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RACE, PROPERTY, AND CITIZENSHIP

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ABSTRACT—The racial wealth gap is stunning. The net worth of an average White family is nearly ten times greater than that of an African-American family. A 2017 *Prosperity Now* report finds that for African-Americans, today's economy is an extractive one; if existing trends continue, the median African-American family will have a net worth of zero by the middle of the twenty-first century. This Essay examines these trends in terms of the relationship between race, property, and citizenship. American democracy has long celebrated economic independence as a desired element of citizenship, forging reciprocal bonds between state efforts to promote and protect property ownership and property owners' greater investment in community and political stability. African-Americans have long been excluded from these benefits and, in the process, have never fully enjoyed the benefits of American citizenship that comes with political clout. The result creates increased vulnerability, not just to White supremacy, but to economic exploitation. The lack of political clout contributes to lax regulation and enforcement of lending laws, which allow racially motivated predators to act with impunity, undermining the rule of law and perpetuating racial subordination. In the modern era, this predation has made home ownership, higher education loans, and marriage—the traditional pathways into middle-class status—dramatically riskier for African-Americans than for Whites.

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INTRODUCTION

In the United States, property ownership and citizenship have long been linked and long served to deny African-Americans full participation in American life. The colonies, like Great Britain, limited the right to vote to White male property owners.[1] They believed that "[p]roperty supplied independence; those without property were presumed to be economically dependent on and subservient to others."[2] Through the end of the Civil War, however, the vast majority of African-Americans in the United States *were* property,[3] and many states limited the ability not only of enslaved people[4] but also of formerly enslaved people to own property within the state.[5] Even after slavery ended, African-Americans were denied the opportunity to

[1] By the middle of the eighteenth century, all American colonies except South Carolina had adopted election laws which denied the franchise to those who owned no property. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 339–40 (1989).

[2] Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1509 (2002).

[3] Roy W. Copeland, *The Nomenclature of Enslaved Africans as Real Property or Chattels Personal: Legal Fiction, Judicial Interpretation, Legislative Designation, or Was a Slave a Slave by Any Other Name*, 40 J. BLACK STUD. 946, 946 (2010) (discussing judicial and legislative acts that considered slaves as property). In 1790, there were almost 700,000 enslaved African-Americans in the United States, constituting eighteen percent of the population. By 1860, there were 4 million enslaved African-Americans in the South, compared to less than half a million free African-Americans in the country as a whole. Aaron O'Neill, *Black and Slave Population in the United States 1790–1880*, STATISTA (Mar. 19, 2021), https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880 [https://perma.cc/2QPY-29WR].

[4] *See, e.g.*, Lea v. Brown, 56 N.C. (3 Jones Eq.) 141, 141 (1857) ("A bequest of two hundred acres of land and three thousand dollars . . . with a provision that on the death or insolvency of the legatee, one of the slaves should select an owner . . . is manifestly for the ease and benefit of the slaves and against the public policy.").

[5] *See, e.g.*, Hinds v. Brazealle, 3 Miss. (2 Howard) 837, 842–44 (1838) (invalidating bequest to formerly enslaved African-Americans because they continued to live in the state). Other states that did not prohibit property ownership altogether made it difficult for Whites to transfer property to unmarried partners and children. Bernie D. Jones, *"Righteous Fathers," "Vulnerable Old Men," and "Degraded Creatures": Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 TULSA L. REV. 699, 743 (2005) (describing cases that involved informal transfers, bequests, and *inter vivos* conveyances that testators challenged as fraudulent or against public policy because of the unmarried nature of the relationships). *But see* Le Grand v. Darnall, 27 U.S. (2 Pet.) 664, 670 (1829) (upholding bequest in Maryland, a state that did not prohibit transfers to African-Americans).

acquire the kind of property that allows for economic security and independence.[6] This legacy continues to this day—not just as a product of the continuing consequences of slavery, but also as a cause and consequence of the lack of political clout granted to African-Americans. Even when African-Americans have the ability to acquire property and other assets, they do not necessarily have the ability to realize the fruits of such investments. The result increases American economic inequality more generally, with particularly devastating effects on minority communities.

This Essay examines the continuing role of racial wealth disparities in the lack of access to full citizenship. Racial disparities in wealth are substantially greater than disparities in income.[7] Between 1983 and 2013, the accumulated assets of median African-American households decreased by 75% (Latino households by 50%),[8] and a 2017 report found that if present trends continue, the median African-American household will have a net worth of zero by 2053.[9] These patterns contribute to disparities not just in economic independence and well-being, but also in families' abilities to manage their investments in human capital (e.g., education) and physical capital (e.g., land) that provide pathways for upward mobility.[10] The results deny racial minorities an ownership stake in American society and make their efforts to acquire middle-class status far more perilous than for Whites.

In Part I, this Essay discusses the close relationship between full citizenship and property ownership and how lack of property ownership has denied African-Americans standing in the American polity. The historical marginalization of African-American communities that began with slavery continues today. Part II then examines three factors that have continued to reduce overall minority equity across three traditional pathways for upward mobility: home ownership, higher education, and marriage. First, the most

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6 *See* Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 656–57 (2013) (discussing both de jure and de facto barriers to African-American land ownership following Emancipation).

7 In 2020, Whites had a net worth of ten times that of African-Americans. Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-White-wealth-gap [https://perma.cc/3RCY-MSM9].

8 DEDRICK ASANTE-MUHAMMAD, CHUCK COLLINS, JOSH HOXIE & EMANUEL NIEVES, PROSPERITY NOW, THE ROAD TO ZERO WEALTH: HOW THE RACIAL WEALTH DIVIDE IS HOLLOWING OUT AMERICA'S MIDDLE CLASS 8 (2017), https://prosperitynow.org/sites/default/files/PDFs/road_to_zero_wealth.pdf [https://perma.cc/3893-8MMC].

9 *Id.* at 12.

10 The traditional pathways into middle-class status have been home ownership and other capital investments; the acquisition of greater human capital, primarily through higher education; and marriage, which combines two family networks to transfer material and emotional assets across generations. *See infra* Part II.

dramatic decline in minority wealth stems from the lingering effects of the 2008 financial crisis where an American housing bubble (fueled at least partly by fraud) burst, contributing to a financial crisis. The financial crisis was fueled in part by the practices of predatory lenders who deliberately targeted minority communities.[11] Second, student loan debt has disproportionately burdened African-Americans. At college graduation, African-American graduates owe almost 50% more than Whites, and that gap more than triples on average over the years immediately following graduation.[12] Part of the reason for the gap is that aggressive lending practices at for-profit universities are much more likely to victimize African-Americans than others. Another reason is that African-Americans enjoy less of an increase in income than Whites from the acquisition of degrees. Third, these disparities increase family instability in ways that undermine marriage and increase wariness about a commitment to a partner who may be more of a financial liability than an asset in managing a household.

In each of these cases, intentional public policies—the refusal to rein in predatory lending practices, the underfunding of public universities, and the encouragement of for-profit universities as an alternative—exacerbate the racial disparities.[13] To make matters worse, policymakers pushing free-market policies have used racial disparities to blame victims.[14] Vilification of homeowners who borrowed more than they could afford to pay back, for example, persuaded the Obama Administration to limit the assistance it provided to underwater homeowners—homeowners with mortgages exceeding the market value of their homes—even as the Administration

[11] *See, e.g.*, Jacob W. Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 HOUS. POL'Y DEBATE 328, 331 (2013) (describing how lenders increased the availability of credit to "blacks, Latinos, and other previously excluded groups, but in the form of higher cost and riskier subprime credit"); *see generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (using the term "predatory inclusion" to describe the policies that made African-American homeowners targets for predatory practices).

[12] JUDITH SCOTT-CLAYTON & JING LI, BROOKINGS INST., BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION 1 (2016), https://www.brookings.edu/research/black-White-disparity-in-student-loan-debt-more-than-triples-after-graduation [https://perma.cc/WK64-JSTP].

[13] *See infra* Part II. The tax system also magnifies the disparities. *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021) (discussing how the tax system has consistently provided disproportionate advantages to Whites).

[14] andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 147 (2011). *See generally* JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY (2020) (arguing that the political right maintains support for unpopular economic policies that allow the concentration of wealth by, among other things, stoking racial resentment).

bailed out large Wall Street banks and refused to prosecute the bankers responsible for these practices.[15]

This Essay concludes that the concept of citizenship involves mutually reinforcing practices. Achieving the economic independence that comes with property ownership and investment enhances the qualities associated with responsible citizenship.[16] Yet, real citizenship—including acquisition of some significant measure of political clout—also creates the ability to protect property investments and make them worthwhile. Truly confronting racial inequality, therefore, requires seeing these developments in mutually reinforcing terms.

