Contracting for Debt: The Relationship Between Debt Capitalism, Higher Education, and the Black-white Wealth Gap

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Abstract

This Note explores the relationship between contractual parties in the credit market, as shaped by debt capitalism, through a brief history of slavery, peonage, and credit/debt legislation. Debt capitalism is a racially exclusionary system — stemming from slavery — in which asset acquisition, facilitated by working to pay debt, (1) is a requirement for inclusion in the economic market, and (2) has a disparate impact on excluding Black Americans from wealth building given their bargaining power position. Over time, debt capitalism shifted from using Black enslaved people as primary sources of labor and collateral to indebting freed Black Americans. Currently, debt capitalism continues to extract labor and interest from Black Americans in particular through different forms of debt peonage. I highlight what I call modern student debt peonage *through the story of the Greenes, a couple who filed for bankruptcy and claimed that the U.S. Department of Education owed them reparations in the form of student debt cancellation.*

By exploring predatory consumer bankruptcy practices and the strengths and weaknesses of the Greenes' claims in the context of the socio-political and economic subordination of Black Americans by the U.S. government, this Note debunks the idea that a student loan is a valid enforceable contract signed by equal parties. The Note supports policy proposals for student debt relief, such as full debt cancellation, bankruptcy reform, and abolishing the current student debt complex. This Note encourages the use of an alternative framework for negotiating and defining credit relationships, which relies on a more equitable understanding of opportunity. This alternative framework could mobilize debt relief policies that reduce the Black-white wealth gap.

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Introduction

In 2009, a Black American[1] couple, Frederick and Terri Lynn Greene (the "Greenes"), filed an appeal in the Seventh Circuit to discharge their student loan debt under chapter 7.[2] Four years earlier, the Greenes had gone through a bankruptcy proceeding, yet still owed student loans totaling $207,000.[3] In 2006, to eliminate the remaining debt, the Greenes filed a complaint against the U.S. Department of Education (DOE), requesting that their student loan debt and any associated interest or penalties be discharged.[4] They specifically alleged that the government's negligence had resulted in "excessive interest and penalties" being attached to their loans, which posed an "undue hardship[.]"[5] As "reparations for slavery and discrimination," the Greenes argued that their loans should be discharged.[6] In 2008, the district court in *Greene v. U.S. Department of Education* denied their request and granted the government's motion for summary judgment as

[1] This paper uses the term Black American in lieu of African-American to refer to Black American citizens whose ancestry includes a Black person who was enslaved within the territory presently occupied by the United States; however, it recognizes and respects the historical legacy that the term African-American connotes.
[2] *In Re Greene*, 310 F. App'x 17, 19 (7th Cir. 2009).
[3] *Id.*; *Greene v. U.S. Dep't of Educ.*, No. 4:06cv105, 2008 WL 859215, at *1, *7 (N.D. Ind. Mar. 27, 2008).
[4] *Greene*, 2008 WL 859215 at *1, *7.
[5] *Id.* at *7.
[6] *Id.*

recommended by a magistrate judge. The Seventh Circuit reaffirmed on appeal.[7]

The district court provided a long-winded justification for denying the Greenes' reparations claim.[8] It noted that the Greenes failed to file a timely response to the government's request for admission, interpreting a discovery error as an admission of fault.[9] The district court also stated that Frederick Greene's claims about law school misrepresentation and discrimination "can only be linked through historical ties to slavery," and because his enslaved ancestors had passed away, the claim was barred by the statute of limitations.[10] The decision is not surprising. Most reparations lawsuits falter because they have been barred by statutes of limitations, and courts apply the political question doctrine to avoid making decisions that they feel would be more appropriately addressed in Congress.[11]

Though the district court dismissed the Greenes' case largely on procedural grounds, the arguments outlined in the Greenes' affidavits highlight the impact that taking out student debt to obtain higher education can have on Black Americans. Frederick Greene asserted in his complaint:

> The Department of Education has alleged that by virtue of my law license I can earn substantially more than the $40,000+ I now earn as a college professor. From 1988 until 1997 I was engaged in the private practice of Law in Lansing, Michigan. I did not net in any of those years income in excess of my present earnings. In each and every year while practicing law, and in each and every

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[7] *Id.* at *1*; In Re Greene*, 310 F. App'x at 21.

[8] *Greene*, 2008 WL 859215 at *7.

[9] *Id.* at *2.

[10] *Id.* at *8.

[11] *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006) (barring reparations claims for descendants of enslaved Black Americans due to statute of limitations constraints and lack of standing, and noting how precedent from as early as 1849 has found that the "political-question doctrine bars the federal courts from adjudicating disputes that the Constitution has been interpreted to entrust to other branches of the federal government."); *see also* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68 (2005) (discussing the Tulsa case, *Alexander v. Oklahoma*, 391 F.3d 1155, 1159 (10th Cir. 2004), which denied reparations to the Greenwood massacre victims and descendants on the basis of a statute of limitations despite the government admitting culpability, and noting patterns of such denial of legal relief). The political question doctrine is the notion that an issue is too politically charged for federal courts to adjudicate given their intended apolitical nature. *See Political Question Doctrine*, Legal Info. Inst., Cornell L. Sch., https://www.law.cornell.edu/wex/political_question_doctrine#:~:text=Federal%20courts%20will%20refuse%20to,should%20not%20hear%20the%20issue [https://perma.cc/3KB7-PZ4Q]. For further substantive discussions on the role of statute of limitations and equitable tolling in reparations, *see* n.15 in Malveaux, *supra* note 11 (citing to Keith N. Hylton, *A Framework for Reparations Claims,* 24 B.C. Third World L. J. 31, 41–43 (2004)); Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story,* 24 B.C. Third World L. J. 13, 26–27 (2004); Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement,* 58 N.Y.U. Ann. Surv. Am. L. 457, 469–71 (2003); Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview,* 58 N.Y.U. Ann. Surv. Am. L. 623, 626–29 (2003).

> year since, I have attempted to find higher paying employment to no avail. Law firms and corporations will not hire me because I am an older African American male. Less than three percent of all lawyers in America are African American.[12]

Frederick Greene's statement highlights the pervasiveness of structural inequality stemming from slavery, the price of higher education, the credit system, and the labor market.[13] In theory, incurring debt to obtain a college or graduate degree is an asset conversion process. However educational and professional attainment has clearly not resulted in wealth gain for all Black Americans.[14] Instead, it has mostly resulted in downward mobility, negative or null net worth, and in some cases, bankruptcy, and poverty.[15]

Many scholars researching Black American wealth accumulation have explored the relationship between a lack of property ownership and the wealth gap as a consequence of slavery, *de jure* and *de facto* segregation, sharecropping, incarceration, and redlining.[16] However, not much research has been conducted on how, by maintaining racialized economic hierarchies,[17] the disparate impact of student loan debt on the widening Black-white wealth gap has created a *modern student debt peonage system.*[18] This

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[12] *Greene*, 2008 WL 859215 at *5–6.

[13] *See* Jalil B. Mustaffa & Jonathan C.W. Davis, Jim Crow Debt: How Black Borrowers Experience Student Loans, Educ. Trust 12 (2021), https://edtrust.org/wp-content/uploads/2014/09/Jim-Crow-Debt_How-Black-Borrowers-Experience-Student-Loans_October-2021.pdf [https://perma.cc/L2ZZ-VY6F] ("72% of the Black borrowers who participated in our study said they had faced discrimination in the labor market due to their race. Researchers reviewed hiring discrimination studies of the past 30 years and found that, even when controlling for education levels and occupation types, people of color face consistent employment discrimination.") [hereinafter Mustaffa & Davis, *Jim Crow Debt*].

[14] *Infra* Parts II-III.

[15] *Id.*

[16] *See, e.g.* Mehrsa Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap (2017) (tracing deeply segregated wealth building mechanisms and the economic failures of Black banks) [hereinafter Baradaran, *The Color of Money*]; Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017) (historicizing the legislative, political, and economic landscape of housing and mortgage lending discrimination through redlining).

[17] *See* Abbye Atkinson, *Borrowing Equality*, 120 Colum. L. Rev. 1403, 1412 (2020) (discussing how debt is "especially dangerous . . . in its capacity as an institution of social subordination that actively engages in hierarchy making and reproduction.") [hereinafter Atkinson, *Borrowing Equality*].

[18] *See* Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1617 (2015) (exploring the concept of a "new peonage" system emerging from criminal debt that disproportionately targets and affects Black Americans); Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 Cath. U. L. Rev. 809 (1983) (analogizing practices in bankruptcy law generally as reminiscent of peonage from the seventeenth century). *See also* Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans*, 71 Tul. L. Rev. 139 (1996) (analyzing the undue hardship standard in student debt discharge and only briefly mentioning peonage in footnote 272). *Cf.* Ian Liberty, *From Debt Collection to Debt Slavery*, 15 Rutgers Race & L. Rev. 281, 286 (2014) (discussing the practice of wage garnishment through debt collection and related connections to peonage and the Thirteenth Amendment, yet not addressing the specific connection with student loan debt);

system is defined by entering into labor contracts and repayment plans to pay off student debt in pursuit of an illusion of economic freedom.[19] The parallel between debt incurred for a physical asset, which has been used as an intergenerational wealth building mechanism, and debt incurred for the purposes of obtaining a degree, which would hypothetically provide increased social and financial capital, reflects the property interest in higher education.[20] By virtue of the expected market value of a degree and labor involved, the degree is effectively personal property.[21] Property is an asset premised on the legal right to exclude and because slavery was premised on the ownership of people as property, as Professor Harris argues, whiteness and property both share the "right to exclude."[22] Whiteness comes with a set of rights and privileges acknowledged and protected by American law[23] and is an asset that continues to yield returns for white Americans. Yet, because non-white Americans are not similarly situated, their personal property, such

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Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. Pa. L. Rev. 59, 70 (1986) (suggesting that Chapter 13 filings "violate the policy and philosophy underlying the anti-peonage laws, thereby further eroding the fresh start policy . . . .").

[19] *See* Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage and The Market in the Age of Slave Emancipation 36 (Cambridge Univ. Press, 1998) (quoting the Freedmen's Bureau chief, Gen. Oliver Otis Howard saying "[i]f [ex-slaves] can be induced to enter into contracts, they are taught that there are duties as well as privileges of freedom."); *id.* at 9 ("[T]he wage contract distinguished freedom from slavery" and "justified the rise of capitalist relations and an expanding market in free labor. . ..."); *cf.* Mustaffa & Davis, *Jim Crow Debt, supra* note 13 (discussing how government student loan repayment plans such as the Income Based Repayment plan shackle Black borrowers for decades); Laura Sullivan, Tatjana Meschede, Thomas Shapiro, & Fernanda Escobar, *Stalling Dreams: How Student Debt is Disrupting Life Chances and Widening the Racial Wealth Gap*, Inst. on Assets & Soc. Pol'y 4 (2019), https://heller.brandeis.edu/iasp/pdfs/racial-wealthequity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf [https://perma.cc/RRW9-5FB9] (finding that the median Black borrower still owed 95% of their debt compared to the median white borrower who only owed 6%) [hereinafter Sullivan et al., *Stalling Dreams*].

[20] *See* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1733 (1993) ("In the context of divorce, courts have held that professional degrees . . . held by one party and financed by the labor of the other is marital property whose value is subject to allocation by the court. A medical or law degree is not alienable either in the market or by voluntary transfer [but]. . . is included as property when dissolving a legal relationship.").

[21] *See* Stanley, *supra* note 19, at 9 (tracing how post-emancipation, in the era of contract theory, labor was both property and a commodity); Sam McHale, *The Amorphous Student-University Contract: Origins, Development, and the Need for State Oversight*, 168 U. Pa. L. Rev. 223, 224 (2019) ("[A]s of 2014, the earnings of a college graduate were over sixty percent higher than those . . . [with] a high school diploma. . . .[H]igher education is thought to operate as a multiplier, enhancing the enjoyment of all individual rights and freedoms.") (internal citations and quotation marks omitted); Harris, *supra* note 20, at 1728 (listing examples of property construed more broadly including "jobs, entitlements, occupational licenses, contracts, subsidies, . . . intangibles that are the product of labor, time, and creativity, such as intellectual property, business goodwill, and enhanced earning potential from graduate degrees"); *id.* at 1729 ("Property is nothing but the basis of . . . an established expectation . . . of being able to draw . . . [certain] advantage[s] from the thing possessed.").

[22] Harris, *supra* note 20, at 1714 ("Following the period of slavery and conquest, white identity became the basis of racialized privilege that was ratified and legitimated in law as a type of status property.").

[23] *Id.* at 1709.

as their degrees, do not offer comparable returns. As such, modern student debt peonage requires individuals, in particular Black, Brown, and Indigenous students, to indebt themselves to pursue social mobility, only to find the financial ladder seriously weighed down by student debt.[24]

In this Note, I argue that, given the systemic barriers to building wealth, entering higher education, and obtaining high-income careers, Black Americans are disproportionately and involuntarily obligated to contract for debt in pursuit of higher education, increased wages, ownership, and intergenerational wealth. When it comes to incurring student debt, one assumption may be that students *voluntarily* contract for debt by taking out loans to pay for their education if they do not have the financial means to pay for their degree. However, I reject this premise. I argue that the student loan complex sells a false promise that higher education leads to economic freedom for all.[25] Instead, there exists an invisible unequal market relationship in which education serves as a prerequisite to enter the labor market in an economically meaningful way.[26] This invisible relationship distorts the reality of education and employment as a direct avenue for full economic participation when, in fact, a racialized group is coerced into indebting themselves to participate in the economy and labor market with less rewarding outcomes. Stemming from this relationship, student loan contracts do not merely memorialize a transaction between lender and borrower, but rather reflect dynamic and deeply inequitable racialized economic contracts that are unconscionable. As the doctrine of unconscionability outlines:

> If a contract is unfair or oppressive to one party in a way that suggests abuses during its formation, a court may find it unconscionable and refuse to enforce it. A contract is most likely to be found unconscionable if both unfair bargaining and unfair substantive terms are shown. *An absence of meaningful choice by the disadvantaged party* is often used to prove unfair bargaining[27] (emphasis added).

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[24] *See* Melanie Hanson, *Student Loan Debt by Race*, EDUCATIONDATA.ORG, https://educationdata.org/student-loan-debt-by-race [https://perma.cc/QE6N-DX5H] (analyzing student debt levels by race); *see also* Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13 (debunking myths about student debt being "good debt" in that it provides access to "credentials that can lead to higher incomes, greater wealth, and social mobility" for Black borrowers).

[25] *See* Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13; Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 3 (2010) (noting "college education may not confer the same protective benefit against financial hardship" for Black Americans) [hereinafter Atkinson, *Race, Educational Loans & Bankruptcy*].

