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Pensions, Risk, and Race

Dorothy A. Brown*

Abstract

Foregone revenues as a result of the tax advantages associated with employer-provided pension plans are estimated to be almost \$95 billion in 2004. An analysis of those workers who are eligible to receive the benefits and those that are not is warranted. This Article provides such an analysis and identifies two distinct problems.

First, even though the majority of private sector workers are not participating in their pension plans, every study confirms the following observation: White workers are the most likely to participate and Hispanic workers are the least likely to participate in their pension plans. Second, even for those workers who do participate in their pension plans, with the proliferation of defined contribution plans that place the investment decisionmaking on the worker, workers make different investment decisions based upon their race or ethnic background. As a result, in order to increase the likelihood that workers of color retire with similar pension account balances as their White counterparts, they will not only need to be encouraged to participate, but they will also need to receive education about various investment vehicles. Given that the majority of all private sector workers are not participating in their pension plans, this presents a unique opportunity to encourage all workers to increase their participation in pension plans—and maximize the investment of those funds.

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I. Introduction

My scholarship, which examines the racial implications of tax policy, is predicated upon the belief that racial disparities are deeply imbedded in federal tax policy and that, with some hard work, the invisible appears. I have previously written about the racially disparate impact of the joint return provisions of the Internal Revenue Code on married Black couples.¹ I

1. See, e.g., Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45, 49–50 (Karen B. Brown & Mary Louise Fellows eds., 1996) (describing how Black wives contribute a greater percentage to household income, making the household more likely to pay the marriage penalty); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Solutions in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287, 292–99 (1999) [hereinafter Brown, *Legislative Solutions*] (describing how the marriage penalty disparately impacts Black couples because Black wives are more likely to earn a larger percentage of the household income than White wives); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1501–04 (1997) [hereinafter Brown, *Race, Class, and Gender*] (describing how a higher percentage of Blacks are in the marriage penalty category than are Whites at all income levels); Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 92–95 (1997) [hereinafter Brown, *Split Personalities*] (describing how wage discrimination and

examined census bureau data that showed that married Black couples were more likely than married White couples to pay a marriage penalty, and that married White couples were more likely than married Black couples to receive a marriage bonus.² Recently, I applied that census bureau data to Social Security benefits for married couples and showed that married Black wives were far less likely than married White wives to receive spousal benefits.³ In addition, the data showed that spousal benefits for married Black couples were generally lower than for White couples. This is because Social Security benefits are generally lower for equal wage earning couples, and married Black couples were significantly more likely than married White couples to be in equal wage earning households.⁴

I have also looked at data from the Survey of Income and Program Participation to analyze earned income tax credit (EITC) eligible recipients and found that, although conventional wisdom viewed the EITC as disproportionately benefiting Blacks, the empirical data prove otherwise.⁵ The typical EITC recipient is most likely White, and most Blacks are ineligible for the EITC.⁶ Most importantly, the Article shows that tax benefits for low-

differing labor participation rates combine with the joint return provisions so that married Blacks are more likely to pay the marriage penalty and married Whites are more likely to receive the marriage bonus); Dorothy A. Brown, *In Sickness, in Health and in the Tax Code*, N.Y. TIMES, Jan. 25, 2004, § 4, at 15 (stating that White couples are more likely to receive a marriage bonus because they are more likely to have a single wage earner, whereas Black couples are more likely to pay a marriage penalty).

2. See Brown, *Legislative Solutions*, *supra* note 1, at 292–99 (noting the disparity in Black and White marriage bonus recipients); Brown, *Race, Class, and Gender*, *supra* note 1, at 1498–1506 (describing how a higher percentage of Blacks are in the marriage penalty category than are Whites of all income levels).

3. See Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111, 137–43 (2004) [hereinafter Brown, *Social Security and Marriage*] (describing how White wives are more likely than Black wives to be eligible for the greatest spousal and survivor benefits and how Black wives are more likely than White wives to receive no spousal benefits and the lowest survivor benefits); Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J.L. & PUB. POL'Y 633, 643–44 (2000) (stating that Black wives are less likely than White wives to collect spousal benefits because they are more likely than White wives to earn close to 50% of the family income).

4. See Brown, *Social Security and Marriage*, *supra* note 3, at 116–21, 137–42 (showing that spousal benefits are generally lower for equal wage earning couples and that Black couples are more likely to earn equal amounts).

5. See Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. (forthcoming 2005) (manuscript at 5–7, 38–43, 49–66, on file with the Washington and Lee Law Review) (stating that while academics have said that the EITC disproportionately benefits Blacks, this is not true).

6. See *id.* at 50–53 (stating that Whites are twice as likely to be eligible for EITC than non-Whites and that most Blacks are not eligible for EITC).

income families with children pale in comparison to those received by middle-class families with children and concludes that the only explanation is race based.⁷

In light of recent corporate scandals and their highly publicized pension fund losses,⁸ as well as Federal Reserve Chairman Alan Greenspan's call for cuts in Social Security benefits for future retirees,⁹ looking at the racial

7. See *id.* at 22–31 (showing the differences between the EITC and the Child Tax Credit and dismissing various race neutral explanations).

8. See, e.g., Douglas Michael McManamon, *Should Attorneys Be Footsoldiers in the War on Corporate Fraud?*, 38 U.S.F. L. REV. 163, 164 (2003) ("[M]any of its thousands of hard working blue collar employees suffered the loss of over \$1 billion in pension plan savings."); Ethan G. Zelizer, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption?*, 15 LOY. CONSUMER L. REV. 27, 30 (2002) (noting the similarities between the Enron and WorldCom pension debacles); Ellen E. Schultz, *Enron Workers Face Losses On Pensions, Not Just 401(k)s*, WALL ST. J., Dec. 19, 2001, at C1 (stating that the pensions of Enron workers will be reduced because companies have increasingly coordinated their 401(k) and pension plans so as to reduce costs and give employees investment discretion). One author explained:

Like Enron, WorldCom employees were victimized. They sustained over \$280 million in pension fund losses; more than 20,000 lost their jobs. . . . Other companies wielded similarly crippling blows to their shareholders and employees. Over 9000 employees were laid off due to Global Crossing's financial misstatements, and the company's pension funds lost over \$66 million. Rite Aid employees also watched their pension funds shrink as \$145 million drained out of the company amid allegations of accounting mismanagement. Global Crossing and WorldCom also had large percentages of their retirement assets in employer stock that became worthless.

Zelizer, *supra*, at 30.

9. See Nell Henderson, *Fed Chief Urges Cut in Social Security; Future Benefits Must Be Curtailed*, WASH. POST, Feb. 26, 2004, at A1 (stating that Alan Greenspan indicated that the government should cut back its promised benefits). The author elaborated, saying:

Federal Reserve Chairman Alan Greenspan warned Congress yesterday that the federal government has promised more retirement benefits than it can pay for and must consider scaling back those commitments soon to avoid damaging the economy in the future. . . . [Greenspan] again recommended gradually raising the eligibility age for both Medicare and Social Security, to keep pace with the population's rising longevity. And he noted that they could link cost-of-living increases in Social Security benefits to a measure of inflation other than the consumer price index, a widely followed measure that many economists believe overstates the rise in overall prices.

Id.; see also David Cay Johnston, *The Social Security Promise Not Yet Kept*, N.Y. TIMES, Feb. 29, 2004, § 4, at 5 ("Social Security retirement benefits are going to have to be cut, Alan Greenspan announced last week, because there just is not enough money to pay the promised benefits."); Robert Kuttner, *Social Security: Finally, an Honest Debate*, BUS. WK., Mar. 15, 2004, at 24 ("Federal Reserve Chairman Alan Greenspan lobbed a useful, if unintended, grenade into the Presidential campaign when he abruptly urged Congress to cut Social Security benefits."); Jane Bryant Quinn, *The Retirement Race*, NEWSWEEK, Mar. 15, 2004, at 65, 73 ("Every person interviewed is counting on Social Security to help get them by. Federal Reserve chairman Alan Greenspan's recent call to cut benefits gave them the chills.")

dimensions of employer-provided pension plans seemed a logical next step. Part II sets the backdrop for this Article by describing the tax benefits associated with employer-provided pension plans. Part III then examines the sources of income for retirees in America and demonstrates the importance of Social Security payments to communities of color. Part III also illustrates the potential importance of employer-provided pensions to those communities. If Social Security benefits are going to decrease for future retirees, those cuts will hit communities of color very hard. Finding alternative sources of funds will become crucial.

Part IV then provides empirical data and examines who does and who does not receive employer-provided retirement benefits from a race-based perspective. Part IV makes several points. First, the majority (or near-majority) of all private sector workers are not covered by an employer sponsored pension plan. Second, while all racial and ethnic minority employees do not participate to the extent of their White counterparts, there are significant differences in participation among racial and ethnic group members. Third, even when workers of color are included in pension plans, their investment decisions differ from White workers, which may lead to lower account balances at retirement. Part IV concludes by observing that because employer sponsored pension plans exclude a majority of Whites and people of color, according to Professor Derrick Bell's interest-convergence thesis,¹⁰ this may be a unique opportunity to effectuate pension reform.

II. Tax Treatment of Employer-Provided Pension Benefits

Much has been made of the money lost to Enron's employees in the form of pension plans. Before the bottom dropped out, approximately \$1.3 billion of retirement money was invested in Enron stock.¹¹ Less has been made of the

10. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

11. See Lorraine Schmall, *Defined Contribution Plans After Enron*, 41 BRANDEIS L.J. 891, 915 (2003) ("An estimated \$1.3 billion of the plan's \$2.1 billion in pension assets consisted of now-worthless Enron stock . . ." (quoting Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1248 (2002))); Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers*, 76 ST. JOHN'S L. REV. 815, 824 (2002) (stating that Enron's pension plan lost \$1.3 billion). Professor Stabile went on to say:

For example, Enron's 401(k) plan lost approximately \$1.3 billion in value between January 2001, when the stock traded at eighty dollars per share, and December 2,

tax advantages that Enron employees received as participants of those pension plans.

Employer-provided pension plans that meet certain requirements receive significant tax advantages.¹² For 2004, the Joint Committee on Taxation has estimated that the loss in tax revenue as a result of all qualified employer-provided pension plans will be \$94.7 billion, which makes it the largest tax benefit available for individuals.¹³ By comparison, the estimated revenue loss for 2004 is \$72.6 billion for the mortgage interest deduction¹⁴ and \$54.7 billion for the reduced tax rate on long-term capital gains.¹⁵ Given the significant loss in tax dollars from employer-provided pension plans, an examination into which taxpayers are receiving pension benefits is especially warranted.¹⁶

2001, when it traded at less than one dollar per share. As a result, many participants lost between seventy and ninety percent of their retirement funds.

