REBALANCING RETIREMENT: HOW 401(k) PLANS EXACERBATE INEQUALITY AND WHAT WE CAN DO ABOUT IT

QUINN CURTIS*, LEO E. STRINE, JR.**, DAVID H. WEBBER***

ABSTRACT

Incentives for individuals to save for retirement currently total 1.5% of U.S. GDP. For that substantial investment, we get a system that actually deepens wealth inequality. The top 10% of earners capture 60% of the associated tax benefits, and employer matching contributions disproportionately favor the highest earners. Although defined contribution plans have long been subject to non-discrimination requirements aimed at ensuring that benefits do not accrue predominantly to the wealthiest participants, these rules have little bite. In an irony, we estimate that the entire 401(k) system would fail the non-discrimination test that every employer offering such a plan is expected to pass. This Article examines the structural causes of these disparities, including growing income inequality, critiques the shortcomings of the non-discrimination rules, and proposes practical reforms to the 401(k) system, alongside a supporting increase in the minimum wage. Our reforms would realign public policy to address the related needs for more economic equality and to provide equitable incentives for retirement savings for the many, not just the few. Ultimately, these reform proposals seek to get the most value for the American public out of the considerable retirement tax expenditures under § 401(k).

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** Strine is Michael L. Wachter Distinguished Fellow at the University of Pennsylvania Law School, Senior Fellow, Harvard Program on Corporate Governance; Of Counsel, Wachtell, Lipton, Rosen & Katz; and former Chief Justice and Chancellor, State of Delaware.

*** Webber is Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law.

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INTRODUCTION

Despite the longstanding existence of federal legislative policies intended to ensure that tax-subsidized retirement plans like the 401(k) are not biased toward highly paid employees, the outcomes generated by defined contribution plans are—as a matter of empirical reality—tilted heavily in just that way. For the bottom quintile of American workers, their average retirement savings is essentially zero.[1] Even middle-class workers have median savings of around $64,300, far less than is necessary to provide for a secure retirement.[2] By contrast, workers in the top income bracket have median savings of $605,000.[3] These inequalities are even worse for Black families, whose savings average less than half of those of White families.[4]

Instead of concentrating federal subsidies on the workers who need it most, federal policy provides tax advantages biased toward the workers who need them least. The great bulk of the annual tax expenditures incurred to create incentives for retirement savings go to affluent workers. Just as concerning, when employers contribute to their workers' retirement savings through "matching" contributions and other means, their contributions are also biased toward the affluent, with estimates suggesting that 44% of employer subsidies go to workers whose wages are in the top 20% of their workforces.[5] The failure of 401(k) plan designs to take into account the realities faced by low- and middle-income workers—such as the greater effect of inertia on their investing decisions, their comparative lack of intergenerational wealth, shorter tenures with employers, and the practical reality that they cannot afford to make contributions approaching the federal tax-advantage maximum levels—leads to plan designs that exacerbate, rather than ameliorate, the wealth gap.

This Article makes several contributions. First, it demonstrates how the legal "non-discrimination" rules designed to ensure that retirement plans do not favor high income employees fail. The Article draws on plans data to show that 401(k)s analyzed collectively would fail the non-discrimination rules. We show that wage stagnation, rising income inequality, plan structure, and employer matching programs are significant contributing factors to this regressivity. We then outline a proposal to address these problems that combines an increase in the minimum wage, a built-in retirement savings feature, and restructured regulation of employer matching programs. We show that such reforms could partially address the extreme regressivity

1. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105342, OLDER WORKERS: RETIREMENT ACCOUNT DISPARITIES HAVE INCREASED BY INCOME AND PERSISTED BY RACE OVER TIME 1, 10-11 fig. 3 (2023).
2. *Id*. at 13.
3. *Id*. at 13.
4. BD. OF GOVERNORS OF THE FED. RSRV. SYS., SURVEY OF CONSUMER FINANCES (2022).
5. Fiona Greig et al., *Are Employers Optimizing Their 401(k) Match?*, VANGUARD RSCH. 1 (May 2024), https://perma.cc/6XZF-8SSQ.

of 401(k) plans. We then argue that such reforms are politically feasible in a fractured partisan landscape.[6]

From the inception of federal efforts to encourage employers to help their workers save for retirement, policymakers of both parties have been concerned about the possibility that taxpayer subsidies will go only to the few and be funded by the many. Two related concerns have animated policymakers for approaching a century. The first is that the focus of federal policy ought to be "worker security," giving priority to vulnerable lower- and middle-income workers who have the most difficulty funding a secure retirement.[7] The second, and related, concern is that scarce resources in the form of tax subsidies should serve a valuable social end and not just provide a windfall to the affluent.[8]

The retirement system's failure to cope with these concerns is reflected in recent polling data. In 2024, 79% of Americans believe we are facing a retirement crisis, and 83% think that all workers should have a pension.[9] Another survey found that 56% of Americans feel behind on their retirement preparedness.[10] 80% believe that employers should contribute more to secure retirement.[11]

It wasn't supposed to be this way. The non-discrimination rules embedded in the regulations governing 401(k)s were supposed to assure that tax-advantaged retirement savings did not skew in favor of the rich.[12] Four distinct non-discrimination rules require firms to compare tax-advantaged retirement benefits offered to highly compensated and non-highly compensated employees to assure compliance with the non-discrimination principle.[13] These rules do more than just fail. They increase discrimination. Many employers opt into regulatory safe harbors to ensure their compliance with the overly complex non-discrimination rules by matching employer contributions. Yet, these matching programs often exacerbate the very bias toward high earners the non-discrimination rules were meant to enjoin. The sharply regressive effects of our 401(k) system are due, at least in part, to the failure of the non-discrimination rules to fulfill their intended function.

6. Explicitly addressing political feasibility is unusual in law review writing, though normative discussions of policy are common. We think—particularly in the current political climate—there is value in grappling with the political realities surrounding suggested reforms when possible.

7. Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 433, 439 (1987).

8. *Id.* at 439-40.

9. Dan Doonan & Kelly Kenneally, *Retirement Insecurity 2024: Americans' Views of Retirement* NAT'L INST. ON RET. SEC. 6, 11 (Feb. 2024), https://perma.cc/GQM2-KQKG.

10. Lane Gillespie, *Survey: More Than Half of American Workers Feel Behind on Their Retirement Savings*, BANKRATE (Sep. 25, 2024), https://perma.cc/HU9Y-Q34Q.

11. Doonan & Kenneally, *supra* note 9, at 14.

12. *See infra* note 78.

13. *See generally infra* Part I.D.

But the non-discrimination rules are not the sole policy failure. As we will show, every aspect of the unequal effect of 401(k) plans has been exacerbated by growing income inequality and the stagnation of real wages for low- and middle-income American workers over the past two generations. 401(k) plans only provide a basis for retirement security for those with sufficient income to enable them to put aside money every paycheck for use far down the line. As income inequality has grown and wages for lower- and middle-income workers has stagnated, their ability to save for retirement has been compromised. Discussing retirement reform without addressing this reality issue omits a critical piece of the puzzle. Any effective program to improve Section 401(k) to help more Americans obtain genuine economic security must address the direct relationship between income and wealth inequality. In a defined contribution system, building wealth depends on having the income to do so.

The resulting economic insecurity felt by the many has led to bipartisan interest among elected officials in policy changes that would provide a more realistic and stable way for American workers to build retirement savings.[14] A recent example of that bipartisan interest is the Social Security Fairness Act of 2025, which extended Social Security benefits to almost three million American workers who had previously been ineligible for it or were limited in what they could collect from it, because they simultaneously participated in public pension plans.[15] The law was adopted with overwhelming Democratic support and substantial Republican support in both houses of Congress: 76-20 in the Senate, 327-75-1 in the House of Representatives.[16] Even increases to the minimum wage enjoy bipartisan support from voters.[17] The minimum wage in many red states far exceeds the current federal minimum, and polls of Republicans demonstrate strong support for substantial increases.[18]

Although the Social Security Fairness Act shows that progress is possible, dramatic reforms risk upsetting the settled expectations of two generations of American workers who have come to view the retirement system as involving two core components that they should be able to rely upon: Social Security, and their 401(k). There is currently \$8.9 trillion in U.S. 401(k)s,[19] making the system larger than the gross domestic product of every country in the world except the United States and China. This is also roughly triple the size of third-place Germany's GDP.[20]

14. *See infra* Part IV.B for a further discussion of the political viability of our reforms.

15. Social Security Fairness Act of 2023, Pub. L. No. 118-273, 138 Stat. 3232.

16. Soc. Sec. Legis. Bull., *House Passes H.R. 82, the "Social Security Fairness Act of 2023,"* (Dec. 23, 2024), https://perma.cc/Z99Y-B6EA.

17. Lew Blank, *Voters Think It's Time to Raise the Minimum Wage*, DATA FOR PROGRESS (Apr. 26, 2024), https://perma.cc/55GC-EJXZ.

18. *See Minimum Wage Tracker*, ECON. POL'Y INST. (Jan. 2025), https://perma.cc/3DMB-QDBR; Blank, *supra* note 17.

19. *401(k) Resource Center*, INV. CO. INST., https://perma.cc/U24L-4YPZ.

20. WORLD BANK Group, GDP, PPP (CURRENT INTERNATIONAL \$) (2023),

Fundamental reforms to that system are not trivial. Likewise, public sentiment about the minimum wage shows support for substantial increases, but not a dramatic move to $20 or even $15 an hour.[21]

Without criticizing more fundamental reform proposals, we advance an incremental, but still, ambitious, proposal to increase retirement security via two mechanisms. First, we propose increasing the capacity of low- to middle-income families to save through a minimum wage increase (including a built-in retirement savings feature). This makes it more feasible for lower income workers to devote responsible sums toward retirement savings. Second, we propose reforms to channel tax expenditures where they are most needed by changing the rules around employer matches to reduce their regressive features. This, coupled with other adjustments to retirement plans aimed to protect low-income workers, ensures that higher-compensated workers at companies do not receive tax subsidies until all their co-workers receive a fair opportunity to save each year.

In our view, a first-best starting point for long-standing reform would involve the following. Upfront we recognize the connection between income and wealth. 401(k) reform would work best in tandem with a federal "minimum wealth" component to the minimum wage equal to 10% of the federal minimum wage that would have to be used by workers for retirement savings. We also believe the minimum wage should be increased to a real level of $15 an hour over the next five years, building from the approximate base of the minimum wage of approximately $12 an hour in working class red states like Arkansas, Missouri, and Ohio.[22] That is, a first-best incremental reform would couple a move toward a living wage that includes a dedicated portion for wealth building with a reform to 401(k) itself. That would better enable a fair requirement that a responsible portion of an employee's wage be devoted to retirement savings.

But, because second—or even third—best can be a large improvement on doing nothing, we advocate reforms to ERISA and federal tax laws to utilize tax incentives in a more equitable manner. ERISA and federal tax reforms that would be valuable even if the minimum wage were not increased. In order to achieve this, our proposed reforms focus on (1) ensuring some employer contribution independent of employee contributions, (2) requiring employers to aggressively match low-dollar contributions, (3) capping matches in dollar amounts rather than percentages of salary, and (4) requiring that these aggressive, low-dollar matches be utilized at a high rate before employers may engage in discretionary matching. In essence, these reforms would require ERISA plans with employer matching features to function as follows if employer contributions are to be tax deductible. We consider two implementations of the proposals with different caps and amounts, but the general approach is as follows:

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https://perma.cc/LA8L-2UR3.

21. Blank, *supra* note 17.

22. *Minimum Wage Tracker*, *supra* note 18.

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- Employees would, as a default matter, be enrolled and participate automatically in their company's plan.
- The first tranche of employer contributions would be automatic and unconditional. This would give all employees some savings.
- The second tranche of employer contribution would take place at a higher than 1:1 match rate, creating strong incentives for employees to save. Automatic enrollment would ensure that most employees capture this matching value.
- The third tranche would require a 1:1 match by the employer but can involve a higher employer contribution. This aggressive match increases incentives to save and advantages employees unable to make large contributions.
- Additional employer match can be on whatever terms the employers choose, but only if a required share of their workforce actually participates in the first four tranches.
- Finally, we would restrict vesting of employer match to occur no later than after one year of employment, so that lower wage employees who tend to have shorter employer tenures are not short-changed, as longer vesting schedules now permit.

In our view, this proposal better aligns public policy with bipartisan public sentiment and the public good. We do not eliminate opportunities for higher-end workers to receive tax advantages in the form of employer contributions, or the ability to set aside substantial sums each year on a tax preferred basis. But we do cabin those opportunities and make them dependent on their employers' provision of sufficient contributions to their more modestly paid colleagues. Nothing in our proposal denies more affluent employees the ability to save more without subsidy from other taxpayers, and each component of our proposal would be open to all employees. But our proposal does recognize that tax subsidies are not free, should be equitably distributed, and should be calibrated to do the most good. Under the current system, the many benefit far less than the few, and that exacerbates growing economic insecurity and inequality.

By addressing that reality within the context of the central place that defined contribution plans now have within our society, we provide a realistic path for providing more Americans with economic security, closing the growing wealth gap in our society, and creating a greater alignment between the investors in American companies and the employees most responsible for those companies' success. And if all working Americans from all regions and backgrounds have more economic security and feel that their families have a fair chance for a more prosperous future, then that will help us better remember that what we have in common with our fellow citizens far exceeds our differences.

This Article proceeds as follows. First, in Part I, we address the well-documented wealth gap problem facing the United States, highlighting its relationship to growing income inequality and persistent racial inequality. We focus on how changes in the American retirement system have exacerbated, rather than ameliorated, the wealth gap. In particular, we document the effect the shift from defined-benefit pension plans to defined-contribution plans associated with Section 401(k) of ERISA had had in this respect. Finally, we discuss the non-discrimination rules for retirement plans that attempt (without success) to ensure that plans don't unduly favor high earners.

In Part II, we describe the research demonstrating that the design flaws of 401(k) plans disadvantage less affluent workers, increase inequality, and focus employer contributions and federal tax subsidies on the most affluent employees. We then highlight the specifics of the problem by drawing on data on plan participation to show how core plan design factors, like matching contributions, skew benefits in favor of affluent and highly paid employees. We show that plans collectively would actually fail a core non-discrimination test. In this Part, we note that the problem of wage stagnation and income inequality has been identified as a contributor to the inequitable outcomes under Section 401(k) as it now operates. Rather than ignore this reality and the direct connection between income and wealth inequality, we address the utility of responsible increases in the federal minimum wage as a complement to reforms to Section 401(k) itself.

In Part III, we make the case for clearer, more prescriptive approaches that better guarantee that expensive and scarce federal tax subsidies are deployed where most necessary and valuable to help all American workers better save for retirement. We develop and analyze a concrete plan that would require employers with matching programs to ensure that the structure of their match provides retirement savings consistent with a living wage to all employees before extending additional benefits likely to favor higher-compensated employees.

In Part IV, we address our plan's advantages, the costs it would impose, and why we believe that the benefit to cost ratio of the Section 401(k) reform proposal would be substantial. At a very basic level, the main question is whether federal subsidies should be focused in a manner that best serve the most American workers or continue to be deployed in a manner that mostly benefits those workers who need subsidies the least. We argue that there is bipartisan concern that American workers are not being given adequate support to fund secure retirements and that federal policy is skewed toward those who least need help and against the average American worker.

Lastly, we conclude on an optimistic note. With minimal sacrifice from high income employees, thoughtful focus by employers on their average workers, and sensible reforms taking into account the empirical evidence about how Section 401(k) plans best work, substantial progress toward providing many more Americans with more retirement security and making our economy function more equitably can be made. And by building on bipartisan support for substantial increases in the minimum wage, we can address the reality that without more income, less affluent workers can

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never achieve the wealth necessary to obtain the peace of mind of a secure retirement. At a time of partisan division, reform of this kind, which builds on bipartisan sentiment and would benefit all regions of the nation, is especially valuable, as it mends frayed ties and better encourages a shared belief in the fairness of our society and its economy.