[26] *See* ANTHONY P. CARNEVALE, ARTEM GULISH & KATHRYN PELTIER CAMPBELL, IF NOT NOW, WHEN? THE URGENT NEED FOR AN ALL-ONE-SYSTEM APPROACH TO YOUTH POLICY, GEO. UNIV. CTR. ON EDUC. & THE WORKFORCE 12 (2021) ("[T]wo out of three jobs require postsecondary education . . .[y]et while young people today need more education than ever to compete in the labor market, a college education is more expensive than in the past").

[27] *Unconscionability*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/unconscionability [https://perma.cc/BHL3-4H8D].

These racialized student loan contracts are unconscionable because they are embedded with historical ties to slavery and state-sanctioned disenfranchisement, demonstrating an absence of meaningful choice for Black Americans and culminating in the ever growing Black-white wealth gap driven by what I call "debt capitalism."

I define debt capitalism as a racially exclusionary system, stemming from slavery, in which asset acquisition, facilitated by working to pay debt, (1) is a requirement for inclusion in the economic market, and (2) has a disparate impact on Black Americans by excluding them from wealth building given their bargaining power position.[28] I argue that altering the unequal bargaining power that Black students have with the federal government would reduce the disparate impact of debt capitalism on Black American wealth building, providing individuals at all income levels meaningful choice in shaping their own economic trajectory. By virtue of this shift in position, Black Americans would have the opportunity to act as full participants in the global economy rather than be excluded by debt capitalism.

In Part I, I first explore how debt capitalism was established during legalized slavery in the United States and reinforced by indentured servitude practices, namely peonage. In Part II, I trace the legislative history of civil rights, higher education, credit, and debt legislation. This history serves as the backdrop of the emergence of student loans as a key feature of debt capitalism in the 20th and 21st centuries, reinforcing racialized economic hierarchies under the guise of access and social mobility. In Part III, I provide insight into how bankruptcy law has affected Black American debt burdens through the *Greene* case and why contracts enforcing student debt repayments to the U.S. government are unconscionable. I then unpack how bankruptcy chapter filings and courts disfavoring student loan discharges reinforce coercive contractual power relations akin to peonage, as demonstrated by *In Re Gordon*. In such contractual relations, debtors are viewed as having the "keys to the shackles" even if "[e]conomic necessity may discourage [them] from freeing [themselves]."[29] These bankruptcy trends, in addition to contract law, inform some of the frameworks I use for evaluating implications for restitution. Finally, in Part IV, I propose several opportunities to reduce the growing Black-white wealth gap and eliminate debt peonage. These proposals transform the core contractual relationships in the

[28] Similar terms such as "racial capitalism," coined by Black scholar Cedric Robinson, have been used to describe how racism and capitalism evolved from the old-world order and remain dependent on "slavery, violence, imperialism and genocide." CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION xiii (UNIV. OF NORTH CAROLINA PRESS 2005). Some organizations such as Progressive International Debt Justice Collective have built on this scholarship by analogizing "debt as racial capitalism." *Debt as Racial Capitalism*, PROGRESSIVE INT'L, https://progressive.international/blueprint/761166de-afa7-4b1f-9fd3-8cc64cdd6831-debt-as-racial-capitalism/en [https://perma.cc/Q8K8-A7U6].

[29] *In re Gordon*, 465 B.R. 683, 700 (Bankr. N.D. Ga. 2012).

credit market, such as by re-categorizing borrowers into *financially vulnerable* and *financially secure* groups and restructuring student debt instruments.

I. Establishing Debt Capitalism Through Slavery and Peonage

The enslavement, selling, disenfranchisement, collateralization, capitalization, and inheritance of Black Americans as valuable assets created a complex credit system for building white wealth in the United States.[30] In this system, boundless free labor and profit extraction from slavery, followed by various forms of involuntary servitude such as peonage, served as seed capital for early debt capitalism in America — a system in which Black human life was disposable and transferable, yet profitable. The following sections outline how slave property was key to accessing credit and building America's debt capitalism[31]; how, following emancipation, without reparations, Black labor continued to be profitable for white wealth building; and how peonage transformed and entrenched Black Americans as debtors in America's debt capitalism.

A. *America's Most Profitable Asset: Enslaved Black Americans*

During chattel slavery in the United States, enslaved Black people were used as secured capital for predominantly white enslavers, who leveraged them as collateral for loans, insurance policies, and debt repayments.[32] Because enslaved people could be more easily sold than land, investing in slave property was a valuable investment granting access to credit.[33] Before the Debt Recovery Act was enacted in 1742, the colonies struggled to categorize enslaved people as real or personal property; this meant that the seizure of enslaved people by unsecured creditors wavered.[34] Once the Act had passed, all forms of wealth and property could satisfy unsecured debts, quieting the legal debate enough to facilitate the entrenchment of debt capitalism.[35] This system funded university endowments, supported small businesses, provided

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[30] *See* Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 Harv. L. Rev. 385, 423, 419 (2006) (discussing how the credit market was built from enslaving Black Americans to use as collateral, to inherit, and to sell).

[31] Priest, *supra* note 30, at 419.

[32] *See id.* (noting the economic advantages of leveraging enslaved Black people for credit because they "functioned as the primary collateral for debts among the wealthy [Southerners]. . ."); Suresh Naidu, *American Slavery and Labour Market Power*, 35 Econ. Hist. of Developing Regions 3, 13 (2020). While non-white enslavers also existed, including Native American tribes, free Black Americans, and other free people of color, the overwhelming majority were racially white. *See* Elizabeth and Gary B. Mills, The Forgotten People: Cane River's Creoles of Color Louisiana (State Univ. Press 2014) (detailing the history of creole people in Louisiana called the "free people of color," who descended from Marie Thérèse Coincoin, an emancipated enslaved woman born to African parents who inherited a plantation from her white slaveowner).

[33] Priest, *supra* note 30, at 419.

[34] *Id.* at 423, 419.

[35] *Id.* at 419.

wealth to predominantly white enslavers, and, through the cotton trade, grew the United States Treasury's reserve.[36]

In 1865, the Thirteenth Amendment formally abolished slavery and involuntary servitude in the United States.[37] Subsequent efforts by Black Americans to gain legal equality, earn income, obtain an education, own property, and accumulate wealth have been documented as a tumultuous and ongoing pursuit, leaving many in perpetual demand for full physical, emotional, and economic freedom.[38] After the Civil War, the promise made under General Sherman's reparations plan — to transfer financial resources to formerly enslaved Black Americans — was not fulfilled.[39] The promised resources, 40 acres and a mule, would have provided property, business capital, and intergenerational wealth through inheritance: a so-called "fresh start."[40] Instead, it was the enslavers who were compensated. Enslavers were compensated with $300 per enslaved person who was freed.[41] This practice of compensating white enslavers was not surprising given colonial precedent of post-slavery reparations in Haiti. Following the first successful major rebellion by enslaved Black people in 1825, France forced Haiti to pay about $560 million in today's dollars, including interest, for its "lost property" — enslaved Black Haitians.[42] Not only did France force Haiti to pay a ransom for their freedom, France extracted further profit from formerly enslaved Black Haitians by lending Haiti the money to pay the ransom and charging interest on top of that.[43] Had Haiti not done so, the Haitian economy would have an additional $21 billion dollars and according to historians, "might have grown at the same rate as its neighbors across Latin America."[44] If Haiti had grown at a comparable rate, the potential economic loss caused by

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[36] Naidu, *supra* note 32, at 13 (explaining how America's "political elite [were] . . . more interested in maintaining financialized claims over mobile human assets than building infrastructure. . . ."). *See* Mary Frances Berry, *Taking the United States to Court: Callie House and the 1915 Cotton Tax Reparations Litigation*, 103 J. African Am. Hist. 91 (2018) (outlining the factual findings argued by formerly enslaved Callie House in *Johnson v. McAdoo*, regarding a federal tax payment from the sale of cotton in the U.S. Treasury) [hereinafter Berry, *Taking the United States to Court*].

[37] U.S. Const. amend. XIII, § 1.

[38] *See* Birckhead, *supra* note 18, at 1605–1606; Liberty, *supra* note 18, at 286; Naidu, *supra* note 32, at 16.

[39] Sarah McCammon, *The Story Behind '40 Acres and A Mule'*, NPR, https://www.npr.org/sections/codeswitch/2015/01/12/376781165/the-story-behind-40-acres-and-a-mule [https://perma.cc/DA34-LLE2]; Tera W. Hunter, *When Slaveowners Got Reparations*, N.Y. Times, https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html [https://perma.cc/2SVS-LBMW].

[40] *Id.*

[41] *Id.*

[42] Catherine Porter, Constant Méheut, Matt Apuzzo & Selam Gebrekidan, *The Ransom: The Root of Haiti's Misery:Reparations to Enslavers*, N.Y. Times, https://www.nytimes.com/2022/05/20/world/americas/haiti-history-colonized-france.html [https://perma.cc/9YHD-4ZTB]; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, U.N. Secretary General, No. 2, at 11, U.N. Doc. A/74/321 (August 21, 2019).

[43] Porter et al., *supra* note 42.

[44] *Id.*

paying enslavers would actually be about $115 billion, "eight times the size of [Haiti's] economy in 2020."[45] A similar hypothesis about Black American wealth can be argued: had formerly enslaved Black Americans received some form of financial reparations, there may have been comparable economic growth.

As early as 1915, Black Americans sued the federal government for reparations.[46] They claimed that they were owed the $68,073,388.99 that the federal government had collected in cotton taxes between 1862 and 1868.[47] To ensure the figures in their legal argument were not speculative, this figure only referred to the amount collected in taxes.[48] The figure did not represent a tort claim for damages suffered during slavery nor compensation for enslaved labor used towards production of tobacco, indigo, and other major agricultural products which grew the economy. Nor did it include compensation for the enslaved labor used ubiquitously for housekeeping, groundskeeping, and construction of property and infrastructure vital to America's rapid economic development and wealth generation for many white Americans.[49] Nevertheless, their arguments were unsuccessful, their suit was barred by government immunity, and the Treasury actively "denied the existence of the cotton tax revenue."[50]

While a robust discussion on historical reparations efforts is beyond the scope of this paper, early reparations for white enslavers, and the lack thereof for Black Americans, indicate how debt capitalism transformed when slavery was abolished. Once chattel slavery was rendered illegal, the mechanisms of debt capitalism shifted from enslavement to other forms of financial, legal, educational, and social exclusion. These exclusionary practices were carried out while newly freed Black Americans were expected to enter the economy as "equal" participants and experience "freedom" solely through wage labor.[51] Black Americans did not experience full economic and labor market inclusion, making them vulnerable in the face of debt capitalism and facilitating the emergence of new systems of economic and labor oppression, as the next section explores through peonage.

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[45] *Id.*

[46] *Johnson v. McAdoo*, 244 U.S. 643 (1917); Berry, *Taking the United States to Court*, *supra* note 36, at 97.

[47] Berry, *Taking the United States to Court*, *supra* note 36, at 99; *cf. Wood v. Ward*, 30 Fed. Cas. 479, 482 (S.D. Ohio 1879) (reaffirming the trial jury's decision to award damages to a formerly enslaved woman who was kidnapped back into slavery by her former enslaver).

[48] Berry, *Taking the United States to Court*, *supra* note 36, at 98–99.

[49] *Johnson v. McAdoo*, 244 U.S. 643 (1917); *see* Naidu, *supra* note 32, at 10 (exploring the profitable labor output and infrastructure development deriving from slavery).

[50] Berry, *Taking the United States to Court*, *supra* note 36, at 98–99.

[51] *See* Louise Seamster, *Black Debt, White Debt,* 18 CONTEXTS 30, 35 (2019) (describing how Mehrsa Baradaran shows in her book, *The Color of Money*, that "the Freedmen's Savings Bank was created for emancipated people as an alternative to reparations," meaning they "were encouraged to earn money through wage labor.") [hereinafter Seamster, *Black Debt*]; Stanley *supra* note 19, at 9 (noting that post-emancipation "the wage contract distinguished freedom from slavery . . . .").

B. The Rise of Debt Peonage Contracts Post-Emancipation

Following Emancipation, courts across the United States ruled that all debt contracts — through which formerly enslaved people were used as capital to pay off debts — were unenforceable under the Thirteenth Amendment.[52] However, the Thirteenth Amendment did not stop all forms of slavery or involuntary servitude.[53] In fact, debt contracts continued under a different guise: debt peonage. Debt peonage refers to contracts exchanging labor for loans, which result in involuntary servitude or slavery-like conditions for the borrower or "peon."[54]

After the Civil War, formerly enslaved Black Americans by and large did not have any income to purchase goods or land because the federal government failed to provide financial restitution.[55] As a result, many Black Americans moved to urban areas or went North in search of economic opportunity.[56] Those who did not, or were unable to do so, entered coercive contracts with local merchants and landowners in the South to acquire basic necessities.[57] These relationships were deeply inequitable and coercive.[58] White creditors exploited Black borrowers by deciding credit prices and interest rates that actively discriminated against Black Americans and devalued their creditworthiness.[59] Purchases made by Black Americans cost more and could incur interest rates ranging from "twenty-five percent to grand larceny."[60] Predatory lending, crop liens, and other forms of debt peonage forced Black Americans to labor at a much higher rate than their white coun-

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[52] *See Henderson v. Montgomery*, 18 La.Ann. 211 (1866) (dismissing an appeal from an order of seizure and sale, from the Sheriff of the Parish of Orleans given the recent abolition of slavery); *Bradford v. Jenkins* 41 Miss. 328 (Miss. Err. & App. 1867) (ruling in a breach of warranty case that a debt owed for which an enslaved person was used as collateral was no longer enforceable) [hereinafter *The Peonage Cases*]. *See also* Jenny B. Wahl, *The Jurisprudence of American Slave Sales,* 56 J. of Econ. Hist. 143, 165 n.82 (1996) (listing a string cite of breach of warranty cases under which emancipation did not cause a breach for enslaved people warranted as "slaves for life"). The Thirteenth Amendment allowed Congress to circumvent constitutional limits on state interference by creating a constitutionally valid exception to invalidate any contracts explicitly entailing slavery or involuntary servitude. U.S. Const. amend. XIII, § 1.

[53] *See* William Wirt Howe, *Peonage Cases,* 4 Colum. L. Rev. 279 (1904) (discussing various peonage cases arising from debt contracts following the enactment of Thirteenth Amendment).

[54] *Id.* at 279 ("It is well known that the word peon signified originally a day laborer; in Spanish America, it came to mean a laborer in debt to his employer and held in a kind of qualified servitude until he should work out the debt.").

[55] *See* Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. Pa. J. L. & Soc. Change 131, 141–68 (2008) (tracing sharecropping and peonage after the Civil War).

[56] *Id.* at 141.

[57] *Id.* at 153–56.

[58] *See id.* at 148–150 (describing coercive credit lending practices that wealthy white farmers employed to exploit Black sharecroppers).

[59] *Id.* at 154–56.