Stabile, *supra*, at 824; see also David Millon, *Worker Ownership Through 401(K) Retirement Plans: Enron's Cautionary Tale*, 76 ST. JOHN'S L. REV. 835, 841 (2002) ("As Enron's share price fell from a high of nearly ninety dollars to around twenty-five cents, its 401(k) plan—in which 15,000 employees participated—lost 1.3 billion dollars.").

12. See *infra* notes 18–24 and accompanying text (describing the tax benefits associated with pension plans).

13. STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2003–2007, at 26 (Comm. Print 2002) [hereinafter ESTIMATES OF FEDERAL TAX EXPENDITURES]; cf. GEN. ACCT. OFFICE, PENSION PLANS: CHARACTERISTICS OF PERSONS IN THE LABOR FORCE WITHOUT PENSION COVERAGE, GAO/HEHS-00-131, at 5 (2000) ("At about \$76 billion in 2000, tax preferences for employer pension plans are the single largest expenditure, exceeding tax subsidies for home mortgages and health benefits."); Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 874 (1987) ("According to recent estimates of tax expenditures, the largest tax expenditure for individuals by far is the net exclusion for employer-sponsored pension contributions and earnings.").

14. ESTIMATES OF FEDERAL TAX EXPENDITURES, *supra* note 13, at 20.

15. *Id.* at 21.

16. Numerous scholars have addressed the concern of providing tax benefits without universal coverage for employees. See, e.g., Daniel I. Halperin, *Special Tax Treatment for Employer-Based Retirement Programs: Is It "Still" Viable as a Means of Increasing Retirement Income? Should It Continue?*, 49 TAX L. REV. 1, 37–50 (1993) (discussing methods for increasing coverage and whether tax expenditures for qualified plans should be continued); Norman P. Stein & Patricia E. Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Reform Debate*, 58 WASH. & LEE L. REV. 1369, 1375–91 (2001) (discussing how to increase coverage and analyzing congressional proposals). Very few have considered the racial, class, and gender implications. But see Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WISC. L. REV. 751, 786–88 (arguing that because Blacks are less likely to be employed or highly compensated, they are less likely to participate in pension plans); Lorraine Schmall, *Women and Pension Reform: Economic Insecurity and Old Age*, 35 J. MARSHALL L. REV. 673, 673–707 (2002) (discussing wage disparities for women, labor patterns

A complex set of labor and tax regulatory requirements govern qualified pension plans.¹⁷ The balance of this Part will briefly describe the tax benefits. First, employers immediately get to deduct payments made to trusts established to hold the pension funds.¹⁸ When an employer transfers stock to the pension plan, the employer deducts the fair market value of the stock, and later can deduct dividends paid on that stock.¹⁹ This provides a tax incentive for employers to transfer stock to satisfy their pension fund obligations.²⁰ Second, employees get to exclude payments that they make or that their employer makes on their behalf to qualified pension plans from their income.²¹ Third, as the pension trust accumulates income, the accumulated income is not taxed.²² Fourth, it is only when employees make a withdrawal from their

for women, and the implications for women's pension benefits); Camilla E. Watson, *The Pension Game: Age and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 1-70 (1990) (showing that the present retirement system discriminates against women and older workers).

17. See JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 234 (3d ed., Foundation Press 2000) (setting out the requirements for a qualified plan to receive tax benefits). The authors went on to say:

In order to receive the favorable tax benefits made available under the Internal Revenue Code, a qualified plan must meet a complex set of detailed requirements, generally contained in IRC §§ 401, 410-417, and amplified in an elaborate set of Treasury Regulations A qualified plan must satisfy [ERISA] requirements as well, even though they have nothing to do with the plan's qualified status under the Internal Revenue Code.

Id.

18. See I.R.C. §§ 404(a)(1)-(3) (2000) (listing the types of plans for which the employer can deduct contributions); LANGBEIN & WOLK, *supra* note 17, at 222 (stating that employers can deduct payments to the trust).

19. See Maureen B. Cavanaugh, *Tax as Gatekeeper: Why Company Stock Is Not Worth the Money*, 23 VA. TAX REV. 365, 370-71 (2003) ("Stock that is non-transferable for many years has an unknown value and allows employer tax arbitrage (permitting a deduction for the stock's fair market value against current income for what is only a contingent future liability).").

20. See *id.* at 373 ("[C]urrent tax rules provide incentives for corporations to contribute company stock to 401(k) plans.").

21. See I.R.C. § 402(a) (2000) (stating that distributions from an employee's trust are taxed in the year they are distributed).

22. See *id.* § 501(a) (listing which organizations are exempt from taxes); LANGBEIN & WOLK, *supra* note 17, at 222 (stating that a trust is exempt from tax on its investment income). The employer does not have to establish a trust. The employer can purchase an annuity plan and receive the same tax treatment, provided the annuity plan satisfies the provisions of § 404(a)(2) of the Internal Revenue Code. See LANGBEIN & WOLK, *supra* note 17, at 222 ("Annuity plans, which purchase annuities directly and do not have a trust, must meet essentially all of the requirements of IRC § 401(a) and are taxed in an identical fashion."). The balance of this Article should be taken to include annuity plans when qualified plans are discussed.

pension plan that they will be taxed.²³ Fifth, the tax laws will deem withdrawals to have occurred—even if they have not—once a retired employee reaches a certain age.²⁴

Pension plans can be either defined benefit or defined contribution plans.²⁵ Defined benefit plans guarantee a certain level of income, regardless of what happens to the funds the employer invests.²⁶ For defined benefit plans, the employer has a fiduciary responsibility to pension fund beneficiaries and is responsible for making all investment decisions.²⁷ Defined benefit plans have very rigid limitations on the amount of employer stock that can be included in the plan. No more than 10% of pension plan assets can be invested in employer stock.²⁸ The theory behind that limitation is the need to diversify

23. See I.R.C. § 402(a) (2000) (stating that distributions from the employees' plan are taxed when they are distributed); LANGBEIN & WOLK, *supra* note 17, at 222 (noting that employees are taxed when they make withdrawals from their pension plans).

24. See I.R.C. § 401(a)(9)(C)(i) (2000) (stating that the required beginning date is April 1 of the year the employee would have reached 70.5 years old or of the year in which the employee retires); LANGBEIN & WOLK, *supra* note 17, at 426 ("The required beginning date is generally April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 ½, or the calendar year in which the employee retires.").

25. See LANGBEIN & WOLK, *supra* note 17, at 42 ("The central divide in the pension landscape is between defined benefit and defined contribution plans."); Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 610 (2000) ("Retirement plans are divided into two distinct categories: defined benefit plans and defined contribution plans.").

26. See GEN. ACCT. OFFICE, *supra* note 13, at 6 ("A defined benefit plan promises a retirement benefit amount that is usually determined by salary level and length of service."); LANGBEIN & WOLK, *supra* note 17, at 45–46 ("In a [defined benefit] plan, the employer or other plan sponsors bears the risk. If the funds are invested poorly, the employer has to make up the shortfall. If the investment experience is exceptionally good, the employer's pension contributions will be reduced.").

27. See LANGBEIN & WOLK, *supra* note 17, at 672 ("The employer (or other plan sponsor) need not be a fiduciary with respect to a plan it sponsors if it names other fiduciaries to discharge all the fiduciary functions. Typically, however, employers retain some fiduciary functions and delegate others . . .").

28. See 29 U.S.C. § 1107(a)(2) (2000) (limiting the amount of employer stock in pension plans); LANGBEIN & WOLK, *supra* note 17, at 381 ("Although qualifying employer securities are generally held by employee stock ownership plans (ESOPs) and profit-sharing plans, even a defined benefit plan could hold up to 10 percent of its assets in such securities."); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1277 n.7 (2002) ("401(k) plans are not subject to ERISA's constraints on investments by defined benefit pension plans, which are subject to a ten percent cap on investment in the employer firm's stock."); Norman Stein, *Three and Possibly Four Lessons About ERISA That We Should, but Probably Will Not, Learn from Enron*, 76 ST. JOHN'S L. REV. 855, 858 (2002) (showing that ERISA requires that no more than 10% of pension plan assets be invested in employer's stock). Professor Stein continued:

Section 407 of ERISA limits pension plan investments in employer stock (and real

risk. By putting too much employer stock in a pension plan, a worker not only risks a current income stream if the employer went out of business, but also faces the additional risk of not having a pension upon retirement.²⁹ Defined benefit plans generally enroll qualified employees automatically.³⁰ As the Employee Benefit Research Institute's analysis shows, the percentage of family heads that participated in a defined benefit plan has declined over the last decade. While in 1992, 59.3% of family heads participated in a defined benefit plan, only 38.4% participated in 2001.³¹

Defined contribution plans, on the other hand, are those that pay out whatever is left in the account at retirement,³² such as 401(k) plans.³³ In

property) to ten percent of plan assets. This rule does not apply, however, to "eligible individual account plans." An "eligible individual account plan" is, with certain minor exceptions, any defined contribution plan that expressly provides for the acquisition and holding of employer securities. As a result, employees can sometimes invest one hundred percent of their defined contribution account in employer stock

Stein, *supra*, at 858; *see also* Deborah M. Weiss & Marc A. Sgaraglino, *Prudent Risks for Anxious Workers*, 1996 WIS. L. REV. 1175, 1197 ("Defined benefit plans may not invest more than ten percent of their assets in employer securities, but defined contribution plans are exempt from this limit.").

29. *See, e.g.*, Stein, *supra* note 28, at 859 (stating that employees should not include too much employer stock in their pension plans). The author went on to say:

Too much investment in a single security is bad, but too much investment in employer stock is worse. If the employer fails, the employee loses both retirement and job security. An economist would put it succinctly: an employee's investment capital and human capital should not be tied together. More colloquially, it is not a good idea to put all your eggs in one basket.

Id.

30. *See* GEN. ACCT. OFFICE, *supra* note 13, at 7 n.6 ("While defined benefit plans generally enroll qualified employees automatically, defined contribution plans, such as 401(k) plans, are generally voluntary and employees must choose to participate in them.").

31. Employee Benefit Research Institute, *EBRI Retirement Income Research: 2004 Findings*, at http://www.ebri.org/findings/ret_findings.htm (last visited Oct. 1, 2004) (on file with the Washington and Lee Law Review).

32. *See* GEN. ACCT. OFFICE, *supra* note 13, at 6 ("A defined contribution plan specifies contribution to be made, but the benefits depend upon investment performance."); LANGBEIN & WOLK, *supra* note 17, at 48 ("The benefits to which each employee will ultimately be entitled depend exclusively upon the contribution and investment experience of his or her individual account.").