I. BACKGROUND

A. Wealth Inequality

As has been documented, the level of economic inequality in the United States has grown substantially during the past two and half generations. During the period between the New Deal in the 1930s and the so-called Reagan Revolution in the 1980s, real gains in economic equality were made, and a genuine middle class emerged as a key segment grew into a real stratum of American society.[23] During this period, gainsharing between corporate stakeholders made crucial contributions to this growing middle class and reductions in overall inequality.[24] Thus, by 1978, the distribution of American wealth reached the high-water mark of its parity in the twentieth century, with just 7% of the national wealth share concentrated in the hands of the top 0.1%, compared to 25% in 1928.[25] But this gainsharing eroded substantially

23. Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSP. 3, 12-14 (2016) (showing the declining share of income earned by the top 1% during this period; see fig. 3).

24. By way of example, during this period, the connection between worker productivity and wages was strong. From 1948 to 1979, worker productivity grew by 108.1% and wages grew in rough tandem by 93.2%. *See The Productivity—Pay Gap*, ECON. POL'Y INST. (last updated Oct. 2022), https://perma.cc/8Y5X-R2GZ. Indeed, "[c]ensus family income data show that from the late 1940s to the early 1970s, incomes across the distribution grew at nearly the same pace." Arloc Sherman, Danilo Trisi & Josephine Cureton, *A Guide to Statistics on Historical Trends in Income Inequality* 8, CTR. ON BUDGET & POL'Y PRIORITIES (last updated Jan. 13, 2020) https://perma.cc/H8KH-WMB9. That is, as workers' productivity enhanced the value of the corporate enterprise, they shared in the benefits of those productivity gains. Top executives were much better paid than the typical worker, but at a ratio that was merely substantial, not astronomical. For example, the CEO-to-worker pay ratio was about twenty-to-one in 1965. Josh Bivens & Jori Kandra, *CEO Pay Slightly Declined in 2022*, ECON. POL'Y INST. (Jun. 21, 2015), https://perma.cc/L8RU-UM47. And stockholders also reaped good returns during this era of fairer gainsharing, as the S&P 500 rose 819% in real terms from 1948 to 1979. This is based on authors' calculation from data published by Aswath Damodaran, *Historical Returns on Stocks, Bonds and Bills: 1928-2023*¸ DAMODARAN ONLINE (Jan. 4, 2024), https://perma.cc/GXN2-KEEM. In other words, when a company succeeded, so did its workers; and in many ways, so did the communities in which the company operated.

25. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519, 521-22 (2016).

during the last four decades, with stockholders and top management procuring a substantial share of the gains that previously went to middle- and low-income corporate workers.[26] By 2020, the top 0.1%'s share of wealth had risen to over 17%, returning our nation to a level of wealth inequality and concentration last experienced in the 1940s.[27] Put another way, between 1986 and 2012, nearly half of all U.S. wealth accumulation went to the top 0.1%.[28] By way of further example, in 1971, 61% of America was middle class and earned 62% the nation's income share.[29] In 2023, however, the middle class made up just 51% of the country and earned just 43% of the income share.[30] Thus, there has been a substantial shift in the distribution of wealth and income toward the affluent and away from middle- and low-income Americans.

This reversal in progress has hit Black Americans—who were victimized by four centuries of official and unofficial racial discrimination and oppression—perhaps the hardest. During the last century, Black Americans had made some important gains in closing the income gap resulting from their historical subordination and exclusion from free labor markets.[31] Thus, by 1970, the median Black American man had an

26. In other work, we have each addressed the various factors we believe have contributed to reduced gainsharing with and thus economic security for American workers during the last two generations. For the view of one of us, *see* Leo E. Strine, Jr. *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged Its Ultimate Decline: A Response to Cuéllar, Levi, and Weingast*, 57 HARV. J. ON LEGIS. 67 (2020); Leo E. Strine, Jr., *Made for this Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267 (2019); Leo E. Strine, Jr. & Michael P. Klain, *Stakeholder Capitalism's Greatest Challenge: Reshaping a Public Consensus to Govern a Global Economy*, 47 SEATTLE U. L. REV. 329 (2024); Aneil Kovvali & Leo E. Strine, Jr., *The Win-Win That Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307 (2022). For the view of another, *see* DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (Harvard University Press 2018); David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y. UNIV. L. REV. 2106 (2014).

27. Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSP. 3, 9-10 (2020).

28. Saez & Zucman, *supra* note 25, at 521.

29. Rakesh Kochhar, *The State of the America Middle Class*, PEW RSCH. CTR. (May 31, 2024), https://perma.cc/BLQ3-VS5H.

30. *Id.*

31. The persistence of racial income and wealth inequality, of course, is influenced by many factors related to historical discrimination. For example, an incisive paper notes that when all males are considered—including those who are not working—Black males have regressed from the median of all males since the 1970s for reasons including changes in the labor markets rewarding college educated employees compared to high school graduates and greater incarceration rates. *See* Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men Since 1940*, 133 Q. J. ECON. 1459, 1473 (2018).

A study of the Black-White wealth gap presents the bleak reality that White families have six times the wealth of Black families on average, a bare improvement from the 7:1

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income of $30,800, which was 59% of that earned by the median White American man.[32] Although this disparity was large, it was much narrower than was the case in the past, owing to gains for Black Americans from the 1940s to 1970s.[33] Closing the racial wealth gap was more difficult than closing the wage gap because of longstanding intergenerational racial wealth disparities, but some progress was made even on that front during the post-war era.[34] Since the 1980s, however, racial inequality as measured by both metrics has again expanded, erasing many of the gains made in the post-war era.[35] For example, one study calculated that, based on data from the Survey of Consumer Finances, in 2019, for every dollar owned by White Americans, Black Americans held only 17 cents, and for every dollar earned by White Americans, Black Americans earned only 50 cents.[36] Even after the COVID-19 pandemic underscored the importance of so-called essential workers to our society and economy, workers who were more likely to be Black, the gains to these workers have not erased the racial wage gap.[37] In fact, the Brookings Institute calculated that over the course of

ratio that existed in the 1950s. This study underscores how the reality of lower incomes translates into Black families have lower savings, lower participation in equity markets, and higher levels of debt than White families, and how this has exacerbated the wealth gap because White families have benefited from rising stock markets while Black families have largely not enjoyed any wealth appreciation from them. *See* Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* 2, 19-20 (Griswold Ctr. for Econ. Pol. Stud., Working Paper No. 296, 2022), https://perma.cc/PLB2-TG27. For present purposes, both studies underscore the reality that unless serious effort is made to increase the ability of Black Americans to build wealth, the historical damage done by racial discrimination will not be ameliorated but may continue to grow.

32. Bayer & Charles, *supra* note 31, at 1471-72.

33. Bayer & Charles, *supra* note 31, at 1487.

34. Derenoncourt et al., *supra* note 31, at 10-11 (noting that despite the significant changes between the 1940s and 1970s in racial progress and discrimination, the racial wealth gap closed only from 9:1 to 7:1 during those three decades).

35. Since 1980, the median earnings gap between White and Black Americans has widened and erased much of the post-war convergence, returning to levels of income inequality not seen since the 1950s. *See* Bayer & Charles, *supra* note 31, at 1496. Progress in the Black-White wealth gap has undergone a similar reversal: During the Depression, the ratio of White to Black family wealth was around 9 to 1. From 1930 to 1960, wealth convergence accelerated, converging at a rate of 1% per annum. Derenoncourt, *Wealth of Two Nations*, at 18. From 1960 to 1980, the rate of convergence quickened again to 1.5% per annum, largely as a result of the Great Migration, post-war wage convergence, and the Great Society. But despite the increasing speed of convergence, the wealth gap remained large, reducing from 9:1 in the 1930s to approximately 6:1 in 1980. In the last two generations, however, no progress has been made and that gap again began to grow, not decrease, for the first time since Emancipation. If the post-1980 trend continues, it is expected that by 2200, the racial wealth gap will widen by over 50%, with a per capita ration of 8.4:1. *See* Derenoncourt et al., *supra* note 31, at 2-3, 18-19, 23, 35.

36. Derenoncourt et al., *supra* note 31, at 2.

37. Kendra Jason et al., *The Impact of the COVID-19 Pandemic on Black and Hispanic Americans' Work Outcomes: A Scoping Review*, 11 J. RACIAL ETHN. HEALTH DISPARITIES 1157, 1161-65

that pandemic, Black wage income was flat, indicating gains to essential workers were offset or nullified by other economic losses.[38] Thus in 2024, the gap between White and Black Americans incomes remains large, with data from the National Urban League suggesting Black workers make just 64 cents for every dollar earned by White workers.[39]

The causes of rising inequality are many. It is not the purpose of this Article to demonstrate which are the most important or to debate those who would argue that some factors we believe are important in explaining the growth in equality are not causes at all. But for the sake of candor, we admit to being of the view that policies bearing on the distribution of societal wealth, not the lack of new wealth, are important.[40] However vigorous international competition has become, it has not prevented the U.S. economy from generating increased levels of real overall wealth. Thus, from 1979 to 2024, the U.S. economy as measured by GDP grew 314.28% in real terms.[41]

And as a matter of objective reality, whatever the precise cause, that is what happened. The returns from the success of American corporations were increasingly directed to stockholders (and top management), and the share that went to corporate employees decreased substantially. A couple of ways to illustrate this phenomenon follow. Figure 1 illustrates the profound difference in how stock prices and wages have grown in the last century. Figure 2 shows the declining relationship between labor costs and production output, underscoring that the share of economic gains resulting from private sector business activity being paid to workers is declining.

(2024) (showing that "Black and Hispanic workers are not only overrepresented as essential but also are more likely to contract COVID-19 in workplace outbreaks when compared to essential workers that identify as other races and ethnicities."); *Essential Workers Pay Trends Report*, PAYSCALE (last visited Jun. 20, 2024), https://perma.cc/Q3NL-SHVG (showing significant median pay increases for workers in essential categories from 2019-2022).

38. In contrast, the same data set found that White American wages grew 6.3% over the same period. Andre M. Perry, Hannah Stephens & Manann Donoghoe, *Black Wealth Is Increasing But So Is the Racial Wealth Gap*, BROOKINGS (Jan. 9, 2024), https://perma.cc/JVN4-9PX7.

39. NAT'L URB. LEAGUE, *The 2024 Equality Index* 10 (2024), https://perma.cc/GW42-G7TQ.

40. For our views on this, *see supra* note 6 and accompanying text.

41. *FRED Economic Data: Real Gross Domestic Product*, FED. RSRV. BANK OF ST. LOUIS (last updated Jun. 26, 2025), https://perma.cc/2LM8-SKVP.

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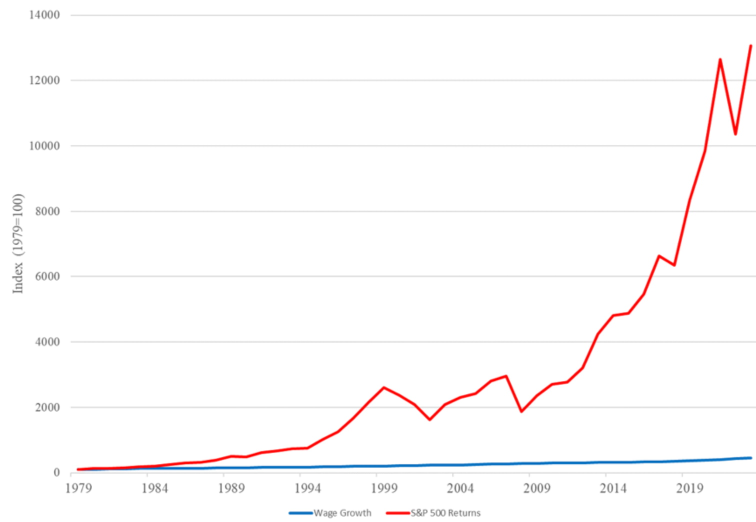
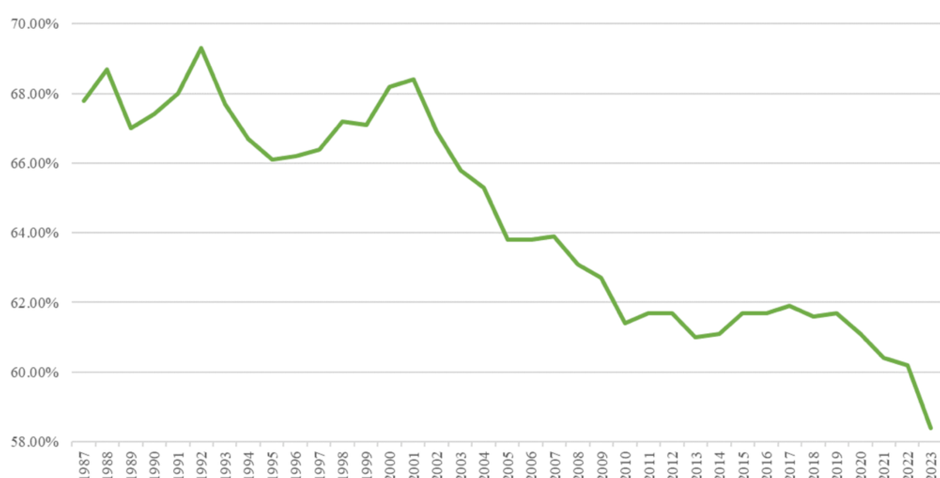
Figure 1: S&P 500 Returns and Wage Growth, 1979-2023



Notes: Data is for the Average Hourly Earnings of Production and Nonsupervisory Employees, Total Private and the Annual Return on Investment of the S&P 500, including dividends, both unadjusted for inflation. It is derived from the authors' analysis of published FRED Economic Data, and S&P 500 Historical Return Data published by Aswath Damodaran.

Figure 2: Private Nonfarm Business Sector: Labor Share, 1987-2023



Notes: Data is for the Private Nonfarm Business Sector: Labor Share, the portion of the total costs to produce output that can be attributed to the cost of labor. It is derived from published FRED Economic Data.

As a paper by Professors Summers and Stansbury underscores, this change in gain sharing with American workers explains much of the increase in inequality during the past few generations.[42] But for present purposes, the causes are not as important as the objective reality, which is that American workers now receive a lower share of the profits their labor creates than they did two generations ago. That is not disputable.[43]

Nor is it fairly arguable that income growth for most American workers stagnated during this same period. From 1979 to 2024, the median real wage grew by only 8.23%.[44] This was a much lower growth rate than in the decades prior.[45] When the typical worker faces more wage stagnation of this kind, the typical worker will also have more difficulty saving and building personal wealth.

B. 401(k) Plans

Defined contribution retirement plans, such as 401(k) plans, are now a pillar of retirement savings for millions of Americans. According to the Investment Company Institute, such plans currently manage more than $12.5 trillion in retirement savings, surpassing the combined value of both public and private defined benefit pension plans.[46] About two-thirds of private sector workers have access to some sort of defined contribution plan,[47] and 64% of those active in an employer-sponsored plan have only

42. Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 60-62 (Brookings Papers on Econ. Activity, Working Paper No. 27193, May 2020), https://perma.cc/E57G-A2D7.

