FINTECH'S ROLE IN EXACERBATING OR REDUCING THE WEALTH GAP

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Research shows that Black, Latinx, and other minorities pay more for credit and banking services, and that wealth accumulation differs starkly between their households and white households. The link between debt inequality and the wealth gap, however, remains less thoroughly explored, particularly in light of new credit products and debt-like banking services, such as early wage access and other fintech innovations. These innovations both hold the promise of reducing racial and ethnic disparities in lending and bring concerns that they may be exploited in ways that perpetuate inequality. They also come at a time when policy makers are considering how to help communities of color rebuild their wealth, presenting an opportunity to critique policy proposals. This Article leverages that opportunity by synthesizing research about the long-term costs of debt inequality on communities of color, adding an in-depth analysis of several new advances in banking and lending, and proposing several key principles for reducing debt inequality as an input to the wealth gap.

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I. INTRODUCTION

Good Girls, the popular American crime comedy-drama television series, follows the lives of three women living in Detroit, Michigan.[1] The crime aspect of the show arises because all three women face financial crises and decide to rob a grocery store to acquire additional cash.[2] Each woman also considers different solutions to her own compounding problems in light of their crime.[3] Ruby Hill, a Black woman, takes out a payday loan.[4] In *Good Girls*, fiction follows reality. People of color use payday loans and other fringe lending at a much higher rate than white Americans.[5]

Reliance on high-cost credit and other nontraditional banking services is expensive. As described by two scholars at Georgetown Law's Center on Privacy & Technology, "[p]ayday loans hurt people. . . . [T]hese loans are for most borrowers grinding debt traps that ensnare families struggling to pay the regular costs of everyday life: rent, prescription medicine costs, the heating bill."[6] Writing about a workshop on sales lead generation organized by the Federal Trade Commission ("FTC"), they continue: "these and other harmful effects of payday

1. Lacey Vorrasi-Banis, *'Good Girls' Series Premiere React: Pilot*, ENT. WKLY. (Feb. 26, 2018, 11:00 PM), https://www.ew.com/recap/good-girls-series-premiere/ [https://perma.cc/L6Q7-SEU2].

2. *See id.*; Shirley Li, *Why* Good Girls *Is Such a Rewarding Show*, ATL. (May 24, 2019), https://www.theatlantic.com/entertainment/archive/2019/05/good-girls-nbc-season-2-christina-hendricks/590173/ [https://perma.cc/73HU-6AU5].

3. Li, *supra* note 2; Vorrasi-Banis, *supra* note 1.

4. Lauren Busser, *Good Girls Review: One Last Time (Season 2 Episode 9)*, TELL-TALE TV (Apr. 29, 2019), https://telltaletv.com/2019/04/good-girls-review-one-last-time-season-2-episode-9/ [https://perma.cc/YHM8-J92W].

5. *See* Nathalie Martin & Ernesto A. Longa, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 LOY. CONSUMER L. REV. 524, 534–35 (2012) (overviewing findings about the demographics of people who use high-cost loan); Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 798 (2012) (discussing payday lending in Native American communities); PEW SAFE SMALL-DOLLAR LOANS RSCH. PROJECT, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY, PEW CHARITABLE TRUSTS 1, 9 (July 2012), https://www.pewtrusts.org/~/media/legacy/uploaded-files/pcs_assets/2012/pewpaydaylendingreportpdf.pdf [https://perma.cc/YP4B-R9ZR] (reporting that African Americans take out payday loans at a rate 105% higher than other races and ethnicities); *infra* Section III.C.

6. Alvaro Bedoya & Clare Garvie, *Comments of Alvaro Bedoya and Clare Garvie, Center on Privacy & Technology at Georgetown Law, on "Follow the Lead: An FTC Workshop on Lead Generation"*, 1, 1 (Dec. 18, 2015), https://www.ftc.gov/system/files/documents/public_comments/2015/12/00017-99877.pdf [https://perma.cc/V99S-X3LJ].

loans were a recurring theme in panel discussions. But one issue was never raised in any of the discussions—the fact that payday loans do not hurt equally."[7]

These observations reflect another reality. Although scholars continue to write about the "debt trap" of high-cost credit, their discussions of these products often lack a robust linkage of the products' harms to larger issues of income and wealth inequality.[8] Similarly, though research continues to draw attention to the racial and ethnic disparities in student loan debt repayment, redlining and subprime home loans, and other credit and banking products,[9] each discussion often pays only passing attention to its place within extensive and long-standing issues of wealth accumulation in America.[10]