I. PROPERTY, CITIZENSHIP, AND POLITICAL POWER

American independence, while celebrated as a triumph for democracy, also came with wariness about the precarious nature of democratic governance.[17] The Founders thought that the prospects for democracy were best served by the existence of a large middle group that would promote a stable society.[18] They distrusted both concentrated elite power and the judgment of the masses who lacked a stake in the stability and prosperity of the country.[19] In both cases, they feared that unaccountable power would corrupt democracy and that a widespread investment stake could align political and economic interests in mutually reinforcing ways.[20]

In denying the right to vote to the propertyless (and therefore women, non-Whites, servants, and those enslaved), colonial leaders expressed concern that the powerful, who supplied the economic well-being of the dependent, would also command the votes of those dependent on such largess, magnifying and entrenching the advantages associated with

[15] *See, e.g.*, David Lawder, *Bailout Watchdogs Slam Obama Housing Programs*, REUTERS (July 20, 2010, 10:34 PM), https://www.reuters.com/article/us-usa-bailout-support-idUSTRE66K0I520100721 [https://perma.cc/NM4V-ES9Q] (explaining how Obama-era housing programs were criticized for bailing out banks and failing to prevent home foreclosures efficiently).

[16] *See infra* Part I.

[17] *See, e.g.*, JAMES BRYANT CONANT, THOMAS JEFFERSON AND THE DEVELOPMENT OF AMERICAN PUBLIC EDUCATION 37 (1962) (emphasizing the importance of education to counter the attractiveness of demagogic appeals to the illiterate masses); *cf.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 39 (1985) (observing that "the 'corruption' that created factions as a natural, though undesirable, product of liberty and inequality in human faculties" presents a threat to democracy).

[18] *See, e.g.*, Steinfeld, *supra* note 1, at 357–58, 358 n.71 (describing the rationale for limiting the franchise to property owners in such terms).

[19] *See, e.g.*, GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 104 (2017) (describing Madison's conviction that the American democracy depended on the broad distribution of land ownership).

[20] *See supra* notes 16–17, *infra* notes 21–22 and accompanying text.

wealth.[21] In accordance with these views, property owners had both a measure of autonomy and a lasting identification with the "destiny of the country."[22] In contrast, James Madison warned against "the transient, often imprudent, and almost always tyrannical nature of an impassioned majority" that could give rise to ill-considered factions.[23]

The alternative view, often identified with Thomas Jefferson and other civic republicans, saw promoting conditions that gave rise to a more robust middle group[24] as the solution to unaccountable power threatening democracy. The critical factor was not the restriction of the right to vote, but the strength of the economic center. Brazilian economist Eduardo Giannetti da Fonseca has defined the middle class in modern terms as "people who are not resigned to a life of poverty, who are prepared to make sacrifices to create a better life for themselves but who have not started with life's material problems solved because they have material assets to make their lives easy."[25] Giannetti da Fonseca's emphasis, paralleling the concerns of the Founders, involves a middle group who, on the one hand, are not so wealthy that they can rig the system to ensure the success of themselves and their children, but, on the other hand, are still capable of producing enough of a surplus to invest in the future.

This conception of a center that was willing to take risks but at the same time promote stability resonated with the civic republican views of the Founders. At the time of the country's founding, civic republicans associated property ownership, which granted some independence, with an alignment of interests between citizens and polity and with the promotion of civic virtue.[26] Madison and Jefferson, for example, favored relative economic

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[21] *See* Steinfeld, *supra* note 1, at 340–41; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1552 (1988).

[22] Steinfeld, *supra* note 1, at 358 n.71.

[23] J. Michael Marshall, *Close Encounters of the Referendum Kind*, 84 FLA. BAR J. 56, 56–57 (2010) (citing THE FEDERALIST NOS. 10, 63 (James Madison)).

[24] *See* Letter for the *National Gazette* (Jan. 23, 1792), *in* 14 THE PAPERS OF JAMES MADISON 196, 197–98 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Fredrika J. Teute eds., 1983).

[25] JOHN PARKER, ECONOMIST, BURGEONING BOURGEOISIE: A SPECIAL REPORT ON THE NEW MIDDLE CLASSES IN EMERGING MARKETS 1 (2009), https://www.economist.com/sites/default/files/special-reports-pdfs/13092764.pdf [https://perma.cc/4RZ9-Z5PK].

[26] Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 286 (1991); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 331–33 (1996) (noting that the Framers considered property rights highly important in establishing a liberal constitutional order). In line with these views, the Founders promoted protection of broadly distributed property rights. Alexander, *supra*, at 291; Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387–88 (2006) (noting the historical ties between early American views of the importance of broadly based property rights and

independence as well as political equality[27] and believed that a well-educated citizenry would be more resistant to demagogic appeals.[28]

The experience of African-Americans in the United States serves as counterpoint to every aspect of this account. At the time of the country's founding, the vast majority of African-Americans were enslaved—treated as property, denied the right to vote and to own property, and viewed as incapable of full citizenship. Those who favored the use of state efforts to promote a stable middle class to provide a ballast for American society could not have seen African-Americans (who were overwhelmingly enslaved) as appropriate candidates for that investment.[29] Those who feared the rabble—a propertyless majority perceived as having little stake in the country—readily assigned African-Americans to that group.[30] And the legacy of slavery left too many African-Americans without property—the "ownership" state of the kind that the Founders envisioned was illusory.[31]

The historic African-American exclusion from an economically independent middle class creates a pincer movement. On the one hand, a history of economic predators stripping African-Americans of property rights with impunity prevents the accumulation of the physical, social, and

Republican political ideals). *But see* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5 (1991) (noting that despite the prioritization of property rights, much of early American real property was forcibly taken from Native Americans).

27 *See* Letter for the *National Gazette*, *supra* note 24, at 197–98.

28 *See, e.g.*, Letter from Thomas Jefferson to George Washington (Jan. 4, 1786), *in* CONANT, *supra* note 17, app. III, at 98 (describing Jefferson's emphasis on the importance of education to a democracy).

29 Development economists Daron Acemoglu and James Robinson describe the South, both before and after the Civil War, as an "extractive" economy designed to transfer wealth to a relatively small elite "plantocracy." DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 351–57 (2012). In extractive societies, the associated political and legal institutions neither protect the property rights of the average person nor constrain elite power. Daron Acemoglu, *Root Causes: A Historical Approach to Assessing the Role of Institutions in Economic Development*, 40 FIN. & DEV. 27, 28 (2003). During the early years of Reconstruction, General Sherman's promise to provide formerly enslaved African-Americans with "forty acres and a mule" offered the hope of breaking the back of the South's extractive economic institutions by setting up a propertied class independent of the Southern White plantation elite. But once Sherman's field order was revoked and the land returned to the plantation owners, the hope of genuine political and economic transformation—and full citizenship for African-Americans—died with it. ACEMOGLU & ROBINSON, *supra*, at 357.

30 *See, e.g.*, Willis v. Jolliffe, 32 S.C. Eq. (11 Rich. Eq.) 447, 455–56 (1860) (explaining the likely political instability that Emancipation would create); Atwood's Heirs v. Beck, 21 Ala. 590, 615–16 (1852) (speculating that an increase in the number of free Blacks in neighboring states might destabilize slavery).

31 ACEMOGLU & ROBINSON, *supra* note 29, at 357 ("The vicious circle is based on extractive political institutions creating extractive economic institutions, which in turn support the extractive political institutions, because economic wealth and power buy political power."); *see also* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 511–23 (2001).

political capital necessary to assert political power. On the other hand, the absence of political power makes it difficult to limit the predatory behavior. The inevitable consequence of such a regime is not just the impoverishment of African-American communities but their political marginalization. The predatory behavior prevents these communities from accumulating surpluses that would otherwise allow for investment in the future. Moreover, those benefitting from this unjust system view any attempt by African-American communities to buck the political or economic status quo as a threat. Thus, African-American communities become frozen outside the group that matters in the construction of the American polity.

II. PREDATORS, PROPERTY, AND DISINVESTMENT

By the middle of the twentieth century, the Civil Rights Movement sought to dismantle Jim Crow restrictions and enforce equal rights across the board.[32] During the same period, African-Americans strove to become members of an economically prosperous middle class.[33] As this Essay will chronicle, the markers of middle-class status had become investment in home ownership,[34] education,[35] and marriage.[36] Each marker corresponds to da Fonseca's notions of middle-class status involving the ability to produce enough of a surplus to support investment for the future.[37] Striving for each of these markers also entailed real risks.[38] By the turn of the twenty-first century, African-American investors also faced a renewed threat from

[32] ACEMOGLU & ROBINSON, *supra* note 29, at 357.

[33] *See, e.g.*, Thomas J. Durant, Jr. & Joyce S. Louden, *The Black Middle Class in America: Historical and Contemporary Perspectives*, 47 PHYLON 253, 255–56 (1986) (describing the emergence of a much larger and more visible African-American middle class between 1950 and 1980, corresponding to an increase in education and movement into white-collar occupations).

[34] *Id.* at 261.

[35] *See infra* Section II.B.

[36] *See infra* Section II.C.

[37] *See supra* note 25 and accompanying text.