[60] *Id.* at 155.

terparts to even come close to paying off a debt. Creditors — both private and public actors — continued to prevent Black Americans from accumulating wealth and meaningfully participating in the economy.[61]

On its face, the Thirteenth Amendment did not bar subservient or coercive labor and debt peonage.[62] In the aftermath of the Amendment, courts narrowly construed subservient or coercive labor relationships to avoid intersecting with the Thirteenth Amendment at all.[63] In response, Congress passed the Anti-Peonage Act in 1867 to invalidate state peonage laws, which existed in the Southern states and the newly acquired state of New Mexico.[64] Under this Act, all contracts for labor as collateral, whether voluntary or involuntary, were declared "null and void."[65] Nearly a century later, the Supreme Court held that any form of servitude to pay off debts was equally as illegal as involuntary servitude and slavery, even if originally contracted for voluntarily.[66]

Over time, debt capitalism quickly shifted from using Black people as enslaved labor and collateral, to indebting them to extract labor and interest. This transformation allowed white Americans to obtain credit and own property, while Black Americans incurred liabilities and became debtors.[67] The dichotomy between white creditors and Black debtors preserved a familiar racialized hierarchical power structure premised on various peonage systems, including sharecropping, predatory mortgages,[68] convict leasing, and now student lending. Student lending is a modern peonage system. It has the

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[61] *Id.* at 193–94. While there is extensive literature on the topic of sharecropping as well as convict leasing in the context of peonage, rather than offering a full review of the intricacies of these systems, this section merely offers insight into the legislative and judicial frameworks of interpretation of peonage as it relates to the Thirteenth Amendment, which will be further explored in the context of discharging student loan debt.

[62] *The Peonage Cases*, *supra* note 52.

[63] *See* Liberty, *supra* note 18, at 307 n.1 ("Lower courts have uniformly held that the judicial power to enforce the Thirteenth Amendment is limited to conditions of literal slavery or involuntary servitude."); *United States v. Kozminski*, 487 U.S. 931, 950 (1988) (rejecting the inclusion of psychological coercion as a form of involuntary servitude as too broad an interpretation); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 151 Duke L. J. 1609, 1638 (2001) ("By the turn of the twentieth century, the Supreme Court read the Thirteenth Amendment as a narrow rule against slavery-like forms of involuntary servitude instead of as a capacious mandate for federal protection of equality and freedom.") [hereinafter Goluboff, *The Thirteenth Amendment*].

[64] 42 U.S.C. § 1994 (2012) (originally enacted as the Peonage Abolition Act of March 2, 1867, ch.187, § 1, 14 Stat. 546) (noting the civil components of the Act); 18 U.S.C. § 1581 (2012) (originally enacted as Criminal Code, § 269) (noting the Act's criminal penalties); Birckhead, *supra* note 18, at 1617; Naidu, *supra* note 32 at 16.

[65] The Act of March 2nd, 1867, Chapter 187, as cited in Howe, *supra* note 53, at 280.

[66] *See Pollock v. Williams*, 322 U.S. 4, 24–25 (1944) (repealing the Florida Act of 1919 as null and void as per the Thirteenth Amendment and the Peonage Act).

[67] Seamster, *Black Debt*, *supra* note 51, at 34 (summarizing how Black and white Americans are incorporated into the economy differently, by which Black debt is "a key industry for generating White wealth" and "does not build Black equity" but rather leads to "further losses" as slave mortgages did).

[68] *See* Nier, *supra* note 55, at 148–61, 170–85 (tracing sharecropping and peonage after the Civil War).

same qualities typical of coercive creditor-debtor and debtor-labor contract relationships, including wealth siphoning, extractive labor, and racialized power imbalances in the U.S. credit market as the following parts show.

Part II analyzes the detrimental effects of modern debt practices on Black Americans through the rise of government-sponsored student loans and the enactment of Higher Education legislation. It raises questions about the coercive nature of higher education student lending for Black Americans, as embedded in debt capitalism, and the role of student debt in exacerbating wealth inequality.

II. Leveraging Educational Attainment and Educational Opportunity to Build Wealth

There is an illusory expectation that attending college or graduate school leads to higher paying employment and increased wealth in a capitalist market, but that is not necessarily the case for Black Americans who are forced to leverage student debt. As Professor Atkinson argues, Congress has championed a "borrowing-as-equality" policy in which credit is treated as an equalizer "without expressly accounting for the countervailing force of debt," which is a "mechanism of the very subordination that Congress's invocation of 'credit' aspires to address."[69] This part explores how student debt further entrenches Black Americans' vulnerable position in America's debt capitalism by tracing the legislative history of higher education, credit, and debt in the context of the Black-white wealth gap. It will show how student debt reinforces racialized and coercive unequal bargaining power between borrower and lender in the form of modern student debt peonage.

A. Expanding Access to Higher Education for Black Americans: Purpose or Profit?

In 1954, the Supreme Court ruled that "separate but equal" — racial segregation in public schools — was illegal.[70] The Civil Rights Act of 1964 codified that holding, making it so that private institutions receiving federal funds could not discriminate on the basis of race. While Black Americans were able to pursue higher education before the Act was passed, "federal legislation contributed to the growing diversity of American postsecondary institutions."[71]

During the Cold War, Congress enacted a federal higher education funding scheme to prepare the workforce for international competition.[72] In

[69] Atkinson, *Borrowing Equality*, *supra* note 17, at 1403.

[70] *Brown v. Board of Education*, 347 U.S. 496 (1954).

[71] *See* Deeper in Debt: Women and Student Loans, AAUW 7, at 8 (2017).

[72] National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1581–82 (1958) ("The present emergency demands that . . . more adequate educational opportunities be made available. The defense of this Nation depends upon the mastery of . . . complex scientific

1958, Congress enacted the National Defense Education Act, which provided grants and loans for individuals to attend particular programs, notably in science, math, technology and foreign languages to "meet the national defense needs of the United States".[73] Not too long after, the Higher Education Act of 1965 expanded funding across all fields of study. The federal government's funding, however, came with a catch: those with few other options to pay for college or graduate school must contract for debt.[74] By structuring a financial aid program premised predominantly on loans rather than solely grant funding, the financial burden of paying for Higher Education was on students and their parents, with the "benefit" of a credit line from the government. Perhaps this "benefit" scheme seemed appropriate at the time because many Americans did not necessarily need an undergraduate or graduate degree in the 60s and 70s to earn a living compared to today.[75]

However, given what we know now about rising tuition costs and disproportionate student loan burdens, the trajectory of credit and debt legislation provides some insight into the current student debt crisis.[76] From the

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principles . . . the discovery and development of new principles, new techniques, and new knowledge. We must increase our efforts to identify and educate more of the talent of our Nation. This requires . . . no student of ability will be denied an opportunity for higher education because of financial need . . . therefore the purpose of this Act [is] to provide substantial assistance . . . to individuals, and to States and their subdivisions . . . to meet the national defense needs of the United States"). While the Morrill Act of 1862 (ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-08 (1988)), appropriated educational loan funding and "authorized federal land grants to the states [to create] . . . agricultural and technical colleges," that was limited to war veterans. Atkinson, *Race, Educational Loans & Bankruptcy*, *supra* note 25, at 13 n.43.

[73] National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958); *see* Atkinson, *Race, Educational Loans & Bankruptcy*, *supra* note 25, at 4 n.6 (noting that "Congress has supported the attainment of higher education through the appropriation of federal funds for educational loans" such as through the National Defense Education Act of 1958).

[74] *See* Atkinson, *Race, Educational Loans & Bankruptcy*, *supra* note 25, at 5 (historicizing how congress recognized higher education as a national priority and increasing "access" while also placing the burden, cost, and risk of debt on students and their families).

[75] *See* Anthony P. Carnevale, Artem Gulish & Kathryn Peltier Campbell, If Not Now, When? The Urgent Need for an All-One-System Approach to Youth Policy, Geo. Univ. Ctr. on Educ. & the Workforce 12 (2021) ("[T]wo out of three jobs require postsecondary education and training, while three out of four jobs in the 1970s required a high school diploma or less."); *The Rising Cost of Not Going to College*, Pew Rsch. Center, (Feb. 11, 2014), https://www.pewresearch.org/social-trends/2014/02/11/the-rising-cost-of-not-going-to-college [https://perma.cc/VP7D-FZMM] (finding that 34% of 25-to-32-year-old's had college degrees in 2013 compared to only 13% in 1965 and that the earnings gap between those with a bachelor's degree and those with a high school degree rose from $7,499 in 1965 to $17,500 in 2013).

[76] *See* Jessica Dickler and Annie Nova, *This is how student loan debt became a $1.7 trillion crisis*, CNBC (May 6, 2022), https://www.cnbc.com/2022/05/06/this-is-how-student-loan-debt-became-a-1point7-trillion-crisis.html [https://perma.cc/55CK-N8JE] ("Legislation like the GI Bill, the National Defense Education Act, and Higher Education Act of 1965 paved the way for greater access to college and enrollment grew while costs remained low. But, eventually, deep cuts in state funding for higher education paved the way for significant tuition increases and pushed more of the costs of college onto students. . .. Over the 30 years between 1991-92 and 2021-22, average tuition prices more than doubled, increasing to $10,740 from $4,160 at public four-year colleges, and to $38,070 from $19,360 at private institutions, after adjusting for inflation."); Andre M. Perry, Marshall Steinbaum & Carl Romer, *Student loans,*

1950s to the 1970s, Congress regulated "credit" separately from "debt."[77] This legislation was enacted around the same time as Civil Rights and Higher Education legislation, and included the Consumer Credit Protection Act of 1968, the Equal Credit Opportunity Act of 1974, the Middle Income Student Assistance Act in 1978, and the Community Reinvestment Act of 1977.[78] These credit statutes were meant to be transformative by providing financial means for all Americans to gain access to higher education.

The aftermath of this new credit legislation did not make education more affordable. Instead, once the media uncovered and publicized instances of student loan borrowers from elite colleges discharging their loans without attempting to repay them as if it were a "widespread phenomenon,"[79] the Bankruptcy Commission made it more difficult to discharge student loans by requiring "proof that borrowers were unable to earn sufficient income" to repay them.[80] The Commission's reasoning was that "student loans should enable individuals to earn a higher income as a result of advanced education."[81] To avoid consumer fraud and protect the integrity of debt collection and bankruptcy processes, Congress enacted the Fair Debt Collection Practices Act of 1977 (FDCPA), the Bankruptcy Reform Act of 1978 (Bankruptcy Code), and then later on, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Subsequent major waves of congressional regulatory changes occurred in the late 1980s and early 2000s. These changes shifted higher education financing further away from grants towards an increased reliance on student loans, further bolstering inequality. By the 1990s, tuition outpaced inflation and, under Reagan, grants became taxable gross income and total interest deduction disappeared, further increasing the financial burden of student aid on recipients.[82] In 1993, through the Student Loan Reform Act, the William D. Ford Direct Loan Program was meant to streamline the lending process,

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the racial wealth divide, and why we need full student debt cancellation, BROOKINGS INST. (Jun. 23, 2021), https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation [https://perma.cc/5ZCF-FPUE] (showing that since 2010, around when the U.S. Department of Education began issuing all federal student loans, the average U,S, student borrower went from owing 26% more on their original loan to 50% more in 2019 and that Black Americans borrowers went from owing 37% more to 74% more of their original loan balance compared to all other borrowers); DEEPER IN DEBT: WOMEN AND STUDENT LOANS, AAUW 7, at 13 (2017) ("Between 1965 and 1993 federal student loans . . .[were] made by authorized private lenders but guaranteed by the federal government—so-called) (internal quotations omitted).

[77] Atkinson, *Borrowing Equality*, *supra* note 17, at 1406 ("Congress has largely bifurcated its regulation of 'credit' from its regulation of 'debt' . . . separating them beginning in the mid to late 1960s and continuing throughout the 1970s, Congress passed a suite of laws aimed at addressing inequality more broadly by improving the ability of marginalized groups to borrow money in the conventional consumer capital markets.").

[78] *Id.* at 1407–08.

[79] Salvin, *supra* note 18, at 145–46.

[80] *Id.* at 146.

[81] *Id.*

[82] R. Paul Guerre, *Financial Aid in Higher Education: What's Wrong, Who's Being Hurt, What's Being Done*, 17 J. COLL. & UNIV. L. 483, 485, 495 (1991).

reduce costs to taxpayers, and make certain loans more affordable.[83] For instance, the Direct Subsidized Loan Program, available only to college students, offers loans that do not accrue interest while a student is in school or during their six-month grace period.[84] However, in 2006, the government took a different approach when it enacted the Federal Grad PLUS loan program.[85] The Federal Grad PLUS program provides students with substantial unsubsidized loans which accrue interest while students are in school, significantly increasing student debt as compared to other loan terms offered by the government under programs such as the Stafford Loan Program, which defers interest accrual until after a designated grace period.[86] To counteract the substantial increase in student loan amounts, in 2007 Congress passed the College Cost Reduction and Access Act, implementing an Income-Based Repayment (IBR) program (also called Income-Driven Repayment (IDR), which extends a borrower's repayment period over 20 – 25 years according to their discretionary income, and the Public Sector Loan Forgiveness program (PSLF) to provide more "affordable" repayment options.[87] These efforts, however, as this next paragraph discusses, proved unsuccessful and were flawed from the start.

Instead of creating an affordable pathway to higher education, these policy changes to federal student loan programs exacerbated the student debt crisis. First, IBR/IDR and PLSF programs have been plagued with structural and management issues, which prevent borrowers from obtaining debt cancellation despite continued efforts for reform. In 2019, only 32 out of 2 million eligible borrowers had their debt cancelled under IDR.[88] Similarly, in 2019 less than 2% of borrowers were eligible to have their debt cancelled under PLSF.[89] According to a nationwide study by the Education Trust, 72% of the Black students who were surveyed had IDR plans.[90] Interviews revealed that the debt balance that seems to never disappear and only grow over time is akin to a "lifetime sentence," "shackles on their ankle," and "Jim Crow," because carrying student debt "ensures that [borrowers] will never have full freedom."[91] Clearly, the prolongment of payment and in-

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[83] 34 CFR § 685.100.

[84] *Subsidized and Unsubsidized Loans*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized [https://perma.cc/W7VT-8HET].

[85] Mark Kantrowitz, *Historical Federal Student Loan Interest Rates and Fees*, SAVING FOR COLLEGE (May 12, 2020), https://www.savingforcollege.com/article/historical-federal-student-interest-rates-and-fees [https://perma.cc/2B63-Z258].

[86] *Direct Plus Loans*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans/plus/grad [https://perma.cc/92QE-32FX]; *Subsidized and Unsubsidized Loans*, *supra* note 84.

[87] College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (codified as amended in scattered titles of 20 U.S.C.); Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13, at 7; Atkinson, *Borrowing Equality*, *supra* note 17, at 1463.