Scholars and researchers cannot be faulted for this. Every link is part of a larger chain of discrimination that prevents people of color from converting their income into wealth, thereby deepening the wealth gap.[11] Each link helps to explain how expensive credit and unequal access to banking services exacerbate the wealth gap.[12] Each link also is needed to consider how innovations in banking and financial services, such as in the financial technology ("fintech") area,[13] may either remedy or exacerbate the wealth gap. Indeed, the details about each link have allowed policy makers to promote in-depth proposals designed to tackle income inequality and the wealth gap.[14] The existence of multiple proposals creates an opportune moment to consider how to reverse unequal access

7. *Id.*

8. There are a few notable exceptions. *See* MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 138–61 (2018) (detailing how unequal credit contributes to inequality); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1094 (2019) (discussing how high-cost credit masquerades as a tool of "social provision" while "deepening economic, and thus social, inequality."); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 260 (2019) (discussing the use of consumer law to target economic inequality).

9. *See, e.g.*, James A. Allen, *The Color of Algorithms: An Analysis and Proposed Research Agenda for Deterring Algorithmic Redlining*, 46 FORDHAM URB. L.J. 219, 255 (2019) (detailing how algorithms can be used to perpetuate redlining in housing); Lisa Rice & Deirdre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK U. L. REV. 935, 937–38 (2013) (noting the percentages of households of colors versus white households sold subprime home loans leading up to the Great Recession); Andrew F. Haughwout et al., *Just Released: Racial Disparities in Student Loan Outcomes*, LIBERTY ST. ECON. (Nov. 13, 2019), https://libertystreeteconomics.newyorkfed.org/2019/11/just-released-racial-disparities-in-student-loan-outcomes.html [https://perma.cc/ZX2N-4D3W] (relying on data from the Federal Reserve Bank of New York to show that black-majority zip codes have the highest and fastest-growing student loan balances, and the highest student loan default rates); *see also infra* Part III.

10. *See generally* Allen, *supra* note 9; Rice & Swesnik, *supra* note 9; Haughwout et al., *supra* note 9.

11. Calvin Schermerhorn, *Why the Racial Gap Persists More Than 150 Years after Emancipation*, WASH. POST (June 19, 2019, 3:00 AM), https://www.washingtonpost.com/outlook2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation/ [https://perma.cc/D4VR-8LMZ].

12. *See infra* Part III.

13. *See* Kristin Johnson et al., *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 FORDHAM L. REV. 499, 499–502 (2019) (detailing the intersection of "fintech" and finance); Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781, 787–88 (2018) (defining and discussing "fintech"); Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 238–40 (2018) (defining and discussing "fintech").

14. For instance, somewhat unique to the 2020 presidential primary process, candidates proposed detailed policies addressing economic and social issues. Some of their proposals are built on and indirectly acknowledge

to banking and lending services (that is, debt inequality), particularly in light of new innovations, which are largely marketed to Americans at the bottom of the wealth spectrum.[15]

This Article connects those links in the wealth gap chain to propose key principles for the consumer banking and lending sector to follow in order to ameliorate the debt inequality that feeds wealth inequality.[16] Part II sets the stage for our focus on unequal access to credit and banking services. It first examines the history of America's income inequality. The income gap has grown exponentially over recent decades, with both the middle class and working poor losing ground in terms of real wages, with the most loss accruing to racial and ethnic minorities.[17]

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the debt inequality we analyze in this Article. *See, e.g.*, *A Working Agenda for Black America*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/agenda-black-america (last visited Jan. 17, 2021) [https://perma.cc/8S9H-XSN2] (detailing plans to help Black Americans achieve "economic security," which includes closing the racial wealth gap); *End Wall Street's Strangehold On Our Economy*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/wall-street/ (last visited Jan. 17, 2021) [https:www.perma.cc/HFH6-6SNR] (discussing postal banking and creating access to lower-cost credit products); *Fair Banking for All*, BERNIE SANDERS, https://berniesanders.com/issues/fair-banking-for-all/ (last visited Jan. 17, 2021) [https://perma.cc/PR7H-MXPG] (proposing capping consumer loans and credit card interest rates at 15%, capping ATM fees, and establishing postal banking); Peter Wade, *Kamala Harris Proposes $100 Billion Plan to Close Racial Homeownership Gap*, ROLLING STONE (July 6, 2019, 4:09 PM), https://www.rollingstone.com/politics/politics-news/kamala-harris-close-racial-homeownership-gap-85614/ [https://perma.cc/BQ2D-JUZ7]; Deborah D'Souza, *Pete Buttigieg's Economic Plan: Keep Calm and Cut Costs*, INVESTOPEDIA (Feb. 17, 2020), https://www.investopedia.com/pete-buttigieg-s-economic-plan-modetate-hopes-for-a-living-479502 [https://perma.cc/T2C2-KGJC]; *Joe Biden's Vision for America's Future*, JOE BIDEN FOR AM., https://joebiden.com/joes-vision/ (last visited Jan. 17, 2021) [https://perma.cc/6EZS-JAWY] (listing rebuilding America's middle class as one of a handful of key priorities). Considered together, the detail and nuance in candidates' discussions and proposals is striking. Calling out the multi-faceted threat of wealth gaps and income inequality itself marks a momentous change in public political discourse. This Article, however, does not discuss the details of these and other policy proposals. Instead, it focuses on *why* consumer banking and credit services have exacerbated and continue to exacerbate the wealth gap, and based on this analysis, begins to build the *how* of combating unequal access to these services.