[38] Investment involves sinking resources into a capital asset (property ownership, human capital investment in education, relationships) with the expectation of a future payoff. *See infra* Sections II.A–II.C. This Essay focuses on housing, debt-financed education, and marriage because these three investments simultaneously have been viewed as the hallmarks of middle-class status, have been the subject of predatory practices that increase household vulnerability, and have triggered "blame-the-victim" criticism that suggests that the victims are responsible for their own fate. Additionally, although stock market investments produce dramatically greater returns than investments in housing and are also subject to substantial racial disparities, substantially lower rates of African-American participate in such investment than White investors. *See, e.g.*, Philip C. Aka & Chidera Oku, *Black Retirement Security in the Era of Defined Contribution Plans: Why African Americans Need to Invest More in Stocks to Generate the Savings They Need for a Comfortable Retirement*, 14 RUTGERS J.L. & PUB. POL'Y 169, 173 (2017).

predators, particularly predators who targeted the politically marginalized.[39] These predatory behaviors further discouraged African-Americans from investing in the three markers of full citizenship and middle-class status. Today, these developments threaten the gains that African-Americans made during the Civil Rights Era and again threaten the possibility of full participation in American life.

A. Home Ownership

1. The Ideal

As a marker of full citizenship and middle-class investment, home ownership remains a potent symbol.[40] Precisely because property is hard to transfer, it constitutes a commitment to the community, the state, and the country.[41] While property ownership as a precondition for civic participation faded with the Industrial Revolution, the idea that some residents who own property may have a greater stake in community well-being than others remains.[42] In this sense, responsible citizenship is still associated with an ownership stake in the well-being of society.

Home ownership has historically been seen as a critical part of the "American Dream," contributing to economic security and civic virtue.[43] Homeowners have been described as financially independent citizens who embody the "core American values of individual freedom, personal responsibility and self-reliance."[44] Rising home values allow homeowners to share in the benefits of economic growth,[45] and home ownership—at least if

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[39] Many of the practices we describe result from financial deregulation, which has increased the opportunities for predatory practices. *See* William K. Black, *The Department of Justice "Chases Mice While Lions Roam the Campsite": Why the Department Has Failed to Prosecute the Elite Frauds that Drove the Financial Crisis*, 80 UMKC L. REV. 987, 993 (2012); JANIS SARRA & CHERYL L. WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN-AMERICAN DREAM 1–2 (2020). *Cf.* Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 859 (2011) (arguing that "the subprime crisis is merely one of a long and striking list of episodes of involuntary divestment from ownership of minority property owners").

[40] *See* Jared Ruiz Bybee, *In Defense of Low-Income Homeownership*, 5 ALA. C.R. & C.L. L. REV. 107, 138 (2013).

[41] *See id.* (contrasting the dangers of absentee ownership with ownership by community residents).

[42] Indeed, many today continue to see majoritarian preferences as "formed against the backdrop of disparities in power and limitations in both opportunities and information." Sunstein, *supra* note 21, at 1544.

[43] A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 189–90 (2009).

[44] *Id.* at 190 (quoting Press Release, The White House, National Homeownership Month, 2005 (May 25, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050525-14.html [https://perma.cc/48SQ-2Q2Y]).

[45] *Id.* at 192.

the homeowner has significant equity in the property—can provide a measure of economic security.[46]

For these reasons, the federal government, as it promoted the creation of a strong middle class in mid-century America, encouraged home ownership through subsidization and other interventions that supported and stabilized the housing and mortgage markets.[47] Government agencies also contributed to the development of the thirty-year fixed mortgage and created incentives that increased mortgage lending.[48]

2. *Race and Reality*

While the government undertook extensive efforts to promote homeownership, it almost simultaneously took steps to exclude African-Americans. In *The Color of Law*, Richard Rothstein describes the Federal Housing Administration's (FHA's) efforts to promote segregation.[49] The FHA pioneered a policy called "redlining," which refused to insure mortgages in and near African-American neighborhoods.[50] It also encouraged the creation of racially restrictive covenants and channeled greater resources to communities that adopted them.[51] While subsidizing the creation of entire subdivisions for Whites, it provided little funding for African-American neighborhoods and at times mandated that the homes in better-off communities not be sold to African-Americans.[52]

The exclusion of African-Americans from federal mortgage efforts made them more vulnerable to predatory lending practices. In Chicago in particular, African-Americans relied heavily on contract lending to purchase homes.[53] Contract lending differed from conventional mortgage loans in that they involved large down payments, monthly payments at high-interest

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46 *Id.* at 191.

47 *Id.* at 193.

48 *See* Christopher L. Peterson, *Fannie Mae, Freddie Mac, and the Home Mortgage Foreclosure Crisis*, 10 LOY. J. PUB. INT. L. 149, 154 (2009).

49 RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63–67 (2017).

50 Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [https://perma.cc/JMF2-WNGX].

51 Lisa Rice, *Long Before Redlining: Racial Disparities in Homeownership Need Intentional Policies*, SHELTERFORCE (Feb. 15, 2019), https://shelterforce.org/2019/02/15/long-before-redlining-racial-disparities-in-homeownership-need-intentional-policies/ [https://perma.cc/LMB7-6KSB].

52 *See* J. William Callison, *From the Reading Room*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 5, 10 (2017) (reviewing ROTHSTEIN, *supra* note 49).

53 Natalie Moore, *Contract Buying Robbed Black Families in Chicago of Billions*, NPR (May 30, 2019), https://www.npr.org/local/309/2019/05/30/728122642/contract-buying-robbed-black-families-in-chicago-of-billions [https://perma.cc/N4MK-62E5].

rates,[54] and title passing to the homeowner only when all the payments had been made and all the contract conditions were met.[55] The contract seller held the deed and could seize the property if the buyer missed even a single payment.[56] Over the period of the contract, the buyer acquired no equity in the home and was not protected by regulation of the practices.[57]

A 2019 report examining these practices concluded that between 75% and 95% of African-American homeowners in Chicago during the 1950s and 1960s purchased their homes through these contracts.[58] The price markup on these homes was 84%, and African-Americans who entered into these contracts "paid, on average, an additional $587 (in April 2019 dollars) more each month" than if they had a conventional mortgage.[59] These practices made home ownership much riskier for African-Americans. Speculators drained money from African-American communities, and neighborhoods, where contract lending predominated, were subject to higher levels of decline than other areas.[60] Discriminatory federal policies created the conditions that allowed these predatory lending practices to occur, and the lack of African-American political clout made it harder to fight the discrimination and predation.[61]

3. *The Financial Crisis, Race, and Disinvestment*

The impact of redlining—and reverse redlining[62]—in the middle of the twentieth century pales in comparison with the impact of the mid-2000s housing bubble and the financial crisis that followed. Scholars have characterized the financial crisis as "nothing short of the preeminent civil rights issue of our time, erasing, as it has, a generation of hard fought wealth

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[54] *Id.*

[55] David Dayen, *African-Americans Are Still Being Victimized by the Mortgage Market*, NEW REPUBLIC (May 27, 2014), https://newrepublic.com/article/117912/reparations-how-mortgage-market-hurts-african-americans [https://perma.cc/8WYR-2YJS].

[56] *Id.*

[57] Moore, *supra* note 53.

[58] THE SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY, DUKE UNIV., THE PLUNDER OF BLACK WEALTH IN CHICAGO: NEW FINDINGS ON THE LASTING TOLL OF PREDATORY HOUSING CONTRACTS iii (2019), https://socialequity.duke.edu/wp-content/uploads/2019/10/Plunder-of-Black-Wealth-in-Chicago.pdf [https://perma.cc/8Y5W-ZDKF]; *see also* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 4 (2009) (estimating the total of African-American homeowners relying on contract loans at 85%).

[59] THE SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY, *supra* note 58, at iii.

[60] *See* Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 904 (2020) (observing that such neighborhoods quickly declined).

[61] *See id.* at 900, 904.

[62] Reverse redlining has been defined as "the practice of extending credit on unfair terms" to communities that have been historically denied access to credit, predominantly on the basis of race. Hargraves v. Cap. City Mortg. Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

accumulation among African Americans."[63] Between 2007 and 2013, African-American college graduates lost an astounding 60% of their accumulated equity, and Hispanic college graduates lost an even greater amount.[64] In comparison, White college graduates lost 16% during the same period.[65]

The housing bubble and the financial crisis followed a period of financial deregulation that fueled predatory lending practices.[66] Legislative changes in the 1980s and 1990s facilitated a shift from direct lending by banks and thrifts to less regulated nonbank lenders through securitized lending.[67] Banks that made direct loans and held the loans in their own portfolios had incentives to secure loan value through underwriting practices that appraised long term home value and guarded against the borrower's likelihood of default.[68] The revenue of nonbank mortgage originators came from "points, fees, origination charges and especially the size of the gap between the prevailing interest rate index and the rate paid by borrowers, commonly known as the 'yield spread.'"[69]

This meant that the more loans brokers originated, the more money they made. And the higher the fees, origination charges, and yield spread premium that they could command, the higher their reported revenue.[70]

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[63] Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 942 (2011).