33. *See, e.g.*, STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., PRESENT LAW AND BACKGROUND RELATING TO EMPLOYER-SPONSORED DEFINED BENEFIT PLANS 4 (Comm. Print 2002) ("Profit-sharing plans and qualified cash or deferred arrangements (commonly called '401(k) plans' after the section of the Internal Revenue Code regulating such plans) are examples of defined contribution plans."), *available at* <http://www.house.gov/jct/x-71-02.pdf>; LANGBEIN & WOLK, *supra* note 17, at 51 ("For practical purposes [401(k)] plans entered the DC plan universe in the early 1980s, after the Revenue Act of 1978 added IRC § 401(k) . . .");

these plans, employees are responsible for making the investment decisions for their contributions to the plan.³⁴ Defined contribution plans are generally voluntary and employees must choose to participate in them.³⁵ The vast majority of employees that are covered by pension plans are in defined contribution plans.³⁶ The Employee Benefit Research Institute analysis shows that there was a significant increase in the percentage of family heads with a defined contribution plan over the last decade. In 1992, 57.8% of family heads participated in a defined contribution plan. That percentage increased to 78.7% in 2001.³⁷

There are a number of safeguards designed to ensure that pension plans are not made available only to high-income employees.³⁸ Those safeguards, however, are ineffective in several instances. For example, the rules prevent employees from being immediately eligible in some circumstances and require employees to work for a minimum number of years and a minimum number of hours per year in order to be included in the pension plan. The minimum hours worked requirement permits employers to exclude part-time

ALICIA H. MUNNELL ET AL., CTR. FOR RET. RESEARCH AT BOSTON COLL., HOW IMPORTANT ARE PRIVATE PENSIONS? 6-7 (2002) (stating that 401(k) plans are the most popular retirement plans and giving reasons for this). The authors expanded on this saying:

Within the defined contribution world, the fastest growing type of plan is the 401(k). The defining characteristics of 401(k) plans are that participation in the plan is voluntary and that the employee as well as the employer can make pre-tax contributions to the plan. These characteristics shift a substantial portion of the burden for providing for retirement to the employee; the employee decides whether or not to participate, how much to contribute, and how to invest the assets.

MUNNELL ET AL., *supra*, at 6-7.

34. See MUNNELL ET AL., *supra* note 33, at 6-7 (noting the particulars of a defined contribution plan).

35. See *id.* (describing the voluntary nature of defined contribution plans).

36. See GEN. ACCT. OFFICE, *supra* note 13, at 6 ("The Pension and Welfare Benefits Administration estimates that, in 1996, 83 percent of all employees with pension coverage were in either a primary or supplemental defined contribution plan."); MUNNELL ET AL., *supra* note 33, at 6 ("Although the percentage of the workforce covered by a pension plan has remained virtually unchanged since the 1970s, the nature of pension coverage has moved sharply from defined benefit plans to defined contribution plans.").

37. Employee Benefit Research Institute, *supra* note 31.

38. LANGBEIN & WOLK, *supra* note 17, at 279 (discussing the limitations on pension plans). The authors note:

Employers are not completely free to pick and choose which employees may participate in a qualified plan or to vary the level of contributions or benefits among the participants. Well before ERISA, the favorable tax treatment accorded to qualified plans was not available to plans that discriminated in favor of highly compensated employees.

Id.

workers from their pension plans because they do not work 1000 hours per year.³⁹ Additionally, employers can exclude those who have worked less than one year, or under certain circumstances two years.⁴⁰ This excludes many part-time, young, and low-income workers.⁴¹ The rules also permit employers to require contributions by employees in order for them to be eligible to participate in the pension plan.⁴² This will, of course, hurt low-income employees who need all of their wages just to survive. Finally, the rules allow an employer to take into account the worker's Social Security benefits and reduce that employee's pension benefits accordingly.⁴³ This

39. *See id.* (relating the minimum work requirement for pension plan eligibility). The authors further explain:

A plan is permitted to exclude employees who have not completed one year of service. IRC § 410(a)(1)(A); ERISA § 202(a)(1)(A). A year of service is defined as a 12-month period during which the employee has at least 1,000 hours of service. IRC § 410 (a)(3)(A); ERISA § 202(a)(3)(A). Thus an employee who worked 18 hours a week on a permanent basis could be excluded from the plan and from all coverage tests.

Id.

40. I.R.C. §§ 410(a)(1)(A), (a)(1)(B)(i) (2000); 29 U.S.C. § 1052(a)(1)(A) (2000); *see* LANGBEIN & WOLK, *supra* note 17, at 236 (describing the minimum service requirement). The authors note:

A plan may generally not require, as a condition of participation, that an employee complete a period of service with the employer extending beyond the later of age 21 or one year of service The minimum service requirement can be extended to two years if the plan provides for 100 percent vesting of accrued benefits after two years.

LANGBEIN & WOLK, *supra* note 17, at 236 (citations omitted).

41. *See* GEN. ACCT. OFFICE, *supra* note 13, at 4 ("In 1998, about 85 percent of employees not in a firm's plan had one or more of the following characteristics: They had relatively low income, were employed part time or part of the year, worked for a relatively small firm, or were relatively young.").

42. *See* LANGBEIN & WOLK, *supra* note 17, at 52 ("Because employee participation is voluntary, employees who do not wish to engage in pension saving will not participate, hence will not receive the employer match. Accordingly, employers may be able to lower their aggregate pension costs while still offering pension coverage to the workforce.").

43. This process is referred to as "integration." *See id.* at 318 (explaining the concept of integration). The authors further state:

From the time the nondiscrimination concept became part of the law in 1942, Congress has permitted plans to take Social Security benefits into account. Plans that do so are said to be "integrated." Over the years the IRS developed complex integration rules based mainly on the premise that Social Security benefits are in part attributable to employer contributions under the Federal Insurance Contributions Act. The employer was viewed as providing two plans: the employer's plan and the employer-financed portion of Social Security. As long as these two plans taken together produced contributions or benefits that bore a uniform relationship to compensation, the employer's plan would not be

discriminatory. Subject to IRS guidelines, this allowed plans to reduce contributions or benefits based on wages below the Social Security taxable wage base.

Id.; see also Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1142 (1997) (discussing integration). Professor Dilley concludes:

[I]ntegration can be viewed as reflecting a static, almost class-based approach to retirement income. Pension integration was based on the assumption that Social Security was sufficient for low-wage workers who were presumed not to need a supplement, while private pensions to supplement Social Security were codified as a right only for high-wage workers.

Dilley, *supra*, at 1142; see also Michael Graetz, *supra* note 13, at 860 (noting the impact of integration). Professor Graetz writes:

For example, the income tax nondiscrimination requirements for employer-provided pension plans have long contained so-called "integration" rules that, in effect, have treated social security benefits as if they were provided by the employer and allowed pension plans to qualify for favorable income tax treatment even if they were restricted so as to be only supplemental to social security benefits.

Graetz, *supra* note 13, at 860; see also Norman Stein, *An Alphabet Soup Agenda for Reform of the Internal Revenue Code and ERISA Provisions Applicable to Qualified Deferred Compensation Plans*, 56 SMU L. REV. 627, 667 (2003) (describing the theoretical foundation for integration). Professor Stein finds:

Despite the nondiscrimination rules and their nominal insistence that benefits for non-highly compensated employees be proportionate to those of highly compensated employees as a percentage of compensation, the Internal Revenue Code permits firms sponsoring defined contribution plans to provide higher contribution rates for compensation above the Social Security taxable wage base. The Internal Revenue Code also permits firms sponsoring defined benefit plans to provide larger benefit accrual rates for benefits above the wage base or to reduce benefits by a percentage of Social Security benefits. The rationale for Social Security integration is that a firm makes contributions to the federal retirement system up to the Social Security taxable wage base and should be able to integrate at least some of the benefits purchased with those contributions with the benefits provided in the firm's own pension or profit-sharing plan.

Stein, *supra*, at 667; see also Edward A. Zelinsky, *Is Cross-Testing a Mistake? Cash Balance Plans, New Comparability Formulas, and the Incoherence of the Nondiscrimination Norm*, 49 BUFF. L. REV. 575, 588-89 (2001) (relating the core rationale behind integration). Professor Zelinsky explains:

The rationale for integration is that the employer makes two pension contributions for compensation covered by social security, the contribution to the employer's plan plus the employer's Federal Insurance Contributions Act (FICA) payment. Hence, the employer can—consistent with the nondiscrimination norm—contribute less to its qualified plan for social security covered compensation because the employer pays FICA on that amount. However, the lower contribution rate is limited to the employee compensation subject to social security coverage. To the extent employees earn compensation above the social security level, they must all receive the same percentage contribution on that noncovered compensation. In simplest terms, when social security coverage ends, higher employer-contribution rates begin.

process prevents lower-paid employees from receiving private pension dollars.⁴⁴

But being eligible doesn't mean the benefits are yours to keep. In order for that to happen, they have to vest, and vesting rules vary. There are three main types of vesting schedules: immediate, cliff, and graduated.⁴⁵ Immediate vesting means that from the first day an employee or employer makes pension contributions to an employee's account, that employee can take those amounts upon departure from the company.⁴⁶ Immediate vesting of pension benefits is often found in defined contribution plans.⁴⁷ Cliff vesting does not allow for immediate vesting. Under cliff vesting, there is a certain period of time where any payments made by an employee or an employer will be forfeited should that employee leave the company.⁴⁸ The maximum period for cliff vesting is five years.⁴⁹ Employees must therefore work for their individual employers for five years in order to be able to leave with the pension. Cliff vesting predominates in defined benefit plans.⁵⁰ Graduated vesting also does not allow immediate vesting, but it does allow partial vesting sooner than cliff vesting. In graduated vesting, employees' rights to take their individual pension account balance upon leaving a company increase the longer they stay with the employer.⁵¹

Zelinsky, *supra*, at 588–89.

44. See Dilley, *supra* note 43, at 1069 ("Integration of private pension plans with Social Security essentially allows an employer to pay lower proportionate pension benefits to low-wage workers than to high-wage workers, based on the size of the lower-paid worker's Social Security benefit or payroll taxes paid.").

45. See LANGBEIN & WOLK, *supra* note 17, at 132–33 (describing the three types of vesting schedules and how they work).

46. See *id.* at 132 ("The employee's account is fully vested at all times, and thus no forfeiture occurs if the employee leaves the institution.").

47. See *id.* ("Outside the world of defined contribution plans, immediate vesting is relatively uncommon."); see also *id.* at 134 ("[O]nly 25 percent of employees covered under defined contribution plans were subject to cliff vesting, while 24 percent were subject to graduated vesting and 33 percent enjoyed immediate vesting.").

