using employer investment vehicles or personal investment vehicles to gain entry into the financial market.

---

167. William Safire, *Third Rail*, N.Y. TIMES (Feb. 18, 2007), <http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html>.

168. See generally *id.*

169. *Id.*



Possessing a home is a decisive element of a family's aptitude to stay economically secure in their retirement years.<sup>170</sup> However, in 2011, only forty-two percent of African-Americans owned a home, compared to sixty-eight percent of Whites.<sup>171</sup> Additionally, "African-American homeowners are eighty-six percent more likely than Whites to have an underwater mortgage."<sup>172</sup> The low homeownership rate among African-Americans is in part caused by the lasting vestiges of segregation, troubles accessing credit, and discriminatory lending policies.<sup>173</sup> Homeownership remains the largest driver of racial wealth inequality in the United States.<sup>174</sup>

Furthermore, access to retirement accounts remains extremely limited for African-Americans.<sup>175</sup> It is reported that only 54.3% of African-American employees work for a firm that provides a retirement plan.<sup>176</sup> Additionally, of those African-Americans who have access to an employer-sponsored retirement plan, only eighty-one percent participate.<sup>177</sup> Those with employer sponsored plans often express confidence about relying on a workplace retirement plan to meet their financial goals.<sup>178</sup> However, their low annual contributions result in below average retirement savings.<sup>179</sup> Nearly three-quarters of African-Americans have less than \$10,000 in retirement savings, compared to only 48.6% of White households.<sup>180</sup> African-Americans are more likely to earn less throughout the course of their careers, resulting in less income for retirement.<sup>181</sup> Additionally, "African-Americans are more likely to provide financial support to individuals outside their immediate family, including distant family members and close friends, leading to lower potential savings for retirement."<sup>182</sup> "White households with adults between the ages of twenty-five and sixty-four have

---

170. Elvis Guzman and Madhulika Vulimiri, *African American Retirement Insecurity*, CTR. FOR GLOB. POL. SOL. (Aug. 2015), <http://globalpolicysolutions.org/wp-content/uploads/2015/08/African-American-Retirement-Insecurity.pdf> [hereinafter Guzman].

171. *Id.*

172. *See id.* (defining underwater as, "a home purchase loan that has a higher balance than the free market value of the home.").

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

an average of 5.5 times more in retirement savings than similar African-American households.<sup>183</sup>

Additionally, as African-Americans (and lower-income Americans) represent an overwhelming proportion of Americans living with student-loan debt, it is important to begin the process of college savings soon. The African-American community as a whole places a great deal of importance on a college education and has high expectations in terms of their children's future education; a college savings account program done effectively offers an excellent opportunity to translate such intentions into action.<sup>184</sup> Establishing a 529 savings account would be a start in terms of minimizing long-term the amount of debt that African-Americans carry coming out of college.<sup>185</sup> Additionally, this would also serve to provide an incentive for lower-income Americans to attend reputable not-for-profit colleges. A 529 plan is a college savings account that is exempt from federal taxes.<sup>186</sup> The account's name comes from the section dedicated to the account in the federal tax code.<sup>187</sup> These plans offer investors tax benefits at both the state and federal level.<sup>188</sup> Any U.S. citizen or resident at least eighteen years old can open a 529 account.<sup>189</sup> 529 accounts come in two flavors: prepaid and savings plans.<sup>190</sup> "Prepaid tuition plans and college savings investment plans. Those who open a prepaid tuition plan lock in the current costs of tuition in place of future prices which generally rise every year."<sup>191</sup> Those who open a 529 account are offered a tax-deferred investment vehicle.<sup>192</sup> Additionally, they are able to make qualified withdrawals to pay tuition, fees, and expenses at "accredited colleges and graduate schools, including professional and trade schools."<sup>193</sup>

---

183. *Id.*

184. Trina R. Williams Shanks et al., *Assets and African Americans: Attempting to Capitalize on Hopes for Children Through College Savings Accounts*, 41 REV. BLACK POLIT. ECON. 337, 355.

185. Kate Stalter, *The Ultimate Guide to Understanding 529 College Savings Plans*, U.S. NEWS INVESTING (May 16, 2016, 10:33 AM), <http://money.usnews.com/money/personal-finance/mutual-funds/articles/2014/09/03/the-ultimate-guide-to-understanding-529-college-savings-plans>.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

The money contributed to a 529 account is invested in large, widely held mutual funds managed by reputable investment firms.<sup>194</sup> Additionally, each plan includes options for the investor to choose from.<sup>195</sup> Most importantly, a 529 account provides two important benefits: it places the funds earmarked for college tuition into a tax-deferred status allowing the investor to build investment income off a larger principle investment,<sup>196</sup> and it provides a high-yield, low-risk investment platform to invest college savings offering all Americans the ability to receive a higher yield than a traditional savings account.<sup>197</sup> The benefits mentioned above should be considered as a viable investment vehicle for African-Americans who have children. Investing in a 529 plan would serve to offset the high cost of tuition and would, in turn, lower the debt that younger African-Americans carry post graduation. This investment vehicle should be used with the intention of freeing capital post-graduation to allow for an early entry for college-age African-American to focus toward retirement savings.

Lastly, personal investment should be used as a tool when planning for retirement.<sup>198</sup> African-Americans participate in the market through forms of personal investment at a far less rate than their white counterparts.<sup>199</sup> Failure to have adequate personal savings in retirement leads to a dependency on Social Security as the primary source of income.<sup>200</sup> It is imperative that, moving forward, African-Americans find ways to educate themselves on sound, safe investment strategies. To rely on Social Security as the sole means of retirement income is flawed. However, research suggests that "Social Security is the bedrock of retirement security for the African-American community. Forty-six percent of African-American seniors age sixty-five and over rely on Social Security for at least ninety percent of their income, compared to thirty-five percent of whites."<sup>201</sup> This information, combined with the average yearly income from Social Security for African-Americans over the age of sixty-five hovering at rough-

---

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Guzman, *supra* note 170, at 3.

199. *Id.*

200. *Id.*

201. *Id.*

ly \$14,514, indicates that many African-American retirees are living at or close to poverty.<sup>202</sup>

## V. Conclusion

An examination of the New Deal cultural attitudes regarding race—in particular, racial attitudes concerning African-Americans—reveals that those sentiments are ingrained in the Social Security legislation that lives on to this day. Mounting a disparate impact challenge through the courts is an insurmountable challenge; it will be up to this generation of lawmakers to update the Social Security Act so that it reflects the social conditions of today. Through an examination of the elements that effect retirement security, it is evident that African-Americans have drastically fewer resources entering retirement than their white counterparts. It will take a holistic approach to correct these inequalities, which involve a thorough look at the institutions that influence retirement security from life to death. It is time to implement a new deal that will secure retirement security for all Americans, not just a segment of the population.

---

202. *Id.*