43. For evidence of consensus on this point, *see* these articles by diverse thinkers and organizations: Mai Chi Dao et al., *Drivers of Declining Labor Share of Income*, IMF BLOG (Apr. 12, 2017), https://perma.cc/9DP7-NENJ; James Manyika et al., *A New Look at the Declining Labor Share of Income in the United States,* MCKINSEY GLOB. INST. (May 22, 2019), https://perma.cc/3W8G-3Q6J; Michael W. L. Elsby, Bart Hobijn & Ayşegül Sahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECON. ACTIVITY (Fall 2013), https://perma.cc/M7EM-4HR7; Sangmin Aum & Yongseok Shin, *Why is the Labor Share Declining?*, 102 FED. RSRV. BANK OF ST. LOUIS REV. 413 (2020); Gene M. Grossman & Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 29165, August 2021), https://perma.cc/EDK6-94CL; Drago Berholt, Francesco Furlanetto, & Nicolò Maffei Faccioli, *The Decline of the Labor Share: New Empirical Evidence*, (Norges Bank Rsch., Working Paper No. 18, 2019), https://perma.cc/SKQ4-7BFG.

44. *Employed Full Time: Median Usual Weekly Real Earnings: Wage and Salary Workers: 16 years and Over*, FED. RSRV. BANK OF ST. LOUIS (last updated Apr. 16, 2025), https://perma.cc/7TDA-4TPH.

45. Makenzie Peake & Guillaume Vandenbroucke, *Worker Diversity and Wage Growth Since 1940*, 102 FED. RSRV. BANK OF ST. LOUIS REV. 1, 2 (showing that between 1940 and 1970 the average hourly wage grew by over 100%).

46. *The U.S. Retirement Market, Third Quarter 2024*, INV. CO. INST. (Dec. 19, 2024) https://perma.cc/8GMU-6P7A (showing retirement assets totaling to $42.4 trillion in Q3 2024; see tbl. 1).

47. David Zook, *How Do Retirement Plans For Private Industry and State and Local Government*

an employer-sponsored plan.[48] These plans are central to the wealth of American families: The median family with some retirement savings has 65% of their financial assets in their defined contribution plan.[49]

Our focus, though, is on another striking statistic: In 2022, the median net worth for families with some individual retirement savings was $442,900 compared with $47,450 for those without.[50] It is, of course, unsurprising that wealthier families would have higher retirement savings, but we argue that individual retirement savings accounts—and their associated tax subsidy—have become not merely the products of wealth inequality, but contributors to the phenomenon.

To provide context for these developments, it is helpful to briefly review the history of defined benefit pension plans.

After World War II, the economic security of Americans was substantially increased by not just the growth and stability of Social Security, but also by the increasing prevalence of private sector pension plans that promised workers a defined benefit after retirement.[51] Thus, for many working Americans, retirement came with not just social security but a pension, both of which supplemented their personal savings. Pension plans were, of course, not cost-free to workers, but they were hassle-free in the sense that workers did not have to decide to save a certain percentage of their salary or how to invest those savings. Rather, under defined benefit pension plans, employers assumed full responsibility for financing the plans that offered workers a promised payment upon retirement.[52]

Workers Compare?, U.S. BUREAU OF LAB. STAT. (Jan. 2023), https://perma.cc/7E3R-JXWD.

48. Craig Copeland, *The Status of American Families' Accumulations in Individual Account Retirement Plans: An Analysis of the 2022 Survey of Consumer Finances*, EBRI Issue Brief (Jun. 20, 2024) https://perma.cc/JUP4-RFKG.

49. *Id.*

50. *Id.*

51. Larry Polivka & Baozhen Luo, *The Neoliberal Political Economy and Erosion of Retirement Security*, 55 THE GERONTOLOGIST 183, 184 (2015). *See also* Patrick W. Seburn, *Evolution of Employer-Provided Defined Benefit* Pensions, BUREAU OF LAB. STAT., 114 MONTHLY LAB. REV. 16, 20 (1991).

52. This was true for approximately 94% of private defined benefit plans in 1988, 97% of plans in 1995, and remained consistent when surveyed again by the Bureau of Labor Statistics in 2006. *See* BUREAU OF LAB. STAT., EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE FIRMS, 1988 (Aug. 1989), https://perma.cc/HJX9-DGV6; BUREAU OF LAB. STAT., Bulletin 2496, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1995 (Apr. 1998), https://perma.cc/XN9V-FKFS; BUREAU OF LAB. STAT., EMPLOYEE BENEFITS SURVEY, 2006, https://perma.cc/PC4J-8HWW. In the other 3-6% of plans, employees were expected to contribute between 2-4% percent of their earnings. In some contributory plans, employees contributed nothing on earnings below the Social Security taxable wage base, and then a higher rate on earnings above that level. BUREAU OF LAB. STAT., Bulletin 2496, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1995 104 (Apr. 1998), https://perma.cc/XN9V-FKFS. Although there was, and continues to be, substantial heterogeneity in plan design, some key generalizations can be made about

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This system worked well at a time when the American economy had a hegemonic hold. But when that hold loosened as a result of greater international competition and other factors, the premises on which the American retirement systems was based were undermined. Declining union membership, rapid automation, periods of recession, corporate failures, downsizings, high and prolonged periods of unemployment all undermined the implicit promise that a good job at a good company meant lifetime employment.[53] With company failures and retirement plan design failures came pension promises that companies could not or would not honor.[54] When companies—plural—began to shirk or slight their obligations to pensioners, the stigma for other companies to do so diminished. Thus, by the 1980s, access to a secure pension for the many was at risk.[55]

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benefits calculations: For White-collar workers, plans were almost always integrated with earnings, and most plans used a terminal earnings formula, where benefits were calculated based on a combination of total years of service and average earnings over a subset of the last ten years of service. These plans typically had benefits integrated into Social Security. For blue-collar workers, formulas based on a fixed dollar amount per year of service were predominant, with an average of $28.47 a month per year of service in 1995. Blue collar workers were less likely to have benefits integrated with Social Security. BUREAU OF LAB. STAT., Bulletin 2496, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1995 3 (Apr. 1998), https://perma.cc/XN9V-FKFS. In contrast to these private plans, public pension plans have substantial contribution requirements, with a median contribution of 9.0% of pay for workers in public schemes not eligible for Social Security, and 6.3% for those eligible for Social Security. Contribution rates have also climbed higher since the Great Recession. *See* NASRA, NASRA ISSUE BRIEF: EMPLOYEE CONTRIBUTIONS TO PUBLIC PENSION PLANS (Nov. 2024), https://perma.cc/ABT2-KWE9.

53. Raven Molloy, Christopher L. Smith & Abigail Wozniak, *Changing Stability in U.S. Employment Relationships: A Tale of Two Tails*, 59 J. HUM. RES. 35, 46-48, 53 (2024) (examining the causes of declining long-tenure in prime working age men).

54. By way of example, ERISA was inspired in part by the failure of the Studebaker company and its pension program. *See* James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001). ERISA created the Pension Benefit Guaranty Corporation to deal with the reality of corporate pension schemes that were not adequately funded or were shirked in corporate bankruptcies, providing for indemnity insurance and government administration for failing plans. *See* 29 U.S.C. §§ 1301 – 1311. ERISA also had an unintentional impact on the long-term viability of defined benefit plans: it imposed an increased administrative burden on employers, which some argue resulted in the closure of many defined benefit pensions at smaller firms. *See generally* Robert L. Clark, Stephan F. Gohmann & Ann A. McDermed, *Declining Use of Defined Benefit Pension Plans: Is Federal Regulation the Reason?* (Dept. of Econ & Bus., N.C. State Univ. Working Paper No. 119, Apr. 1988); John H. Langbein, *ERISA's Role in the Demise of Defined Benefit Pension Plans in the United States*, 31 THE ELDER L. J. 1 (2023). *See also* ELLEN E. SCHULTZ, THE RETIREMENT HEIST: H HOW COMPANIES PLUNDER AND PROFIT FROM THE NEST EGGS OF AMERICAN WORKERS (2011).

55. By way of example 77,755 plans were terminated between 1980 and 1989, with 1,123 of those entering federal receivership. PENSION BENEFIT GUAR. CORP., *PBGC Terminations and Claims (1975-2022)*, https://perma.cc/BD47-3YFS.

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Coincident with and inspired in part by these changes came a push to replace defined benefit pension plans with a system that made workers more responsible for funding their own retirements on a basis that was not tied to employment at any particular firm.[56] This eventually led to the substantial growth of defined contribution plans, under § 401(k) of the U.S. Internal Revenue Code, which soon became the predominant form of retirement savings for American workers outside of Social Security.[57]

Under 401(k) plans, workers receive no guarantee of a particular payment upon retirement. Rather, under a 401(k) plan, a worker can invest a portion of her salary annually on a tax-preferred basis, so that no income tax is paid on that portion of the salary until the worker withdraws it upon retirement.[58] The worker has the

56. Portable retirements began in 1918, when the Carnegie backed Teachers Insurance and Annuity Association (TIAA) established the first portable annuity targeted at teachers, now known as the TIAA Traditional Annuity. In 1958, Congress enacted § 403(b) of the Internal Revenue Code (I.R.C.), regulating the annuity contract purchases and the TIAA became the largest provider of annuity contracts under § 403(b). TIAA, Comment Letter on Proposed Regulations on Multiple Employer Plan Relief (REG-121508-18) (Sep. 30, 2019), https://perma.cc/KDM3-J9VF. The drive for broader individual portability began with ERISA's authorization of Individual Retirement Accounts ("IRAs") for employees not covered by pension plans beginning in 1975. 26 U.S.C. §§ 219, 408, 410-415, 4971, 4974-4975; 29 U.S.C. §§ 1101-1114.

57. Contributory plans like defined contribution plans under § 401(k) predated ERISA but have grown exponentially since the 1980s. *See generally* Altman, *supra* note 7. Section 401(k) was intended to supplement, not replace, defined benefit plans. *See* S. DOC. NO. 99-313, at 549-550 (May 29, 1986) (". . . the committee believes that qualified cash or deferred arrangements should be supplementary retirement savings arrangements for employees; such arrangements should not be the primary employer-maintained retirement plan. Therefore, the committee believes that the extent to which employers can shift the burden of retirement saving to employees should be reduced. Moreover, the committee finds it necessary to restrict the extent to which employers can condition the receipt of other benefits on employees' elections to defer under a qualified cash or deferred arrangement. Another way of achieving this goal is to limit the number of employers that can maintain cash or deferred arrangements. Thus, the committee believes it is appropriate to make qualified cash or deferred arrangements unavailable to State and local governments which currently are permitted to maintain a similar kind of elective contribution arrangement."). Indeed, even the Reagan Administration was initially skeptical of 401(k) plans as inconsistent, and even inappropriate, with the rest of the tax code. U.S. DEP'T TREASURY, THE TREASURY DEPARTMENT REPORT TO THE PRESIDENT, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH 117 (Nov. 1984) ("Employees of employers that maintain qualified cash or deferred arrangements (401(k) plans) effectively can avoid the IRA limitations of current law by making additional deductible contributions to these plans. The Treasury Department believes that this disparity among individuals is inappropriate and thus, coupled with increasing the limits on IRAs, proposes to repeal the current provisons [sic.] that accord cash or deferred arrangements preferential tax treatment. Employers will be able to set up IRA plans for their employees, as under current law.").

58. James Choi, *Contributions to Defined Contribution Pension Plans* 2-3 (Nat'l Bureau of Econ.

responsibility of choosing, within certain parameters, how to invest her funds from a menu of investment choices provided by her employer.[59] Employers can help workers save, of course. One way is by paying higher salaries, which gives workers more room to save. The other, is providing a direct or matching contribution on behalf of the worker to the plan itself.[60]

The latter approach was subsidized by taxpayers generally. Up to annual thresholds set by federal law, contributions to 401(k) plans by workers or employers on behalf of their workers are exempt from current federal and state taxation.[61] Any taxation on the funds is deferred until withdrawn by the worker for use after retirement (or hitting age 59½), investment appreciation on the funds is not subject to capital gains tax, and the worker pays the income tax rate they face post-retirement, which will often be lower than when they were working. For many decades now, the cost of these subsidies have been among the largest tax expenditures in the federal budget.[62]

The cost to taxpayers of 401(k) tax subsidies has also grown as annual contribution limits have been raised. After a major tax reform effort in the late 1980s, the annual

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Rsch. Working Paper No. 21467, Aug. 2015). Initially, the pre-tax status of elective contributions under § 401(k) was unclear at the state and local level, as well as to Social Security and Federal Unemployment Tax. *See* John H. Appel, *Proceedings from the 1984 Tax Institute Symposium: Cash or Deferred Arrangements Under I.R.C. Section 401(k)*, 2 AKRON TAX J. 183, 195 (1984). Elective contributions are now broadly accorded pre-tax status at the state and local level, with some notable exceptions, e.g., Pennsylvania and local taxes in Ohio. *See PA Personal Income Tax Guide: Gross Compensations,* COMMONWEALTH OF PA DEP'T OF REVENUE, https://perma.cc/6YQT-H66P.

59. Veronika K. Pool, Clemens Sialm & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71 J. FIN. 1779, 1785 (2016).

60. Employer support for matching contributions is not only a pro-worker policy. To satisfy the IRS non-discrimination test, the degree to which the contributions of highly compensated employees can exceed non-highly compensated employees is limited. Thus upper and middle management has a structural incentive to promote participation, to ensure they too can reap the full tax benefits of their 401(k) plans. Choi, *supra* note 58, at 5.

61. I.R.C. § 402(g).

62. In 2016, the estimated cost was $177.9 billion, approximately 0.96% of GDP. In 2022, the Department of the Treasury estimated the tax expenditure to be over $195 billion. U.S. GOV'T ACCOUNTABILITY OFF., *Older Workers*, *supra note* 1, at 1. *See also* Altman, *supra* note 7, at 436 n. 4 (showing that as of the mid-1980s, ERISA-provided tax benefits were the largest tax expenditures, being $79 billion in 1986); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-118SP, THE NATIONS RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION IS NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY 86 (2017) (noting that in 1975, tax incentives for retirement savings cost the federal government $5.6 billion annually, roughly 0.33% of national GDP); Eric Toder, Surachai Khitatarkun & Aravind Boddupatti, *Tax Incentives For Retirement Savings*, TAX POL'Y CTR., URB. INST. & BROOKINGS INST. (May 11, 2020), https://perma.cc/98NU-FT7L ("The tax law provisions that subsidize saving in tax-qualified retirement plans add up to one of the largest tax expenditures in the federal income tax.").

contribution limit for a worker to receive tax advantaged treatment was $7,000.[63] Over time, that limit has been raised substantially, because it is tied to inflation, and now stands at $23,500 per year.[64] (For those over fifty, the total 2025 limit is $31,000, and for those ages 60-63, it is $34,750.[65]) Saving at these increased limits is only feasible for affluent workers, with salaries sufficient for them to put aside this substantial sum per year out of their salary.[66]

The cost of these tax subsidies is substantial. The U.S. Treasury Office of Tax Analysis estimates the size of tax expenditure for defined contribution retirement plans to be $134 billion in 2023.[67] Behind the non-taxation of health insurance benefits, this is the largest tax expenditure in the Federal budget. In enacting such plans, Congress was not indifferent to the distribution of this benefit across income levels. As outlined in the next Part, from the very beginning—and well before ERISA—tax-preferred retirement savings vehicles were subject to restrictions designed to promote the equitable distribution of benefits.

C. SECURE Act (2019) and SECURE 2.0 Act (2022)

Recent legislation, notably the SECURE ACT and SECURE 2.0, has changed the retirement saving landscape for the better, although the acts do not go far enough, in our view.[68] Among the most notable attributes of SECURE 2.0 and SECURE: auto-enrollment of all employees in *new* 401(k) plans; the extension of 401(k) plans to part time employees who work at least 500 hours a year for two consecutive years (beginning in 2025); and Saver's Match.[69] In the Saver's Match program, the government will contribute a 50% match on the first $2,000 contributed to an employee's 401(k) annually, beginning in 2027.[70] An employee who contributes $2,000 will receive $1,000 government match.[71] An employee who contributes $500 will

63. Sarah Holden, Peter Brady & Michael Hadley, *401(k) Plans: A 25-Year Retrospective*, 12 INV. CO. INST. RSCH. PERSP. 1, 10 (2006), https://perma.cc/N98X-WFER.