48. See *id.* (defining cliff vesting).

49. 29 U.S.C. § 1053(a)(2)(A) (2000); see LANGBEIN & WOLK, *supra* note 17, at 133 ("The maximum period for cliff vesting under the present law is five years.").

50. See LANGBEIN & WOLK, *supra* note 17, at 134 ("Cliff vesting schedules predominate in defined benefit plans. In 1995, 96 percent of employees covered by defined benefit plans sponsored by medium and large firms were subject to cliff vesting, compared with only one percent benefiting from immediate vesting and three percent subject to graduated vesting.").

51. See *id.* at 133 ("Under a graduated vesting schedule, the employee's protection against forfeiture increases incrementally across time.").

III. Social Security and Retirement

The percentage of income that households receive from Social Security when compared with that received from other sources demonstrates the importance of Social Security to certain families and the importance of pensions to others. Consider the following 2000 data, which reveal that the vast majority of Americans receive Social Security payments regardless of race or ethnicity. The data, however, also show that the percentage of their total income attributable to Social Security differs according to race and ethnicity. Social Security is much more important to Americans of color than White Americans. This Part begins by describing the significance of Social Security to communities of color. It then provides data concerning the sources of retirement income and shows the importance of employer-provided pensions to decreasing poverty among the retired elderly.

One study provides that on average 75% of Black and Latino retirement income is from Social Security compared with 60% of White retirement income.⁵² While it is conventional wisdom that the progressive benefit structure of Social Security benefits minorities more than Whites, when one factors in the different mortality rates for Blacks and Whites, conventional wisdom is not supported by the facts. Generally, people with higher life expectancies will receive Social Security benefits longer and receive greater lifetime benefits.⁵³ In 1995, Asians and Hispanics had the highest life expectancy rates at age 65, followed by Whites, while Blacks had the lowest life expectancy.⁵⁴ There are also differences between men and women. Intra- racially, women have longer life expectancies than men.⁵⁵ Asian women had the highest life expectancy, followed by Hispanic women, White women, Asian men, Hispanic men, Black women, and White men, with Black men having the lowest life expectancy.⁵⁶

A typical Black male worker would receive lifetime benefits equal to 3.56 times his lifetime contributions, compared with 5.93 times the lifetime

52. Richard Hogan et al., *Racial Inequality in Men's Employment and Retirement Earnings*, 38 Soc. Q. 431, 433 (1997).

53. Alexa A. Hendley & Natasha F. Bilimoria, *Minorities and Social Security: An Analysis of Racial and Ethnic Differences in the Current Program*, SOC. SEC. BULLETIN 62 No. 2, at 62 (1999) ("All else equal, persons with higher life expectancies will receive retirement benefits for a longer period and therefore receive higher lifetime benefits.").

54. *Id.* at 63 ("In 1995, Asians and Pacific Islanders had the highest life expectancy rates at birth and at age 65, while blacks had the lowest While whites, on average, had lower life expectancy rates than Asians and Hispanics, they consistently remain well above blacks.").

55. *Id.*

56. *Id.*

contributions of a typical White male worker.⁵⁷ A typical Black female worker would receive lifetime benefits 5.81 times her lifetime contributions, compared with 8.44 times the lifetime contributions of a typical White female worker.⁵⁸ While it is true that a typical Black worker received a monthly benefit that was a higher percentage of his or her lifetime earnings than a White worker, that same Black worker would receive less in lifetime benefits than his or her White counterpart because of the differences in life expectancy.⁵⁹ Raising the retirement age, as Federal Reserve Chairman Alan Greenspan has suggested, would only increase this racial disparity.⁶⁰

Chairman Greenspan also suggested slowing the cost of living adjustments.⁶¹ It is generally accepted that if retirement income is at least 80% of preretirement earnings, retirees will not suffer a decline in economic well-being during their retirement.⁶² Estimates show that Social Security replaces on average 55% of preretirement income for couples in the lowest income levels.⁶³ Therefore, those that rely solely on Social Security for their financial well-being are suffering an economic decline during their retirement. Slowing cost of living adjustments will only exacerbate the problem.

People of color rely on Social Security for most of their retirement income because they do not have other sources of income.⁶⁴ Social Security benefits, however, are important for people of color as well as for Whites. While Blacks aged 65 or older would have poverty rates as high as 60%

57. Martha N. Ozawa & Hak-Ju Kim, *Money's Worth in Social Security Benefits: Black-White Differences*, 25 SOC. WORK RES. 5, 10–11 (2001) ("These figures indicate that a typical black male worker would receive lifetime benefits that would be equal to 3.56 times his lifetime contributions, compared with 5.93 times the lifetime contributions of a typical white male worker.").

58. *Id.* at 11 ("Thus, a typical black female worker would receive lifetime benefits that would be 5.81 times her lifetime contributions, compared with 8.44 times the lifetime contributions of a typical white female worker.").

59. *Id.* ("These findings indicate that although black workers appear to receive better money's worth on the basis of monthly benefits, they receive smaller money's worth on the basis of lifetime benefits than white workers.").

60. *See supra* note 9 (outlining Chairman Greenspan's recommendations for Social Security).

61. *See supra* note 9 (noting Chairman Greenspan's suggestions regarding cost of living adjustments).

62. MUNNELL ET AL., *supra* note 33, at 9 ("As a rough benchmark, retirement income equal to 80 percent of pre-retirement earnings should be more or less adequate.").

63. *Id.*

64. Hendley & Bilimoria, *supra* note 53, at 59–60 ("[M]inorities rely on Social Security for most of their retirement income because they lack other sources of income and have fewer income-producing assets than whites.").

without Social Security, almost 50% of Whites aged 65 or older would live in poverty without Social Security.⁶⁵ Approximately 75% of people of color and almost 67% of Whites who are Social Security beneficiaries rely on Social Security for at least half of their income.⁶⁶

Social Security benefits constitute a far larger proportion of the total household income of Black and Hispanic women, even though Black and Hispanic women's Social Security benefits are considerably smaller than those of White women.⁶⁷ For 36% of Black nonmarried women and 33% of Hispanic nonmarried women age 65 and older, Social Security benefits constituted their entire income, compared with 18% of White nonmarried women.⁶⁸ Lack of pension income only compounds the financial woes of these women. Obviously any slowing of the cost of living adjustment would have serious implications for these women.

Nine percent of all Social Security beneficiaries aged 65 or older (and approximately 10% of all elderly) were in poverty in 1997.⁶⁹ Without Social Security, 49% would have been in poverty.⁷⁰ Poverty rates for people of color are higher than for Whites. Elderly Black beneficiaries had the highest poverty rate (24%), while Whites and Asians had the lowest poverty rate (8%).⁷¹ American Indians had about a 12% poverty rate.⁷² Without Social Security, the poverty rates would be much higher. Blacks, American Indians, and Hispanics would have the highest (60%), and Whites (48%) and Asians (33%) would have the lowest.⁷³

65. *Id.* at 60 ("Social Security benefits are particularly important to blacks (aged 65 or older) who would have poverty rates as high as 60 percent without Social Security, while poverty rate for whites would increase to near 50 percent.").

66. *Id.* ("About 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.").

67. See Martha N. Ozawa, *The Economic Status of Vulnerable Older Women*, 40 Soc. WORK 323, 325 (1995) ("Compared with white women, black and Hispanic women have considerably smaller incomes.").

68. See *id.* ("For 36 percent of the black nonmarried women and 33 percent of the Hispanic nonmarried women age 65 and older, social security benefits constituted their entire income, compared with 18 percent of white nonmarried women."); cf. Hendley & Bilmora, *supra* note 53, at 60 ("[F]or those aged 65 or older in 1996 . . . A much higher percentage of minorities relied on Social Security for *all of their income*; 33 percent of blacks and 33 percent of Hispanics, compared with only 16 percent of whites.").

69. Hendley & Bilmora, *supra* note 53, at 61.

70. *Id.*

71. *Id.* at 60–61.

72. *Id.* at 60 chart 3.

73. *Id.* at 60–61 chart 3.

Poverty rates also vary by gender within the various racial and ethnic groups. Women generally have higher poverty rates than men.⁷⁴ Consider the following table.

TABLE 3.1
POVERTY RATES BY RACE, ETHNICITY, AND GENDER, 1997⁷⁵

Race/Ethnicity	<i>Poverty with Social Security</i>		<i>Poverty without Social Security</i>	
	Men	Women	Men	Women
White	4.4	9.9	41.7	53.2
Black	19.6	26.2	55.7	65
Asian	5.3	9.4	32.6	35.8
Hispanic	17.3	21.8	56.1	56.1

In 1997, women were significantly more likely to be living in poverty than men. The greatest gender disparity was between White women and men. The poverty rate for White women was more than twice that of white men. The lowest poverty rates among women were found among Asians and Whites, with the greatest poverty rates among Blacks and Hispanics. The lowest poverty rates among men were again found among Asians and Whites, with the greatest poverty rates for Blacks and Hispanics. Asians had the lowest level of poverty of all the groups and Blacks had the highest.

Marital status also was a factor in poverty rates and the elderly. Fewer married couples aged 62 and over live in poverty than singles. For married White couples aged 62 to 64, 7% of Whites, 10% of Blacks, and 19% of Hispanics live below the poverty line.⁷⁶ For single women aged 62 to 64, 17% of Whites, 47% of Blacks, and 23% of Hispanics live beneath the poverty line.⁷⁷ This is true even though married Black couples generally receive fewer Social Security benefits than married White couples.⁷⁸ For those married Black couples who are already receiving less in Social Security benefits than their

74. *Id.* at 61 ("Women, on average, have higher poverty rates than men.").

75. *Id.* The source is the Office of Policy, Social Security Administration, tabulations of March 1998 Current Population Survey data. The sample size for American Indians is too small to present poverty data by gender.

76. Ozawa, *supra* note 67, at 326 tbl.3.

77. *Id.*

78. See *Social Security and Marriage*, *supra* note 3, at 123–24 (stating that "Black married couples that are contributing to Social Security but are not receiving benefits are subsidizing White married couples who are receiving spousal benefits").

White counterparts, they will be further disadvantaged by any future cuts in Social Security benefits.