15. Odinet, *supra* note 13, at 784.

16. This Article focuses on the income and wealth gap and assesses the contribution of financial discrimination to those disparities. It touches on racial and ethnic disparities in home ownership, student loans, and fringe credit. *See infra* Part III. There are other key contributors to Americans' continuing struggles, including rising health care costs, the failure of state and local governments to deliver essential services, and the concentration of power, both economic and political, in the hands of few huge corporations, that, in the interest of scope, this Article will not discuss. *See* JAMES KWAK, *Introduction* to TAKE BACK OUR PARTY: RESTORING THE DEMOCRATIC LEGACY, (Am. Prospect ed. 2019), https://prospect.org/politics/take-back-our-party-restoring-the-democratic-legacy/ [http://www.perma.cc/WB27-AJM2] (noting these factors); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1357–59 (2015) (linking the anticompetitive practices of sophisticated and politically influential companies to perpetuated inequality).

17. *See* Taylor Telford, *Income Inequality in America Is the Highest It's Been Since Census Bureau Started Tracking It, Data Shows*, WASH. POST (Sept. 26, 2019, 2:57 PM), https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/ [https://perma.cc/GDQ5-LX6M] (linking systemic inequality and income inequality); Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 SOCIO. SCI. 182, 182 (2018) (noting that more than 50 years after the Civil Rights Act, Black–white family income disparities in the United States remain almost exactly the same as in 1968); Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Aug. 21, 2019), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality [https://perma.cc/N8JL-63HW] (summarizing the "broad facts of income inequality over the past seven decades . . . ."); *see also infra* Sections II.A., II.B.

Part II then links income inequality to America's persistent wealth gap. The United States now has more income and wealth inequality than any other developed country—and more than during the 1920s, just before the Great Depression.[18] This gap has redistributed wealth from the poor and middle classes to the rich.[19] To put this in perspective, the three wealthiest people in America have more than the bottom half of Americans, all 160 million combined.[20] The wealth gap between white Americans and racial and ethnic minorities likewise has not diminished over past decades,[21] despite the passage of anti-discrimination laws during the same period.[22]

Income inequality and wealth building also connect with debt inequality.[23] The inability of some Americans, particularly minorities, to access credit and banking services at a reasonable cost is a key reason why these households cannot transform their income into wealth.[24] Parts III and IV explain why this remains the case by focusing on how debt inequality may aid wealth redistribution and exacerbate the wealth gap.

Part III reviews the rise of the use of debt in America. It focuses on the demographics of subprime home mortgages, student loans, payday loans, and other high-cost lending.[25] Disparate use of these products by communities of color chips away at savings, prevents wealth accumulation, and exacerbates long-term economic losses across generations. This discussion also notes how government policies have contributed to this wealth redistribution, with an eye to understanding how regulation has failed in the past.

Part IV showcases a few "advances" in banking and credit services that rely on innovations in fintech: payroll cards, early wage access programs, and automobile loans, such as Uber's short-lived car financing program that ended after

18. *See* Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), https://www.pewsocialtrends.org/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/ [https://perma.cc/EPW8-8YG8] ("[I]ncome inequality in the U.S. is higher than among other advanced economies . . . ."); *infra* notes 50–53 and accompanying text.

19. KWAK, *supra* note 16.

20. Noah Kirsch, *The 3 Richest Americans Hold More Wealth Than Bottom 50% of the Country Study Finds*, FORBES (Nov. 9, 2017, 12:08 PM), https://www.forbes.com/sites/noahkirsch/2017/11/09/the-3-richest-americans-hold-more-wealth-than-bottom-50-of-country-study-finds/#30bd9e83cf86 [https://perma.cc/KK8J-HCAP]; *infra* Sections II.A., II.B.

21. We focus substantially on Black households and provide some information on Latinx, Native American, and Asian-American households. *See infra* Sections II.B., II.C.