[88] Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13 at 8.

[89] *Id.*

[90] *Id.*

[91] *Id.*

crease in debt balances have only exacerbated the debt crisis. In turn, by reducing the percentage of Pell Grant tuition coverage, which is the largest federal need-based aid program, the government placed Black borrowers further at a disadvantage given their overreliance on Pell Grants (58% in 2015), compared to white students (32%).[92] These policies also failed to protect students from predatory and fraudulent for-profit universities that have disproportionately harmed Black students given their overrepresentation at those institutions compared to white students who predominantly attend public or non-profit universities.[93] While retroactive cancellation has been granted to a number of borrowers who were victims of predatory for-profit colleges,[94] the actual impact of the federal government's recent debt cancellation plan and temporary PSLF waiver program have yet to be fully evaluated.[95]

Higher student debt has bridged the gap between increasingly high costs of higher education and decreasingly fewer low-cost funding options for Black students. Though facilitating "access," student loan debt has had tangible detrimental repercussions, including increasing loan default rates and severe financial strain.[96] The American Association of University Wo-

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[92] Investing in Our Future: The 5 Top Student Aid Policies Needed to Strengthen Higher Education, Nat'l Ass'n of Student Fin. Aid Adm'r. 4 (2020).

[93] Dyvonne Body, *Worse Off Than When They Enrolled: The Consequence of For-Profit Colleges for People of Color*, Aspen Inst. (Mar. 19, 2019), https://www.aspeninstitute.org/blog-posts/worse-off-than-when-they-enrolled-the-consequence-of-for-profit-colleges-for-people-of-color [*archived at* https://perma.cc/45YR-JWD8] (noting that "black and Hispanic individuals are three times more likely to attend a for-profit college than white individuals" and that "[i]n 2017 alone, students of color made up over half of the attendees at all for-profit colleges."); Victoria Jackson & Tiffany Jones, *The 'Black Tax' Is Key to Understanding and Solving the Black Student Debt Crisis in the Time of COVID-19 and Beyond,* The Educ. Trust (Apr. 16, 2020), https://edtrust.org/resource/the-black-tax-is-key-to-understanding-and-solving-the-black-student-debt-crisis-in-the-time-of-covid-19-and-beyond [https://perma.cc/RB7T-ZXVB] (commenting on the high default rate of Black borrowers who attended for-profit institutions).

[94] Press Release, Xavier Bercerra, Attorney General, State of California Department of Justice, *Attorney General Becerra: Students Begin to Receive Loan Forgiveness After Being Defrauded by Corinthian and Other Predatory For-Profit Colleges* (Mar. 18, 2021), https://oag.ca.gov/news/press-releases/attorney-general-becerra-students-begin-receive-loan-forgiveness-after-being [https://perma.cc/VSY4-BWSJ] (commending the Biden administration for relieving $1 billion in student loan debt to borrowers who were defrauded by predatory for-profit colleges).

[95] *See FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, White House (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [https://perma.cc/9AVR-UCS9] (announcing $10,000 of student debt relief with income cap restrictions and an additional $10,000 of relief for Pell Grant recipients); *Complete the Public Service Loan Forgiveness (PSLF) Form With the PSLF Help Tool*, Fed. Student Aid, https://studentaid.gov/pslf/ [https://perma.cc/LKU5-AFJC] ("Under the limited PSLF waiver, borrowers may receive credit for payments that previously didn't qualify for PSLF or Temporary Expanded Public Service Loan Forgiveness (TEPSLF).").

[96] *See generally* Jackson & Jones, *supra* note 93 (discussing high default rates of Black borrowers); Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13, at 8-9 (analyzing data from Black students that shows how debt poses a financial strain on their ability to save, afford healthcare, and meet other essential needs in some cases).

men (AAUW) found that 57% of Black women college graduates who were four years out of college and paying off their student loans were "unable to meet all of their essential expenses at some point in the past year."[97] This statistic is alarming when compared to the fact that 17% of Black women graduates were not making student debt payments and were still unable to make ends meet.[98] This comparison is important for understanding the underlying psychological and economic implications that student debt is perpetuating through peonage.[99] If basic economic needs are not being met because of debt burdens, then contracting to pay off debt from wages earned after graduation may be close to involuntary servitude—peonage.[100] While the force exercised here may not be physical, it is real: to participate in the economy one must repay loans or else be completely excluded by debt capitalism. By not repaying, one's credit will be negatively impacted, and thus future participation in wealth-building through leveraging credit to obtain assets will be limited or almost impossible. Therefore, while it is not involuntary servitude per se, which would require physical force according to court interpretation,[101] I argue that the lack of freedom that debt imposes on Black Americans is close enough.[102]

Considering these major federal enactments along with the high increases in tuition across American universities,[103] the fact that "student loans have come to be used extensively. . .fund[ing] billions of dollars of tuition money"[104] should raise serious concerns about how students, especially Black Americans, are contracting for debt to achieve higher education. These trends provide insight into profit margins that major institutions, in particular elite private universities, have gained through non-white and non-wealthy students taking on educational debt to gain access to privileged and previously segregated institutions with the hope of building economic and social capital.[105] As the next section demonstrates, the expected gains in economic and social capital did not materialize as promised for Black Americans. In reality, modern student debt peonage has contributed heavily to the current Black-white wealth gap.

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[97] AAUW, *supra* note 71, at 30.

[98] *Id.*

[99] *See* Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13, at 8, 10 (sharing that interviews reveal Black borrowers in IDR plans feel shackled like under Jim Crow and that many "have a hard time affording a savings account (71%), health care expenses (24%), rent (25%), child care (13%), and food (22%).").

[100] *See id.*

[101] *See infra* Section III.A.

[102] *See* Mustaffa & Davis, *Jim Crow Debt*, *supra* note 13, at 8 (discussing Black borrowers who felt that their debt "ensures that they will never have full freedom" akin to Jim Crow).

[103] *See* Guerre, *supra* note 82, at 485, 488 (discussing exorbitant increases in tuition rates as revenue sources for universities).

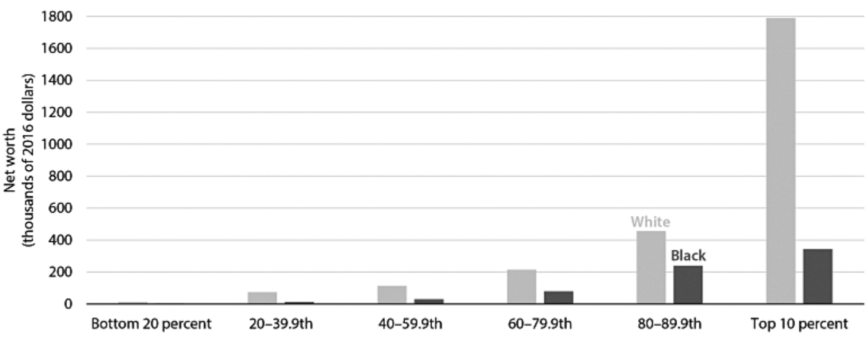
[104] Salvin, *supra* note 18, at 145.

[105] *See* AAUW, *supra* note 71.

B. The Black-white Wealth Gap

As of 2016, the Black-white wealth gap was about tenfold irrespective of income level or class status, which was only slightly lower than prior findings that the gap was thirteenfold in 2014 –its highest level since 1989, when white households held 17 times the net worth of Black households.[106] A number of reports and articles have surfaced on America's Black-white wealth gap in relation to student debt and the disproportionate impact that educational lending has had on Black Americans, not only with regard to earning higher incomes, but also their ability to accumulate wealth.[107] According to a study conducted by the AAUW, "[B]lack women take on more student debt on average," and also take much longer to pay off their loans than any other borrower group, causing them to pay more on their loans as interest accrues.[108]

FIGURE 1: Median net worth, by household income percentile, 2016.[109]



Income status is not dispositive of wealth and, as the data in Figure 1 show, the wealth gap only widens the higher the income bracket. In 2016,

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[106] Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-white wealth gap*, BROOKINGS INST. (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/K7G6-37GN]; Rakesh Kochhar & Richard Fry, *Wealth inequality has widened along racial, ethnic lines since end of Great Recession*, PEW RSCH. CTR. (Dec. 12, 2014), https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ [https://perma.cc/M3HU-2BNR].

[107] *See, e.g.,* Sophie Quinton & Nat'l J., *The Disproportionate Burden of Student-Loan Debt on Minorities*, THE ATLANTIC (May 5, 2015), https://www.theatlantic.com/education/archive/2015/05/the-disproportionate-burden-of-student-loan-debt-on-minorities/392456/ [https://perma.cc/7R6A-W8V5]; Jackson & Jones, *supra* note 93; Suzanne Kahn, Mark Huelsman, & Jen Mishory, *Bridging Progressive Policy Debates: How Student Debt and the Racial Wealth Gap Reinforce Each Other*, ROOSEVELT INST. (Sept. 2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Student-Debt-and-RWG-201909.pdf [https://perma.cc/262A-7NBS].

[108] AAUW, *supra* note 71, at 2, 26.

[109] Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-white wealth gap*, BROOKINGS INST. (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/K7G6-37GN].

net worth for Black Americans in the top 10th percentile hovered under $400,000 whereas white American net worth was nearly $1.8 million in the same income percentile. Furthermore, regardless of net worth, student debt disparities between Black and white Americans persist, and suggest they may be highest for wealthier Black Americans as compared to white Americans in the same wealth quintile.[110] According to a 2016 study by Addo, Houle, & Simon, a white family with a net worth of $150,000 is expected to have "54% less debt than a white family with zero net worth," however, almost no difference in debt levels is expected for Black Americans with a net worth of $150,000 compared to those with zero net worth.[111] Research suggests that the difference in why Black Americans, regardless of net worth, must still incur student debt may be because of the type of assets they own and how liquid those assets are compared to assets owned by white Americans.[112] A study in 2016 found that "wealthy black parents have substantially less home equity and only one-half the financial assets of wealthy white parents," which tend to include relatively liquid assets such as stocks, bonds, and savings that could be used to pay for higher education.[113] Data controlling for educational attainment reveal that wealth disparities also persist at every level of higher education and across all graduate degree categories. As Figure 2 shows below, the median net worth for Black Americans with a college degree is substantially lower than even that of white Americans with a high school education or less, let alone with a bachelor's degree. The median net worth of a Black American with a bachelor's degree or higher is $68,200, whereas that of a white American is $399,000 with a bachelor's degree or higher and $94,500 with a high school education or less.

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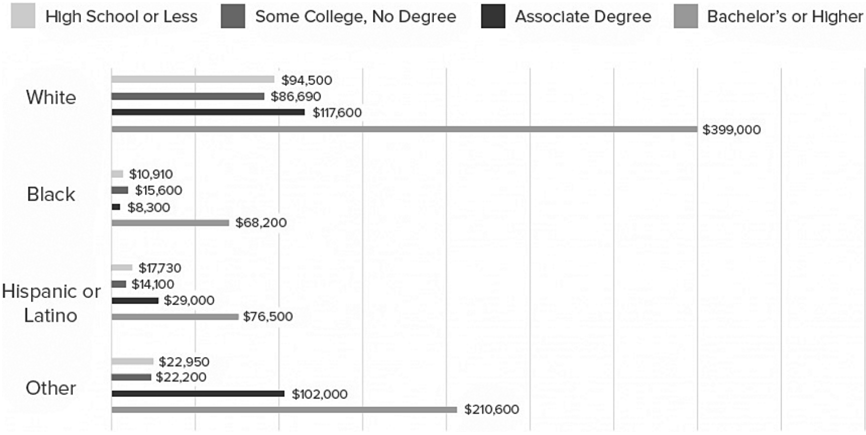
[110] Fenaba R. Addo, Jason N. Houle, & Daniel Simon, *Young, Black, and (Still) in the Red: Parental Wealth, Race, and Student Loan Debt*, 8 Race & Soc. Probs. 64, 73 (2016) ("[P]arents' wealth is associated with substantial reductions in student debt for white, but not black, young adults . . . providing further evidence that the racial disparity in student loan debt is highest among those from the wealthiest families.").

[111] *Id.*

[112] *See id.* ("[I]n addition to having higher amounts of wealth, whites may also possess forms of wealth that are more easily transferred across generations . . . ."); Kahn et al., *supra* note 107, at 15–16 (discussing findings from Addo et al., *supra* note 110 regarding wealth liquidity amongst Black and white Americans).

[113] Addo et al., *supra* note 110, at 73–74.

FIGURE 2: Median Net Worth by Race and Educational Level, 2016.[114]



While statistics analyzing racial inequality often focus on attainment metrics such as homeownership status, education levels, and income brackets, the reality of the strikingly low rate of intergenerational wealth within Black American families[115] suggests that increases in attainment metrics do not correlate with national upward mobility trends. Student loan debt is the highest consumer debt category after mortgages and currently has the highest default rate compared to other loans,[116] thus impacting wealth accumulation despite increased earnings from higher education degrees, particularly for Black Americans.[117] As studies have found, "increasing costs of higher

[114] Kahn et al., *supra* note 107, at 24 (analyzing data from the 2016 Survey of Consumer Finances).

[115] Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances,* FED. RESERVE (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/ERW5-4HK6] (noting the differences in inheritance support and financial assistance from family, with 17% of white Americans expecting to receive an inheritance and 30% actually receiving one, compared to 6% and 10% of Black Americans, respectively).

[116] Melanie Hanson, *Student Loan Debt Statistics*, EDUCATIONDATA.ORG (Jul. 29, 2022), https://educationdata.org/student-loan-debt-statistics [https://perma.cc/G4JT-2CN4] ("Student loan debt is now the second-highest consumer debt category after mortgages."); *see also* Liz Knueven, *The average American debt by type, age, and state*, BUS. INSIDER (Aug. 22, 2020), https://www.businessinsider.com/personal-finance/average-american-debt#average-american-debt-by-age [https://perma.cc/2JB8-Q4MV] (outlining average consumer debt by categories of which student loans are either the top or second-highest debt category for two of the five categories, depending on age bracket). Matt Egan, *Americans now have a record $14 trillion in debt,* CNN (Nov. 13, 2019), https://www.cnn.com/2019/11/13/business/household-debt-student-loans-fed [https://perma.cc/RMK8-D4AP] ("About 11% of the $1.5 trillion of US student debt was more than 90 days delinquent or in default . . . That's the most for any loan type and is nearly double 2004 levels").

[117] *See* Perry et al., *supra* note 76 ("Regardless of the incomes they make after graduation, Black households carry more student debt, which pushes down their creditworthiness. Unsurprisingly, then, Black people with a college degree have lower homeownership rates than

education and corresponding rise in student loan debt are creating a new form of stratification for recent cohorts of young adults," for which "student loan debt may be a new mechanism by which racial economic disparities are inherited across generations."[118] In fact, the inverse economic mobility correlation for Black Americans demonstrates quite clearly the underlying argument that the Greenes' affidavits explore through the context of debt relief as a form of reparations: their intended path towards social and economic mobility through higher education and student debt negatively impacted the ends they sought.