TABLE 3.2
SOURCES OF INCOME BY % FOR MARRIED COUPLES
AGE 65 OR OLDER, 2000⁷⁹

<i>Source of Income</i>	<i>White</i>	<i>Black</i>	<i>Hispanic</i>
Earnings	36	37	34
Social Security	92	89	84
Government Pensions	17	22	10
Private Pensions	38	30	22
Asset Income	72	44	38
Veterans' Benefits	6	5	4
Public Assistance	2	4	10

Here we see the similarities and differences by race and ethnic group concerning sources of income for married couples aged 65 and over. The percent receiving earnings and Social Security are quite similar, whereas the percent receiving private pensions, asset income, and public assistance are very different. There is an 8% gap between married Whites and Blacks receiving private pensions and between Blacks and Hispanics. There is a 16% gap between married Whites and Hispanics receiving private pensions. There is a 28% gap between married Whites and Blacks receiving income from assets and a 34% gap between Whites and Hispanics receiving income from assets. There is a 6% gap between Blacks and Hispanics receiving income from assets. Married Hispanics are five times more likely to receive public assistance than Whites, and two and a half times more likely to receive public assistance than Blacks. By any measure, Hispanics fare worse than any other racial or ethnic group in every category.

79. SOC. SEC. ADMIN., INCOME OF THE POPULATION 55 OR OLDER, 2000, at 10–12 tbl.1.3 (2002), available at http://www.ssa.gov/policy/docs/statcomps/income_pop55/2000/incpop00.pdf. This data set did not include separate data for Asian Americans or American Indians. Cf. Hendley & Bilimora, *supra* note 53, at 60 ("The greatest difference . . . is the receipt of income from assets; less than 40 percent of blacks and Hispanics have asset income, compared with more than 60 percent of whites.").

TABLE 3.3
SOURCES OF INCOME BY % FOR WHITE, UNMARRIED PERSONS
AGE 65 OR OLDER, 2000⁸⁰

<i>Sources of Income</i>	<i>Men</i>	<i>Women</i>
Earnings	19	11
Social Security	90	91
Government Pensions	11	12
Private Pensions	29	24
Asset Income	54	58
Veterans' Benefits	7	2
Public Assistance	3	5

Here there are very similar percentages between men and women except in the areas of veterans' benefits and earnings. While more than half of single White men and women receive asset income (with a higher percentage of women receiving asset income than men), less than 30% of either men or women receive private pensions.⁸¹ Recall that 38% of White married couples received private pensions.⁸² At least 90% of White men and women receive Social Security benefits, and no more than 5% receive public assistance.

TABLE 3.4
SOURCES OF INCOME BY % FOR BLACK, UNMARRIED PERSONS
AGE 65 OR OLDER, 2000⁸³

<i>Sources of Income</i>	<i>Men</i>	<i>Women</i>
Earnings	15	11
Social Security	86	87
Government Pensions	14	10
Private Pensions	13	15
Asset Income	29	20
Veterans' Benefits	8	4
Public Assistance	9	16

Again there are no clear patterns. There is a higher percentage of single Black men than single Black women receiving earnings, government pensions,

80. SOC. SEC. ADMIN., *supra* note 79, at 10.

81. While this statistic is lower than those discussed in Part IV *infra*, it is only for unmarried persons, and the statistics in Part IV *infra* are not so limited.

82. *See supra* Table 3.2 (documenting married couples' sources of income).

83. SOC. SEC. ADMIN., *supra* note 79, at 11.

asset income and veterans' benefits. A higher percentage of single Black women receive Social Security, private pensions, and public assistance than single Black men. While less than 30% of single Black men receive asset income, only 20% of single Black women receive asset income. While 15% of single Black women receive private pension income, only 13% of single Black men receive private pension income. Recall that 30% of married Black couples receive private pension income.⁸⁴

TABLE 3.5
SOURCES OF INCOME BY % FOR HISPANIC,⁸⁵ UNMARRIED PERSONS
AGE 65 OR OLDER, 2000⁸⁶

<i>Sources of Income</i>	<i>Men</i>	<i>Women</i>
Earnings	20	8
Social Security	74	73
Government Pensions	7	6
Private Pensions	16	9
Asset Income	24	23
Veterans' Benefits	2	0
Public Assistance	10	22

Here, in six of the seven categories, there is a greater percentage of single Hispanic men than women. The one category where Hispanic women are found in greater percentages than Hispanic men is in the receipt of public assistance. More than twice the percentage of Hispanic women are receiving public assistance than Hispanic men. Significantly greater percentages of Hispanic men have earnings than Hispanic women. While almost twice the percentage of Hispanic men receive private pensions than women, only 16% of Hispanic men receive private pensions. Less than 10% of Hispanic women receive private pensions. Recall that 22% of Hispanic married couples receive private pensions.⁸⁷

84. See *supra* Table 3.2 (documenting married couples' sources of income).

85. See SOC. SEC. ADMIN., *supra* note 79, at 12 n.b ("Persons of Hispanic origin may be of any race.").

86. *Id.* at 12.

87. See *supra* Table 3.2 (documenting married couples' sources of income).

TABLE 3.6
SOURCES OF INCOME BY % FOR UNMARRIED MEN
AGE 65 OR OLDER, 2000⁸⁸

<i>Sources of Income</i>	<i>White</i>	<i>Black</i>	<i>Hispanic</i>
Earnings	19	15	20
Social Security	90	86	74
Government Pensions	11	14	7
Private Pensions	29	13	16
Asset Income	54	29	24
Veterans' Benefits	7	8	2
Public Assistance	3	9	10

Here the differences outweigh the similarities. Whites have twice the percentage of asset income than Blacks and Hispanics. A greater percentage of Whites receive Social Security than any other group, while less than three-fourths of Hispanics receive Social Security. A higher percentage of Blacks receive Social Security than Hispanics. Whites are twice as likely to receive private pension income as Blacks and twice as likely to receive asset income as Hispanics. Blacks are the most likely to receive government pensions and twice as likely as Hispanics to receive government pensions. Hispanics are the most likely to continue working in retirement and the least likely to receive Social Security. Three times as many Blacks and over three times as many Hispanics receive public assistance when compared to Whites.

TABLE 3.7
SOURCES OF INCOME BY % FOR UNMARRIED WOMEN
AGE 65 OR OLDER, 2000⁸⁹

<i>Sources of Income</i>	<i>White</i>	<i>Black</i>	<i>Hispanic</i>
Earnings	11	11	8
Social Security	91	87	73
Government Pensions	12	10	6
Private Pensions	24	15	9
Asset Income	58	20	23
Veterans' Benefits	2	4	0
Public Assistance	5	16	22

88. SOC. SEC. ADMIN., *supra* note 79, at 10-12 tbl.1.3. This data set did not include separate data for Asian Americans or American Indians.

89. SOC. SEC. ADMIN., *supra* note 79, at 10-12 tbl.1.3. This data set did not include separate data for Asian Americans or American Indians.

Here single White and Black women are similar in the percent receiving earnings, Social Security, and government pensions. In all other categories there are vast differences. Further, when comparing Hispanic women to White and Black women, there are generally vast differences in all areas. There are about three times the percentage of single Black women receiving public assistance as single White women and four times the percentage of single Hispanic women receiving public assistance as White women. More than half of White women receive asset income, while less than one quarter of Black and Hispanic women receive asset income. Black and White women receive government pensions in roughly similar percentages, but twice as many White women receive government pensions as Hispanic women.

While Social Security can reduce the percentage of people in poverty, it does very little to provide for a financially secure retirement. Those who are retired and are without pension income are more likely to be in poverty.⁹⁰ Almost one quarter of retired workers who lack pension income have income levels below the federal poverty threshold, compared with 3% of retired workers with pension income.⁹¹ Therefore, private pensions can make the financial difference in retirement. The next Part considers empirical data concerning private pension income recipients and considers whether there are certain groups that are more vulnerable to poverty in old age because they are less likely to participate in private pension plans.

IV. Critical Race Theory and Employer-Provided Pension Plans

A. Introduction

This Part will begin by defining critical race theory and explain how a critical race theorist would analyze the racial impact of employer-provided pension plans. It then describes several empirical studies that all conclude that White workers are more likely to participate in employer-provided pension plans than workers of color. Those studies also show that significant percentages of White employees are not participating in their pension plans.

90. See GEN. ACCT. OFFICE, *supra* note 13, at 4–5 (discussing the impact of the lack of a pension on poverty rates for retirees).

91. See *id.* at 5 ("About 21 percent of retired persons without pension income had incomes below the federal poverty threshold, compared with 3 percent with pension income.").

This Part then describes how Whites and people of color make different investment decisions that can lead to lower account balances for people of color when compared to those of Whites. Over two decades ago, Professor Derrick Bell coined the phrase "interest convergence" to describe how rights for people of color are gained only when they coincide with interests of Whites.⁹² The data provided in this Part shows that many White workers are being negatively affected by current pension plan rules, which would suggest an interest convergence with people of color and make the possibility of reform likely.

B. Critical Race Theory: Methodology

Critical race theory "focuses on the various ways in which the received tradition in law adversely affects people of color not as individuals but as a group."⁹³ The operation of pension plans can have a racially disparate impact without having a discriminatory purpose. For example, qualified pension plans must be in writing.⁹⁴ Would you look to see if there was a provision which excluded people of color and finding none end your analysis?⁹⁵ Critical race theory demands more. You must look at the impact of the pension plan's operation on communities of color to determine whether there is a racially disparate impact.

My prior research showed that the operation of the joint tax return provision disadvantaged married Blacks when compared with married Whites because married Blacks were less likely than married Whites to have a stay-at-home spouse.⁹⁶ Consider the joint return provision: "A husband and wife may

92. See Bell, *supra* note 10, at 523–24 ("Translated from judicial activity in racial cases before and after Brown, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

93. DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS 2* (2003).

94. See LANGBEIN & WOLK, *supra* note 17, at 235 ("There must be a 'definite written program and arrangement which is communicated to the employees and which is established and maintained by an employer.' Treas. Reg. § 1.401-1(a)(2). ERISA also requires every employee benefit plan to be established and maintained pursuant to a written instrument. ERISA § 402(a)(1).").

95. Of course, if you found a racially discriminatory clause, a separate cause of action would be available.

96. See *Race, Class, and Gender*, *supra* note 1, at 1490–95 (documenting the disparate impact of the joint tax return provision of the Internal Revenue Code).

make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions"⁹⁷

The joint return provision benefits families with stay-at-home wives and husbands that work in the paid labor market.⁹⁸ Nowhere does the statute provide that "Blacks pay more." The critical race theorist would ask which racial group was more likely to have stay-at-home wives. The Census Bureau data provided the answer. Whites were far more likely than Blacks to have stay-at-home wives and therefore were far more likely to benefit from a tax provision that never mentioned race.⁹⁹ Even though the Internal Revenue Code did not say "Blacks pay more," in actuality Blacks do pay more because of the labor market contributions to household income by Black wives. Taking into account the context in which the statutory words operate is what critical race theory does. Failure to do so will often lead to an incomplete or inaccurate race-based analysis.¹⁰⁰

Critical race theory shows us that unconscious racism is a significant part of the American legal process. Professor Charles Lawrence stated in his seminal article on unconscious racism and the law:

[M]ost of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.¹⁰¹

Therefore, as employer-provided pension plans are considered, critical race theory would suggest that we examine all the ways in which unconscious racism *could* be a factor. Even where there is no statute that is discriminatory on its face, or a plan that has discriminatory provisions, there can still be discrimination present.