64. I.R.C. § 402(g).

65. *Retirement Topics – Catch-up Contributions,* INTERNAL REVENUE SERV. (Aug. 19 2024), https://perma.cc/C8BB-R6LM.

66. Benjamin Guggenheim, *'The 401(k) Industry Owns Congress': How Lawmakers Quietly Passed a $300 Billion Windfall to the Wealthy*, POLITICO (Apr. 13, 2024), https://perma.cc/5JF6-DK35.

67. U.S. DEP'T OF THE TREASURY OFF. OF TAX ANALYSIS, TAX EXPENDITURES 24-26 (Mar. 11, 2024), https://perma.cc/5PSP-RN7J.

68. *See* Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534; SECURE 2.0 Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459.

69. *See* Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534; SECURE 2.0 Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459.

70. SECURE 2.0 Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459.

71. *See* SECURE 2.0 Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459.

receive a $250 match.[72] That formula applies to any contributions below the $2000 statutory cap.

There is much to celebrate in these reforms. In particular, the inclusion of part-time employees is a major step forward.[73] But the Saver's Match program is underpowered. The matching contributions are only half the employee contribution, and employees must still find a way to save in order to benefit at all. As we will explain further, given the many Americans without sufficient income to devote funds to retirement savings, providing an unconditional contribution that is not dependent on employee savings is critical. Still, we think SECURE 2.0, if nothing else, demonstrates that there is bipartisan interest in making 401(k) plans work better for the many, not just the few. Consistent with this shared objective, we advocate further reforms to push the benefits of existing tax expenditures down the income ladder.

D. Non-Discrimination Rules: The Basics

The principle of non-discrimination in retirement plans predated the passage of the Employee Retirement Income Security Act of 1974 ("ERISA") and relevant Internal Revenue Code provisions, which govern those plans today. The principle was previously enunciated by President Franklin D. Roosevelt in connection with The Revenue Act of 1942, legislation aimed at raising government revenues in support of America's World War II efforts.[74] Numerous Congressional hearings were held targeting various tax and other loopholes.[75] President Roosevelt indicated his concern that highly-compensated workers were using retirement funds to avoid taxes, articulating the principle of non-discrimination–that the tax code should not be used to discriminate in favor of highly-compensated employees.[76] This non-discrimination principle made its way into the tax code provisions governing retirement plans and is now purportedly implemented via the "non-discrimination rules", four ways of testing 401(k)s to assure compliance, plus a safe harbor.[77] Thus, even before ERISA and relevant tax provisions were codified, there was concern about the regressive nature of tax-subsidized retirement savings, and the potential for most of that tax benefit to flow to those who need it least: highly-compensated employees. The non-

72. *See* SECURE 2.0 Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459.
73. *See* Gary J. Gunnett, *Secure 2.0 Act of 2022 Makes Sweeping Retirement Plan Changes*, HOUSTON HARBAUGH, P.C. (Jan. 5, 2023), https://perma.cc/K63T-RVXL.
74. We aim here to provide a bit of background on non-discrimination. This is not a work of legal history and we have not endeavored to track down the origins of the principle.
75. *See* Altman, *supra* note 7, at 450.
76. *See Tax Evasion and Avoidance: Hearings Before the Joint Comm. on Tax Evasion and Avoidance,* 75th Cong., 1st Sess. 2-7 (1937); *see also* Altman*, supra* note 7, at 450-51.
77. DAVID COWART & GRETA E. COWART, BENDER'S FEDERAL INCOME TAXATION OF RETIREMENT PLANS § 5.08 (2025).

discrimination rules were supposed to solve that problem.[78] They have failed to do so. Here, we offer a high-level description of how they work.

At their core, the non-discrimination rules involve two steps, each conducted on a firm-by-firm basis. First, the firm must establish which of its employees are considered "highly compensated" for purposes of comparing them to the unartfully-named "non-highly compensated."[79] Once this determination is made, the plan sponsor must compare the benefits offered to highly-compensated and non-highly compensated employees. These benefits need not be identical, but they must fall within purportedly limited ranges of difference in order to pass the non-discrimination tests.

In our view, these nondiscrimination rules have several key flaws. First, the test is done at the firm level, on a firm-by-firm basis. Second, there is far too much flexibility around defining who is and is not highly-compensated. Third, the available tests themselves actually embed discrimination: They formally permit companies to offer higher tax-subsidized benefits to highly-compensated employees as long as those higher benefits are cabined within certain limits. Both frontally and through the back door, they embed a principle of discrimination, not non-discrimination. In our view, the rules might be more accurately be described as discrimination rules. The best that can be said of them is that they attempt to cap the quantity of discrimination. Our proposal dispenses with most of the current non-discrimination process in favor of clearer mandatory policies that benefit many more American workers on a more equitable basis.

1. Manipulating Who is Highly Compensated

Even before conducting their non-discrimination tests or opting for a safe harbor, plan sponsors have flexibility in making a key determination: Who is a highly-compensated employee ("HCE")?[80] The purpose of making that determination is for the plan sponsor to implement the four non-discrimination tests, which compare the benefits offered to highly-compensated employees against the benefits to non-highly-compensated employees. As long as the benefits offered to highly-compensated employees differ within a purportedly narrow range from those offered to non-highly compensated employees, the plan sponsor's 401(k) passes the non-discrimination test and is, therefore, entitled to tax-favorable treatment. In turn, plans that flunk non-discrimination, fail to cure, and fail to qualify for the safe harbor are disqualified from

78. *See* Title-Xi pensions and Deferred Compensation; Employee Benefits; Employee Stock Ownership Plans (ESOPS), 1987 WL 1364658, at *1.

79. *See* 26 U.S.C. § 414(q).

80. *Id.*

the tax benefit.[81] That means contributions cannot be made to the fund tax free and that capital gains in the fund are taxed.

Consider one way that employers can manipulate the HCE calculus: by limiting the benefit to the Top Paid Group.[82] The Top Paid Group election limits HCEs to only those in the top 20% when ranked by compensation.[83] Making the top paid group election can be beneficial to employers who have many employees who are compensated over a numerical limit, set annually. (The amount for 2024 was $155,000.[84])

For example, associate compensation at large law firms greatly exceeds $155,000 annually. According to one recent report, 2024 biglaw compensation started at $251,000 for first-year associates, rising to $575,000 for eighth-year associates.[85] If the firm makes the top paid group election, the most highly compensated firm partners will fall into the top paid group, enabling the firm to categorize these associates—who are highly compensated by almost any metric—as NHCEs. Thus, if the firm offers the same or similar tax deferred retirement benefits to partners and associates, the firm's 401(k) can pass the non-discrimination test, even if that plan offers little meaningful benefit to lower-paid employees like secretaries or paralegals. Once a firm establishes who counts as a HCE, they must conduct annual non-discrimination testing to prevent the plan from discriminating in their favor. A plan sponsor may also choose to design their plans as a safe harbor or SIMPLE plan to avoid certain non-discrimination tests.[86]

A detailed discussion of the ins and outs of the nondiscrimination rules is not necessary to demonstrate their failures. Instead, we briefly note how they in fact operate in a discriminatory manner rather than accomplish their supposed goal of eliminating discrimination in favor of more affluent workers. Consider how several aspects of the nondiscrimination rules tolerate discrimination. The "Coverage" test requires that 70% of the non-highly compensated receive the same benefit as the highly-compensated, clearly leaving room for many NHCEs not to receive the same level of benefits.[87] A component of the "Contributions Test" requires that "The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 1.25" and "The excess of the actual deferral percentage for the group of eligible highly compensated employees over that of all other eligible employees is not more than 2

81. *401(k) Plan Fix-it Guide—The Plan Failed the 401(k) ADP and ACP Nondiscrimination Tests*, IRS, https://perma.cc/E29K-5B9Q.

82. I.R.C. § 414(q)(1)(B)(ii).

83. COWART & COWART, *supra* note 77.

84. *Retirement plans definitions*, IRS, https://perma.cc/QD25-EPVQ.

85. Paul Caron, *BigLaw Associate Compensation Soars To $251k For 1st Years, $575k For 8th Years*, TAXPROF BLOG (Nov. 24, 2024), https://perma.cc/PZ9V-AC5J.

86. *401(k) Plan Fix-It Guide – 401(k) Plan – Overview*, IRS, https://perma.cc/HM9M-WZUZ.

87. I.R.C. § 410 (b)(1)(A-C).

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percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 2."[88] Here, too, the rules permit discrimination.

The Top-Heavy Plan test triggers remedial measures if more than 60% of the plan's total assets are for "key employees."[89] (This suggests that a plan that allocates 59.4% of its assets to key employees does not violate non-discrimination). Thus, each of these tests permit discrimination on their face. A plan may avoid even these sharply unequal tests by creating a safe harbor plan. Such plans come in three flavors: (1) The employer can make a non-elective contribution equaling 3% of compensation for each NHCE; (2) the employer can match 100% of NHCE elective contributions up to 3% of compensation and half of NHCE elective contributions from 3% to 5% of compensation; or (3) an enhanced match whose complexity is unnecessary to describe here but that is capped at 6% and a percentage match for HCEs that does not exceed that for NHCEs.[90] By definition, even under these safe harbors, highly-compensated employees receive a higher tax-subsidized benefit, not only because they have higher compensation, but because they are in a better position to make sufficient contributions to earn the match.

The nondiscrimination rules and the safe harbor are far more complex and nuanced than described here. We offer this high-level overview to give the reader a flavor for how they work. The bottom line is that the non-discrimination rules permit discrimination on their face, as does the safe harbor. Unsurprisingly, the data show that 401ks are deeply regressive.

II. RETIREMENT PLANS EXACERBATE WEALTH INEQUALITY

It is perhaps unsurprising that, in a nation where income inequality is profound and rising, retirement savings would also be unequal. But our retirement system is not just inequality in, inequality out. It is itself regressive. In fact, our current 401(k) system is so tilted in favor of the wealthy that if all defined contribution plans were treated as a single plan, they would fail the non-discrimination test or the relative contribution of highly-compensated employees.

There is no better indication that our system is failing than that the system in aggregate fails the rules that Congress set out to ensure fairness—rules so lax that they present little problem of non-compliance for employers whose plans allocate most of their benefits to high-income employees. In this Part, we explore the roots of these failures.

88. I.R.C. § 401 (k)(3)(A)(ii)(I-II).

89. I.R.C. § 416 (g)(1)(A)(i-ii).

90. *401(k) Plan Fix-It Guide – 401(k) Plan – Overview*, *supra* note 86.

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A. The Empirical Evidence Shows that 401(k) Plans Work Poorly for the Many, and Are Tilted to the Advantaged Few

The nature of 401(k) plans made certain realities more piquant. First, although many defined benefit plans tied the pension in some formulaic way to the worker's underlying salary, defined contribution plans called on workers themselves to carve out a percentage of their salary and put it aside.[91] There was no default requirement in favor of savings that one would have to accept (as was true in a defined benefit pension program where non-participation was not an option), and instead a requirement that the worker decide to do so.[92] This made more modestly paid workers choose between money now, when money was not plentiful, or putting it aside for some more distant need.

Second, a worker's decision to put money aside was not a guarantee of a future payment stream. Rather, it was simply a decision to invest the contributions for the long term in investments from an employer-selected menu and to hope that the investment results would be favorable. Because different employers provide different choices of different quality, as well as differences in terms of the investment advice and support made available, American workers (many of whom lack financial literacy) can end up making suboptimal choices in many possible directions.[93] Plus, the mere need to make unfamiliar decisions itself acts as a discouraging factor.

Third, Section 401(k) has also been touted as being more portable and, thus, fitting an economy whose workers are more likely to work for many employers and where there is no guarantee of life-time employment. But Section 401(k) permits employers to use lengthy vesting schedules for any employer contributions that were common in defined benefit plans effecting a lifetime benefit. The evidence is that using these schedules in 401(k) plans in today's economy where turnover is higher hurts lower wage employees who are more likely to work in jobs that do not involve lengthy years of employment for one employer.[94]

91. *See FRED Economic Data: Real Gross Domestic Product*, supra note 41.

92. *The Automatic 401(k): A Simple Way to Strengthen Retirement Savings*, BROOKINGS (Mar. 2005), https://perma.cc/VZ4M-P749.

93. *See generally* Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741 (2019); Jill E. Fisch, Tess Wilkinson-Ryan & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 DUKE L. J. 633 (2016); Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 U. PA. L. REV. 605 (2014); Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71 (2002). *See also* Pool, Sialm & Stefanescu, *supra* note 59, at 15 (concluding that 401(k) service providers show significant favoritism to their affiliated funds resulting in "significant subsequent negative abnormal returns for participants in those funds").

94. Samantha J. Prince et al., *The Effects of 401(k) Vesting Schedules—in Numbers*, 134 YALE L. J. F. (Apr. 21, 2024) (manuscript at 25-26) (showing that since 2018 in the plans studied, more

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Finally, to the extent that worker pay stagnates at the lower and middle levels, the ability of typical workers to use Section 401(k) effectively to have a secure retirement becomes more doubtful.

When facing the difficulty of paying bills and the seemingly small prospects that regular contributions of small amounts will build real wealth, a worker might rationally give weight to the here and now. That might also be even more true if the principal subsidy for retirement savings is the avoidance of immediate taxation, a benefit that might mean less to the lower paid (and lower taxed). And if Black or Hispanic Americans are more likely to be modestly paid because of the effects of long-standing discrimination, this will be even more true for them on average.

The empirical outcomes from an American retirement system that shifted from defined pension plan to a predominately 401(k) based system reflect these realities. As a comprehensive Government Accounting Office study shows:

- participation rates in 401(k) plans is far lower among lower and middle income workers than high income workers;
- participating lower and middle income workers contribute a far lower percentage of their pay than high income workers;
- the effect of increasing annual contribution limits almost entirely benefits high income workers, not middle or low income workers, who typically contribute nothing close to the annual contribution limit;
- 60% of the tax expenditures incurred by the federal government as a result of 401(k) tax subsidies went to households in the top 5th in income of American households;
- Employers contribute much more to higher income employees — on average $5,000 per year—than to lower income employees—on average only $1,300.[95]

Consistent with these findings was the resulting wealth distribution of 401(k) retirement savings for American workers. According to the Government Accountability Office ("GAO"), the median high-income worker had 401(k) savings of $605,000 in 2019 while the median middle-income worker had savings only $64,300.[96] For low-income workers, the situation was even more dire, with 90% of low-income workers having no savings.[97]

than 1.2 million workers had been adversely affected by long vesting schedules, which in 2022 alone was a loss of more than $1.5 billion in contributions).

95. U.S. GOV'T ACCOUNTABILITY OFF., *Older Workers*, *supra* note 1, at 10-11, figs. 3, 19, 32, 15, 19.

96. *Id*. at 15.

97. *Id*. at 1, 10-11 fig. 3.