While scholars have focused on the attainment gap for the purpose of exploring inequality, the opportunity gap is a better metric for specifically understanding the wealth gap.[119] I define the opportunity gap as representative of legal, political, economic, educational, cultural, and social opportunities that determine a person's chance to obtain an education, earn equal wages, accumulate wealth, and attain positions of power and decision-making.[120] The opportunity gap is ultimately where Black Americans and all other Americans stand apart. The opportunity gap is where income, debt, and wealth, irrespective of educational attainment or achievement, do not equate across racial groups.[121] The opportunity gap dictates forced student loan and

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white high school dropouts. Moreover, research from the Federal Reserve Bank of St. Louis finds that after college graduation, white households receive wealth transfers from their family to help pay for things like the purchase of a home. Black households, on the other hand, transfer their increased post-college income to help their family. Different patterns of intergenerational transfers contribute to nearly three-quarters of Black borrowers' student loans having a higher balance today than they did originally."); *see generally* Raphaël Charron-Chenier, Louise Seamster, Tom Shapiro, & Laura Sullivan, *Student Debt Forgiveness Options: Implications for Policy and Racial Equity*, Roosevelt Inst. 12 (Aug. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_StudentDebtForgiveness_WorkingPaper_202008.pdf [https://perma.cc/P3B4-FHEF] (noting that consumer debt is "an indicator of collective financial strain" which has steadily increased in the past decade according to the Federal Reserve Bank of New York 2020).

[118] Addo et al., *supra* note 110, at 64; *see also* Charron-Chenier et al., *supra* note 117, at 20 (suggesting that debt cancellation could be a viable wealth transfer mechanism to reduce the Black-white wealth gap yet that it is insufficient to fully close the wealth gap given how wide the gap is).

[119] *See Opportunity Gap*, Close the Gap Found., https://www.closethegapfoundation.org/glossary/opportunity-gap [https://perma.cc/2PG8-ULSV] ("The opportunity gap is the way social or economic factors result in lower rates of success in a variety of life aspirations."); Theresa Mooney, *Why We Say "Opportunity Gap" Instead of "Achievement Gap,"* Teach for Am. (May 11, 2018), https://www.teachforamerica.org/one-day/top-issues/why-we-say-opportunity-gap-instead-of-achievement-gap [https://perma.cc/9UUZ-4DGA] (explaining why Teach for America uses the term "opportunity gap" to explain educational and economic inequality); *see generally* Prudence L. Carter & Kevin G. Welner, Closing the Opportunity Gap: What America Must Do to Give Every Child an Even Chance, Oxford U. Press 2013), https://edpolicy.stanford.edu/library/publications/761 [https://perma.cc/Z6ED-A7A9] (discussing the opportunity gap through the lens of public educational opportunities).

[120] *See id.*

[121] *See supra* Section II.B, Figures 1 & 2 and accompanying text; Tatjana Meschede, Joanna Taylor, Alexis Mann, & Thomas Shapiro, *"Family Achievements?": How a College Degree Accumulates Wealth for Whites and Not for Blacks*, Fed. Reserve Bank of St. Louis Rev., First Quarter 2017 at 125 ("Education itself does not equalize wealth accumulation op-

consumer credit indebtedness for Black Americans.[122] The opportunity gap is where intergenerational wealth-building at rates even half as much as that of white Americans becomes impossible for Black Americans if continued to be left unaddressed.[123]

The tenfold Black-white wealth gap has been exacerbated by the student debt crisis, given the disproportionate debt burdens that Black Americans, and specifically Black women, shoulder. Federal legislation regarding higher education, credit, and debt have only contributed to the student crisis and the Black-white wealth and opportunity gap. This next part will explore how current predatory practices in consumer bankruptcy proceedings, as demonstrated by several cases including *In re Gordon* and the Greenes' case, reveal the need for a revised legal standard for student debt relief in the context of reparations for Black Americans.

III. Filing for Bankruptcy or Reparations?

Consumer bankruptcy proceedings offer important insight into what happens when individuals are unable to repay their debts. In this part, I outline the intent of the Bankruptcy Code, the impact of chapter choice on debtors, and the effects of case conversions in consumer bankruptcy proceedings through *In re Gordon*. I then define the legal standard for undue hardship in consumer bankruptcy proceedings and address recent updates to the undue hardship factors. Finally, I highlight reparations claims that challenge the undue hardship standard through the *Greene* case by arguing that student debt repayment contracts between the U.S. government and Black Americans are unconscionable.

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portunities among Black and White families."); *see also* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 Stan. L. Rev. 1093, 1121 (2019) (describing how credit worked well for white Americans because an extended period of economic prosperity ensued and, as the "main beneficiaries of government-subsidized credit," could expect to be wealthier because "white wealth ballooned with the unmatched economic growth that characterized the so-called Golden Age of Capitalism") (internal quotation marks omitted) [hereinafter Atkinson, *Rethinking Credit*].

[122] *See, e.g.*, Christian Weller, *Households Of Color Owe Costlier, Riskier Debt, Hurting Their Chances To Build Wealth*, Forbes (Dec. 28, 2021), https://www.forbes.com/sites/christianweller/2021/12/28/households-of-color-owe-costlier-riskier-debt-hurting-their-chances-to-build-wealth/?sh=78e6f66b5600 [https://perma.cc/RN3D-C3UA] ("Households of color need to rely more on consumer debt to help them pay their bills than is the case for White households" and "Black households owed more in consumer loans than all of their consumer durables were worth . . . ."); *see generally infra* Part II.

[123] *See* Janelle Jones, *The Racial Wealth Gap: How African-Americans have been shortchanged out of the materials to build wealth*, Econ. Pol'y Inst. Blog (Feb. 13, 2017), https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/ [https://perma.cc/QBC6-KAPK] ("Educational attainment, the right occupation, and full-time employment are necessary, but not sufficient conditions for building wealth (and even equalizing these between races would be nothing short of miraculous).").

A. *A Predatory Landscape in Bankruptcy Proceedings: Chapter Choice, Case Conversions, and Peonage as seen through* In re Gordon

Bankruptcy proceedings are intended to provide legal recourse for individuals who cannot afford to pay their debts, providing both a "fresh start" and an avenue for creditors to collect on outstanding balances. Yet, this promised "fresh start" has proven challenging and often impossible to obtain.[124] Key barriers arise from issues related to deciding the chapter under which a person should file a bankruptcy case. The U.S. Bankruptcy Code has three different filing options for consumers: Chapter 7, Chapter 13, and, in certain circumstances, Chapter 11.[125] The most relevant Chapters to individual debtors are 7 and 13. In exchange for debt discharge, Chapter 7 requires a person to liquidate all of their property, subject to certain exemptions.[126] On the other hand, Chapter 13 provides a wage-earning plan that allows individuals to retain all or most of their property.[127] The catch under Chapter 13 is that the individual must follow a set repayment plan, or they risk losing the chance for a discharge.[128] An individual may prefer to file under one chapter versus another depending on their demographic background and life circumstances. For example, under Chapter 13, individuals risk wage garnishment if they are unable to maintain the three- to five-year repayment plans.[129] Given the existing structural disparities that Black Americans face in the labor market with regards to their earnings, as discussed in Parts I & II, garnishing wages could send someone back into the cycle of debt or worse, into poverty.

Despite the passage of the FDCPA to protect consumers from abusive third-party debt collectors[130], modern debt collection practices continue to resemble peonage,[131] implicating principles underlying the Thirteenth Amendment[132] and the Anti-Peonage Act[133]. A harmful practice in bank-

[124] *See, e.g.*, Gross, *supra* note 18, at 70 (suggesting that certain Chapter filings are at odds with bankruptcy's intended "fresh start" policy); *see generally* Salvin, *supra* note 18 (discussing challenges to student debt relief in Bankruptcy court).

[125] 11 U.S.C. §§ 701-84, 1301-30, 1101-95. Chapter 11 is usually associated with larger entities filing for bankruptcy rather than an individual; however, it allows those "who don't qualify for Chapter 13 or need some of the special protections that Chapter 11 provides [to] reorganize their debt." *Chapter 11 for Individuals vs. Chapter 13*, AM. BANKR. INST., https://www.abi.org/feed-item/chapter-11-for-individuals-vs-chapter-13 [https://perma.cc/4T56-XHPS].

[126] *See* Salvin, *supra* note 18, at 140 (citing the Bankruptcy Reform Act of 1978); *see also* Liberty, *supra* note 18, at 297–98 (discussing the debt relief differences between chapter 7 and 13 bankruptcy filings).

[127] *Id.*

[128] *Id.*

[129] Liberty, *supra* note 18, at 297–98.

[130] Fair Debt Collection Practices Act § 803(6), 15 U.S.C. §1692 (defining a debt collector as "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.").

[131] Liberty, *supra* note 18, at 281.

[132] U.S. CONST. amend. XIII, § 1.

[133] 42 U.S.C. § 1994.

ruptcy proceedings for Black filers is a case conversion—a process through which a judge mandates the conversion of a case filing from one chapter, usually Chapter 7, to another, such as Chapter 13 or 11. This practice is harmful because racial bias has played a significant role in pushing Black Americans to file under Chapter 13.[134] Notwithstanding the fact that Chapter 13 is a more expensive filing option and generally does not result in debt discharge, it is particularly coercive to mandate this conversion given that Chapter 13 entails wage garnishment,[135] requiring labor to pay off debt over time. Chapter 7, on the other hand, supposedly provides a faster route towards debt relief and a "fresh start" by discharging certain unsecured debt, such as credit card debt.[136] While both chapter choices have their respective costs and benefits, Chapter 7 emphasizes forgiveness and helping individuals restart their lives without debt as soon as possible. By contrast, Chapter 13 prioritizes maximizing repayments to creditors and imposing financial restrictions on debtors to "reform" their lifestyle.[137] In fact, Black Americans are twice as likely to be steered by courts towards filing under Chapter 13, rendering them more vulnerable to wage garnishment.[138] This trend can be viewed on a state-by-state basis according to demographic make-up. In 2019, Chapter 13 cases represented only 9.6% of bankruptcy cases in the District of Idaho, which is predominantly white; meanwhile Chapter 13 represented 81% of cases in the Southern District of Georgia, which is predominantly Black.[139] Regionally, Chapter 13 is much more common in the South, as compared to other parts of the country, and its use originated in Birmingham, Alabama in the 1930s during the Depression to teach debtors "the hard

[134] Letter to Elizabeth Warren in support of Consumer Bankruptcy Reform Act of 2020, at 32 (Dec. 14, 2020), https://www.warren.senate.gov/imo/media/doc/CBRA%20Law%20Prof%20Letter%20in%20Support.pdf [https://perma.cc/T3VV-XBKC] [hereinafter *Letter to Elizabeth Warren*]; *see* Jean Braucher, Dov Cohen, & Robert M. Lawless, & Dov J. Cohen, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393 (2012) (explaining the results of an experiment on a random sample of consumer bankruptcy attorneys in which they "were more likely to recommend Chapter 13 when the hypothetical debtors were a couple named 'Reggie & Latisha,' who attended an African Methodist Episcopal Church, as compared to a couple named 'Todd & Allison,' who attended a United Methodist Church.").

[135] Braucher, Cohen, & Lawless, *supra* note 134, at 405.

[136] *Id.* at 395, 399.

[137] *Id.* at 394–95 (noting that, while Chapter 13 is expensive, it is often used to help debtors keep certain property such as a home or car, and that, while Chapter 7 involves liquidating assets, "in practice . . . more than . . . 90% of all Chapter 7 debtors have no assets to liquidate" due to exemptions and having already "pledged all of [their] assets as collateral," rendering them "beyond the reach of the bankruptcy trustee").

[138] Liberty, *supra* note 18, at 281.

[139] *Idaho White Population Percentage by County*, INDEXMUNDI, https://www.indexmundi.com/facts/united-states/quick-facts/idaho/white-population-percentage#map [https://perma.cc/LW73-F5G2] (mapping the percentage of the white population in Idaho); *Georgia Black Population Percentage by County*, INDEXMUNDI, https://www.indexmundi.com/facts/united-states/quick-facts/georgia/black-population-percentage#map [https://perma.cc/SRC5-NWSC] (mapping the percentage of the Black population in Georgia).

lesson of self-discipline."[140] Given the Supreme Court's 1944 decision in *Pollock v. Williams* that a Florida law making "it a misdemeanor to induce advances with intent to defraud by a promise to perform labor and . . .failure to perform labor for which money has been obtained, prima facie evidence of intent to defraud," violated the Thirteenth Amendment and the Anti-Peonage Act, it is likely that the rise of the use Chapter 13 during the early 20th century overlapped with *de facto* peonage practices.[141] Unsurprisingly, according to data from the Bankruptcy Data Project at Harvard University, 23 of the 24 "judicial districts with the highest [C]hapter 13 rates in 2010" were located in former confederate states.[142]

Several underlying racialized assumptions may factor into why Black Americans are more likely to be pushed towards Chapter 13. For example, attorneys may not think Black Americans can afford to pay the upfront cost for Chapter 7 attorney's fees,[143] or may attribute different standards to white and Black filers regarding financial responsibility.[144] Research comparing 2007 data collected by the Consumer Bankruptcy Project to 2012 data collected in an experimental study found that Black Americans "seem to have to 'earn' their bankruptcy discharge (their forgiveness) more often through Chapter 13."[145] Black Americans were viewed as having "good values" when they expressed a preference for filing under Chapter 13, yet were viewed as having "poor values" when they expressed a preference for filing under Chapter 7.[146] Meanwhile, the complete opposite perceptions were true regarding white filers.[147] As Braucher, Cohen, & Lawless note, "[t]he competent African-American couple takes care of the mistakes of the past; the competent white couple wants [and gets] a fresh start on the future."[148]

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[140] Braucher, Cohen, & Lawless, *supra* note 134, at 396; *cf.* Stanley, *supra* note 19, at 36 (discussing how formerly enslaved Black Americans were patronized and viewed as needing to be taught about the duties and privileges of freedom when they entered into contracts).

[141] 322 U.S. at 24–25, 4-6 (noting in footnote 1 that the Florida statute was originally enacted as Chapter 7919 of the Acts of 1919 and further re-enacted as §§ 817.09 and 817.10); *see* Goluboff, *The Thirteenth Amendment*, *supra* note 63, at 1660–62 (discussing peonage complaints to the Department of Justice and the NAACP during the 1940s and 50s).

[142] Braucher, Cohen, & Lawless, *supra* note 134, at 396.