Ideally, the examination would begin with a racial breakdown of the employer's workforce—one would identify which industries were most likely and least likely to provide pensions for their workers. First, one would

97. I.R.C. § 6013(a) (2000).

98. See *Race, Class, and Gender*, *supra* note 1, at 1477–78 ("When Congress enacted the joint return provisions in 1948, eighty percent of all American families were single-income households.").

99. See *id.* at 1490–95 (noting the disproportionate advantage gained by Whites through the joint return provision).

100. See generally Brown, *supra* note 5, for an example of a failure to take context into account.

101. Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

compare the employees who were *eligible* to participate in the pension plan with those who were *ineligible* by breaking the employee data out by race and ethnic background. This comparison would seek to uncover whether the eligibility rules were excluding certain groups from participating. Take the seemingly neutral rule that any worker who works 1,000 hours or less per year does not have to be included in an employer's plan.¹⁰² Does that rule equally impact workers of color and White workers? Does the employer only hire people of color to work less than 1,000 hours per year? What about the cliff vesting rules that require you to stay with one employer for at least five years in order to be eligible to keep your pension? Do people of color have shorter job tenures than Whites? Consider the rule that permits you to be excluded from coverage if you are not 21 years old? Are workers of color more likely to enter the workforce at younger ages than White workers? If the answer to any of these questions is yes, while the written plan does not discriminate, the operation of the plan may have a discriminatory impact. Any employer that does not want its pension plan to have a discriminatory impact should perform such an analysis.

Second, one would look at the pool of eligible participants and compare those who were *participating* with those who were eligible but *not participating*, again breaking out the data by race and ethnic background. Is there a certain group that although eligible is still not participating? Is income a factor? What does adding class data to the analysis provide?

Third, one would get information on the retirement account balances of the employees. This data would similarly be broken down by race and ethnic background. This analysis would show whether there were differences in how the account balances were being invested by race and ethnic background, which impact account balances at retirement. Consider the integration rule which permits an employer to pay reduced pension benefits for employees that earn less than the Social Security taxable wage base. Are workers of color more likely to earn less than the Social Security taxable wage base than White workers? Consider the differences in defined benefit and defined contribution plans. Do workers of color make different investment decisions than White workers? Will participating in a defined contribution plan disadvantage workers of color relative to White workers? While this information would be more relevant for defined contribution plans because participants are not guaranteed a benefit as they are in defined benefit plans, I would argue that it would be useful information for defined benefit plans as well. It would

102. See *supra* notes 38–39 and accompanying text (discussing the minimum work requirement for defined contribution plans).

provide information concerning the racial integration of the employer's workforce. If those with the greatest benefits were of the same race and those with the least benefits were of a different race, perhaps such data would alert the employer that their workforce and promotion policies need to be addressed.¹⁰³

If the data set described above existed, this Article would have written itself. However in many cases, the ideal data set does not exist. For example, my prior scholarship examining the operation of the joint return provision did not examine tax return data because the Internal Revenue Service does not collect tax return data by race.¹⁰⁴ The question that must be asked is: What empirical data can be used as a proxy and still provide useful insights in this area? The balance of this Part seeks to provide the answer.

C. Workforce Composition

1. Who Is Excluded from Coverage?: An Overview

A recent Government Accounting Office report provides that about 53% of the employed labor force was without a pension plan in 1998.¹⁰⁵ *The majority of the labor force was without a pension plan.* Social Security cuts will affect more than just communities of color. Of that 53%, about 39% of the employed labor force worked for employers that did not sponsor a plan, and the balance, or about 14%, worked for employers that did sponsor plans, but the employee chose not to participate.¹⁰⁶ Those who lacked pension income were more likely to be poor.¹⁰⁷ About 21% of retired persons without

103. Cf. Donald Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1613 (2004) (suggesting that those most likely to succeed in corporate America are white males).

104. See *Split Personalities*, *supra* note 1, at 91 (stating that tax return data is not collected by race); *Race, Class, and Gender*, *supra* note 1, at 1492 n.147 (same). However, census bureau data and survey of income and program participation data sets have provided useful information with which to study the impact of federal tax provisions by race. See Brown, *supra* note 5 (manuscript at 49) (documenting the worth of census bureau and survey data for impact analysis).

105. GEN. ACCT. OFFICE, *supra* note 13, at 7; cf. MUNNELL ET AL., *supra* note 33, at 3 ("[O]nly about 50 percent of private sector workers aged 25–64 participated in an employer-sponsored pension in 2000.").

106. GEN. ACCT. OFFICE, *supra* note 13, at 7.

107. *Id.* at 5.

pension income had incomes below the federal poverty threshold, compared with only 3% with pension income.¹⁰⁸

Those who lacked pension income were more likely to have incomes below the federal poverty threshold or be single, female, Hispanic or not White, or less educated compared to those with pension income.¹⁰⁹ In addition, 23% without pension income were Hispanic or not White compared with 11% with pension income.¹¹⁰ While 40% of persons employed full-time and year-round lacked pension coverage, 79% of part-time and part-year employees lacked coverage.¹¹¹ Employees with the following characteristics were disproportionately more likely to lack pension coverage: income of less than \$20,000 (81%);¹¹² worked part-time or part of the year (79%);¹¹³ worked for a firm with fewer than 25 employees (82%);¹¹⁴ or were younger than 30 (76%).¹¹⁵

While pension coverage declined for male workers (except the highest paid),¹¹⁶ pension coverage increased for women at all income levels.¹¹⁷ Pension coverage among women who work full-time, full-year is the same as

108. *Id.*

109. *Id.* at 28 tbl.3.

110. *Id.*

111. *See id.* (noting that there are 85.9 million employees reported working full-time, year-round, 34.1 million of which lack pension coverage, compared with a total of 44.9 million employees reported working part-time or part of the year, 35.4 million of which lack pension coverage).

112. *See id.* (documenting that of 52.3 million employees with an income less than \$20,000, 42.5 million lack pension plans).

113. *See id.* (stating that of 44.9 million total employees who work part-time or part of the year, 35.4 million lack pension plans).

114. *See id.* (relating that of 29.2 million total employees who work for employers with less than 25 employees, 23.9 million lack pension plans).

115. *See id.* (noting that of 38.7 million total employees younger than 30, 29.5 million lack pension plans).

116. MUNNELL ET AL., *supra* note 33, at 4 ("[P]ension coverage declined for all male workers except those in the highest-earning quintile (i.e., the top 20 percent of the population)."). The decline in male coverage has been attributed to "declines in union membership and employment at large manufacturing firms, and by the rapid growth in 401(k) plans that made employee participation in pensions voluntary." *Id.*

117. *See id.* (explaining that the increase in female coverage has been attributed to "improved earnings and an increase in full-time work and—to a lesser extent—increased union membership and employment at large firms"); William E. Evan & David A. Macpherson, *The Changing Distribution of Pension Coverage*, 39 INDUS. REL. 199, 202 (2000) ("[M]ale pension coverage fell from 58.1 to 49.9 percent between 1979 and 1994, whereas female coverage rose from 38.1 to 41.2 percent.").

that for men,¹¹⁸ however class makes a difference. At the highest income levels, about 70% of workers—men and women—participate in pensions.¹¹⁹ At the lowest income levels, 20% of men and 10% of women participate in pensions.¹²⁰ Whites and Blacks participate in similar percentages; however, Hispanics have lower participation rates in all earnings groups.¹²¹

Of those not covered by a pension plan, about one quarter work for an employer with a plan and three quarters work for an employer without a plan.¹²² Beginning with those who work for employers with plans, approximately 60% are not part of their pension plan because they do not meet the age, service, or hours worked requirement, or they work in jobs that are not covered by the pension plan.¹²³ Approximately 10% said they didn't know or gave another reason for not participating.¹²⁴ The balance, or less than 30%, said they chose not to contribute to their plan.¹²⁵

Researchers provide various explanations for why those who are eligible choose not to participate in their pension plans. The likelihood of participation as well as the amount of contributions increases with income, age, education, and job tenure.¹²⁶ The higher the education level the more likely it is that a person will work for a firm that offers pension coverage.¹²⁷ Employees in high-turnover industries may have less desire for coverage since they may be

118. MUNNELL ET AL., *supra* note 33, at 4 ("The remaining differential between coverage patterns for men and women can be explained by their different work patterns, since pension coverage among women who work full-time, full-year is virtually identical to the coverage rates for men.").

119. *Id.* ("In the top quintile, about 70 percent of workers—both male and female—participate in pensions . . .").

120. *Id.* ("[I]n the bottom quintile, that figure drops to about 20 percent for men and 10 percent for women.").

121. *Id.* at n.3 ("Earnings also appear to be more important than race in explaining pension participation. When examining participation by earnings groups, the picture for whites and blacks looks very similar. Hispanics, on the other hand, have lower participation rates in all earnings groups.").

122. *Id.* at 4 ("Of those not covered by a pension plan, roughly one-quarter work for an employer with a plan and three-quarters are employed in a firm without a plan.").

123. *Id.* at 4–5.

124. *Id.* at 5 fig.3.

125. *Id.* at 5; see Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71 (2002) (discussing several ways of increasing employee participation in defined contribution plans).

126. See MUNNELL ET AL., *supra* note 33, at 5 ("First, a series of studies using data from the CPS show that both the likelihood of participation and the level of contributions rise with income, age, education and job tenure.").

127. See GEN. ACCT. OFFICE, *supra* note 13, at 16 (establishing a correlation between education and pension coverage).

unable to meet vesting requirements.¹²⁸ In addition, employees in high-turnover industries may prefer higher wages to pension benefits because their job situation is less secure.¹²⁹ Employers who offer matching contributions increase the likelihood of employee participation.¹³⁰ If the 401(k) plan is in addition to a defined benefit plan, employees are less likely to participate.¹³¹ In addition, employees are more likely to participate if they can borrow from their pension accounts.¹³²

Race and ethnicity are also associated with a lack of pension coverage.¹³³ Blacks and non-Hispanic Whites appear equally likely to lack pension coverage, whereas Hispanics and Asians are more likely than non-Hispanic Whites to lack coverage.¹³⁴ Those who lacked pension coverage according to race and ethnicity are as follows: 42.1% of Hispanic workers lacked coverage; 29.6% of Asian workers lacked coverage; 28.5% of "other" workers lacked coverage; 25.0% of White workers lacked coverage; and 23.6% of Black workers lacked coverage.¹³⁵ Regarding those workers who chose not to participate, 29.9% of Black workers, 26.5% of Hispanic workers, 16.37% of White workers, and 6.49% of Asian workers chose not to participate.¹³⁶ Black workers are the most likely to choose not to participate, while Asian workers are the least likely to choose not to participate.¹³⁷

Working in the private sector makes it less likely to be in a pension when compared to the public sector. According to the recent government report, 58% of private sector employees lacked pension coverage while only 27% of

128. *See id.* (discussing the impact of job turnover on pensions).