[64] William R. Emmons & Lowell R. Ricketts, *College Is Not Enough: Higher Education Does Not Eliminate Racial and Ethnic Wealth Gaps*, 99 FED. RSRV. BANK ST. LOUIS REV. 7, 17 (2017), https://files.stlouisfed.org/files/htdocs/publications/review/2017-02-15/college-is-not-enough-higher-education-does-not-eliminate-racial-and-ethnic-wealth-gaps.pdf [https://perma.cc/6SCH-X74E]; *see also* Justin P. Steil, Len Albright, Jacob S. Rugh & Douglas S. Massey, *The Social Structure of Mortgage Discrimination*, 33 HOUS. STUD. 759, 761 (2018) ("Even after controlling for available loan and household characteristics, such as income, black home purchase borrowers were more than twice as likely to receive a subprime loan as white borrowers and the likelihood of receiving a subprime loan actually increased with household income, calling into question claims that subprime loans were given to riskier borrowers.").

[65] Emmons & Ricketts, *supra* note 64, at 17 fig.6. Minority college graduates who might have qualified for prime loans were targeted for unfavorable mortgage terms, contributing to loan defaults and foreclosures that stripped them of the equity they had in their homes before the loans. *See* Carlos Garriga, Lowell R. Ricketts & Don E. Schlagenhauf, *The Homeownership Experience of Minorities During the Great Recession*, 99 FED. RSRV. BANK ST. LOUIS REV 139, 148 (2017), https://files.stlouisfed.org/files/htdocs/publications/review/2017-02-15/the-homeownership-experience-of-minorities-during-the-great-recession.pdf [https://perma.cc/3FZT-F6NX] (finding that delinquencies and foreclosures were much higher for African-Americans and Latinos than for other groups).

[66] *See* WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY 30 (updated ed. 2013).

[67] Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOCIO. REV. 629, 631–32 (2010); Steil et al., *supra* note 64, at 761.

[68] Steil et al., *supra* note 64, at 761.

[69] *Id.*

[70] *Id.* at 768.

During the '90s, mortgage lenders had developed new models justifying increased lending to borrowers with low credit scores. "Subprime loans" made to borrowers with greater credit risk tended to come with higher fees and interest rates, boosting the revenue for their originators.[71] A lender focused on the long-term profitability of a loan portfolio would balance the increased revenue from such loans against their increased risk and, indeed, the traditional lenders who developed subprime loans reported only slightly increased default rates from their portfolios.[72] A lender, on the other hand, who planned to sell the mortgages to others to be securitized or who simply sought to maximize short-term revenue (and the bonuses for top executives) would place greater weight on the additional up-front revenue and less on long-term risk.[73] The least-scrupulous lenders thus sought to grow rapidly, emphasizing origination of the mortgages generating the greatest revenue and fees, with little attention to loan quality—that is, the value of the underlying collateral or the borrower's ability to repay the loan.[74] At the height of the housing bubble of the mid-2000s, "the subprime market was the Wild West. Over half the mortgage loans were made by independent lenders without any federal supervision."[75]

The housing bubble produced a sophisticated "Ponzi scheme."[76] Individual brokers who initiated loans "received compensation based on the volume of loans originated, rather than the quality of the loans made."[77] The emphasis on quantity over quality led lenders to seek out the vulnerable, unsophisticated, and politically powerless borrowers who could be persuaded to take out loans that industry insiders referred to as "toxic."[78]

The expanding army of loan brokers disproportionately found such borrowers in minority communities.[79] Scholars observe, "[a]fter being

[71] *See* Nier & St. Cyr, *supra* note 63, at 944–96.

[72] *Id.* at 944; *see also* cummings, *supra* note 14, at 212 (noting that, for traditional lenders, the default rates and percentages are significantly lower than the subprime loans written by independent mortgage companies and are in line with typical default percentages expected with CRA subprime loans).

[73] *See* Thomas Herndon, *Liar's Loans, Mortgage Fraud, and the Great Recession*, 31 REV. POL. ECON. 479, 482 (2020).

[74] *Id.* at 479.

[75] Paul Krugman, *A Catastrophe Foretold*, N.Y. TIMES (Oct. 26, 2007), https://www.nytimes.com/2007/10/26/opinion/26krugman.html [https://perma.cc/7DDJ-3FG8].

[76] Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 1008 (2009); *see also* June Carbone, *Once and Future Financial Crises: How the Hellhound of Wall Street Sniffed out Five Forgotten Factors Guaranteed to Produce Fiascos*, 80 UMKC L. REV. 1021, 1026 (2012) (describing "the central factor in a Ponzi scheme—the ability to earn large sums in the present through activities likely (or even certain) to lead to the eventual failure of an enterprise").

[77] Carbone, *supra* note 76, at 1058.

[78] *Id.* at 1054–55.

[79] *See* Steil et al., *supra* note 64, at 769.

denied credit for years these communities represented an untapped market with established home equity and ample room for increased homeownership populated by borrowers with little financial experience."[80] African-American and Latino borrowers remained "more likely than whites to be turned down for a mortgage, even when controlling for income and home location."[81] Mortgage originators seeking to peddle nonprime loans on a wholesale basis saw an opportunity.[82]

Nonprime loans grew dramatically,[83] driven by the mortgage originators who often used predatory practices to pressure wary or unsophisticated borrowers to take out loans on adverse terms.[84] Scholars maintain that while predatory lending can be difficult to define, "the link between predatory lending and subprime lending is clear"; the lenders originating the most nonprime loans also are the most likely to engage in abusive lending practices.[85] These practices include (1) excessive fees and interest rates given the nature of the loan and the borrower's credit quality; (2) "fraudulent, high-pressure, or misleading marketing"; and (3) high rates of refinancing, including "flipping" one loan into another, often on onerous terms, to avoid default.[86]

The results were particularly devastating for minority communities.[87] The mortgage brokers were not trying to provide a service tailored to meet borrower needs. Instead, they were seeking to peddle as many high revenue loans as possible.[88] The predatory lenders who targeted vulnerable communities often focused on well-off minority borrowers—borrowers who might otherwise have qualified for more advantageous prime loans.[89] As a result of these practices, "low-risk African American borrowers were 65% more likely than similar white borrowers to receive a subprime home-

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[80] *Id.* at 761.

[81] Nier & St. Cyr, *supra* note 63, at 947.

[82] Steil et al., *supra* note 64, at 761 (attributing the racially segmented practices to the "persistence of high levels of racial segregation combined with structural changes in the lending industry").

[83] Nier & St. Cyr, *supra* note 63, at 944. For the purposes of this Essay, we use nonprime lending to refer to higher-cost, higher-risk lending products that generate higher revenues for lenders.

[84] Indeed, loan officers testified that they targeted minority communities because they believed that they would be less savvy in evaluating nonprime loans with onerous terms. Steil et al., *supra* note 64, at 769.

[85] Nier & St. Cyr, *supra* note 63, at 946.

[86] *Id.* (quoting DANIEL IMMERGLUCK & MARTI WILES, WOODSTOCK INST., TWO STEPS BACK: THE DUAL MORTGAGE MARKET, PREDATORY LENDING, AND THE UNDOING OF COMMUNITY DEVELOPMENT 1, 8 (1999)).

[87] *See* Rugh & Massey, *supra* note 67, at 632.

[88] *Id.* at 630.

[89] *See* Emma Coleman Jordan, *The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures*, 2 U. PA. J.L. & PUB. AFFS. 107, 122 (2017) (explaining how "lenders encouraged their mortgage brokers to sell more subprime loans by offering larger commissions" and that this contributed to the targeting of minority neighborhoods underserved by more conventional lenders).

purchase loan and 124% more likely to receive a subprime refinance loan."[90] By 2006, "roughly one out of every two loans made to African-American (53%) and Latino (46%) borrowers were high-cost, compared to fewer than one out of five loans made to white borrowers (18%)."[91]

Compounding the effect, roughly two-thirds of the subprime loans at the height of the bubble were made to homeowners who already owned their homes and were refinancing them, particularly in minority communities.[92] In addition to charging higher fees and interest rates, some of these loans offered "temporary low teaser rates, interest only mortgages, or mortgages with 40 year payment terms that ballooned in later years."[93] Others involved prepayment penalties that made it harder to refinance to avoid the jump in monthly payments in later years.[94] Yet, the lenders evaluated the borrower's ability to repay the loan based only on their ability to afford the initial "teaser rate."[95]

The combination of more expensive terms and the lack of rigorous underwriting to determine the borrower's ability to repay the loan made foreclosure more likely.[96] Concentrated foreclosures, in turn, had a devastating impact on minority neighborhoods, affecting local property values (even in homes that did not experience foreclosure); serving as a magnet for crime, particularly when property remained vacant for an extended period; and undermining the property tax base needed to support local schools and services.[97] Entire communities became burdened with increased debt, reducing the assets available for other investments and contributing to neighborhood devaluation.[98]

Ramirez and Williams conclude that the financial crisis "contributed to the greatest upward transfer of wealth in modern American history."[99] In part because of falling home values, African-American households experienced

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[90] Nier & St. Cyr, *supra* note 63, at 949.

[91] Steil et al., *supra* note 64, at 761.

[92] *Id.*

[93] *Id.* at 766.

[94] *See* McGlawn v. Pa. Hum. Rels. Comm'n, 891 A.2d 757, 769 (Pa. Commw. Ct. 2006) (describing onerous lending practices and fraud).