[143] *See* Tara Siegel Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, N.Y. TIMES (Jan. 20, 2012), https://www.nytimes.com/2012/01/21/business/blacks-face-bias-in-bankruptcy-study-suggests.html [https://perma.cc/Z2AE-9S62] ("Even though the attorneys' fees for the more labor-intensive Chapter 13 are more than double the charge for a Chapter 7, some truly distressed debtors will pursue a Chapter 13 anyway, . . . because they can pay the fee over time, unlike in a Chapter 7, which typically requires a payment before the case is filed. If [B]lacks are perceived as less likely to have the resources—or a family with resources—to come up with a lump sum, some lawyers may be inclined to suggest a Chapter 13").

[144] *See* Braucher, Cohen, & Lawless, *supra* note 134, at 393 (analyzing in depth findings of their studies on bankruptcy chapter choice and racial bias between Black and white consumer filers).

[145] *Id.* at 398, 393.

[146] *Id.* at 421.

[147] *Id.*

[148] *Id.* at 414.

A case highlighting how predatory conversions can resemble peonage is *In re Gordon.* In 2012, a Black plaintiff named Derrick Dewayne Gordon claimed that the court's application of Section 706(b) in converting his Chapter 7 filing to Chapter 11 constituted involuntary servitude and therefore violated the Thirteenth Amendment and the Anti-Peonage Act.[149] The court held that the case conversion did not violate either.[150] The court relied on an assumption that continuing employment is a choice, and if Gordon were to just stop working, no wage garnishment would occur and the debt would not be paid off. According to the court, it is the fact that an individual is employed that allows for a creditor to collect, whereas someone who is unemployed or retired would be exempt from debt collection.[151]

With this perspective, the court positioned the debtor as the decision-maker and the creditor as the party harmed in this transaction: "[t]he debtor always has the keys to the shackles. Economic necessity may discourage him from freeing himself, but is hardly the equivalent [of] a law of force compelling performance or continuance of service in violation of the Constitution."[152] By blaming individuals for their choices resulting in debt, the court drew a line between peonage as an involuntary performance and "the voluntary performance of labor or rendering of services in payment of a debt."[153] However, the court's standard creates a thin line between peonage and lawful voluntary labor. The court relies on a practically impossible standard for contract dissolution: either a person was (1) physically forced by

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[149] *In re Gordon*, 465 B.R. 683, 690 (N.D.Ga. 2012); *see also* Jay Adkisson, *Gordon: Debtor Asserts Concepts of Slavery and Peonage to Try to Avoid Chapter 11 Bankruptcy*, FORBES (Jan. 31, 2012), https://www.forbes.com/sites/jayadkisson/2012/01/31/gordon-debtor-asserts-concepts-of-slavery-and-peonage-to-try-to-avoid-chapter-11-bankruptcy/?sh=18a738e36f09 [https://perma.cc/LR7R-SRL2] (reporting on the novelty of the peonage claim Gordon brought in bankruptcy court).

[150] *In re Gordon*, 465 B.R. at 683–84.

[151] *Id.* at 700 n.12 (noting precedent finding that wage garnishment does not violate the Thirteenth Amendment where the "determining factor was that the debtor chose to continue employment").

[152] *Id.* at 700–01 (internal citations omitted). Through invoking imagery of physical coercion imposed by criminal punishment, the court recognized economic necessity as a barrier to freeing oneself and ironically invoked the process by which Black Americans had been subjected to peonage in the 1940s and 50s. Black Americans who sought to change employment in search of physical, economic, and social mobility were met with violent resistance and were criminalized. *See* Letter from Administrative Assistant, NAACP, to Victor Rotnem (May 27, 1943), cited in Goluboff*, The Thirteenth Amendment*, *supra* note 63, at 1636 n.93 ("[T]he general pattern [of peonage complaints] which is being adopted . . . to intimidate and deter farm laborers from leaving the area for more lucrative employment in industrial centers."). Here, Gordon's former employer is preventing him from changing employment through indebting him. The debtor clearly does not have the key to the shackles unless the key is restricting freedom to contract elsewhere, seek gainful employment, or economically improve one's life, whether that be through education to obtain a higher paying job or by changing employment, which is what higher education purports to do. *See* McHale, *supra* note 21, at 224 ("[A]s of 2014, the earnings of a college graduate were over 60% higher than those of a worker who attained only a high school diploma . . . . [H]igher education is thought to operate as a multiplier, enhancing the enjoyment of all individual rights and freedoms.") (internal citations and quotation marks omitted).

[153] *In re Gordon*, 465 B.R. at 700 (quoting *Clyatt v. U.S.*, 197 U.S. 207, 215–16 (1905)).

their employer to work or (2) threatened with criminal punishment for not working, which would be "involuntary servitude." Alternatively, a person could stop working, not earn any wages, and thus "free" themselves from their debt repayment obligation. Effectively, an individual choosing poverty or a low enough income akin to poverty, would be worthy of debt discharge.[154]

In making "freedom" from debt repayment contingent upon an individual's employment status, the court narrowly construed freedom as dependent on whether an individual can technically quit their job, rather than viewing employment as a necessary means for living in the United States.[155] The court's reasoning that employment is a voluntary choice is untenable, especially for many Black Americans who do not have the freedom to choose.[156]

B. Discharging Student Loan Debt: A High Undue Hardship Standard

Under the U.S. Bankruptcy Code, student loans are supposedly dischargeable if not doing so would pose an "undue hardship" on the debtor and the debtor's dependents —a standard which Congress did not define.[157] As a result, courts have determined different tests for assessing "undue hardship"[158] and have interpreted the standard narrowly over time.[159] Under the *Brunner* test, which many bankruptcy courts have adopted,[160] to prove an "undue hardship", the debtor must show that:

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[154] *See id.* at 701; *cf.* Salvin, *supra* note 18 (discussing the very high bar for successful consumer debt discharge through bankruptcy); *see also* Risa L. Goluboff, *"We Live's in a Free House Such As It Is": Class and the Creation of Modern Civil Rights*, 151 U. Pa. L. Rev. 1977, 2005 (2003) (noting that while "employers certainly used physical violence[,] . . . the oppressive nature of the working and living conditions served as the basis for many of the [peonage] complaints" that the NAACP received); Seamster, *Black Debt*, *supra* note 51, at 35 ("[D]ebt is a relationship of violence, that violence falls along racial lines.").

[155] *See In re Gordon*, 465 B.R. at 700 n.12 ("Garnishment of wages has been held to not violate the Thirteenth Amendment to the Constitution" given that the debtor chose to continue employment) (citations omitted); *see also* Naidu, *supra* note 32, at 16 ("The anti-peonage law . . . is a restriction on labour-market contracting, explicitly forbidding voluntary servitude [and] . . . interpreted very narrowly by the courts and legislatures.").

[156] *See* Seamster, *Black Debt*, *supra* note 51, at 35 (referring to how Black Americans "were encouraged to earn money through wage labor" after Emancipation); Letter from Milton R. Konvitz, Assistant Special Counsel, to Leslie Perry, NAACP Washington Bureau (July 8, 1943) (on file with NAACP Papers, Part 13, Series C, Reel 12) cited in Berry, *Taking the United States to Court*, *supra* note 36, at 2003 ("[I]nvoluntary servitude comes in only with respect to the absence of a choice of employment, and also with the fact that the parole, conditioned as it was, gave him only the appearance of freedom but certainly not the reality.").

[157] 11 U.S.C. § 523(a)(8). The terms "undue hardship" and "under burden" are used interchangeably throughout this Note.

[158] See *In re* Andresen, 232 B.R. 127 (B.A.P. 8th Cir. 1999) (discussing various undue hardship tests used to evaluate whether or not student loans were fully or partially dischargeable on that basis, including the Brunner test, Johnson test, the Bryant-Poverty test, and other miscellaneous variations).

[159] *See* Salvin, *supra* note 18, at 142.

[160] *See In re* Andresen, 232 B.R. 127, 137 (B.A.P. 8th Cir. 1999) ("Many bankruptcy courts, including several in the Eighth Circuit, have followed the *Brunner* test.").

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[161]

> Whereas a "totality-of-the-circumstances" test for example assesses: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and their dependents' reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[162]

Because of the subjective nature of these various factors, discharging student loans under any of these tests is ultimately subject to the court's discretion, which generally appears to be unfavorable. For example, one court expressed that, amongst all the debtors seeking financial relief, "few, as a class, inspire less sympathy than the well-educated beneficiaries of student loans seeking to avoid those debts on the ground of undue hardship."[163] The animus expressed here fails to acknowledge the relationship between education and the labor market as tainted with unequal racial disparities which affect debtors at all educational levels and across varying income levels. It fails to recognize the opportunity gap previously discussed.[164]

Scholars have critiqued court interpretations that student debt is undeserving of discharge through bankruptcy because it is inconsistent with the purpose of Chapter 7 and Chapter 13 bankruptcy proceedings. Dr. Robert E. Salvin, Director at the Center for Research and Reform in Education at Johns Hopkins University, argues that strictly interpreting the undue hardship standard is "at odds with the fresh start policy underlying the discharge of debt in bankruptcy."[165] According to Salvin, discharging student loan debt for those who bear an "undue hardship" would allow debtors to engage in productive participation in the economy.[166] He advocates for a more comprehensive standard for determining an "undue hardship" considering class sta-

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[161] *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

[162] *See In re* Andresen, 232 B.R. 137-141 (outlining the test for undue hardship according to the court's opinion in *In re* Andrews, 61 F.2d 702 (8th Cir. 1981)); *see, e.g., In re* Long, 322 F.3d 549, 553 (8th Cir. 2003) (using a totality of the circumstances test).

[163] *Id.* at 151 n.71 (internal quotation marks omitted).

[164] *Supra* Section II.B.

[165] Salvin, *supra* note 18, at 139; s*ee also* Gross, *supra* note 18, at 70 (suggesting that the implications of Chapter 13 filings are at odds with the legislative intent of anti-peonage laws, thereby "eroding the fresh start policy").

[166] Salvin, *supra* note 18, at 139.

tus and the ability to "maintain a middle class lifestyle" if debtors were freed of their student debt burden.[167]

Recently, the Department of Education (DOE) and Department of Justice (DOJ) took a step in Salvin's direction and issued new guidance to provide more consistent benchmarks for determining undue hardship, with three new factors: (1) present ability to pay, while maintaining a minimal standard of living; (2) future ability to pay, while maintaining a minimal standard of living; and (3) good faith efforts as determined by a set list of steps.[168] While the results of these new prongs have yet to be realized, the undue hardship test still falls short of addressing the root of the issue: debt cancellation might be a necessary means for certain individuals to be able to financially capitalize on their educational degree and their labor, where racism, debt

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[167] *Id.* Granted, the middle-class lifestyle has greatly changed since Salvin's article was published in 1996. According to Pew Research, in 1996 the average median U.S. household income was around $65,000 for a household of three, rising to $74,600 by 2018. Juliana Menace Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in income and wealth* inequality, Pew Rsch. Ctr (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/ [https://perma.cc/X8DH-2Q8N]. Additionally, as of 2021, only 50% of U.S. adults were considered middle class compared to 61% in 1971. Rakesh Kochhar & Stella Sechopoulos, *How the American middle class has changed in the past five decades*, Pew Rsch. Ctr (Apr. 20, 2022), https://www.pewresearch.org/fact-tank/2022/04/20/how-the-american-middle-class-has-changed-in-the-past-five-decades/ [https://perma.cc/WHQ5-KV23].

[168] *Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers*, Dept. of Just. (Nov. 17, 2022), https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy [https://perma.cc/WJL6-JK47]. *See Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation*, Dept. of Just. (Nov. 17, 2022), https://www.justice.gov/civil/page/file/1552681/download [https://perma.cc/7TZQ-T46T] (providing guidance to DOJ attorneys for student loan discharge requests in bankruptcy cases and detailing how to assess each factor such as for example, using the IRS' guidelines for determining minimal standards of living); *At a Glance: Department of Justice's New Process for Student Loan Bankruptcy Discharge Cases,* Dept. of Just., https://www.justice.gov/civil/page/file/1552676/download [https://perma.cc/JD7Z-CGWJ] (Present Ability to Pay – Using existing standards developed by the IRS and the information provided by the debtor, the Justice Department attorney will calculate a debtor's expenses and compare those expenses to the debtor's income. If a debtor's expenses equal or exceed the debtor's income, the Department will determine that the debtor lacks a present ability to pay.

Future Ability to Pay – The Department will then assess whether the debtor's present inability to pay is likely to persist in the future. The Department attorney will presume a debtor's financial circumstances are not likely to change if certain factors—such as retirement age, disability or chronic injury, protracted unemployment history, lack of degree, or extended repayment status—are present. Where such factors are not present, the Department attorney will assess the facts showing whether the debtor's present inability to pay is likely to persist.

Good Faith Efforts – In assessing what courts call the "good faith" standard, the Department will focus on objective criteria reflecting the debtor's reasonable efforts to earn income, manage expenses, and repay their loan. The Department attorney will consider, for example, whether the debtor contacted the Department of Education or their loan servicer regarding payment options for their loan. A debtor will not be disqualified based on past non-payment if other evidence of good faith exists. A debtor also will not be disqualified based on their not enrolling in an income driven repayment plan where the debtor was deterred from participating in such a plan or otherwise provides a reasonable explanation for nonenrollment.)

peonage, and lack of generational wealth have otherwise prevented them from doing so.

As Salvin's undue hardship standard suggests, there is an unwritten contract that the debtor's signed promissory note was not just "an unconditional promise to pay a certain amount of money"[169] to repay a loan, but an implied conditional component of being able to financially capitalize on their educational degrees. According to Salvin, "the fresh start policy demands that the worth of a debtor's education be included in" evaluating undue hardship, not only for those trying to "start over" but also for those who are just trying to "maintain a status quo."[170] Some courts have acknowledged the financial value of an educational degree in their interpretation of undue hardship in terms of an individual's past or future earnings, but not in terms of facilitating intergenerational wealth building.[171] A debtor's "inability to realize the [full] benefits of [their] labor," which arguably includes the opportunity to build intergenerational wealth, is central to understanding how student loan debt reinforces the Black-white wealth gap.[172]

C. *Case Study:* Greene v. U.S. Dept. of Education

In 1993, Frederick Greene defaulted on his Federal Family Education Loan Program Consolidation Loan in the amount of $34,347, which he took out for five years' worth of education at four different institutions from 1981 to 1987.[173] Frederick Greene repaid a total of $300 to the Department of Education (DOE),[174] and was unable to repay his loans while employed as a college professor. The DOE's only offers to the Greenes were deferment, forbearance, cancellation, or repayment through extended, graduated income-contingent or income-sensitive repayment options.[175] The government only acknowledged limited circumstances—permanent disability—as justifying loan forgiveness.[176] In 2006, Greene's loans totaled $102,541.19, of which the principal balance was $49,038.65 with interest amounting to a staggering $53,502.54.[177]

How is it possible for accumulated interest to exceed the principal loan balance? To what consumer protections should the government be held ac-

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[169] *Promissory Note*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/promissory_note [https://perma.cc/RS43-4HZT].