129. *See id.* (suggesting that employees with unstable jobs may prefer higher wages over benefits).

130. *See* MUNNELL ET AL., *supra* note 33, at 5 ("If employers offer a matching contribution, workers are more likely to participate since the match provides a large initial return that supplements the advantage of income tax deferral.").

131. *See id.* ("If the 401(k) plan supplements a defined benefit plan, workers are less likely to participate. The research suggests that both participation and contributions are negatively related to the presence and generosity of a defined benefit plan.").

132. *See id.* ("Finally, workers are more likely to participate and contribute if they can gain access to their funds through borrowing.").

133. *See* GEN. ACCT. OFFICE, *supra* note 13, at 17 (noting the effect of race and ethnicity on pension coverage).

134. *Id.* at 17 (documenting the racial and ethnic composition of persons who lack pensions).

135. *Id.* at 31 tbl.5.

136. *Id.* at 34-35.

137. *See id.* (relating the likelihood that persons in certain racial or ethnic groups will refuse pension coverage).

public sector employees lacked pension coverage.¹³⁸ Public sector employees may have higher coverage rates than private sector employees because many public sector employees have traditionally been excluded from Social Security coverage and more public sector employees are unionized.¹³⁹ A study of the 1994 Current Population Survey showed that Blacks are more likely to be employed in the public sector and Hispanics are less likely to be employed in the public sector.¹⁴⁰ Among those whose longest job was in the public sector, there is no statistically significant difference between Whites and Blacks, or Whites and Hispanics, in terms of their *pension coverage*.¹⁴¹ Blacks, though, are found to have significantly lower *pension benefits* than Whites among public sector employees.¹⁴² There is no statistically significant difference between Hispanic and White pension benefits in the public sector.¹⁴³

2. Who Is Participating?

Several recent studies discuss the racial differences in employer-provided pension plans.¹⁴⁴ The balance of this Part will describe three different studies which provide remarkably similar results, namely that White workers are the most likely to participate and Hispanic workers are the least likely to participate in their pension plans—even though significant percentages of White retirees are not receiving employer-provided pension benefits.

138. *Id.* at 16.

139. *See id.* (positing reasons why public sector employees have higher pension coverage rates).

140. *See* William E. Even & David A. Macpherson, *Racial and Ethnic Differences in Pension Wealth*, in *WORKER WELL-BEING AND PUBLIC POLICY* 203, 205 (Solomon W. Polachek ed., 2003) ("Blacks are more likely and Hispanics less likely than whites to be employed in the public sector."). This result is also consistent with Tables 3.2, 3.6, and 3.7, *supra*.

141. *See id.* at 205 (relating that coverage rates for public employees are roughly the same across racial and ethnic classes).

142. *See id.* (documenting a pension benefits gap between Black and White public employees).

143. *See id.* (failing to find a pension benefits gap between Hispanic and White public employees).

144. *See, e.g., id.* at 203–04 (studying the differences in pension wealth between Blacks, Whites, and Hispanics); Joni Hersch & Shelley White-Means, *Employer-Sponsored Health and Pension Benefits and the Gender/Race Wage Gap*, 74 *SOC. SCI. Q.* 851, 851–52 (1993) (studying the differences in fringe benefits coverage rates by gender and race). *See generally* EMPLOYEE BENEFITS SECURITY ADMIN., U.S. DEPT. OF LABOR, *COVERAGE STATUS OF WORKERS UNDER EMPLOYER PROVIDED HEALTH AND PENSION PLANS* (2003).

a. *Even and Macpherson Study*

A recent study of Current Population Survey (CPS) data provides interesting results. The data set is limited to people age 55 and over that were employed in the past but not currently employed.¹⁴⁵ The study is not limited to private sector employees. The study showed that 33.5% of Whites are receiving pension benefits compared with 26% of Blacks and almost 19% of Hispanics.¹⁴⁶ When the measure of pension coverage is broadened to include people that report coverage by a pension plan at any time in the past, coverage rates grow to almost 46% of Whites, 37% of Blacks, and 27% of Hispanics. Coverage rates are lowest among Hispanics and highest among Whites. *Again we see that the majority of workers are not receiving a pension.* Therefore, while things are bad for White employees, they are even worse for Blacks and Hispanics.

In addition to the CPS data, the authors also analyzed Wave I of the Health and Retirement Survey (HRS), which began in 1992, and the 1992 Survey of Consumer Finances (SCF) to predict the extent to which there might be gender differences among coverage of Whites and workers of color. The HRS and SCF data sets take into account defined contribution plans, in contrast to the CPS data, which only accounted for defined contribution plans if they had been converted into an annuity.¹⁴⁷ Those gender differences are described below in Table 4.1.

Table 4.1
 Intra-Racial Gender Differences % Covered by Pension
 with Either Current or Past Employer

	<i>White</i>		<i>Black</i>		<i>Hispanic</i>	
	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>
SCF	67.2	61.6	60.4	67.2	40.6	44.3
HRS	88.1	74.2	80.4	72.9	63.4	66.7

Both data sets again show that White males are predicted to be most likely to be covered and Hispanic males are predicted to be least likely to be

145. Even & Macpherson, *supra* note 140, at 205 ("The sample is restricted to people aged 55 and over who were previously employed but not in the labor force at the time of the survey.").

146. *Id.* at 206 tbl.1.

147. *Id.* at 208.

covered. In both data sets, White men are more likely to be covered than White women. In both data sets, Hispanic women are more likely to be covered than Hispanic men.¹⁴⁸ In the SCF data set, Black women are more likely to be covered than Black men, but in the HRS data set, Black men are more likely to be covered than Black women.¹⁴⁹ Pension coverage is higher for men than women among Whites.¹⁵⁰ In Black and Hispanic populations, women have higher coverage than men.¹⁵¹ Unfortunately, the data set did not include information on Asians or American Indians. Over 60% of both Whites and Blacks are likely to be covered—in similar percentages. In fact, in the SCF data set, the percent of White men and Black women that are covered is identical. Again, we see that Whites are the most likely to be covered by pensions and Hispanics the least likely.

b. Contingent Work Supplement Study

The following data comes from findings from the Contingent Work Supplement to the February 2001 Current Population Survey.¹⁵² While 91% of public sector employees worked for an employer with a pension plan, only 60% of private sector workers worked for an employer with a pension plan.¹⁵³ For private sector workers, 65% of full-time workers and 39% of part-time workers worked for firms with pension plans.¹⁵⁴ But being employed by a firm with a plan does not mean that you participate in such plans.

In 2001, the pension *coverage* rate of private sector workers was 45%, which includes 48% for men and 42% for women.¹⁵⁵ The higher percentage of women workers employed on a part-time basis was a major factor in the lower overall *coverage* rate of women when compared to men.¹⁵⁶ These percentages include both full- and part-time employees.

148. *Id.* at 209.

149. *Id.*

150. *Id.*

151. *Id.* In the Black population, coverage is higher for men than women according to the Health and Retirement Survey data, but coverage is higher for women than men according to the Survey of Consumer Finances data. *Id.*

152. See generally EMPLOYEE BENEFITS SECURITY ADMIN., *supra* note 144.

153. *Id.* at 8 ("Public sector employees were much more likely to work for an employer with a plan (91 percent) than private sector workers (60 percent).").

154. *Id.*

155. *Id.* at 9.

156. *Id.*

If you separate out the pension coverage rates for full-time and part-time employees, you find that the pension *coverage* rate for full-time employees was 52% and for part-time employees was 15%.¹⁵⁷ So even if the race issue is eliminated, there will remain the problem that only 52% of private sector full-time employees are *covered* by pension plans. Those who are not covered will be left to rely on Social Security and their own personal investments—a bleak picture indeed.

The percentage of workers covered by employer-sponsored plans is as follows: 64% for White non-Hispanic workers; 58% for Black non-Hispanic workers; 56% for Asian or Pacific Islander non-Hispanic workers; 55% for "other" non-Hispanic workers; and 40% for Hispanic workers.¹⁵⁸ Black workers were slightly more likely than Asian or Pacific Islander workers to work for an employer with a pension plan. Both Black and Asian or Pacific Islander workers were significantly more likely to work for an employer with a pension plan than Hispanic workers. Again, of all racial groups, Hispanic workers are the least likely and White workers are the most likely to work for an employer with a pension plan.

The percentage of workers who participate in their pension plans is as follows: 49% for White workers; 42% for Asian or Pacific Islander workers; 41% for Black workers; and 25% for Hispanic workers.¹⁵⁹ For all racial groups, workers participate in their pension plans in significantly smaller percentages than those who are eligible to participate. Second, Asian or Pacific Islander workers are slightly more likely than Black workers to participate in their pension plans. Third, both Asian or Pacific Islander workers and Black workers are significantly more likely to participate in their pension plans than Hispanic workers. Notice the difference between working for an employer who has a pension plan and actually participating in that plan. While Black workers are slightly more likely than Asian or Pacific Islander workers to work for an employer with a pension plan, Asian or Pacific Islander workers are slightly more likely than Black workers to *participate* in their pension plan. Again, White workers are the most likely to work for employers with pension plans and most likely to participate in those plans, and Hispanic workers are the least likely to participate in those plans.

157. *Id.*

158. *Id.* at tbl.23.

159. *Id.* at 9.

c. Previously Unpublished Hersch Study

The last study considers only Blacks and Whites and points out the tremendous impact that class has in this area.¹⁶⁰ This data comes from the February 1999 and February 2001 Current Population Survey Contingent Work Supplement. The sample is of employees who work for employers that have pension plans. The study provides information on whether the employees are participating in the pension plan, but it does not provide information on the value of their pension assets. It reports the results for those who are eligible for a plan and asks whether they are participating. An answer of "1" means they are eligible and participating and an answer of "0" means they are eligible but not participating.