[95] Steil et al., *supra* note 64, at 766.

[96] Nier & St. Cyr, *supra* note 63, at 948.

[97] *See* Nier & St. Cyr, *supra* note 63, at 948 n.56 (quoting CAL. REINVESTMENT COAL. ET AL., PAYING MORE FOR THE AMERICAN DREAM: A MULTI-STATE ANALYSIS OF HIGHER COST HOME PURCHASE LENDING 1 (2007)). By 2017, White homeowners at all income levels showed at least some appreciation in property while African-Americans at all income levels continued to show home values below 2006 levels. Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019, 12:01 AM), https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation [https://perma.cc/HC2C-TWB4].

[98] Nier & St. Cyr, *supra* note 63, at 948.

[99] Steven A. Ramirez & Neil G. Williams, *Deracialization and Democracy*, 70 CASE W. RSRV. L. REV. 81, 99 (2019).

a 53% decline in net worth during the financial crisis.[100] Hispanic households experienced a 66% decline.[101] Meanwhile, White household wealth declined by only 16%.[102]

African-American and Latino homeowners were targeted because they were vulnerable.[103] Yet in the aftermath of the financial crisis, conservative commentators tried to shift the blame to government policies that encouraged expansion of lending to previously excluded groups[104] or to the borrowers themselves for borrowing more than they could afford.[105] The purpose of many of these efforts was to block regulatory reform and government-sponsored relief for the homeowners.[106] Law professors Janis Sarra and Cheryl Wade describe any reforms to help the homeowners as "pathetically weak," and "the actual relief given to families suffering the devastating effects of the meltdown [as] woefully inadequate."[107] The relief to homeowners paled in comparison with the Wall Street bailouts that kept the major financial institutions that had profited from the practices afloat.[108] It also undermined the financial base of many minority communities, as property values remained depressed and homeowners' debt burden increased.[109] The overall result is that the long-standing racial disparities in home ownership worsened not only during the financial crisis but in the

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[100] Jordan, *supra* note 89, at 112.

[101] *Id.*

[102] *Id.*

[103] *See, e.g.*, Swan, *supra* note 60, at 879–82 (describing the role of redlining and reverse redlining in explaining vulnerability during the financial crisis); Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. STATE U.L. REV. 313, 316 (2015) (alterations and emphasis in original) (quoting M&T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 576 (2010)) (describing a "jury might well conclude that [the borrowers] were targeted not on the basis of being African-American, but because they were vulnerable, low-income, unsophisticated, first-time home buyers who *happened* to be African-American" even if it cannot be determined that they were targeted *because* of their race).

[104] PETER J. WALLISON, HIDDEN IN PLAIN SIGHT: WHAT REALLY CAUSED THE WORLD'S WORST FINANCIAL CRISIS AND WHY IT COULD HAPPEN AGAIN 218 (2016).

[105] *See, e.g.*, cummings, *supra* note 14, at 205 (explaining the "dirty little myth" that minority borrowers were to blame for the housing crisis); *cf.* Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1570 (2016) (observing that the consensus view is that the housing bubble was fueled by supply side demand (the desire of the lenders to originate more mortgages) rather than greater borrower demand).

[106] *See, e.g.*, Natalie Goodnow, *'Hidden in Plain Sight': A Q&A with Peter Wallison on the 2008 Financial Crisis and Why It Might Happen Again*, AM. ENTER. INST. (Jan. 13, 2015), https://www.aei.org/economics/hidden-plain-sight-qa-peter-wallison-2008-financial-crisis-might-happen [https://perma.cc/NZK2-TRTX] (explaining that the result was to get the government out of the housing market entirely).

[107] SARRA & WADE, *supra* note 39, at 1–2.

[108] *See, e.g.*, Jeffrey Manns, *Building Better Bailouts: The Case for a Long-Term Investment Approach*, 63 FLA. L. REV. 1349, 1371 (2011) (stating that Congress authorized bailouts of $700 billion for Wall Street through the Trouble Asset Relief Program); *see also* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765. For a comprehensive view, see generally Xiaoxi Liu, *The Costs of Bailouts in the 2007–08 Financial Crisis*, 22 FORDHAM J. CORP. & FIN. L. 417 (2017).

[109] Nier & St. Cyr, *supra* note 63, at 948.

postrecession recovery.[110] African-American college graduates lost the most ground as they became even less likely than White college graduates to own their own homes than they had been before the Crisis.[111] Wade and Serra conclude that the "progress of blacks into the middle class that started in the mid twentieth century not only stopped after 2008, but also declined significantly."[112]

B. Higher Education

The second traditional pathway into middle-class status and greater political clout is education—particularly higher education. Thomas Jefferson viewed education much the same way he did property ownership: as facilitating the independent thought necessary for democratic self-government.[113] California Supreme Court Justice Goodwin Liu argues that education is a central component of the concept of equal citizenship, both historically and today.[114] Yet, both historically and today, this pathway has been more perilous for African-Americans.

African-Americans were excluded from education during slavery. Slave owners believed that education would undermine slavery because "if slaves were permitted to learn to read and write the English language, they could begin to think and act on their own and rebellion was inevitable."[115] South Carolina became the first Southern state to pass prohibitions on educating enslaved African-Americans in 1740,[116] and most of the other slave states followed suit.[117] With Emancipation, African-Americans slowly gained access to public education as the South put in place comprehensive public school systems for the first time.[118] However, in contrast with the rest

[110] Christopher Famighetti & Darrick Hamilton, *The Great Recession, Education, Race, and Homeownership*, ECON. POL'Y INST. (May 15, 2019, 2:04 PM), https://www.epi.org/blog/the-great-recession-education-race-and-homeownership [https://perma.cc/LKS9-P42K].

[111] *Id.*

[112] SARRA & WADE, *supra* note 39, at xv.

[113] *See* Letter from Thomas Jefferson to George Washington, *supra* note 28, at 98.

[114] *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 342, 344 (2006) ("[C]itizenship implicates not only the civic republican values of political participation and democratic self-governance, but also the ethical values of mutual respect, personal responsibility, and equal dignity.").

[115] Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, 33 BEVERLY HILLS BAR ASS'N J. 12, 13 (2000).

[116] *Id.*

[117] *See* Paul Finkelman, *Coming to Terms with* Dred Scott*: A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49, 67 (2011) (stating that "[m]ost of the slave states made it a crime to educate any blacks, slave or free").

[118] *See* STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880, at 134 (1980).

of the country, none of the Southern states had well-developed public school systems in 1870—for Whites or African-Americans.[119]

Meanwhile, by the middle of the twentieth century, university education expanded and became more critical to individual advancement. At the beginning of this expansion, public colleges and universities were relatively affordable.[120] But since the end of the 1980s, public funding of university education has declined as a percentage of total cost[121] as tuition has increased substantially.[122] Student borrowing has made up the difference.[123]

Since Emancipation, African-Americans have sought the same educational opportunities as other Americans.[124] Yet they have received less access to affordable, good-quality education, and pervasive discrimination has made the payoff from their investments less than that for Whites with comparable degrees.[125] The Great Recession exacerbated all of these conditions and set the stage for a new round of predatory practices with familiar racially disparate effects.

Four facts help to contextualize these predatory practices, especially during times of financial crises. First, financial downturns are often seen as a good time to stay in school and disproportionately affect African-Americans.[126] Second and relatedly, an additional degree can be seen as

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[119] *See* Liu, *supra* note 114, at 388, 391 (stating that, in the 1880s, the tax base in the Northeast, with high school enrollment levels and low illiteracy, was four times the base in "the South, where enrollment rates were low and illiteracy rates high").

[120] Public institutions and funding reached their height in the postwar era, and the percentage of students attending public colleges and universities increased from one in five at the beginning of the twentieth century to two in three by the beginning of the twenty-first century. *See* CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY 130, 266 (2008).

[121] S*ee* NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 71–72, 71 fig.20 (Thomas D. Snyder ed., 1993); Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1577 (2015).

[122] John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 239 (2016). The increases have been particularly steep at public universities compared with the increase at private, nonprofit institutions. Glater, *supra* note 121, at 1573.

[123] Brooks, *supra* note 122, at 248–51. Brooks reports, "In the 1975–1976 academic year, total federal grants were four times the volume of federal loans, but by 1981–1982, loans became a greater share of federal funding, and by 2012 the volume of federal grants was about half the volume of federal loans." *Id.* at 248 (citations omitted).

[124] *See, e.g.*, Herman N. Johnson Jr., *From Status to Agency: Abolishing the "Very Spirit of Slavery*,*"* 7 COLUM. J. RACE & L. 245, 262 (2017) (observing that "freed Black persons valued education as a central tenet of freedom, and this value reflected the desire for autonomy and self-improvement they believed to be so indicative of freedom").

[125] *See* Emmons & Ricketts, *supra* note 64, at 32–33.