[170] Salvin, *supra* note 18, at 185.

[171] *See In re* Andresen, 232 B.R. 137-141 (discussing how the court in *In re* Johnson, 5 B.C.D. 532 (Bankr.E.D.Pa. 1979) considered student loans as non-dischargeable if the debtor ever "derived financial benefits from the education received by virtue of the loans" and outlining how the court in *In re* Pena, 207 B.R. 919 (B.A.P. 9th Cir. 1997) factored in the value of a debtor's education when determining the debtor's future earning ability).

[172] Salvin, *supra* note 18, at 139.

[173] *Greene*, 2008 WL 859215, at *1.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

countable? While Frederick Greene may not have had a permanent physical impairment preventing him from earning a wage in the labor market, the effects of racism on economic and physical wellbeing alone could have prevented Greene from "repaying" the loans issued to him by the government to pursue higher education.

By 2006, Terri Greene owed $70,731.75, including $58,141.73 in principal and $12,590.02 in interest.[178] The DOE asserted that Terri Greene "made no effort to accept any of [its] offers," then retracted slightly to note that Terri Greene did ask for forbearance, but had not made any payments on her loans, unlike Frederick, who did not ask for forbearance, but did make payments on his loans. Therefore, one of the Greenes had accepted the government's offer, yet that was insufficient. The court's framing equates alternative repayment options as "offers" that require acceptance and presumes those "offers" to be reasonable. However, considering the history of debt capitalism, which contributed to the social and financial subjugation of Black Americans, these offers are not reasonable.

On the contrary, all offers from the DOE to Black Americans to pay the federal government in the form of principal and interest to achieve a higher education are unconscionable. As noted earlier, contracts are unconscionable if "both unfair bargaining and unfair substantive terms are shown" and "*[a]n absence of meaningful choice by the disadvantaged party* is often used to prove unfair bargaining."[179] Requiring Black Americans to take on debt in order to obtain "unfettered" access to education, which financially benefits the U.S. economy and the federal government,[180] or to own property, which some argue is an inalienable right, is unconscionable.[181] The reason that Black Americans must take out loans is that government sanctioned programs and policies stripped Black Americans of opportunities to build wealth for centuries.[182] Not only do those practices reflect an absence of meaningful choice, proving unfair bargaining, but they also show unfair substantive terms given how much accumulated interest can exceed the original loan amount, as was the case for the Greenes.

As the Greenes outline through their reparations, civil rights, and negligence arguments,[183] their family's intergenerational experiences of disen-

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[178] *Id.* at *2.

[179] *Unconscionability, supra* note 27.

[180] Melanie Hanson, *Student Loan Debt Crisis*, EDUCATIONDATA.ORG (Jan. 5, 2022), https://educationdata.org/student-loan-debt-statistics [https://perma.cc/5UYS-Z299] (noting that $1.6 trillion of the $1.75 trillion in student debt are federal student loans and that Black American students are "the most likely to borrow federal loans at 76.1%").

[181] *See* Harris, *supra* note 20, at 1729 (discussing property as a legal right).

[182] *Supra* Part I.

[183] The Greenes ultimately failed to substantively address their civil rights argument by not including the term "civil rights" and not citing to 42 U.S.C. § 1983 or Title VII of the Civil Rights Act of 1964 in their complaint. They also failed to file a federal tort claim, which is required in order for the government to waive sovereign immunity. *Greene*, 2008 WL 859215, at *23.

franchisement began with slavery and resulted in bankruptcy.[184] These intergenerational experiences are not just a continuing harm; rather, these experiences demonstrate "an absence of meaningful choice" and "unfair bargaining," which was the basis of the Greenes' contractual agreement with their lenders and the DOE. By listing the government's "willingness to negotiate payment arrangements," the court presupposes the contract was valid to begin with by virtue of the Greenes' signed promissory notes.[185] While promissory notes would normally be treated as binding contracts, applying the same standard for contract formation here ignores centuries of racialized debt capitalism[186] that underly this contract. Indeed, the unequal grounds under which Black Americans have had to incur debt because of a lack of intergenerational wealth is directly attributable to their enslaved ancestors' labor, government sanctioned disenfranchisement, and their inability to earn equal and livable wages[187] in the labor market.[188]

Consider the evidence of unequal bargaining power between the parties to the contract as evidenced by Terri Greene's application for student loans. As Terri Greene notes in her affidavit, the Kentucky State University (KSU), an HBCU and land-grant institution, was founded in 1886 "to educate the freed slaves and the descendants of slavery."[189] KSU, like other HBCUs, was underfunded by the government as compared to traditionally white institutions (TWI).[190] Research has shown that underfunded institutions rely on high student loan borrowing given the low amounts of financial aid available for students and the disparity in graduates' employment prospects.[191] The federal government entered into a contract with Terri Greene while fully aware of the unfair bargaining position in which descendants of formerly enslaved people are placed.

The modern student debt peonage system allows debt capitalism to continue to function as intended.[192] The contractual relationships involved in this

[184] *Id.* at *4–6.

[185] *Id.* at *1–2.

[186] *See supra* Part I; Seamster, *Black Debt*, *supra* note 51, at 34 (describing how Black debt generates white wealth and instead of building Black equity, leads to "further losses").

[187] Bankruptcy scholars have noted that the standard for evaluating whether someone is able to sustain themselves economically is whether their incomeless liabilities would allow someone to be considered "middle class." *See* Salvin, *supra* note 18, at 191 (noting that the undue hardship test should determine whether the debtor would "be able to maintain a . . .middle-class lifestyle and at the same time repay student loans").

[188] *See supra* Part I & Sections II.A, II.B.

[189] *Greene*, 2008 WL 859215, at *20.

[190] *Id*. at *4.

[191] *See* Addo et al., *supra* note 110, at 66 ("[B]lacks are more likely than whites to attend postsecondary institutions that are associated with high debt—including underfunded institutions that have a high cost relative to aid provided and for-profit institutions.") (internal citations and parentheticals omitted).

[192] *See* Mustaffa & Davis, *Jim Crow Debt, supra* note 13, at 15 (quoting a borrower who has $205,000 in student loans who said, ". . .the [student loan] system is working exactly as we expect it to. . . .[I]t was designed for this very outcome and so no one's surprised that we somehow built a financial aid process and policy and set that up to only consider your annual salary, as if [Black Americans] all have the same net assets.").

case resemble those involved in the sharecropping and peonage systems of the 19th and early 20th centuries. In both instances, the oppressor offers an oppressed person the "freedom" to make a livelihood at a price at which the oppressor profits, while the "free" person will continue to be shackled by debt.[193] The Greenes, like so many Black Americans, are descendants of formerly enslaved people with little wealth inheritance who lived in segregated neighborhoods, both attended HBCUs founded to educate free formerly enslaved people, took out student loans, and failed to obtain lucrative sources of income despite obtaining law degrees at a time when only 3% of attorneys were Black.[194] Their family history clearly shows significant systemic barriers to higher education.[195] Perhaps, given the holding in *Brown* that segregated schooling was illegal, the judge in *Greene,* Judge William Lee—a Reagan appointee—failed to understand that, while the legal barriers to an education were theoretically extinct, in reality, the opportunity gap caused the Greenes to file for bankruptcy.[196]

The court should have applied an undue hardship standard in *Greene* that would factor in the lack of intergenerational opportunities for wealth-building available to the couple. The DOE, DOJ, and Bankruptcy courts should consider systemic racism and racialized economic barriers to building intergenerational wealth as undue burdens, not just the recently added undue

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[193] *Compare* discussion *supra* Part I *with* discussion *supra* Sections III.A, III.B.

[194] *Greene*, 2008 WL 859215, at *4-6*; see* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, Am. Bar Ass'n. (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/PVT6-DJJV]. Today, only 5% of attorneys are Black, and that number has not changed in a decade. *ABA Profile of the Profession*, Am. Bar Ass'n (July 2020) https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [https://perma.cc/P77D-LHSA]. Meanwhile, tuition and debt burdens have increased significantly. *Id.* at 25, 27. Further research would be required to determine whether Black lawyers are more likely to file for bankruptcy today than around the time of the 2008 financial crisis.

[195] *Greene*, 2008 WL 859215, at *5.

[196] It is significant to note the judge's appointment given the Reagan administration's harmful policies towards Black Americans. Redlining, freeway building, government taking of Black property and land through eminent domain, and unequal mortgage lending all targeted Black Americans, undermined intergenerational wealth transfers, increased debt, and systemically disenfranchised Black wealth building. *See, e.g.,* Dedrick Asante-Muhammad, *The Reagan Era: Turning Back Racial Equality Gains*, Huffington Post Blog (May 11, 2013), https://www.huffpost.com/entry/the-reagan-eraturning-bac_b_2838625 [https://perma.cc/GB6B-GT7K] (recounting how Reagan opposed civil rights legislation, supported tax cuts for racially segregated schools, and implemented budget cuts that particularly affected Black Americans). Judge William Lee mostly hears labor and employment as well as civil rights cases, many of which deal with discrimination complaints, and has a track record for predominantly granting motions to dismiss in such cases. *See Hon. William C. Lee Ruling Tendencies*, Westlaw https://1.next.westlaw.com/Analytics/Profiler?findType=&pubNum=176284&cite=0229848901&originatingDoc=I70f4612e00b411ddb595a478de34cd72&refType=RQ&originationContext=document&vr=3.0&rs=Cblt1.0&transitionType=documentItem&contextData=%28sc.Folder%2Acid.094ac48ff7e9466a8e2585eef61622f5%2Aoc.Search%29&__lrTS=20210301224334689&CobaltRefresh=4994&docGUID=I13815D741DD211B2988DA8009201C6EC&contentType=judge#/judge/I13815D741DD211B2988DA8009201C6EC/partyOutcomeReport [https://perma.cc/8C4N-XGC4].

hardship factors.[197] Instead, the court assumes that signing a promissory note inherently provides equal bargaining power for any borrower who takes out a loan from the federal government. The court's decision erroneously failed to first consider whether a valid contract was in place. Courts should not simply assume that a student loan is a valid contract signed by equal parties given the backdrop of socio-political and economic subordination that Black Americans have endured and continue to experience at the hands of the U.S. government.[198] The default assumption for historically marginalized groups should be to treat them as vulnerable parties worthy of protection. Slavery, discrimination, and systemic racial economic oppression have resulted in a pervasive wealth gap bankrupting many Black borrowers.[199] The general racial economic contract imposed by debt capitalism is not valid, voluntary, or equitable when Black Americans can trace economic deprivation back to slavery in their own families and have been subjected to systemic disenfranchisement by predatory economic practices.[200] Such student loan contracts are unconscionable when looking at the totality of the circumstances.

As evidenced by the predatory landscape in bankruptcy proceedings, the debtor is seen to have the keys to their own shackles which, when coupled with the impossibly high standard for demonstrating that student loans pose an undue burden under Chapter 7 and Chapter 13 filings,[201] reinforces the idea that blame lies with the debtor. Such a premise reinforces racial hierarchies for Black Americans and is unconscionable given the undue burden posed by slavery, debt peonage, and ongoing discrimination. To understand the implications of predatory lending and bankruptcy practices, the next part will explore the relationship between contractual parties in the credit market as determined by debt capitalism. I will then conclude this paper by supporting policy proposals for debt relief and suggesting an alternative way for negotiating and defining credit relationships from a more equitable framework of opportunity, which could help reduce the Black-white wealth gap.

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[197] *See supra* note 168 and accompanying text for recently issued guidance by the DOJ and DOE in 2022 on assessing student loan discharge cases in bankruptcy.

[198] *See* Nier, *supra* note 55 (tracing harms from discriminatory credit markets leading to barriers for Black American homeownership).

[199] *See supra* Part I *with* discussion *supra* Sections III.A, III.B. .

[200] *See* Mustaffa & Davis, *Jim Crow Debt, supra* note 13, at 15 ("Black borrowers noted that a system that encourages the use of student loans and ignores racial and economic evidence of inequality is designed to reproduce inequality.").

[201] Given the new undue hardship factors issued in 2022, the impossibly high bar for demonstrating an undue hardship will hopefully be lessened; however, whether there has been any meaningful change remains unknown at the time of publication of this Note. *See supra* note 168 and accompanying text.

IV. Eliminating Debt Peonage and Closing the Racial Wealth Gap through Redefining Contractual Credit Relationships

To reduce racial subordination in the global economy, eliminate debt peonage, and close the racial wealth gap in the U.S., scholars and policymakers need to re-envision what equitable and inclusive economic participation looks like in a debt capitalist economy. To do so, as Professor Abbye Atkinson, Professor Mehrsa Baradaran, and others have suggested, there needs to be alignment in consumer finance policy and even a comprehensive redesign of America's credit market.[202] While many proposals to reimagine our economy and financial services sector are promising, key areas that require immediate action to prevent further disenfranchisement are (1) student debt relief and (2) fair lending.

A. *Mechanisms for Debt Relief*

Most Black Americans, even those at the most "elite" educational institutions and those entering higher earning careers, have higher debt-to-income ratios than their white counterparts. This prevents them from engaging in meaningful asset-building financial practices such as investing, which their debt-free counterparts can participate.[203] A study following a cohort of students starting college in 1995-1996, conducted over 20 years, found that "the median white borrower had paid off 94% of their education debt, while the median Black borrower still owed 95% of their debt."[204] This disparity demonstrates how Black students are disproportionately obligated to contract for debt, which, in turn, leads to modern peonage for Black borrowers who continue to work towards a seemingly unattainable goal of economic equality. Shackled by debt capitalism, Black Americans' economic mobility and freedom are stymied by educational debt. The Greenes' case reflects these shackles. Relieving Black American students of their student debt

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[202] *See* Atkinson, *Borrowing Equality*, *supra* note 17; Mehrsa Baradaran, *Rethinking Financial Inclusion: Designing an Equitable Financial System with Public Policy*, Roosevelt Inst. (Apr. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_FinancialInclusion_Working-Paper_202003.pdf [https://perma.cc/U9CM-SWJQ] [hereinafter Baradaran, *Financial Inclusion*].

[203] Meera Deo, *Student Debt is a raceXgender Issue*, LSSSE Blog (July 9, 2021), https://lssse.indiana.edu/uncategorized/student-debt-is-a-racexgender-issue/ [https://perma.cc/BWX9-5A6Z] (showing statistics of Black students owing more than $200,000 in law school debt compared to their white peers). This evidence is supported by the 2020-2021 Financial Equity Project (FEP) report of a study conducted by the University of Pennsylvania Carey Law School's Black Law Students Association, which found that Black students held a disproportionately high amount of student debt above Penn Law's average student debt amount, and that, as of October 2020, around 18% of Black students were expecting to graduate with over $200,000 in debt. Magali Duque, The 2020-2021 FEP Report 7 (2022), https://www.financialequityproject.com/fep-report [https://perma.cc/E4QX-Q8DG].