These outcomes were even more disparate for Black Americans. According to the Survey of Consumer Finances in 2022:

- Only 34.8% of Black households had retirement account balances, compared to 61.8% of White households;
- Of those Black households with balances, the median balance was $39,000, compared to the White median of $100,000;
- The disparities in savings largely tracked median income disparities, with Black households making $46,100 compared to $90,700 for White households.[98]

An incisive study commissioned by Vanguard,[99] a market leader in the provision of 401(k) plans to employers, points to employer matching programs as a partial culprit in the inequality in the system: The study documents that a supermajority of U.S. employers who have a defined contribution plan offer matches of some kind and that employers contributed $212 billion, or "roughly 58 cents for every dollar that participants saved."[100] The study finds that the median employer spends 3.8% of its compensation dollars on defined contributions for employees, and that the top 75% of employers spend 6.1% of their compensation dollars for that same purpose.[101] But the study found that "[e]mployer contributions . . . disproportionately accrue to those with higher incomes, White workers, those with more access to liquid wealth, and those with richer parents . . ."[102] It further goes on to show that in two-thirds of the plans, "employer contributions exacerbate[d] pay inequity."[103] Higher paid employees

98. BD. OF GOVERNORS OF THE FED. RSRV. SYS. FED. RSRV., SURVEY OF CONSUMER FINANCES (2022). *See also* U.S. GOV'T ACCOUNTABILITY OFF., *Older Workers*, *supra* note 1, at 15, 16-17, 21; *Breathe Easy — How Guaranteed Retirement Accounts Could Change Your Life — A Primer on GRAs and How They Work*, ECON. POL'Y INST. (June 12, 2019), https://perma.cc/46GR-XYCY (noting that a majority of Black families, 59%, have no retirement savings, and among those with savings the median amount saved is $29,200 compared to $79,500 for White non-Hispanic families); Teresa Ghilarducci, *Guaranteed Retirement Accounts: Toward Retirement Income Security*, ECON. POL'Y INST. (Mar. 3, 2008), https://perma.cc/U3E3-SK8K (citing CHRISTIAN WELLER & EDWARD N. WOLFF, RETIREMENT INCOME: THE CRUCIAL ROLE OF SOCIAL SECURITY (2005), which found that more than 56% of Black Americans facing retirement had expected retirement incomes below twice the poverty level).

99. Greig et al., *supra* note 5. Authors Fiona Greig and Anna Madamba are from Vanguard; Guillermo Carranza and Cormac O'Dea are from the Yale Tobin Center for Economic Policy, Taha Choukhmane and Lawrence D.W. Schmidt are from the Massachusetts Institute of Technology's Community and Equity Office.

100. *Id.* at 2.

101. *Id.* at 15.

102. *Id.* at 2.

103. *Id.* at 5-6. The Vanguard study harmonizes with an important study illuminating how longstanding wealth inequality contributes to the bias of 401(k) plans in terms of their

received a share of employer contributions 11% larger compared to lower paid employees.[104] Indeed, most employer contribution dollars flow to the typically higher end workers who "contribute above the cap on matching. These workers do not receive matching dollars for additional savings (beyond the cap), so the match does not create a financial incentive for them to save more."[105] This evidence is consistent with our prior conclusions that the non-discrimination rules, as now formulated, fail to accomplish this stated purpose.

But the Vanguard study identified another problem: Many modestly paid workers do not even take advantage of employer matches when they are available. Thus, the study found that many workers were not contributing at all (22%) even with the possibility of a match, and many others were not contributing up to the full match level (another 24%).[106] Thus, the study concludes:

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effect on racial inequality. This is perhaps because Professor Choukhmane was an author of both studies. *Compare* Choukhmane et al., *supra* note 103 *with* Taha Choukhmane et al., *Who Benefits from Retirement Savings Incentives in the U.S.? Evidence on Racial Gaps in Retirement Wealth Accumulation* (FDIC Consumer Rsch. Symp. Conf. Paper, Nov. 2024), https://perma.cc/V5DK-HRPK [hereinafter Choukhmane et al., *Who Benefits?*]. Choukhmane shows that the empirical evidence underscores another reason that explains the current racial tilt of savings patterns. Because of existing wealth inequality, Black Americans are more vulnerable to labor shocks and circumstances that might demand cash on hand. By way of example, Black Americans are less likely than White Americans to have parents who are affluent and can provide them with support if needed in a cash crunch, and more likely than White Americans to have to provide economic support to their parents. Choukhmane et al., *Who Benefits?*, at 4, 6-7 (noting that parental backgrounds negatively affect the racial contribution gap). When a younger worker's parents have assets and can backstop that younger worker, the younger worker is better positioned to put money into a retirement account than someone who does not have that backstop. Likewise, if instead of providing support for a worker, the worker's parents are in fact dependent on that worker, the worker is less able to save because she needs more of her paycheck not just to provide for her and her children, but to provide for the prior generation. Choukhmane et al., *Who Benefits?*, at 6-7, ("Black individuals are both more likely to *provide* support to their parents and less likely to *receive* support from their parents than White individuals"). When these effects of generational wealth inequality combine with the reality that Black Americans are still more likely to have lower wages than White Americans, they put strong downward pressure on the ability of Black Americans to save and thus build retirement wealth. Choukhmane et al., *Who Benefits?*, at 11-12. And because federal retirement policies favor workers with higher incomes, and because those with higher parental wealth are more likely to save, the greater likelihood that White Americans enjoy these benefits means that they are more likely to be able to grow their wealth. Taken together, the historical wealth disadvantages that still hamper Black people, on average, and the historical wealth advantages that still benefit White people, on average and in comparison, exacerbate racial wealth inequality, rather than ameliorate it.

104. Greig et al., *supra* note 5, at 11.

105. *Id.*

106. *Id.*

> To sum up, if the primary goal of a match formula is to create incentives for employees to contribute more, our findings suggest that, for most workers, the incentives that current matching formulas create are not effective. Put differently, for the majority of workers, reducing the generosity of the match may not translate into lower incentives for employee contributions.[107]

Perversely and of great importance from a policy perspective, the study notes that many match plans that are regressive are tailored to put them into a regulatory safe harbor under ERISA's non-discrimination rule, as discussed above.[108] That is, designs that are regressive qualify and have the upside-down effect of exempting employers from non-discrimination testing.[109]

As virtually all the empirical research shows, the current American retirement system fails to help low-income workers save for a secure retirement. Instead, the status quo channels tax subsidies to the most advantaged of American workers, exacerbating rather than closing the wealth gap.

B. Measuring the Problem

As the findings above suggest, in many plans, the distribution of benefits doesn't just favor the well-off, but does so to a degree that is disproportionate to their salaries. That is, the plan structure actually exacerbates the disparity between the best paid employees and other company workers. This Subpart attempts to quantify this inequality using data from a broad sample of retirement plans to evaluate the distribution of benefits in various scenarios.

1. The System-Wide Distribution of Benefits

Who benefits from the defined contribution tax expenditure? The U.S. Treasury Department of Tax Analysis publishes a breakdown of the relative proportion of the tax benefit that goes to each decile of earners.[110]Although the Treasury reports the results as percentages of income, it is straightforward to compute the median dollar value of benefit for each decile of income. The resulting table is below:

107. *Id.* at 13.
108. *Id.* at 18.
109. *Id.*
110. U.S. DEPT. OF THE TREASURY OFF. OF TAX ANALYSIS, RETIREMENT SAVINGS 2017 (2017), https://perma.cc/KW5V-TNHS.

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Table 1: Present Value of Tax Benefits for Retirement Savings as a Share of After-Tax Income

Family Size Adjusted Cash Income Percentile	Traditional Defined Contribution Plans and Accounts (%)	Midpoint Salary	Benefit Value
0 to 10	0.01	$5,451.00	**$0.55**
10 to 20	0.02	$13,533.50	**$2.71**
20 to 30	0.08	$18,939.00	**$15.15**
30 to 40	0.15	$25,233.00	**$37.85**
40 to 50	0.26	$33,134.50	**$86.15**
50 to 60	0.37	$42,948.50	**$158.91**
60 to 70	0.52	$54,740.50	**$284.65**
70 to 80	0.75	$70,799.50	**$531.00**
80 to 90	1.08	$98,861.50	**$1,067.70**
90 to 95	1.25	$141,298.50	**$1,766.23**
95 to 99	1.14	$272,372.00	**$3,105.04**
99 to 99.9	0.62	$1,056,767.50	**$6,551.96**

Note: Adapted from US Department of the Treasury Office of Tax Analysis, *Retirement Savings 2017* (reflects 2017 income data and policy)

Expressing the value in dollars is striking. For the lowest earners, the tax benefit is essentially worthless, while it amounts to thousands of dollars for the wealthiest. By this measure, more than half of the value of the tax benefit accrues to those in the top decile of income.

At least some of this result is driven by the lack of access to plans for many of the poorest in the economy, but the problem is not limited to that group. A recent study of gaps in retirement savings correlates data from across several sources for different age, income, and racial groups.[111] The sample consists of those with some access to plans, and this data can be used to show that the defined contribution system collectively would fail to comply with the non-discrimination rules. Consider the following table of employer and employee contributions as a percentage of salary, drawn from data in Choukhmane et al.[112]

111. Choukhmane et al., *Who Benefits?*.

112. *Id.* at 48 tbl. 2.

Table 2: Employer and Employee Plan Contributions by Income Percentile

Income percentile	Deferral Pct	Employer Pct	Total
0 TO 10	1.06%	0.56%	1.62%
10 TO 20	1.56%	0.90%	2.46%
20 TO 30	2.18%	1.27%	3.45%
30 TO 40	2.68%	1.53%	4.21%
40 TO 50	3.16%	1.75%	4.91%
50 TO 60	3.66%	1.92%	5.58%
60 TO 70	4.19%	2.11%	6.30%
70 TO 80	4.88%	2.32%	7.20%
80 TO 90	5.87%	2.67%	8.54%
90 TO 100	5.90%	2.98%	8.88%

One of the nondiscrimination rules, the Contribution Test, requires that the contributions from highly-compensated employees as a percentage of income not exceed the greater of 1.25 times the non-highly compensated or the non-highly compensated rate plus 2 percentage points, both for the employee contribution, and the total contribution net of match.[113] If we treat the data above as a single plan, the top two deciles (roughly the high-compensated employees) are contributing an average of 8.71% after match and 5.89% pre-match. The bottom 80% are contributing 4.47% and 2.92% respectively. These relative contributions would be impermissible in a single plan, under the Contribution Test.

The point is worth emphasizing. Our system is failing so egregiously to fairly distribute benefits, that—taken as a whole—it would fail the non-discrimination norm that Congress has held plans to since the inception of the system.

2. Evaluating the Impact of Employer Matching Programs

To give a concrete baseline to evaluate the impact of various policy choices, consider the following simplified example designed to illustrate how the benefits of the 401(k) tax expenditure might be distributed at a firm where the compensation structure of employees matches the nation as a whole. To estimate the net present value of the 401(k) tax break and employer matching contributions at different income

113. I.R.C. § 401(k)(3)(A)(ii).

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levels,[114] we use the salary data and savings rates from Choukhmane et. al. and apply some simple matching approaches.[115]

Consider the simplest example, where all employees contribute 6% of income. In Table 3 we compute the tax benefit by income level. Because those making less than $47,000 owe no capital gains tax, any tax benefit from saving in a 401(k) plan must come from being in a lower bracket at retirement. We assume income will be the same in retirement and twenty-years before, essentially offsetting potentially lower income needs in retirement with likely increase in salary over twenty-years of work. Thus, for those below the median, there is no tax benefit. Although the Treasury calculations find some tax benefit for below-median earners, the numbers are fairly low, so our simplified model tracks Treasury's findings. The results of these calculations are in Table 3 below.

The last three columns of the table examine the share of benefits and income attributable to each income decile. Because each decile contains the same number of individuals, an equal distribution would allocate 10% of the value to each decile. As noted above, our focus is on the degree to which defined contribution accounts contribute marginally to *additional* inequality. Thus, we compare two measures: The percent of the total retirement benefit, and the percent of total income for each decile. The difference between the two allocations is in the final column of the table. Negative (red) values indicate a decile whose share of the retirement benefits is smaller than the income percentage, positive (green) values show retirement benefits larger than the income percentage.

As can be seen from the table, in a world where every worker with access to a plan saved 6% of salary, 40% of the benefit of 401(k) plans would accrue to the top 10% of earners. For the top four deciles, retirement benefits outpace their already high percentage of total income. Thus, these tax benefits are substantially regressive, even relative to the income distribution. This analysis therefore provides a benchmark for comparing other scenarios. Note the strong connection between income and the distribution of benefits. Every income decile above the median gets a disproportionate share of value, with the share rising monotonically as income increases for the top four deciles.

114. We assume a 20-year retirement horizon and measure the benefits of the defined contribution tax break by comparing the net present value of the retirement account to a non-tax advantaged account assuming 6% returns and income and capital gains tax rates based on current salary. We assume maximal capital gains tax efficiency, so that all gains are taxed at retirement. To be clear, these are simplified assumption, but since the goal is to produce a breakdown of benefits for comparative purposes, these assumptions are reasonable for that purpose.

115. Choukhmane et al., *Who Benefits?*.

Table 3. Distribution of Benefits Across All Plan Participants Assuming Equal Participation

Income Percentile	Salary	Savings Rate	Savings	NPV Difference	% of Total Benefit	% of Total Income	Relative Pct
0 TO 10	$13,019	6.00%	$781	$0	0.0%	2.2%	-2.2%
10 TO 20	$15,064	6.00%	$904	$0	0.0%	2.6%	-2.6%
20 TO 30	$27,890	6.00%	$1,673	$0	0.0%	4.7%	-4.7%
30 TO 40	$34,776	6.00%	$2,087	$0	0.0%	5.9%	-5.9%
40 TO 50	$41,962	6.00%	$2,518	$0	0.0%	7.1%	-7.1%
50 TO 60	$50,301	6.00%	$3,018	$0	0.0%	8.5%	-8.5%
60 TO 70	$60,477	6.00%	$3,629	$425	15.0%	10.3%	4.8%
70 TO 80	$74,426	6.00%	$4,466	$522	18.5%	12.6%	5.9%
80 TO 90	$97,683	6.00%	$5,861	$686	24.3%	16.6%	7.7%
90 TO 100	$174,068	6.00%	$10,444	$1,191	42.2%	29.5%	12.7%

We next consider more realistic savings rates. The above table understates the degree of regressivity because many low-income individuals—who need more of their lower incomes just to make ends meet—save at lower rates than higher income individuals. If we plug realistic savings rates into the table, we get the following distribution of benefits which is even more regressive than the baseline case. Table 4 shows the results, again calibrating the calculation using the data from Choukhmane et al.[116] The results show how the lower capacity to save and generous capital gains tax treatment of low-income employees skews the tax benefit toward the highest compensated employees.

These two examples focus solely on the government-provided tax benefits associated with a 401(k) plan, but most employers offer some sort of matching program,[117] and the Vanguard study suggests that these are highly regressive as

116. *Id.* at 48 tbl. 2.

117. *67th Annual 401(k) Survey*, PLAN SPONSOR COUNCIL OF AM., https://perma.cc/GTR5-MRA8.

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well.[118] There is an extensive array of matching approaches but consider the most common form: Matching 50% of contributions up to 6% of income.[119]

Table 4. Distribution of Benefits Across All Plan Participants Assuming Realistic Savings Rates

Income Percentile	Salary	Savings Rate	Savings	NPV Difference	% of Total Benefit	% of Total Income	Relative Pct
0 TO 10	$13,019	1.06%	$138	$0	0.0%	2.2%	-2.2%
10 TO 20	$15,064	1.56%	$235	$0	0.0%	2.6%	-2.6%
20 TO 30	$27,890	2.18%	$608	$0	0.0%	4.7%	-4.7%
30 TO 40	$34,776	2.68%	$932	$0	0.0%	5.9%	-5.9%
40 TO 50	$41,962	3.16%	$1,326	$0	0.0%	7.1%	-7.1%
50 TO 60	$50,301	3.66%	$1,841	$0	0.0%	8.5%	-8.5%
60 TO 70	$60,477	4.19%	$2,534	$296	11.6%	10.3%	1.3%
70 TO 80	$74,426	4.88%	$3,632	$425	16.6%	12.6%	4.0%
80 TO 90	$97,683	5.87%	$5,734	$671	26.2%	16.6%	9.6%
90 TO 100	$174,068	5.90%	$10,270	$1,171	45.7%	29.5%	16.2%

That approach generates inequality in two ways. First, the 6% cap means that high income employees can match a higher dollar amount than low-income employees. Second, the ability, and thus propensity of high earners, to defer more compensation means that they will typically match a higher percentage of their income than lower earners. Table 5 presents the distribution of benefits with an employee match program.