[126] *See* SCOTT-CLAYTON & LI, *supra* note 12, at 5 (indicating that higher African-American graduate enrollment rates may reflect higher unemployment rates as "the Great Recession hit black college graduates much harder than white college graduates," and evidence indicates that "employers are more likely to discriminate against minorities in weak labor markets").

essential to gain employment in a tight labor market.[127] Third, absent increased federal expenditures, financial downturns undercut state tax bases, undermining support for public education.[128] This can make public universities more expensive as they raise tuition to compensate.[129] Fourth, the decline in income and asset values made it harder for parents to contribute to their children's education, increasing reliance on student loans.[130]

During the financial crisis, for-profit universities were poised to take advantage of these circumstances to engage in predatory lending practices. Their expansion depended on the existence of federal loan guarantees without appropriate oversight of the institutions profiting from the loans.[131] In 1965, Congress passed legislation to encourage greater student lending.[132] Student borrowers, who typically have no income, assets, or credit history, are thus poor credit risks for traditional loans.[133] By guaranteeing loan repayment, the federal government encouraged private lenders to extend credit at lower rates.[134] In 2005, Congress substantially increased the amount students—especially graduate students—could borrow.[135] Congress also passed legislation limiting the ability to discharge student loans in bankruptcy—a boon to creditors—and expanding the loan programs.[136]

As a result, student borrowing dramatically increased, with African-Americans seeing the largest overall increases.[137] Between 1993 and 2008, average individual student loan debt rose substantially, tripling for Latinos,

[127] Brooks, *supra* note 122, at 237. This has been particularly true for African-American women, who are more likely to be in fields such as education or health care where additional degrees are important to advancement. African-American enrollment in masters programs doubled between 1996 and 2016, with women leading the way. Nikki Katz, *Black Women Are the Most Educated Group in the U.S.*, THOUGHTCO (June 20, 2020), https://www.thoughtco.com/black-women-most-educated-group-us-4048763 [https://perma.cc/K5SN-PXYV].

[128] Brooks, *supra* note 122, at 246.

[129] *Id.*

[130] Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2017, 9:00 AM), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-showstudent-loan-crisis-african-american-borrowers [https://perma.cc/SCH6-HWPC].

[131] *See* Matthew Adam Bruckner, *The Forgotten Stewards of Higher Education Quality*, 11 U.C. IRVINE L. REV. 1, 12 (2020).

[132] 20 U.S.C. § 1071; *see also* Timothy D. Naegele, *The Guaranteed Student Loan Program: Do Lenders' Risks Exceed Their Rewards?*, 34 HASTINGS L.J. 599, 599 (1983).

[133] Naegele, *supra* note 132, at 603 n.23.

[134] *Id.* at 601 (noting that although the Act was originally designed to benefit low-income borrowers, it was eventually extended to all student borrowers).

[135] The Higher Education Reconciliation Act of 2005 (HERA 2005) greatly increased federal borrowing limits, particularly for graduate students. C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J. COLL. & U.L. 79, 91 (2007).

[136] Brooks, *supra* note 122, at 249 (calling this legislation "essentially an additional subsidy to lenders").

[137] *See* SCOTT-CLAYTON & LI, *supra* note 12, at 2.

quadrupling for Whites, and rising almost sixfold for African-Americans.[138] Graduate borrowing accounted for a significant share of the differences.[139] The most startling finding, however, was that this increased African-American graduate enrollment was concentrated in for-profit institutions, accounting for more than a quarter (28%) of African-American graduate enrollment in comparison with only 9% for Whites in 2012.[140]

The growth of African-American enrollment in for-profit institutions is recent. In 2004, for-profit institutions enrolled less than seven percent of the students in any racial group.[141] Yet by 2008, around a quarter of African-American graduates were enrolled in for-profit institutions.[142] This growth has had a major impact on the student loan picture, particularly for African-Americans.

First, the level of borrowing at for-profit institutions is higher than at other educational institutions. At all institutions, African-Americans already borrow more than other students.[143] At for-profit institutions, students generally are more dependent on student loans, with 95% of African-Americans at these institutions taking out loans.[144]

Second, the benefit from attending a for-profit institution is less than what students at other institutions receive for their degree. Five years after entering these for-profit programs, students are less likely to be employed or satisfied with their course of study than students attending public or private nonprofit schools.[145]

Third, given these factors, it is unsurprising that African-Americans have higher default rates than other borrowers[146] and that student defaults in repaying loans at for-profit institutions are vastly higher than at other educational institutions.[147] These effects reinforce each other. For example, "only 4 percent of white graduates who never attended a for-profit defaulted within 12 years of entry, compared to 67 percent of black dropouts who ever attended a for-profit."[148]

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138 *Id.* at 3 fig.1.

139 *Id.* at 3 fig.2.

140 *Id.* at 4 fig.4.

141 *Id.*

142 *Id.* at 4 fig.5.

143 Miller, *supra* note 130.

144 *Id.* at tbl.1.

145 David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSPS. 139, 159 (2012). Graduates from these programs also have lower earnings, but the effects are not statistically significant. *Id.* at 160.

146 *See* JUDITH SCOTT-CLAYTON, BROOKINGS INST., THE LOOMING STUDENT LOAN DEFAULT CRISIS IS WORSE THAN WE THOUGHT 6 (2018), https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf [https://perma.cc/2MHR-DP79].

147 Deming et al., *supra* note 145, at 143, 153.

148 SCOTT-CLAYTON, *supra* note 146, at 1.

Fourth, about a quarter of the racial gap in student loan debt reflects differences in rates of repayment and interest accrual,[149] further compounding the impact of student debt. African-Americans are much more likely than Whites (48% compared with 17%) to have interest accumulate faster than repayments, increasing their debt loads after graduation.[150] For African-Americans, the rates are at "crisis levels" and continuing to rise.[151]

While some for-profit institutions perform a useful service by training students, for example, in health care and technology,[152] others enrich their executives at the expense of their students.[153] The growth of for-profit education institutions—like the growth of unregulated mortgage lenders—reflected market-oriented neoliberal ideology.[154] As Congress cut back on grants, it expanded the availability of federally guaranteed loans and seemingly treated the growth of for-profit institutions as evidence of the wisdom of the market.[155] Yet, increasing the availability of federal student loan guarantees without increasing supervision of the quality of educational institutions creates what economists call a "moral hazard."[156] Of higher education institutions eligible to receive federal financial aid under Title IV of the Higher Education Act, 42.9% were for-profit institutions in academic year 2016–2017.[157] Deriving up to 90% of their revenue from federal aid programs,[158] these for-profit institutions had incentives to enroll as many students as possible.[159] With each student enrolled, the college or university

[149] SCOTT-CLAYTON & LI, *supra* note 12, at 4.

[150] *Id.* ("[B]lack graduates owe 6 percent more than they have borrowed, while white graduates owe 10 percent less than they have borrowed, four years after graduation.").

[151] SCOTT-CLAYTON, *supra* note 146, at 9.

[152] *See, e.g.*, Deming et al., *supra* note 145, at 143.

[153] *See* Joseph Sipley, *For-Profit Education and Federal Funding: Bad Outcomes for Students and Taxpayers*, 64 RUTGERS L. REV. 267, 274–76, 278–79 (2011) (documenting poor outcomes for students and high levels of executive compensation); *see also* Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults*, BROOKINGS PAPERS ON ECON. ACTIVITY 1, 79–80 (2015), https://www.brookings.edu/wp-content/uploads/2015/09/LooneyTextFall15BPEA.pdf [https://perma.cc/94JS-TCRB].

[154] *See* Black, *supra* note 39, at 993–95 (explaining that a deregulatory mindset in the lending markets led to the financial crisis).

[155] *See, e.g.*, Jacob Alderdice, *The Informed Student-Consumer: Regulating For-Profit Colleges by Disclosure*, 50 Harv. C.R.-C.L. L. Rev. 215, 224–25 (2015) (observing that "state spending on higher education has decreased in the last several decades, falling from 4.1% of total state government spending in 1984 to 2.4% in 1994 to 1.8% in 2004," and that in this period loans have increasingly been preferred to direct spending or grants).

[156] BLACK, *supra* note 66, at 6 (describing moral hazard as the "temptation to seek gain by engaging in abusive, destructive behavior, either fraud or excessive risk taking" and explaining that "[m]oral hazard arises when gains and losses are asymmetrical").

[157] ALEXANDRA HEGJI, CONG. RSCH. SERV., R43159, INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS 1 (2019).

[158] Stephanie Riegg Cellini & Claudia Goldin, *Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges*, 6 AM. ECON. J.: ECON. POL'Y, 174, 175 (2014).