Table 4.2

Likelihood of Participating in Pension Plan by Race, Class, and Gender

<i>Race, Gender, Income</i>	<i>Mean</i>
White male earning > \$50,000	.72
Black female earning > \$50,000	.70
Black male earning > \$50,000	.69
White female earning > \$50,000	.64
Black female earning between \$20,000–49,000	.56
White male earning between \$20,000–49,000	.51
Black male earning between \$20,000–49,000	.51
White female earning between \$20,000–49,000	.50
White male earning < \$20,000	.32
White female earning < \$20,000	.32
Black female earning < \$20,000	.31
Black male earning < \$20,000	.30

The data show the importance of class. While White males earning more than \$50,000 are the most likely to participate in a pension plan, Black females and males are closely following. *White women earning more than \$50,000 are the least likely of the data set to be included in a pension plan.* At the middle income level, with earnings between \$20,000 and \$49,000, the results varied. Black females were the most likely to participate, followed by White males and Black males with identical participation rates. *White women were once*

160. I would like to thank Professor Joni Hersch for running these numbers and Professor Julie Woodzicka for patiently reviewing the results with me. The statistical data are on file with the Washington and Lee Law Review.

again bringing up the rear. At the lowest income level, there was a remarkable similarity in the means of the different racial and gender groups and the likelihood that workers are less likely to participate in their pension, with Black men the least likely to participate. White men and women were equally likely to participate, followed by Black women and then Black men.

Overall, the highest mean of 0.72 was for White men who earned more than \$50,000. The next highest mean of 0.70 was for Black women who earned more than \$50,000.¹⁶¹ The next highest mean of 0.69 was for Black men who earned more than \$50,000 and the next highest mean of 0.64 was for White women who at this income level were the least likely to participate in a pension plan—even though they were eligible. At this income level White men had the highest mean, followed by Black women, then Black men, then White women. Far more of these employees were participating in pension plans than were not participating. The highest mean in the next category of those earning between \$20,000 and \$49,000 was 0.56, and it was for Black women. White men had the next highest mean of 0.51, followed by 0.51 for Black men. White women at this income level had the lowest mean of 0.50. At the \$20,000–\$49,000 income level, the participation rate was still significant, but much less so than those at the highest income level. The final income level category was for those earning less than \$20,000. White males had the highest mean of 0.32, followed by White women with the identical mean of 0.32. Black women are next with a mean of 0.31, followed by Black men with a mean of 0.30.

The mean was the lowest for those earning less than \$20,000 and the greatest for those earning more than \$50,000. While the data set does provide participation information that at high income levels could give one reason for optimism, the data does not tell us whether the value of those pension benefits is the same for those with similar participation means.

D. Summary

First, for all racial groups, workers participate in their pension plans in significantly smaller percentages than their eligibility percentages. Second, White workers are the most likely to be eligible for and to participate in employer sponsored pension plans, while Hispanic workers are the least likely to be eligible for and to participate in employer sponsored pension plans.

161. This result is similar to the Even and Macpherson SCF data set result. *See supra* Table 4.1 (charting the percent of persons in certain racial groups who had or have a pension, using data from two separate surveys).

Third, Asian or Pacific Islander workers are most likely to participate in their pension plans—once they are eligible. Fourth, both Asian or Pacific Islander workers and Black workers are significantly more likely to participate in their pension plans than Hispanic workers. Fifth, while Black workers are slightly more likely than Asian or Pacific Islander workers to work for an employer with a pension plan, Asian or Pacific Islander workers are slightly more likely than Black workers to *participate* in their pension plan. We next turn to consider whether participants in defined contribution plans make different investment decisions based upon race.

E. Investment Decisionmaking

This subpart considers whether people of color and Whites make different investment decisions, because if they do that will significantly impact pension balances at retirement. In that instance only part of the problem will be solved if you solve the participation issue. If investment decisions differ by race, we will have identified another problem which will need to be addressed.

The stock market is considered, over the long term, to be the investment with the greatest returns.¹⁶² To the extent that people of color invest less in the stock market than Whites do, their pension fund balances will differ significantly. In defined contribution plans, employees make their own investment decisions; therefore, their retirement account balances will be a function of earnings history. Earnings history will in turn be a function of the investment choices made by the employee.

Black investors think that real estate is a better place to invest their money than either stocks or bonds.¹⁶³ Blacks also think insurance policies are

162. See Martha N. Ozawa & Yat-Sang Lum, *Taking Risks in Investing in the Equity Market: Racial and Ethnic Differences*, 12 J. OF AGING & SOC. POL'Y 1, 3 (2001) ("[I]nvesting in [stocks and stock mutual funds] generally yields a higher rate of return in the long run than does investing in other types of instruments, although investing in stocks and stock mutual funds involves a higher risk."); James M. Poterba et al., *401(k) Plans and Future Patterns of Retirement Saving*, 88 AM. ECON. REV. 179, 181 (1998) ("Historically, investments in corporate stock have yielded substantially higher returns than investments in fixed-income securities such as corporate or government bonds."). Whether the stock market will continue to provide the greatest returns is an open question.

163. See Luisa Beltran, *Many Black Investors Back in Market*, S. FLA. SUN-SENTINEL, June 28, 2004, at 21, 2004 WL 82605555 ("[T]he study found that 61 percent of blacks and 51 percent of whites believe that real estate is the best investment overall."); Sandra Block, *African-American Investors Catching Up*, USA TODAY, June 24, 2004, at 2B, 2004 WL 58559305 ("[M]ost black investors believe real estate is the best overall investment . . ."); Francine Knowles, *African Americans Exit Stocks*, CHI. SUN-TIMES, June 25, 2003, at 65, 2003 WL 9558408 ("Fifty percent of blacks viewed real estate as the best investment . . ."); Tristan

good investment vehicles.¹⁶⁴ Blacks and Hispanics are less likely to invest their money in the stock market than are Whites.¹⁶⁵ Several explanations have been offered for the disparity. One is that investing in the stock market is commonplace for Whites but not Blacks.¹⁶⁶ Another is the lack of diversity in the financial markets industry.¹⁶⁷ A third is general distrust.¹⁶⁸ A fourth is that Blacks are more comfortable investing in real estate and insurance because they know Black real estate and insurance agents.¹⁶⁹

The lack of knowledge about the stock market has hurt Blacks in another way. For those who were brave enough to invest, many got out of the market before it started to rally.¹⁷⁰ As a result, they were unable to reap the benefits

Mabry, *Black Investors Shy Away from Stocks: Women in Particular are Afraid to Trust Brokerage Firms*, WALL ST. J., May 14, 1999, at A2 ("Blacks . . . tend to favor much more conservative investment vehicles, including real estate and insurance."); Sheila Muto, *The Property Report: Plots & Ploys*, WALL ST. J., June 23, 2004, at B6, 2004 WL-WSJ 56932741 ("Black investors continue to think real estate is a better place to invest their money than stocks, bonds or mutual funds, according to a survey of black and white households earning more than \$50,000 a year.").

164. See Mabry, *supra* note 163 ("Blacks . . . tend to favor much more conservative investment vehicles, including real estate and insurance.").

165. See Ozawa & Lum, *supra* note 162, at 5 ("We posit that black and Hispanic people are not only less likely to invest in the stock market than are white people, but that they invest a smaller portion of their total assets, net of home equity, in the stock market.").

166. See Paulette Thomas, *Investing Survey Shows Race Plays a Part*, WALL ST. J., June 6, 2001, at C21 ("Investing is a rite of passage for white investors . . . [w]hereas a certain income level is what makes the bell go off for black investors.").

167. See *id.* ("'Because of the lack of diversity in the financial-services industry, I think there's been a lack of confidence' among blacks about investment markets . . ." (quoting Mellody Hobson, President of Ariel Mutual Funds)).

168. See Knowles, *supra* note 163 ("Forty-nine percent of blacks said they don't trust the stock market, up from 34 percent in 2000. Among whites, 33 percent said they don't trust it, up from 23 percent in 2000."); Mabry, *supra* note 163 (citing trust as a factor in the investment decisionmaking). The author further notes:

The difference between black and white investment behavior, say investment advisers, is mainly an issue of trust. Trusting others to handle one's finances is never an easy call, but for an ethnic group with a long memory of false promises from the nation's political and commercial power brokers, putting money into something you can't feel and touch can be frightening.

Id.

169. See Mabry, *supra* note 163 ("But others say blacks feel more comfortable investing in real estate and insurance because those industries have a long history of marketing their products to black consumers. 'We know real-estate agents and insurance agents and more of them are black.'" (quoting Charles Davis, president of the Coalition of Black Investors)).

170. See Knowles, *supra* note 163 ("[Blacks] got out of the market right before it started to rally They sold at the low and are missing the rally.") This problem affected Whites as well. See *id.* ("A smaller number of white investors [also sold before the market started to rally] . . .").

provided by long-term investment in the stock market. Professors Ozawa and Lum conducted a study which found that "even after age, marital status, gender, education, health condition, income, and risk tolerance are controlled for, the likelihood of blacks and Hispanics investing their financial resources in the equity market is significantly smaller than the likelihood of whites doing so."¹⁷¹ Men of color are more willing than women of color to take risks. As Professor Zanglein shows, Hispanic-American men were more willing than any other group to take risks, followed by Asian-American men, African-American men, then Hispanic-American women, Asian-American women, and African-American women.¹⁷² However, single Black women hold riskier investments than single White women.¹⁷³ Data exists therefore to suggest that even if all employees begin with identical account balances, over time there will be significant differences in those account balances at retirement. To increase pension income for communities of color, additional education work will need to be done. This education work should not just be provided for communities of color but for Whites as well.¹⁷⁴

V. Conclusion

These data raise troubling issues. Why do Hispanics lag behind every other racial and ethnic group? Why do White women lag behind White men and Black men and women? While the data may have raised more questions than it answered, this Article seeks to provide a framework for future analytical work in this area.

Is there any good news? First, as someone who spends an inordinate amount of time tracking down data, it is refreshing to see data that is collected not just for Black and White workers, but for Asian or Pacific Islander workers and Hispanic workers as well, particularly in light of the racial demographics of this country. More data could be collected—for American Indians, for example—but the existing data sets are a very good beginning. Second, if you are retired and receiving an employer-provided pension plan, you are far less likely to be living in poverty than if you did not receive an employer-provided

171. Ozawa & Lum, *supra* note 162, at 15.

172. Jayne Elizabeth Zanglein, *Investment Without Education: The Disparate Impact on Women and Minorities in Self-Directed Defined Contribution Plans*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 223, 242 (2001).

173. *See id.* at 242–43 (noting the likelihood of risky investing by single women).

174. *See* Beltran, *supra* note 163 ("A majority of both blacks and whites . . . failed a 10-question financial quiz.").

pension plan. Therefore, more workers of color need to be included in employer-provided pension plans, and this issue should be front and center on the agendas of advocacy groups for the elderly as well as for communities of color. Advocates for communities of color must seek opportunities for coalition building with White advocacy groups. Given that the majority, or a significant minority, of the employed labor force is not participating in a pension plan, the opportunities for coalition building are real. This is a unique opportunity that must not be wasted.