A typical employee match program, as applied to our whole-labor-force example, is regressive. About 37.7% of the value of the match would go to the top 10% of earners, and for the top three deciles, the benefit of the match would be disproportionate to their salaries. Importantly, this type of match is encouraged by the non-discrimination rules. So long as the *offered* match is calibrated as a proportion of employee salaries, employers are insulated from concerns about the actual use of that match be employees. Although a plan with a match is less regressive than the raw tax benefits

118. Greig et al., *supra* note 5, at 10.

119. *Id.* at 4.

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(it is hard to be more regressive than offering zero value to the lowest deciles) it is nevertheless more regressive than the distribution of income.

Table 5. Distribution of Benefits Across All Plan Participants With an 50%/6% Employer Match

Income Percentile	Salary	Savings Rate	Savings	Employer Contribution	NPV Difference	% of Match	% of Total Benefit	% of Total Income	Relative Pct
0 TO 10	$13,019	1.06%	$138	$46	$46	0.5%	0.4%	2.2%	-1.8%
10 TO 20	$15,064	1.56%	$235	$78	$78	0.9%	0.7%	2.6%	-1.9%
20 TO 30	$27,890	2.18%	$608	$203	$203	2.2%	1.7%	4.7%	-3.0%
30 TO 40	$34,776	2.68%	$932	$311	$311	3.4%	2.7%	5.9%	-3.2%
40 TO 50	$41,962	3.16%	$1,326	$442	$442	4.9%	3.8%	7.1%	-3.3%
50 TO 60	$50,301	3.66%	$1,841	$614	$614	6.8%	5.3%	8.5%	-3.3%
60 TO 70	$60,477	4.19%	$2,534	$845	$1,141	9.3%	9.8%	10.3%	-0.5%
70 TO 80	$74,426	4.88%	$3,632	$1,211	$1,635	13.3%	14.0%	12.6%	1.4%
80 TO 90	$97,683	5.87%	$5,734	$1,911	$2,582	21.0%	22.2%	16.6%	5.6%
90 TO 100	$174,068	5.90%	$10,270	$3,423	$4,594	37.7%	39.4%	29.5%	9.9%

Although simplified, the above examples illustrate how defined contribution retirement plans increase, rather than ameliorate. Interventions that seem equitably distributed, like a straightforward employer match interact with differences in pay to produce regressive results. When this regressivity is subsidized by the tax code and blessed by weak non-discrimination rules, we ought to seek more efficient and equitable uses of tax expenditures.

C. The Many Failures of the Non-Discrimination Rules

As noted in Part II.C., the non-discrimination rules fail to implement any plausible principle of non-discrimination, and in fact permit the opposite. All of the above inequality occurs in plans that satisfy the non-discrimination requirements. Why? The non-discrimination rules have three basic problems, which we detail below: (1) The analysis is conducted at the firm level as opposed to the national level; (2) there is too much flexibility in defining who is and is not highly compensated; and (3) they formally permit higher tax-subsidized benefits for highly-compensated employees. Our proposal substantially limits flaws (1) and (3), and eliminates flaw (2).

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1. The Problem of Firm Level Analysis

The first critique of the current non-discrimination tests is that they are conducted at the firm level. If one were trying to craft a retirement savings policy designed to direct scarce tax subsidies in a nondiscriminatory fashion as between highly compensated individuals and others, one might anchor it to objective, nationwide measurements of compensation. The non-discrimination rules do that at one point, defining everyone making $155,000 or more annually as highly-compensated.[120] But then they retreat from that approach through approaches like their authorization of Top-Heavy Plans. A rule that requires plans to rebalance when becoming *too* top heavy inherently permits a substantial amount of top-heaviness.

It also underscores defining highly-compensated at the firm level.[121] Someone making $200,000 could be highly or "non-highly" compensated depending on the firm that employs them. When establishing a national policy at the federal level of how best to target tax subsidies without discriminating by compensation level, the firm-level approach makes little sense, or less sense than it once did.[122] By allowing a firm-level analysis, one opens the door to a system that bears more than a passing resemblance to the one we have now, in which the vast majority of plans pass the non-discrimination test, but in the aggregate, their effect is regressive nationwide discrimination in favor of highly-compensated employees.[123]

2. Excessive Flexibility in Determining Who is Highly Compensated

Closely related to the problem of firm-level analysis is the flexibility around defining who is highly-compensated. To return to the law firm example, if the firm offers the same or similar benefit to law firm partners and associates, and then lumps

120. COWART & COWART, *supra* note 77.

121. I.R.C. § 416(i)(1)(A)(i).

122. To this point, our policy proposal is also conservative in the sense that it fails to adequately address the reality that corporations now have large numbers of what are, in effect, contract workers, but who do not count as direct employees for purposes of employment laws, and Section 401(k) in particular. That is, firm-level analysis might once have been more legitimate than it is today. The "fissuring" and "gigification" of the workplace has likely undermined its validity, if it ever were valid. Today, many people who were once employees are now either independent contractors or employees of firms to whom the once in-house work has been outsourced.

123. No doubt, firm level analysis is a concession to administrative flexibility and the nuances of particular fields, in which what is considered high compensation may vary greatly, as might complex questions around compensation measurement. It is also true that firms themselves may be best positioned to determine who is highly-compensated because they have access to private information. Although these concerns might be legitimate, they should not be permitted to compromise the policy principle of nondiscrimination.

in associates with all other firm employees, including secretaries and paralegals, it can use the Top Paid group election to pass the non-discrimination test.[124] In effect, lawyers might be getting far more tax subsidized retirement benefits than nonlawyers, but the non-discrimination rule can be used to mask this discrimination.

Rather than attempt to identify a group of highly compensated employees and restrict their benefits—an approach that has failed—we focus on ensuring that low income employees receive adequate support before matching contributions flow to to others. This bottom up approach requires minimum contributions to be made across the board, regardless of compensation level, and we cap the level of employer match. We drop formal comparison between arbitrarily defined highly and non-highly compensated employees.

Our plan solves for another problem, likely the most profound problem with the current system: The fact that income disparities mean many employees feel they cannot take advantage of all the available tax benefits. This proposal tackles this issue by reallotting the distribution of tax benefits from the highly compensated to all workers via higher required employer contributions, more incentives for employees to match, and a cap on the overall employer match. This is important: A recent survey found that 52% of workers said that they did not feel they had enough income to save for retirement.[125]

The rules create the permitted disparity because of the competing interests involved. Specifically, by allowing tax advantages to HCEs, so that NHCEs can also benefit from employer-established retirement plans.[126]

3. Discrimination is Baked Into the Non-Discrimination Rules

At least three of the four non-discrimination rules thus permit discrimination, and the Safe Harbor doesn't do much better. The Coverage test, the Contributions test, and the Top Heavy test permit more tax-subsidized benefits to flow to highly-compensated employees than their lower paid counterparts. And the Safe Harbor, with a 2% across-the-board match, necessarily means higher subsidies for the highly compensated, unless all income levels made the maximum contribution, which we know is not the case based on the Vanguard data.

To some extent, poor policy input may drive output here. We have already described the evidence showing the uneven distribution of the tax subsidies. All of that inequality has been generated while passing these non-discrimination tests or sailing through its safe harbor. The data are indictment enough. But there is no

124. 26 U.S.C. § 413(q)(1)(B)(ii).

125. CAPITALIZE RSCH. TEAM, THE TRUE COST OF FORGOTTEN 401(K) ACCOUNTS (2023) 24 (June 2023), https://perma.cc/N66S-V2N5.

126. Regina T. Jefferson, *Increasing Coverage in Today's Private Retirement System*, 6 DREXEL L. REV. 463, 472 (2014).

mystery here regarding what's wrong with these rules. They allow the bulk of the benefits of a 401(k) plan to go toward more affluent employees. It's time for a new approach.

III. A SOLUTION

Solving the profound income and wealth inequality in our society is a worthy goal, but one this paper does not seek to fully address. We do seek to advance a feasible, efficient proposal that makes taxpayer-subsidized 401(k) plans work better for the many.

We begin with a straightforward suggestion to modestly increase the minimum wage, with the twist that part of the increase could be allocated to retirement savings on a mandatory basis (supplemented by an aggressive employer match). Although debates over the minimum wage are wide-ranging and we do not seek to fully engage them here, we nevertheless feel an obligation to grapple with the reality that much of the problem with retirement savings reflects a problem of income. Failing to adequately save for retirement when one's wage is not sufficient to meet basic current needs is not a moral failing, but a reasoned choice in the face of scarcity—and an important problem of public policy. Our analysis acknowledges this.

We offer two variations of a proposal aimed at tilting employer matching programs in a more equitable direction. These proposals attack a core problem in retirement plan design: the regressivity of employer matching programs. Both proposals involve automatic enrollment, a mandatory baseline employer contribution, and tranches of aggressive employer matching of contributions. Employers who wish to retain the tax-deductibility of their contributions to plans would be required to structure their match program to meet these requirements.[127]

These approaches work in tandem with bringing up the floor on wages to ensure an adequate opportunity to save for low-income employees. We propose a set of modest reforms aimed at creating incentives for employers to structure matches in ways that benefit lower-income employees. Although they would not–and do not aim—to achieve full equity within the defined contribution system or overcome the problems of a fractured job market, they would nevertheless play the valuable role of shifting more of the benefit of the substantial 401(k) tax expenditure down the income ladder.

127. Of course, employers could always forego the tax-favored treatment and simply pay their highly-compensated employees bonuses or higher salaries. Below, we discuss reasons we think employers would likely continue to contribute Our interest is in ensuring that the 401(k) tax expenditure is fairly distributed.

A. The Undeniable Connection Between Income and the Ability to Save For Retirement

As each of the preceding Parts underscores, the difficulties low-wage workers face in meeting the immediate needs of their families explains much of the reason for their lack of retirement savings. It is therefore not credible to opine on the design of retirement savings plans while ignoring the effect that stagnating wages for America's lower- and middle-class workers have had on growing wealth inequality. At each stage of our analysis, it is evident that it is far harder to save when one's current income is not sufficient. This Subpart suggests building on a shared consensus of Americans of all political persuasions that the minimum wage should be increased and that we should do more to support retirement security for the working class.[128]

It is well-documented that the real value of the federal minimum wage has fallen precipitously. At $7.25 per hour in 2024, it is worth just 68% of the real value it held in 2009, the year when it was last raised.[129] More starkly, the federal minimum wage holds a mere 57% of the real value it had in 1970, when it was $1.60.[130] All told, some 32 states and the District of Columbia have minimum wages above $7.25, with an average minimum wage of just over $13.[131] Of the red states with a base minimum wage higher than the federal minimum, the average is still over $11.50.[132] These include states in every region of the nation, not just on the coasts.[133] By way of example, consider four states represented by Republican Senators who have expressed concern over wage stagnation and the failure to pay American workers well:[134]

- Arkansas, Senator Tom Cotton (R): $11
- Florida, Senator Marco Rubio (R): $13
- Missouri, Senator Josh Hawley (R): $13.75
- Ohio, former Senator and now Vice President JD. Vance, $10.70

128. Amina Dunn, *Most Americans Support a $15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), https://perma.cc/M87D-QLB7 (showing 62% of Americans support raising the minimum wage to $15.00, and 89% of Americans favor raising the minimum wage above $7.25). For Bipartisan support for increasing retirement security, *see* SEN. HICKENLOOPER & SEN. TILLIS, RETIREMENT SAVINGS FOR AMERICANS ACT: BIPARTISAN, BICAMERAL RETIREMENT SAVINGS FOR AMERICANS ACT WOULD MAKE SAVING FOR RETIREMENT RELIABLE, REAL, AND ATTAINABLE FOR AMERICAN WORKERS (Oct. 18, 2023), https://perma.cc/PNB4-SM8U.

129. Adjusted for inflation, the present value of the minimum wage in 2009 is $10.63.

130. Adjusted for inflation, the present value of the minimum wage in 1970 is $12.00.

131. The authors' analysis is based on data from *Minimum Wage Tracker*, *supra* note 18.

132. *Id*.

133. Of the twelve red states with a state minimum wage higher than the federal minimum, nine are not coastal: Arkansas, South Dakota, Ohio, Montana, Missouri, West Virginia, Nevada, Nebraska, and Vermont.

134. *See id.*

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Public opinion polls also show strong support for a minimum wage increase of this kind. For example, a recent poll showed that Republican voters hesitated to support increasing the federal minimum wage to $15 per hour.[135] But 75% of them supported increasing it to $12 per hour.[136] Independents are even more supportive.[137] Thus, the reality of red state minimum wage statutes and Republican public opinion suggests the feasibility of using a base like $12, which would benefit many workers, and allow it be used as a sensible foundation for incremental annual increases to something more like a real living wage.

Importantly, research suggests that jobs paying the minimum wage are less subject to relocation abroad and that the benefit of increases for those who depend on those jobs to provide for their families exceed the costs of decreased levels of employment.[138] If the federal minimum was raised to, for example, the average of the red states with a minimum wage above the federal minimum, with a provision providing for increases until it got to a real value of $15 per hour, based on the value of the dollar in 2019, there would be two material benefits to working class American families.

The first is obvious in that workers making less than the current minimum wage would get an increase of substantial value to their families, and that all workers would have a floor under wage bargaining that is helpful to them. This increase would benefit those American workers who need it the very most.[139]

The second is less obvious but directly relevant to the focus of this Article. If the federal minimum wage were increased in this manner, it might make sense to permit a responsible percentage of a worker's pay to be required to be deployed for retirement savings by the worker on a tax-advantaged basis in an employer's 401(k) or equivalent. These required savings could be used to help fund the employee matches contemplated by our reform proposals. Bipartisan support for requiring workers to devote a responsible portion of their pay to retirement savings already exists, but without a higher minimum wage that begins to approach a living wage, many workers would be asked to do the impossible.

135. *See* Dunn, *supra* note 128.

136. Blank, *supra* note 17.

137. *Id.*

138. David Cooper, Lawerence Mishel & Ben Zipperer, *Bold Increases in the Minimum Wage Should Be Evaluated for the Benefits of Raising Low-Wage Workers' Total Earnings*, ECON. POL'Y INST. (Apr. 18, 2018), https://perma.cc/DC2E-87D7.

139. *See* Doruk Cengiz et al., *The Effect of Minimum Wages on Low-Wage Jobs*, 134 Q. J. ECON. 1405 (2019).

B. Reforms to Make Retirement Savings Fairer to Low-Income Workers

The most egregious way in which the current retirement system compounds wealth inequality is the tax subsidy for matching employer contributions. Employer matches are common features of 401(k) plans, and matching contributions from the employer are tax free to the employee as long as they fall below the total contribution limit to the plan. As noted above, such matches heavily favor the interests of highly compensated employees, whose higher tax brackets and greater capacity to take advantage of the matching benefits means they capture most of the value of the employer matching programs. Indeed, highly compensated employees often capture value from the employee match that is disproportionate to their income, meaning that employer match programs actually make income inequality within the firm worse.

We do not think that, in an era of growing wealth inequality, it is a sensible or responsible use of public resources—in the form of a tax expenditure—to subsidize matching programs that exacerbate the income disparities and subsidize the retirement plans of those who are already situated to retire comfortably. In a world where public resources are scarce and workers face widespread concern about their retirement security, the public fisc should put a thumb on the scale to promote the interests of those facing savings challenges, not provide additional benefits to the well-off at taxpayer expense.