[204] Sullivan et al., *Stalling Dreams, supra* note 19, at 4.

could allow college and graduate degree holders to spend their additional income on wealth-generating opportunities such as investments in assets including real property and companies. By increasing disposable income, student debt relief would allow Black Americans to leverage the wealth-building mechanisms that have allowed their white counterparts at varying educational levels to outpace them in wealth generation for centuries.[205]

Given the disparate impact that the COVID-19 pandemic has had on Black Americans,[206] to continue shouldering any amount of student debt seems fraught with negative implications for Black economic and psychological well-being. Cancelling all student loan debt would be a crucial economic and symbolic "fresh start" for all, increasing the amount of available income and providing an opportunity for Black and other economically oppressed groups to become more equal participants in the global economy.[207] President Biden recently made temporary changes expanding borrower eligibility for Public Service Loan Forgiveness and agreed to cancel $10,000 in student debt for federal loan borrowers who earn less than $125,000 in individual income; $250,000 for married couples; and an additional $10,000 for Pell Grant recipients.[208] While this initial effort will likely be helpful to many, forgiveness that falls short of full student loan cancellation is ultimately insufficient to meaningfully reduce the Black-white wealth gap.

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[205] *See* Charron-Chenier et al., *supra* note 117, at 20 ("[E]ven relatively small cancellation amounts lead to a massive relative increase in wealth. Cancelling $20,000 of student debt means a slightly more than tenfold increase in Black wealth for this population."). While white households would gain from student debt cancellation too, Black borrowers' large relative gains "suggest that student debt cancellation may have a transformative impact on Black borrowers through its positive impact on net worth." *Id.*; *accord* Wesley Whistle, *Cancel Black Student Debt as Reparations*, FORBES (July 11, 2020), https://www.forbes.com/sites/wesleywhistle/2020/07/11/cancel-black-student-debt-as-reparations/?sh=36a735f36989 [https://perma.cc/F9XP-HAH7].

[206] Lindsay M. Monte & Daniel J. Perez-Lopez, *COVID-19 Pandemic Hit Black Households Harder Than White Households, Even When Pre-Pandemic Socio-Economic Disparities Are Taken Into Account*, U.S. CENSUS BUREAU (Jul. 21, 2022), https://www.census.gov/library/stories/2021/07/how-pandemic-affected-black-and-white-households.html [https://perma.cc/CEN5-QREK]; *Health Equity Considerations and Racial and Ethnic Minority Groups*, CENTER FOR DISEASE CONTROL (Jan. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html [https://perma.cc/8PG3-E3LY].

[207] Senator Warren has proposed cancelling up to $50,000 for borrowers according to income level. *See* Elizabeth Warren, *I'm calling for something truly transformational: Universal free public college and cancellation of student loan debt*, MEDIUM (Apr. 22, 2019), https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f [https://perma.cc/3P2Q-BE4L]*; see also* Whistle, *supra* note 205 (calling for debt cancellation for Black student as reparations). These policies would have a substantial impact on Black borrowers in particular. *See* Charron-Chenier et al., *supra* note 117, at 5 (noting that $40,000 in loan forgiveness would leave 75% of borrowers without any educational debt and "projected net worth gains for Black households overall are substantial due to the greater proportion of Black households holding student debt relative to the proportion of white households").

[208] *See supra note* 95. Biden's Executive Order is being challenged in the Supreme Court and is currently pending review as of the time of publication of this Note. *See* Dept. of Ed. v. Brown, No. 22-535 (Fed. Cir. Feb. 28, 3023) and Biden v. Nebraska, No. 22-506 (Fed. Cir. Feb. 28, 3023).

Moreover, the $1.2 trillion dollar stimulus that cancelling all federal student loans would inject into the economy could mitigate the impact of this next looming recession.[209] Alongside full debt cancellation, a serious proposal for supporting free higher education must be considered, although such a proposal is beyond the scope of this Note.[210]

In 2020, Senator Elizabeth Warren proposed the Consumer Bankruptcy Reform Act, which would repeal Chapter 13 completely and replace Chapter 7 with Chapter 10, leaving Chapter 10 as the only option for consumer filers other than Chapter 11.[211] Chapter 10 promises to provide "consumers [with] greater flexibility in addressing their debts and prevent[ ] disparate treatment of similarly situated consumers" by, among other provisions, allowing for student loan debt discharge "on equal terms with most other types of debt."[212] The Act aims to "reduc[e] racial, gender, and other harmful disparities in the availability, accessibility, costs, and outcomes with respect to the bankruptcy process,"[213] which are "deeply troubling" and occur as a result of chapter choice.[214] Professors who support Senator Warren's proposal, including UC Berkeley School of Law Assistant Professor Abbye Atkinson and University of Houston Law Center Professor Emeritus Richard M. Alderman, note that "debt relief is not only the right thing to do but also helps the economy by freeing up income for productive investment to help people build their financial lives."[215] While the bill has not yet been passed, it provides some hope. Specifically, it provides the prospect of significant statutory liability relief from student loan debt. This could be the first meaningful legislative step towards addressing the Black-white wealth gap by providing a "fresh start" as was promised throughout history, from "40 acres and a mule" and the Reconstruction Amendments to the Civil Rights Act of 1964.[216]

Still, the Act should not be seen as the end-all be-all for reform of the pervasive and recurring exploitative pattern in credit relationships. The Act currently does not include an express provision defining "undue hardship" as a historical financial vulnerability derived from racialized group economic oppression. As evidenced by the Greenes' case study, the Act should expressly list racial discrimination as an element satisfying the undue burden standard for student debt cancellation in bankruptcy proceedings. Moreover,

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[209] *See* Baradaran, *Financial Inclusion, supra* note 202 at 13-14 (noting that "$1.2 trillion of the $1.6 trillion student loan market" are direct loans from the U.S. government).

[210] Atkinson, *Race, Educational Loans & Bankruptcy*, *supra* note 25 at 4 n.6 ("Congress has encouraged all Americans to invest in their own human capital through higher education. Although it has never taken the step of making college free.").

[211] Consumer Bankruptcy Reform Act of 2020, S.4991, 116th Cong. (2020).

[212] *Id.*

[213] *Id.*

[214] *Letter to Elizabeth Warren, supra* note 134, at 2 (expressing support for the bill, which was signed by 74 Bankruptcy and Consumer Law professors).

[215] *Id.* at 4.

[216] *Supra* Section I.A.

while credit and debt alignments, debt relief, and education funding initiatives would act as a much-needed jump start towards addressing modern student debt peonage and the Black-white wealth gap, other credit relationships are not covered by the Act. In the following section, I propose an alternative framework for fair lending through the reconstruction and humanization of credit systems, a framework that would apply to both student lending and other credit relationships.

B. Reconstructing Credit Systems and "Fair" Lending

As Professor Abbye Atkinson argues, the way the current U.S. credit system designs lending and borrowing as a "social provision" is inherently flawed.[217] I argue that the most salient flaw is the structuring of credit as a financial tool reliant on interest rates as a remunerative enforcement mechanism for repayment and economic gain. Interest rates reflect "risk," but should be recalibrated to reflect need and vulnerability. Risk is an assumption about the borrower's ability to repay a loan. Yet, the assumption that a borrower is "risky" contains the counterintuitive notion that as a result the borrower must bear higher interest rates and fees, not because they can afford to, but because the lender "risks" losing their investment.[218] With this framing, borrowers are set up for failure; their inability to afford their repayment plan is essentially ensured. The miscalculation of risk not only results in higher interest rates and fees, but also limits the amount of loans certain individuals can receive if creditors think that they pose too high of a risk. In this system, the creditor controls and acts upon a moral judgment that the debtor is "risky," otherwise understood as "financially vulnerable"; as a result, high rates are charged to protect creditor property interests. Ultimately, creditors judge whether the borrower is worthy or deserving through the lens of affordability. The moral judgment of credit risk is the economic determination of credit worthiness.

In the current government-sponsored credit system, "risky" borrowers are exploited and profited off of by creditors. While private lenders have historically been viewed as predatory lenders, the government's financial aid scheme is also predatory. To be clear, predatory lending is the offering of coercive and expensive loans to vulnerable borrowers who do not have access to other financial means or significant assets resulting from discrimina-

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[217] Atkinson, *Rethinking Credit*, *supra* note 121, at 1098–1099 ("This notion of credit as social provision for the working poor is deeply flawed . . . . [C] . . . redit is a form of intertemporal and intrapersonal redistribution [because] credit shifts an individual's future capital to facilitate present consumption . . . . [and] implies an expectation that . . . low-income borrowers will be better off in the future and able to repay their debts without hardship.").

[218] *See* Atkinson, *Borrowing Equality*, *supra* note 17, at 1466 (noting that creditors charge marginalized borrowers high interest rates to "hedge against the likelihood of default.").

tory exclusion from capital markets and traditional banking services.[219] Predatory lending is credit inclusion that leads to subsequent economic repercussions for borrowers who bear an unjust burden of associated risk.[220] It leads to a cycle of financial vulnerability and the continued need to contract for debt, which in turn informs the negative moral judgment of a borrower's risk profile. As Professor Abbye Atkinson points out, borrowers are expected to "invest in their own mobility" and are left "to fend for themselves" in a discriminatory debt capitalist market.[221] The blame then falls on the borrower if the market does not work in their favor. This premise sits at the heart of the Greenes' argument: as descendants of enslaved Black Americans and survivors of racial discrimination in U.S. labor and economic markets, the Greenes' were blamed for their inability to repay their student loans.[222]

The entire U.S. credit system is enabled by the federal government, which has the power to transfer and redefine "risk."[223] Congress should redefine "risk" to set a new framework for all consumer lending and protection issues which considers the converse relationship to the traditional creditor-debtor relationship. Borrowers who are "at risk" in a debt capitalist economy are *financially vulnerable*, whereas borrowers who are not "at risk" are more *financially secure*. The *financially secure* group has the financial capacity to afford higher cost loans, to repay debt, and to leverage debt for economic gain. Therefore, the *financially secure* can afford more risk tolerance in the market and should be assessed at higher interest rates with reasonable caps. This would offer an alternative source of profit that is currently being extracted from the *financially vulnerable*.

In transferring the cost of "risk" from the *financially vulnerable* to the *financially secure*, the U.S. credit market should not impose any interest rates at all on the *financially vulnerable*, nor should creditors try to collect on defaults by the *financially vulnerable* given that creditors are insured by

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[219] *See id.* at 1413–1414, 1466 (historicizing how discrimination and exclusion from mainstream capital markets rendered marginalized borrowers susceptible to predatory lending).

[220] *Id.* at 1455 (describing how nonwhite neighborhoods were deemed undesirable and were excluded from government-subsidized loans enjoyed by their white counterparts and were therefore forced to pay exorbitant interest on risky loans); Baradaran, *Financial Inclusion, supra* note 202 (tracing how Black American wealth building was stifled by predatory lending practices and cash circulation shortages, among other factors, causing most Black banks to fail and Black customers to lose their money).

[221] Atkinson, *Borrowing Equality*, *supra* note 17, at 1413.

[222] *Greene*, 2008 WL 859215, at *7.

[223] Baradaran, *Financial Inclusion, supra* note 202, at 13–14 ("The majority of home loans and student loans are insured by and sold to the federal government. . . . The Department of Education originates the loans, holds the note, and then contracts with third-party servicers who collect on the contracts. . . . This type of lending, unlike mortgage lending, is a direct budget line item on the Treasury's balance sheet. The credit line is created by the federal government and lent to students, and then repayments flow back [to] the federal government. . . . At the crux of our banking system, then, is a state-enabled credit system.").

the federal government and protected from default.[224] While the premise of extractive profit in credit markets is still inherently coercive, transferring the cost of risk is a more equitable social provision than the current operation of credit in America's debt capitalist market.[225]

This new dichotomy between the *financially vulnerable* and the *financially secure* would encompass historical wrongs related to racialized economic oppression. Given the history of debt peonage and stigma attached to the term "debtor,"[226] this change would recognize a more equitable and viable creditor-debtor relationship, one that humanizes Black and other financially vulnerable borrowers. In doing so, the debtor-labor relationship that governs modern student debt peonage would be disrupted and transformed into a labor-wealth relationship for Black Americans attending higher education institutions.

Conclusion

Debt is an important regulator of inequality. Black Americans continue to leverage higher education in pursuit of financial freedom only to find a lack of debt-to-asset conversion and a growing Black-white wealth gap. The freedom to contract for debt as a Black borrower continues to be intercepted by an oppressive credit market and predatory definition of risk, as seen through modern student debt peonage. Major policy changes are required to shift this trajectory, invest in education, provide Black Americans with capital and reparations, and create a more humanizing and equitable credit system that would alleviate the negative externalities of debt capitalism by reducing the Black-white wealth gap. Partial loan forgiveness is a one-time debt reduction that will help some, as will new undue hardship factors, but these efforts will ultimately only address symptoms of the student debt crisis as opposed to its root cause. To find a sustainable solution to the student debt crisis and reduce the Black-white wealth gap, the federal government needs to abolish the current student debt complex. Instead of this system, higher education needs a new source of funding and a shift in perspective regarding consumer debt.

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[224] Baradaran, *Financial Inclusion, supra* note 202, at 13–14 ("Most standard mortgages and student loans are guaranteed, bundled, or subsidized by the FHA or the government-sponsored enterprises (GSEs). . . . These GSEs purchase almost every mortgage and student loan in the country and resell them to investors. . . . [S]ince 2008, . . . all standard student and mortgage loans are now guaranteed by the federal government, and the majority of these loans issued by banks are essentially risk-free. The banks and investors are paid interest rates by borrowers even though GSEs protect lenders from default.").

[225] *See* Atkinson, *Rethinking Credit*, *supra* note 121, at 1098–1099 (suggesting that "for credit to work as social provision, it must be extended on terms that are likely to result in an overall improvement in welfare").

[226] *See* Atkinson, *Borrowing Equality*, *supra* note 17, at 1455 ("Once debt entered the picture, there was no longer any requirement that the initial crime bear a proportional relationship to the punishment, like hard labor . . . [because] their status as a debtor of the state that legitimized such harsh punishment.").

With a new framework for credit market relationships rooted in opportunity rather than debt, new types of "debtors" can exist and thrive: credit-borrowers (designating the *financially secure*) and credit-opportunity recipients (representing the *financially vulnerable*). These new credit-borrower and credit-opportunity recipient categories can help provide the basis for mobilizing debt relief policies as first steps towards closing the Black-white wealth gap. In doing so, modern debt peonage could be eliminated for all marginalized groups and our economy could shift away from reliance on debt capitalism to provide more opportunity for equitable intergenerational wealth accumulation and collective financial wellbeing.