[159] Sipley, *supra* note 153, at 291.

would receive the federal guaranteed loans up front, ensuring that the institution would profit whether or not the student ever repaid the loans and whether or not they graduated.[160]

The obvious response to this type of asymmetric risk is oversight of the institutions. Indeed, the federal government requires accreditation for eligibility to participate in the federal guarantee loan program.[161] Yet, oversight has been lax,[162] and under former Secretary of Education Betsy DeVos, the Department of Education has rolled back Obama-era measures designed to strengthen oversight.[163]

The incentives to grow—and to spend as little as possible educating students[164]—led to the use of aggressive marketing campaigns designed to find students who were willing to take out the loans necessary to pay the relatively high tuition at these institutions.[165] A 2012 Senate investigation, for example, found that for-profit institutions spend hundreds of millions of dollars a year on marketing, often more than they spend on instruction.[166] For-profit institutions average $400 in advertising per student in comparison with public institutions that average $14 per student.[167] The advertising typically targets the vulnerable: veterans, single parents, low-income, and minority students.[168] The schools have been accused of misrepresenting costs,[169] using high-pressure sales tactics,[170] admitting students who have not graduated from high school, and "misleading students about classes and programs in order to secure enrollment."[171] For-profit schools claim, however, that they are more likely to meet students "where they are," offering more flexible scheduling to accommodate students who are working

[160] *See id.* ("[T]he schools themselves get paid upfront and do not suffer any consequences of a default . . . .").

[161] Higher Education Act of 1965, 20 U.S.C. § 1002(b)(1)(A)(ii)(II).

[162] *See* Bruckner, *supra* note 131, at 14–15 (describing weaknesses in accreditation oversight).

[163] Brooke Seipel, *DeVos Rolls Back Obama-Era Policy that Aimed to Curb Abuse from For-Profit Colleges*, HILL (June 28, 2019, 8:45 PM), https://thehill.com/homenews/administration/450982-devos-rolls-back-obama-era-policy-that-aimed-to-curb-abuse-from-for [https://perma.cc/P6DD-WP7K].

[164] Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 158 (2020).

[165] *See* Cellini & Goldin, *supra* note 158, at 200 (pointing out that the amount spent on marketing is roughly the same as the amount that these institutions make from the increased tuition).

[166] Alderdice, *supra* note 155, at 225.

[167] Stephanie Riegg Cellini, *The Alarming Rise in For-Profit College Enrollment*, BROOKINGS (Nov. 2, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/11/02/the-alarming-rise-in-for-profit-college-enrollment/ [https://perma.cc/28VW-M9ZB].

[168] Alderdice, *supra* note 155, at 225–28.

[169] *See, e.g.*, Joseph Sanders & Vijay Raghavan, *Improvident Student Lending*, 2018 UTAH L. REV. 919, 933–36 (2018) (describing cases alleging that for-profit colleges failed to provide appropriate information or steered students towards high default loans in order to generate revenue for the institution).

[170] Alderdice, *supra* note 155, at 228.

[171] Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J. COLL. & U.L. 45, 73 (2011).

or caring for children.[172] Predatory recruiting—including the deliberate targeting of prospective African-American students—contributes to the racial disparities in enrollment.[173] The lesser emphasis on entering credentials and the lesser available support services, not to mention closures and outright fraud, contribute to lower completion rates.[174]

The responses to the growth in minority student loan debt have been twofold. First, just as the financial crisis led to critics questioning the value of home ownership, so has the growth in student debt led to renewed questioning of the value of a college education. Crippling debt is given as a major reason for questioning the value of a college degree,[175] and indeed, the payoff is lowest for those snookered into attending poor-quality for-profit schools.[176] As a result, since 2010, overall African-American college enrollment has fallen.[177] The second response has been to increase the pressure for across-the-board student debt forgiveness.[178] The critical question going forward, student debt forgiveness or not, is what role education plays as a pathway into the middle class.

The COVID-19 pandemic, together with the Trump Administration's weakening of regulatory oversight, has raised the specter of a new wave of unnecessary debt.[179] Enrollment in for-profit institutions is again on the rise, corresponding with substantial drops in community college attendance.[180] Particularly concerning is the increased attendance of first-time college students enrolling at for-profit colleges right out of high school.[181] Creating second-class private institutions to address the unmet need for postsecondary

[172] Ashley A. Smith, *For-Profit Graduate Schools Popular with Black Women*, INSIDE HIGHER ED. (July 25, 2017), https://www.insidehighered.com/news/2017/07/25/black-women-graduate-students-enroll-higher-numbers-profits [https://perma.cc/6HHS-WFUD].

[173] For-profit recruiting practices have been described as "little more than racial dog whistles." Mark Huelsman, *Betrayers of the Dream*, AM. PROSPECT (July 12, 2015), https://prospect.org/labor/betrayers-dream/ [https://perma.cc/4DQ6-QKU4].

[174] Jiménez & Glater, *supra* note 164, at 148.

[175] *Is a College Education Worth It?*, BRITANNICA PROCON.ORG (Jan. 30, 2020), https://college-education.procon.org [https://perma.cc/NGG9-CY2T].

[176] Cellini, *supra* note 167.

[177] Megan Zahneis, *Why Has Black-Student Enrollment Fallen?*, CHRON. HIGHER EDUC. (Aug. 18, 2019), https://www.chronicle.com/article/why-has-black-student-enrollment-fallen [https://perma.cc/A9GY-87GB].

[178] Kate Smith, *Biden's Department of Education Secretary Pick Miguel Cardona Says Student Debt Relief Will Be "a Priority,"* CBS News (Jan. 26, 2021, 2:07 PM), https://www.cbsnews.com/news/student-loans-miguel-cardona-education-department-priority [https://perma.cc/Z6AU-5PDF].

[179] Kenneth K. Wong, *Trump's Administrative Presidency and Its Effort to Weaken Federal Oversight in Public Education*, BROOKINGS (Oct. 12, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/10/12/trumps-administrative-presidency-and-its-effort-to-weaken-federal-oversight-in-public-education [https://perma.cc/5WN7-KWKY].

[180] Cellini, *supra* note 167.

[181] *Id.*

education simply invites fraud—fraud that further undermines the basis for full citizenship and strong communities.

C. Marriage

Marriage has also been foundational for entering into the middle class and marshalling the resources for investment in the next generation.[182] Extensive commentary addresses the decline in marriage and its disproportionate impact on African-Americans.[183] What has received less commentary is the impact of debt and financial instability on family relationships. Financial reserves and family instability almost certainly interact, increasing the impact of the predatory lending practices.

Entering into the right marriage has long been considered necessary to assemble the resources required for investment in children. Historian Stephanie Coontz maintains that for thousands of years, marriage served as a "way of raising capital, constructing political alliances, organizing the division of labor by age and gender," and ordering the relationship between children and their parents.[184] Marriage served as the principal means "of transferring property, occupational status, personal contacts, money, tools, livestock and women across generations and kin groups."[185]

Sociologist Orlando Patterson claims that modern marriages continue to constitute a form of social dowry that increases the links to richer and more powerful parts of society.[186] African-Americans are thus at a disadvantage given their lower marriage rates[187] and are the least likely to marry outside of their immediate ethnic and social group.[188] Patterson further argues that alternatives to marriage such as cohabitation are even more fragile than marriage.[189] That in itself diminishes the resources available to

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182 *See, e.g.*, ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 163 (1998) (describing the impact of declining marriage rates on social networks that support families and transmit resources to the next generation).

183 *See, e.g.*, *id.* at 154 (describing African-American family patterns as one of the biggest challenges for racial advancement). *See generally* Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, *in* 621 ANNALS AM. ACAD. POL. & SOC. SCI. 6 (Douglas S. Massey & Robert J. Sampson eds., 2009).

184 Stephanie Coontz, *The World Historical Transformation of Marriage*, 66 J. MARRIAGE & FAM. 974, 977 (2004).

185 *Id.* (quoting MARGARET HUNT, THE MIDDLING SORT: COMMERCE, GENDER, AND THE FAMILY IN ENGLAND, 1680–1780, at 151 (1996)).

186 PATTERSON, *supra* note 182, at 155.

187 *See* R. Kelly Raley, Megan M. Sweeney & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 FUTURE CHILD. 89, 91 tbl.1, 97 tbl.3 (2015) (indicating that African-American women have lower marriage rates than other groups and that African-American marriage rates have dropped since the mid-nineties while divorce rates have been relatively higher than other groups).

188 *See* PATTERSON, *supra* note 182, at 157.

189 *Id.* at xi.

the next generation and makes entry into the middle class more difficult.[190] The problem arises not just from the lack of marriage per se, but also from the lessened ability to construct the alliances that encourage investment in the pathways to middle-class status.[191] More recent data indicates that the fragility of African-American relationships have only worsened in the decades since Patterson wrote.[192]

Why African-American family ties are more fragile involves a long and complex history.[193] As the preconditions for stable relationships have become harder to meet, however, three factors in the modern era undermine not just marriage, but also relationship stability outside of marriage.

The first is the impact of racism on African-American men. In their introduction to a 2009 retrospective on the inflammatory 1965 Moynihan Report on the African-American family, sociologists Douglas Massey and Robert Sampson observe that "Moynihan's core argument was really rather simple: whenever males in any population subgroup lack widespread access to reliable jobs, decent earnings, and key forms of socially rewarded status, single parenthood will increase, with negative side effects on women and children."[194] The inability to secure the pathways into middle-class status continues to disproportionately affect African-American men with reinforcing effects on African-American family stability.[195]

The second is the "mismatch" between African-American men and women. Sociologists maintain that in societies where women outnumber men, marriage declines and women invest more in their own resources, networks, and earning capacity.[196] Among African-Americans, gender disparities increase over time, as African-American male death rates outpace those of the women.[197] The high incarceration rates of African-American

[190] *See id.* at 154–56 (describing the various ways in which the disappearance of marriage and enduring relationships exacerbates the isolation of poor African-American people).