1. The Empirical Evidence Supports Specific Reforms

The Vanguard study discussed above marshals evidence in support of some broad reforms that would more fairly distribute the benefits of employer matches. For starters, the study finds that inertia matters and that plans that auto-enroll employees tend to better encourage lower paid employees to participate.[140] Likewise, having inertia be in favor of a higher default savings rate has similar results and encourages fewer well-paid workers, who are often less financially sophisticated, to save more.[141]

Furthermore, the Vanguard study finds that shorter vesting periods and immediate eligibility better stimulate participation.[142] Consistent with this conclusion,

140. Greig et al., *supra* note 5, at 17. This corroborates other work supporting the utility of auto-enrollment in increasing savings rate among more modestly paid workers. *See, e.g.*, Jack VanDerhei, *The Impact of Auto-enrollment and Automatic Contribution Escalation on Retirement Income Adequacy*, EBRI Issue Brief (Nov. 2010), https://perma.cc/2XCA-9HK4; Richard W. Patterson & William L. Skimmyhorn, *How Do Behavioral Approaches to Increase Savings Compare? Evidence from Multiple Interventions in the U.S. Army* (Nat'l Bureau of Econ. Rsch. Working Paper No. 30697, Sep. 2022).

141. Greig et al., *supra* note 5, at 17. For other studies to this effect, *see* David Blanchett, Michael S. Finke & Zhikun Liu, *The Impact of Employer Defaults and Match Rates on Retirement Saving* (Dec. 24, 2021), https://perma.cc/MCR3-VKFL.

142. Greig et al., *supra* note 5, at 17. Other studies have quantified the negative impact that longer vesting periods have on savings; see, e.g., Prince et al., *supra* note 94.

a provocative new article shows how vesting periods of three, to even as long as six, years hit low wage workers the hardest, particularly in jobs where turnover is high because jobs are physically demanding.[143] Employers use funds that do not vest—and thus are not transportable by the departing employees—to buy down their future 401(k) plan costs.

But perhaps most importantly, the Vanguard study confirms that focusing employer contributions in a way that is more likely to benefit the entire workforce in fact creates more equity.[144] Thus, the study recommends that employers who want more equity consider "dollar caps" on contributions, because programs with these caps are often less expensive for employers and have the effect of focusing contributions on workers who cannot make contributions that approach the federal limit of $23,000.[145] The Vanguard study buttresses this recommendation with new evidence, confirming findings in other studies, that higher paid employees are likely to save regardless of matches because of the substantial tax incentives they have and because these employees often have greater access to intergenerational wealth and are more financially sophisticated.[146] The Vanguard study finds that even plans that offer only no elective employer contributions operate in a regressive manner that exacerbates inequality and that only plans with dollar caps have a progressive effect.[147] But it also shows the value of focusing plans in ways that recognize the economic challenges of modestly paid workers: Match programs that focus more on the initial 3% of salary or match 100% of employee contributions have a less regressive effect.[148]

Notably, the Vanguard study also finds that dollar cap programs are, as a general matter, less expensive for employers and that their primary negative impact, if one considers it to be a negative, is that they minimize the extent to which higher-end employees receive taxpayer-subsidized employer contributions.[149] By contrast, higher match caps cost the most because they go disproportionately to higher earning employees, many of whom would save even without the match.[150] For these reasons, the Vanguard study concludes:

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143. Prince et al., *supra* note 94, at 10-13.

144. Greig et al., *supra* note 5, at 17.

145. *Id*.

146. *Id.* at 2 (citing Eric M. Engen & William G. Gale, *The Effects of 401(k) Plans on Household Wealth: Differences Across Earnings Groups* (Nat'l Bureau of Econ. Rsch. Working Paper No. 8032, Dec. 2000), https://perma.cc/5PLC-UC3A; Daniel J. Benjamin, *Does 401(k) Eligibility Increase Saving? Evidence from Propensity Score Sub-classification*, 87 J. PUB. ECON. 1259 (2003); Choukhmane et al., *Who Benefits?*).

147. Greig et al., *supra* note 5, at 10 fig. 7.

148. *Id.*

149. *Id.* at 16.

150. *Id.*

> [W]e find that a dollar cap on matching contributions correlate with greater equity and lower costs. Employers could prioritize plan features that promote savings for lower-income workers, such as autoenrollment, a higher default savings rate, or immediate eligibility and vesting. Dollar caps are a promising (and currently under-used) tool that could free up employer resources to pay for such features…. Just as plan sponsors have a role in promoting equity and efficiency, so do policymakers. Many common match formulas, including safe harbor designs, disproportionately benefit higher-income employees, who can and already do save the most.[151]

These arguments support reforms that include aggressive auto-enrollment, dollar caps for matching, and employer contributions that are not conditional on employee contributions. In the following Subpart, we develop these broad suggestions into a more concrete proposal for reform that would require plans to implement tax-preferred matching programs in a more equitable way.

2. Calibrating to Retirement Savings Needs For Low-Income Individuals

In proposing these reforms to 401(k) plans, we are motivated both by concerns about (1) rising inequality and the ways in which current plans contribute to that inequality, and (2) insufficient savings by low-income individuals. Wealth inequality could certainly be concerning even in a world where low-income individuals enjoyed retirement security (at least relative to their income levels), and revisions to the retirement system might be a tool to address that inequality. But in a world where many low-income individuals have no retirement savings at all, the fact that taxpayer-subsidized defined contribution plans not only fail to address the problem but exacerbate it is egregious.

Nevertheless, our modest reforms are not designed to tackle the problem of inequality wholesale. Instead, our focus is on making retirement savings more equitable (if not altogether equitable). That task requires taking account of the needs of retirement savers at various income levels. Although it is commonly observed that many low- and middle-income individuals have insufficient retirement savings, their actual needs are less often discussed. This question is somewhat complicated because lower-income individuals will have a higher percentage of their income replaced by Social Security, necessitating less savings in a defined contribution plan. But it is also true that replacing what is an already inadequate or precarious income base does not involve "economic security," even more so if future legislative effort reduces the support social security provides.[152]

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151. *Id.* at 17.

152. By way of example, increases in the retirement age disproportionately affect workers with physically demanding jobs, workers who are more likely to have modest incomes and

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Figure 6 draws on recent calculations from Andrew Biggs[153] to estimate, for the average earner in each income quintile, how much they should be saving for retirement each year given their anticipated retirement needs and the likely Social Security benefits they will receive in retirement. The "Rate" is the needed savings rate as a percentage of income and "Amount" is the dollar amount for the average earner in each quintile. These estimates err on the low side, given the assumptions of the underlying calculations, but they nevertheless give some idea of what reasonable targets for savings *as a dollar amount* might be. The expression as a dollar amount is critical, as we have already shown that expressing retirement benefits as a percentage can conceal inequities in plans.

Figure 6. Recommended Savings Rates by Income Level

	Income	**Rate**	**Amount**
Lowest Quintile	$16,120.00	0.40%	$64.48
Second Quintile	$43,850.00	2.60%	$1,140.10
Middle Quintile	$74,730.00	4.40%	$3,288.12
Fourth Quintile	$119,900.00	4.90%	$5,875.10
Top Quintile	$177,300.00	6.40%	$11,347.20

As can be seen, the recommended savings rates for very low-income individuals are quite low. Given that the lowest income decile reflects an average wage which is clearly not a living wage, the suggested $65 a year deferral is also inadequate. We would set a rather more ambitious goal: Ensuring that all workers saved a sufficient amount to replace a $60,000 wage. This is a bit less than the median wage, so it might seem high for many workers, but such an approach helps offset the risk of periodic unemployment (more frequent among lower-compensated employers), drawdowns due to personal emergencies (same), and the risk of reduced value of social security (disproportionately affecting low-income individuals). Based on the Biggs calculations, this would necessitate saving about $2,000 a year. As a decidedly second-best option—one that still has genuine value—a savings of $1,000 annually is approximately sufficient income replacement for a worker making $43,000, which would be a living wage in much of the country.[154] We therefore calibrate our second-

have physical reasons why retiring at, say, 68, is not practical.

153. Andrew G. Biggs, *How Much Should the Poor Save for Retirement? Data and Simulations on Retirement Income Adequacy Among Low-Earning Households* (Wharton Pension Rsch. Council Working Paper No. 2019-15, May 2, 2019), https://perma.cc/2QL3-3XWN.

154. Amy K. Glasmeier, *Living Wage Calculator*, MIT Living Wage Inst., https://perma.cc/4969-6PYT (last updated Feb. 10, 2025).

best proposal with the goal of encouraging employer matching programs to ensure that all employees obtain at least $1,000 a year in savings before any additional benefits flow to high income employees. This baseline reflects the minimalist goal that all individuals saving for retirement are doing so on a basis that at least reflects income replacement for a living wage.

It is, of course, possible to quibble about the adequacy of the amounts used in either proposal, but two things are worth noting. First, many people are failing to save even at these very modest levels. *Any* increase in low-income savings would be an improvement over our current system of subsidizing the wealthy. Second, even limited reforms that move small amounts of wealth down the income distribution have the potential to significantly improve the retirement prospects of low- and middle-income individuals. Although many low-income individuals view retirement as an insurmountable goal, the realistic projections above suggest that modest savings may put secure retirement within reach for many.

3. Beyond Non-Discrimination: Designing Match Requirements to Address Inequality

Now to the specifics. We consider two possible implementations of our plan, which we term "first best" and "second best" tied to target savings rates of $2,000 and $1,000 annually, respectively. We structure our proposal as a condition on the tax deductibility of matching contributions. In order to qualify for tax-favorable treatment, employee matching programs would need to be structured to meet the following requirements, which include adopting universal automatic enrollment, making an unconditional contribution to savings, and structuring matching programs into tranches that ensure low-income employees have access to high match rates.

a. Tranches of Employer Contributions

To comply with our requirements, employer contributions would be divided into tranches, with contributions in the next tranche permissible only after the current tranche is satisfied.

> *Tranche 1: Unconditional Contribution.* Before employers could match any employee contributions, we would require that employers set up automatic enrollment for all employees and contribute—in the first best case—$1,000 or—in the second best case—$250 per employee per year, regardless of whether the employee makes any contribution to the plan out of their wage. "Employee" here, would borrow the definition from the SECURE 2.0 Act. For employees working

less than full-time, the mandatory contribution would be pro-rated against full-time employment.

The $1,000 requirement for the first-best proposal is fairly generous. For the second-best proposal, $250 may seem small, bordering on trivial. But this amount of savings is sufficient for employees toward the bottom 20% of the income distribution if the goal is the minimal use of replacing their current income after retirement. The reason is that these workers have incomes so low that Social Security alone replaces a substantial portion of their income. Even this modest contribution would give the lowest compensated employees some stake in the retirement plan. Moreover, even a small plan balance has numerous benefits for employees, including the capacity to borrow in times of financial distress, as outlined below.

Tranche 2: Aggressive Match. The next requirement would be as follows. For the first best proposal, we would advocate employer matching at a 9:1 rate for $100 of employee contribution. An employee saving $100 would net $1,000. For the second-best proposal, the first $250 of employee contributions be matched 3:1, so that employees able to defer $250 of compensation annually (or about $5 per week) would net $750 in employer match, or $1,000 in total savings. Employers would be free to satisfy this tranche simply by depositing the entire balance but could also implement it as a matching program. The low dollar limit and high match rate favors lower-income employees, since a greater proportion of their contribution is subject to the advantageous match rate.

For the first-best proposal, implementing the first two tranches would mean an employee attains $2,000 in savings, tracking our goal of replacing $60,000 in income. Even in the second-best plan, an employee would be on track to save $1,250 by utilizing the first two tranches.

Tranche 3: Equal Match. The next tranche would require that additional employee contributions up to $1,000 be matched 1:1. Equal employer matches are not uncommon, but employers often match at a 50% rate, meaning that more of the value of the match goes to employees who are able to make very large deferrals into the plan. A 1:1 match with a relatively low cap once again advantages lower-income employees.

Tranche 4: Discretionary Match. Beyond the first three tranches, employers would be free to match additional contributions as they see fit. However, we would implement a requirement that additional matching beyond tranche three can be undertaken on a tax-favored bases only when the employer attains sufficient participation rates in each of the first three tranches. We would suggest 100% participation in tranche 1, 85% participation in tranche 2, and 60% participation in Tranche 3.

In addition to these changes to matching, we suggest the following additional requirements that would improve the quality and availability of benefits.

b. Automatic Enrollment

One of the most important problems in retirement savings for lower-income employees is non-participation in an available plan. Automatic enrollment is an effective tool to increase participation. The Secure 2.0 plan enacted in 2022 mandated automatic enrollment as a feature for newly created plans, and a substantial number of older plans feature automatic enrollment.[155] Our proposal would make automatic enrollment a mandatory feature of plans that have an employer matching contribution program. Mandating enrollment would ensure that the matching benefit is not overlooked and ensure that even those employees not actively engaged with saving for retirement are enrolled by default. To be clear, although automatic enrollment would be a mandatory feature, participation would not be. Employees would–as always–be free to adjust their contributions, including by zeroing them out. But as outlined below, we would ensure that at least some value goes to the accounts of all employees by mandating a small contribution by the employer even if the employee does not defer any compensation.

c. Shorter Vesting

Less affluent workers change jobs more frequently and are more subject to dislocations in employment. Lengthy vesting periods exacerbate inequality and allow employers to subsidize their operations by essentially forfeiting the earned savings of short-tenured employees.[156] Thus, we would restrict vesting of employer match to occur no later than one year after employment.

Employers structuring their match in this way would enjoy the benefit of the matching contributions getting tax-preferred treatment. Otherwise, the benefits would simply be income to the employees.

d. Company Stock

Finally, we offer one change aimed at making these reforms more palatable and affordable to employers. We would permit an employer to use its own stock as up to 25% of the match contemplated by our proposal, but only on the condition that the

155. *See* SECURE 2.0 Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459.

156. *See supra* note 94.

stock be listed on an exchange, be freely tradable after one year or an employee's termination, whichever is earlier.

There has long been bipartisan interest in aligning the interests of workers with the success of their companies.[157] Although that is more difficult in an economy where workers change jobs more frequently, there is still utility in the concept. Although worker ownership of employer stock raises diversification concerns, it has other benefits, including incentivizing workers through direct or indirect profit sharing.

Increased worker ownership of firms takes various forms, and has support across a surprisingly broad swathe of the political spectrum. Conservative supporters emphasize American versus foreign ownership of business and an "ownership society" rationale, in which firm owners are seen as being more likely to act responsibly and in the long-term interests of the firm.[158] Progressive supporters emphasize how ownership enhances worker voice both within the firm and in society more generally.[159]

The ability of a company to use its own stock for match purposes might also encourage more of them to do so. But, another design factor must be considered: Workers already face substantial company-specific risk and it is important that the retirement system not increase that risk by either making a worker's portfolio imprudently subject to the risks and prospects of a single company or by acting as an impediment to leaving for a better job elsewhere. The 25% cap limits diversification and shackling concerns while incentivizing companies to better fund worker retirement and offering some of the virtues of worker ownership.

C. Estimating How Our Reforms Reduce Regressivity

To estimate how our first- and second-best proposals would affect the regressivity of employer match programs, we replicate our valuation exercise from Part III.B with the match program now structured to comply with the sets of rules we lay out. In the first-best proposal, we assume that the employer would cap the 1:1 match at an employer contribution of $500 after the first two tranches. In the second-best

157. Geoffrey T. Sanzenbacher, *When It Comes to Saving for Retirement, Here's Something Both Parties Can Agree On,* CTR. FOR RETIREMENT RSCH. AT BOSTON COLLEGE (Mar. 13, 2025), https://perma.cc/X9PF-W5RJ.

158. *Van Hollen, Moran, Moore, Trahan Introduce Bipartisan Bill to Boost Employee Ownership of Businesses*, CHRIS VAN HOLLEN U.S. SEN. FOR MD. (May 7, 2025), https://perma.cc/4ENC-W5GC (Congressman Blake Moore (R-Utah): "The *American Ownership and Resilience Act* will empower and support business owners and workers who want to transition to employee ownership, building substantial livelihoods for new employee owners and protecting our domestic supply chain from hostile foreign competitors.").

159. *Id.* ("ESOPs give employees an ownership stake in their company, increasing their motivation as well as their empowerment").

proposals, we cap the matching so that the total cost of the plan is equal to the regressive match from Part III.

As can be seen, both of our proposals reverse the regressive structure of a conventional matching program, at least relative to the proportion of salary. It is worth noting that even our first-best proposal still has a disproportionate share of the match value going to high-earners. It is simply less disproportionate than their salary share. That this is the case is evidence that our proposal is, in fact, fairly modest, even in its more aggressive form.

Figure 7: First-Best Compliant Match

Income Percentile	Salary	Savings Rate	Savings	Employer Contribution	NPV Difference	% of Match	% of Total Benefit	% of Total Income	Relative Pct
0 TO 10	$13,019	15.36%	$2,000	$1,900	$1,900	9.1%	8.1%	2.2%	5.9%
10 TO 20	$15,064	13.28%	$2,000	$1,900	$1,900	9.1%	8.1%	2.6%	5.6%
20 TO 30	$27,890	7.17%	$2,000	$1,900	$1,900	9.1%	8.1%	4.7%	3.4%
30 TO 40	$34,776	5.75%	$2,000	$1,900	$1,900	9.1%	8.1%	5.9%	2.2%
40 TO 50	$41,962	4.77%	$2,000	$1,900	$1,900	9.1%	8.1%	7.1%	1.0%
50 TO 60	$50,301	3.98%	$2,000	$1,900	$1,900	9.1%	8.1%	8.5%	-0.4%
60 TO 70	$60,477	4.19%	$2,534	$2,167	$2,463	10.4%	10.6%	10.3%	0.3%
70 TO 80	$74,426	4.88%	$3,632	$2,400	$2,825	11.6%	12.1%	12.6%	-0.5%
80 TO 90	$97,683	5.87%	$5,734	$2,400	$3,071	11.6%	13.2%	16.6%	-3.4%
90 TO 100	$174,068	5.90%	$10,270	$2,400	$3,571	11.6%	15.3%	29.5%	-14.2%

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Figure 8: Second-Best Compliant Match

Income Percentile	Salary	Savings Rate	Savings	Employer Contribution	NPV Difference	% of Match	% of Total Benefit	% of Total Income	Relative Pct
0 TO 10	$13,019	1.06%	$1,250	$664	$664	6.9%	5.7%	2.2%	3.5%
10 TO 20	$15,064	1.56%	$1,250	$955	$955	9.9%	8.2%	2.6%	5.6%
20 TO 30	$27,890	2.18%	$1,250	$1,000	$1,000	10.4%	8.6%	4.7%	3.9%
30 TO 40	$34,776	2.68%	$1,250	$1,000	$1,000	10.4%	8.6%	5.9%	2.7%
40 TO 50	$41,962	3.16%	$1,250	$1,000	$1,000	10.4%	8.6%	7.1%	1.5%
50 TO 60	$50,301	3.66%	$1,841	$1,000	$1,000	10.4%	8.6%	8.5%	0.1%
60 TO 70	$60,477	4.19%	$2,534	$1,000	$1,296	10.4%	11.1%	10.3%	0.9%
70 TO 80	$74,426	4.88%	$3,632	$1,000	$1,425	10.4%	12.2%	12.6%	-0.4%
80 TO 90	$97,683	5.87%	$5,734	$1,000	$1,671	10.4%	14.3%	16.6%	-2.2%
90 TO 100	$174,068	5.90%	$10,270	$1,000	$2,171	10.4%	18.6%	29.5%	-10.9%

IV. COUNTERARGUMENTS AND FEASIBILITY

Now, we consider potential objections and challenges to the implementation of our reforms. We begin by describing what we see as the most rational objections: that our reforms would reduce employer participation in matching programs or in 401(k) plans altogether, that our reforms would disadvantage highly compensated employees, and that our reforms are too prescriptive and would disrupt the optimal calibration of matching programs. We next turn to whether our proposal could feasibly gather the bipartisan support necessary to become law, taking at face value the statement of public officials that echo the broad support of the American public, regardless of party, for higher wages and more retirement security.

A. Are Reforms Practically Feasible?

Our reforms are structured as a set of requirements applied to employer matching programs in 401(k) plans. We understand that such plans are optional for employers to provide. If matching plans are made too onerous or do not achieve the goals that employers set out for them, it is possible that employers would simply not adopt a matching program to begin with. Employers fleeing the field would be an undesirable, counterproductive, outcome. Fortunately, we do not think it is a likely outcome, either at the level of employers abandoning plans or abandoning matching programs.

Nothing in our proposal should tempt employers to cease offering 401(k) plans. Indeed, by simplifying compliance with the non-discrimination rules, our proposal would make such plans easier to administer. And, of course, the rules we suggest are applied to matching contributions, which are not a prerequisite for having a plan. There is one issue that could arise from the proposal that would increase the cost of administering a plan: our commitment to ensuring that low-income workers have at least some savings would potentially lead to plans with more accounts with small balances, which would carry proportionately higher administrative expenses. This, though, is unavoidable if the proposal is to serve its intended purpose of providing more retirement security for lower-income Americans.

What about employers abandoning matching programs? As a threshold matter, nothing we propose would make a matching program inherently more expensive for an employer. A fixed budget for matching employer contributions could always be redistributed to comply with our requirements. As our less aggressive example illustrates, even high earners could get some benefit in a matching program compliant with these reforms without increasing the total cost. The primary question, then, is whether a distribution of matching contributions down the income ladder would make employers less inclined to participate in matching programs. This might be the case if employers feel they get less value out of a bottom-heavy match. If, for example, low-income employees tend to value matching contributions less than high-income employees, then employers might get less value out of matching. Indeed, that employees value matching programs—and perhaps overestimate their value[160]—is part of their attractiveness to employers, which might be reduced under our plan.

Any mandatory change to the structure of matching carries a risk that matching might become less attractive to employers, but we think this risk is tolerable. First, we read the Vanguard report as evidence that many plan sponsors have not given much thought to the structure of their matching program. Employers often choose matches that are poorly calibrated to the needs of their overall workforce.[161] It is quite possible that many employers don't think much about the structure of their matching program and instead simply defer to advisors or market practice. If employer matching isn't already optimally selected, then our reforms may not reduce its value. Second, even if employers are setting up matching programs strategically to maximize their perceived value to employees, the fact that our reforms are mandatory would largely address this concern. If Microsoft and Google compete for the same highly-compensated employees, then both of them have an incentive to tilt their match in that direction. If our proposal requires both companies to first make contributions to lower-compensated employees, then the relative attractiveness of the two firms for an employee choosing between them will not be affected. At worst, they will both be a bit

160. Ryan Bubb & Patrick L. Warren, *An Equilibrium Theory of Retirement Plan Design*, 12 AM. ECON. J.: ECON. POL'Y 22 (2020).

161. *See*, *e.g.*, *supra* notes 118, 125-30 and accompanying text.

less generous to high earners. Of course, if both companies wanted to increase their match for highly compensated employees (and take advantage of the tax subsidy for doing so) they could do so within our framework. Either way, there would be no reason to *reduce* the aggregate expenditure on matching. So long as the market for highly-compensated employees is competitive—which is almost tautological—then requiring firms to first take care of lower-compensated employees should not induce firms to abandon matching.

Another potential response is that our rules are simply too prescriptive. Different firms with different workforces in different industries have different needs and should have the flexibility to set up matching programs as they see fit. Perhaps employers are not inattentive to the structure of matches but are carefully tuning the substantial array of matching approaches to meet different needs in ways that our proposal would disrupt. Moreover, our approach also takes a particular view of what it means for a matching program to be fair that could be different for different workforces. Put more sharply, one might argue that our proposal is inconsistent with allowing the labor market to operate in the most efficient way. Employers should be able to focus incentives largely where they think they will increase profits the most, and going beyond current non-discrimination rules commandeers employers into either subsidizing workers who may not be as important to the business or cutting back on their contributions to 401(k) plans altogether.

Two simple and direct points respond most compellingly to these concerns. First, nothing in our proposal prevents employers from increasing salaries or retirement contributions for their most advantaged employees. They just have to do it without taxpayer subsidies. Second, our prescriptive, straightforward approach may involve prescriptive rules, but clear rules that accomplish their purpose efficiently beat cumbersome rules that do not. Our proposal is prescriptive but sensible and deploys tax subsidies in a manner that is better for the society that pays for those subsidies.

B. Are Reforms Politically Feasible?

At a time of stark partisan division, the existence of common ground is easy to forget. But it exists and building on it is more important than ever, precisely because doing so is the best way to reduce strife and forge progress. When that common ground involves a core issue—economic security—there is even more potential to do something meaningful both on the level of sensible policy that will improve the lives of millions of American workers and their families, but also in the sense of forging a social compact that has broader support and that unites us more as Americans.

Americans of all political persuasions believe that employers should pay fair wages that include a meaningful contribution to a worker's retirement savings.[162]

162. *See infra* notes 165-72 and accompanying text. DATA FOR PROGRESS, POLL (Apr. 26, 2024), https://perma.cc/KW5L-BWNK.

Americans of all political persuasions believe that the tax system should not favor the affluent and that scarce tax dollars should be used in a way that benefits the many, not just the few.[163]

But the system by which American taxpayers now subsidize and encourage retirement savings supplemental to Social Security violates these shared beliefs. For the bulk of American workers, their entire access to retirement savings on top of Social Security depends on their own ability to squeeze funds out of their pay, during a period in which wages have stagnated for middle- and low-income workers. Defined benefit pension plans are rare and have been almost completely replaced in the private sector by defined contribution funds, first and foremost among them the ubiquitous 401(k). These funds afford workers the opportunity to invest a portion of their own income on a tax-advantaged basis in the mutual funds offered through their employer's 401(k) or equivalent plan. The tax advantages to employers (who can deduct contributions to the plans) and to employees (who can defer income taxes on the funds invested until retirement and avoid capital gains taxes on them altogether) are substantial and cost the federal government in excess of $200 billion in revenue annually—one of the largest tax subsidies in the federal budget.[164]

These types of tax breaks that favor corporations and the well-off draw bipartisan ire. One survey found that 83% of those polled are frustrated that corporations do not pay their fair share of taxes.[165] By similar margins, respondents expressed sentiment that the wealthy do not pay their fair share, including 43% of Republicans polled.[166] 82% of Americans think it is important to avoid a major pay gap between CEOs and average workers, and 66% think that corporations are doing a poor job of it.[167] 68% of workers think they are not paid fairly.[168] In 2021, 73% of Americans reported being worried about "the way income and wealth are distributed in America."[169] This bipartisan worry about the wealth gap chimes with strong bipartisan support for a higher minimum wage and other measures to lift worker wages.[170] As we have shown, both public opinion polls of Republicans—not just Democrats and Independents—and

163. *See infra* note 165.

164. U.S. GOV'T ACCOUNTABILITY OFF., *Older Workers*, *supra* note 1, at 1.

165. J. Baxter Oliphant, *Top Tax Frustrations For Americans: the Feeling that Some Corporations, Wealthy People Don't Pay Fair Share*, PEW RSCH. CNTR. (Apr. 7, 2023), https://perma.cc/2BNG-LC7P.

166. *Id.*

167. Kristjan Archer, *2 in 3 U.S. Adults Say Companies Do a Poor Job on CEO-Employee Pay Gap*, GALLUP (Jun. 18, 2024), https://perma.cc/E4CS-XMND.

168. Mikaela Cohen, *A Vast Majority of Workers Aren't Happy With What They're Being Paid*, CNBC (Dec. 14, 2022), https://perma.cc/P9VD-AZFA.

169. When including those who worried even a little, 89% of Americans expressed some concern. Megan Brenan, *Record-High Worry in U.S. About Hunger, Race Relations*, GALLUP (Mar. 26, 2021), https://perma.cc/Y5BL-NVXW.

170. *See* Blank, *supra* note 17.

the actual minimum wage laws in important red states show the feasibility of substantial increases in the minimum wage to address the direct connection between income and wealth building critical to addressing retirement security.

Among policymakers, concern about the growing wealth gap exists. Many Republican members of Congress have voiced concerned about the difficulty working Americans have in saving for retirement and the lack of retirement wealth among average Americans.[171] This concern has animated proposals by both Democrats and Republicans to reform 401(k) in a manner that would result in more retirement savings for all workers. As discussed, the details matter and there is great variation in these approaches and a vigorous debate exists about whether a reformed system would act as a supplement to the current Social Security system or instead of it. But what is not debatable is that there is a broad recognition by a wide swath of the American public and their elected officials that the current situation is not acceptable and that more needs to be done to assure lower- and middle-class American workers the ability to build wealth for a secure retirement and to provide greater opportunities for their children and grandchildren.

This popular sentiment has begun to be reflected in actual policy changes. As noted above, the Social Security Fairness Act was just adopted with overwhelming bipartisan support. Three million public employees who were previously ineligible for Social Security will now receive these benefits. Substantial Republican support is particularly striking. In the past few election cycles, both parties, not just the Democratic Party, have voiced concerns over the wages and economic security of everyday Americans. President Trump's second term Vice President, J.D. Vance, for example, has argued for policies to raise the wages of lower-paid American workers and give increases in their economic well-being priority.[172] And the reality is that it is in many of the so-called "red" states where reforms of the kind we propose would be most helpful, because those states have populations comprised of the workers who have most struggled during the past 40 or so years, and who were not well served by the current operation of 401(k) plans. We advocate our proposal in the good faith belief that all our leaders want American workers to have the promise of a secure retirement.

171. For example, Democratic Senator Hickenlooper and Republican Senator Tillis have introduced an act inspired by the work of Professor Teresa Ghilarducci and Kevin Hasset, one of the former Trump administrations top economic advisors, called the Retirement Savings For Americans Act. *See* Retirement Savings for Americans Act of 2022, S. 5271, 117th Congress (2022). In the fact sheet they released when announcing the bill, the Senators stressed in bold that "[t]he bottom 50 percent of households own only 1.5 percent of total U.S. wealth. . . [and] that 25% of workers have no retirement savings at all." SEN. HICKENLOOPER & SEN. *TILLIS*, *supra* note 128.

172. *E.g.*, Ross Douthat, *What J.D. Vance Believes*, N.Y. TIMES (Jun. 13, 2024), https://perma.cc/4Q3F-QXAN; Michael Chapman, *Vance, Like Biden, Flunks Econ 101: Backs Hiking Federal Minimum Wage*, CATO (Jul. 24, 2024), https://perma.cc/Q6XM-VMJ3.

The proposals we make are realistic, feasible, and efficient, and within the capacity of the world's greatest economy.

CONCLUSION

At a time of partisan division, it is more important than ever to build on shared priorities. Americans in all regions, and of all political persuasions, believe that American workers deserve fairer wages and more help to save for a secure retirement. Americans also believe that taxpayer-supported programs like Section 401(k) should work for the many, not just the few. A complementary increase in the minimum wage and reform of Section 401(k) can feasibly address these shared bipartisan beliefs, spread the blessings of our capitalist economy more broadly, and provide a more secure and thus brighter future for American workers. If leaders of both of our major political parties are true to their words, our proposal is on that they should come together and embrace, because it is consistent with their stated priorities and the best interests of all Americans.