[191] *Id.* at 150–54.

[192] *See* Raley et al., *supra* note 187, at 93 fig.1.

[193] *See, e.g.*, *id.* at 93 (discussing the effects of forced adaptations to slavery on African-American family structures).

[194] Massey & Sampson, *supra* note 183, at 13.

[195] Raley et al., *supra* note 187, at 95; *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 83–92 (1987) (describing the factors that undermine marriageability, particularly the disappearance of stable jobs for blue-collar men and concluding that White men have not suffered a decline comparable to that among African-American men).

[196] *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 50–56 (2014) (summarizing literature on gender ratio theory).

[197] *Id.* at 71 (observing that for the twenty-five to thirty-four year-old cohort, there are 89 African-American men for every 100 African-American women compared with 102 White men for every 100 White women).

males exacerbate the ratios further.[198] Educational differences further separate African-American men and women. A 2007 report found that only 46% of African-American boys graduated from high school in comparison with 60% of girls.[199] The disparities in college graduation rates are even greater, with twice as many African-American women as men graduating from college.[200] In some African-American communities, marriageable women outnumber marriageable men by two-to-one.[201]

The third and final factor is gender distrust. As intimate relationships have become more egalitarian, they depend to a greater degree on shared expectations about committed relationships.[202] Yet, when women outnumber men in a given marriage market, that trust tends to decline.[203] And when men and women in a given culture have different expectations about intimate relationships, the foundation for long-term commitment is harder to establish.[204] Differences in the sex-role ideologies of African-American men and women tend to be larger than for other groups.[205]

These three factors result in patterns of family formation in African-American communities different from White communities. In 2018, for example, 39.6% of births in the United States were nonmarital, with African-Americans (69.4%), Native Americans (68.2%), and Hispanics (51.8%) having the highest rates.[206] Moreover, births to "solo" mothers, who are neither married nor cohabitating, constitute almost half of African-American births, in contrast with 9% of births to Whites and 16% of births to Latinas.[207] And African-American marriages are substantially more likely than White

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[198] *See* WILSON, *supra* note 195, at 83.

[199] Sterling C. Lloyd, *Gender Gap in Graduation*, EDUC.WEEK (July 6, 2007), http://www.edweek.org/rc/articles/2007/07/05/sow0705.h26.html [https://perma.cc/9UZV-WFDY]. This trend is also very closely related to higher incarceration rates of African-American males. Raley et al., *supra* note 187, at 95 (observing that "in the early 2000s, more than one-third of young [African-American] men who hadn't attended college were incarcerated, and nearly twice as many [African-American] men under age 40 had a prison record than a bachelor's degree").

[200] In 2015–2016, African-American women constituted 64% of African-American college graduates, a higher percentage of women than for any other group. *Fast Facts: Degrees Conferred by Race and Sex*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=72 [https://perma.cc/2NDZ-M4TC].

[201] WILSON, *supra* note 195, at 84–86 figs.3.1–3.3.

[202] PATTERSON, *supra* note 182, at 67–69.

[203] *See* Kristen Harknett & Sara S. McLanahan, *Racial and Ethnic Differences in Marriage After the Birth of a Child*, 69 AM. SOCIO. REV. 790, 794, 808 (2004) (describing how fathers' perceptions about the availability of other mates affects relationships). *See generally* Kristen Harknett, *Mate Availability and Unmarried Parent Relationships*, 45 DEMOGRAPHY 555 (2008) (discussing the impact on alternative mate availability on unmarried relationships).

[204] *See* PATTERSON, *supra* note 182, at 67–69.

[205] *Id.* at 67–68.

[206] Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman & Anne K. Driscoll, *Births: Final Data for 2018*, 68 NAT'L VITAL STAT. REPS. 1, 5 (2019).

[207] Megan M. Sweeney & R. Kelly Raley, *Race, Ethnicity, and the Changing Context of Childbearing in the United States*, 40 ANN. REV. SOCIO. 539, 543 tbl.2, 544 (2014).

marriages to end in divorce in most age groups.[208] Moreover, for African-Americans, higher levels of education and income have less of a protective effect. African-American women with bachelor's degrees are less likely to marry and stay married than other college graduates.[209]

The interaction between family structure and economic vulnerability increases the importance of a financial cushion before marriage.[210] Marriage itself tends to be associated with higher levels of these resources whether from savings, homeownership, or parental contributions.[211] Those without such safety nets have a harder time recovering financially from illnesses, unemployment, and unexpected expenses.[212] In today's marriage markets, therefore, it is not surprising that "both women's and men's earnings are positively associated with marriage and that the positive association between women's earnings and marriage has been increasing over time."[213]

In the absence of such reserves, commitment to a partner who may need support is a risky proposition. Many individuals are reluctant to commit to a partner who is not financially stable for fear that the relationship will deplete their own resources.[214] Economic insecurity accordingly increases family instability. For example, going through a foreclosure makes it more likely that a married couple will divorce.[215] The same goes for student loan debt. One study found that "13% of divorcees blame student loans specifically for ending their marriage," and a larger number suggested that such debt contributed to tensions.[216]

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208 Raley et al., *supra* note 187, at 91 tbl.1.

209 *See generally* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011) (discussing marriage rates amongst African-American women).

210 *See generally* Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. STATE L.J. 1 (2021) (explaining how a state-based system that guarantees family stability can be uncoupled from marriage, providing some financial safeguards).

211 Raley et al., *supra* note 187, at 101.

212 *See, e.g.*, ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S, at 103–04 (2011) (indicating that while white-collar workers often switch jobs, blue-collar workers are more likely to experience involuntary layoffs with longer periods between jobs and long-term declines in income).

213 Raley et al., *supra* note 187, at 96.

214 *See, e.g.*, Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 135–36 (2009) (observing that many African-American women were concerned that "monetary entanglements with another would deplete their resources").

215 *See* Rebecca Diamond, Adam Guren & Rose Tan, *The Effect of Foreclosures on Homeowners, Tenants, and Landlords* 31 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27358, 2020), https://www.nber.org/system/files/working_papers/w27358/w27358.pdf [https://perma.cc/YZ47-HDN9] (finding that the biggest effect was on "marginal" borrowers—that is, borrowers who with a loan modification might have been able to avoid foreclosure).

216 Ben Luthi, *Survey: Student Loan Borrowers Wait Longer and Pay More to Get Divorced*, STUDENT LOAN HERO (Dec. 3, 2018), https://studentloanhero.com/featured/survey-student-loan-borrowers-and-divorce [https://perma.cc/A53B-35F8].

All these factors disproportionately affect African-Americans.[217] They also increase the attractiveness of student loans, at least from the perspective of African-American women. African-American women, who are more likely than White women to believe that they will need to rely on their own resources, see additional education as critical to their advancement in employment.[218] Yet, as shown above, increased debt may further undermine and destabilize relationship commitment.

Together, these trends magnify the racial wealth gap.[219] For African-Americans, the lack of access to marriage has compounded social, economic, and political marginalization. And the lack of a greater financial cushion undermines marriage.

CONCLUSION

As the United States has dismantled the protections that fueled stable prosperity in the middle of the twentieth century, the pathways into the middle class have become more perilous. Those perils have become particularly treacherous for African-Americans. Home ownership, higher education, and marriage remain important sources of full citizenship, political clout, and advancement for most; yet, the security that such investments traditionally provided has become harder to achieve. This has occurred in part because the nature of the American political system has changed with the country's changing demographics, including greater inequality and greater diversity. Instead of shared prosperity, Americans are experiencing increasing inequality. These changes came to a head in the aftermath of the 2008 financial crisis. While Whites have largely recovered, the financial crisis destroyed a stunning percentage of African-American wealth, which remains unrecovered due to a dramatically slower recovery in both housing values and income potential relative to White communities. The result undermines political as well as economic equality, threatening the prosperity of what has been the most upwardly mobile parts of minority communities and discouraging future investment.

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[217] *See* notes 7–8 (documenting the dramatically lower wealth of African-Americans); Section II.B (describing crisis levels of student loan debt for African-Americans).

[218] *See, e.g.*, Stéphane Mechoulan, *The External Effects of Black Male Incarceration on Black Females*, 29 J. LAB. ECON. 1, 27 (2011) (describing how mass incarceration policies that affect African-American men correlate with increased emphasis on African-American female employment).

[219] *See* WILLIAM R. EMMONS & BRYAN J. NOETH, FED. RSRV. BANK ST. LOUIS, WHY DIDN'T HIGHER EDUCATION PROTECT HISPANIC AND BLACK WEALTH? 1 tbl.2 (2015), https://www.stlouisfed.org/~/media/Publications/In-the-Balance/Images/Issue_12/ITB_August_2015.pdf [https://perma.cc/YAY8-88LY] (observing that African-American college graduates have an average net worth one-tenth that of White college graduates).