22. This Part includes discussions of disparities in employment and home ownership as key contributors to the persistent wealth gap. *See* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 3, 5 (2019) (detailing how the push for Black homeownership was co-opted by banks and real estate agents to make profits at the expense of the wealth building which typically accrues from owning houses); Brentin Mock, *Why Can't We Close the Racial Wealth Gap?*, BLOOMBERG CITYLAB (Mar. 21, 2019, 3:53 PM), https://www.citylab.com/equity/2019/03/racial-wealth-gap-income-inequality-black-white-households/585325/ [https://perma.cc/69EH-QVVE] (discussing how employment patterns feed the wealth gap); *infra* Section II.C.; *see also* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017) (presenting a history of wealth building post-slavery).

23. *See infra* Part III.

24. *See infra* Parts III, IV.

25. *See infra* Part III.

a $20 million settlement with the FTC.[26] By delineating these products' mechanics, the history of their emergence, and the laws (or lack thereof) surrounding them, this Part draws out the basics of how regulation of banking and credit services can serve as a part of solutions to effectively tackle the wealth gap.

Having mapped a network among income inequality, the wealth gap, and discrimination in access to banking and credit services, Part V draws lessons from fintech products to set forth our four tenets for reducing debt inequality as an input to wealth inequality: providing access, delivering choice, accounting for discrimination across its variants, and creating a public option.[27] In this discussion, we again focus on tackling racial and ethnic disparities in banking and credit.

The COVID-19 pandemic intensified the imperative to understand and combat debt inequality. Within in a couple months of the novel coronavirus's emergence, tens of millions of Americans lost their jobs, saw their hours cut, or were called on to perform essential tasks.[28] People of color experienced job loss at higher rates, while also being more likely to be deemed essential workers, forcing them to put their lives on the line.[29] Reports detailing how many people, and particularly Black and Latinx households, could not survive a few weeks or months without monetary help brought America's stark disparity in income and

26. *See* James J. Angel & Douglas M. McCabe, *The Ethics of Payment: Paper, Plastic, or Bitcoin*, 132 J. BUS. ETHICS 603, 603 (2015) (discussing the "ethical implications" of payment cards); Chris Opfer, *'Early Wage' Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, BLOOMBERG L. (Aug. 1, 2019, 5:15 AM), https://news.bloomberglaw.com/daily-labor-report/early-wage-apps-aim-to-disrupt-payday-loans-two-week-cycle [https://perma.cc/D54G-5JD4] (overviewing early wage programs); Press Release, Fed. Trade Comm'n, Uber Agrees to Pay $20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited [https://perma.cc/JJH8-44MS]; *infra* Part IV.

27. *See infra* Part V.

28. *See* Dominic Rushe & Amanda Holpuch, *20m Americans Lost Their Jobs in April in Worst Month Since Great Depression*, GUARDIAN (May 8, 2020), https://www.theguardian.com/business/2020/may/08/april-jobs-report-us-unemployment-rate [https://perma.cc/TW9V-MT36]; Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html [https://perma.cc/M4RG-ZR2G]; Camila Domonoske, *Poll: Nearly 1 in 5 Households Has Lost Work Because Of Pandemic*, NPR (Mar. 17, 2020, 12:00 PM), https://www.npr.org/2020/03/17/817158521/poll-nearly-1-in-5-households-have-lost-work-because-of-pandemic [https://perma.cc/2KY3-696D].

29. *See* Connor Maxwell & Danyelle Solomon, *The Economic Fallout of the Coronavirus for People of Color*, CTR. FOR AM. PROGRESS (Apr. 14, 2020, 9:20 AM), https://www.americanprogress.org/issues/race/news/2020/04/14/483125/economic-fallout-coronavirus-people-color/ [https://perma.cc/TK3S-AGNQ]; Catherine Powell, *Color of Covid: The Racial Justice Paradox of Our New Stay-At-Home Economy*, CNN (Apr. 18, 2020, 9:13 AM), https://www.cnn.com/2020/04/10/opinions/covid-19-people-of-color-labor-market-disparities-powell/index.html [https://perma.cc/8ZEP-TAL3].

savings into focus.[30] For instance, when Congress enacted the CARES Act,[31] questions about how "relief rebate" payments would be delivered to the millions of unbanked Americans quickly emerged, highlighting how disparate access to electronic payment and banking systems exacerbates race and class differences.[32] Minorities also worried more about debt collection if they defaulted on existing obligations, with coronavirus being termed a "new housing crisis for communities of color."[33]

As Lani Guiner and Gerald Torres wrote, race "is like a miner's canary."[34] "Miner's canary" describes how miners would carry canaries, which are more susceptible to toxic gases, into mines with them. If the canary collapsed, miners knew to leave.[35] Focusing on Black, Latinx, and other minority Americans, allows for a detailed and sustained discussion of racial and ethnic disparities in access to debt, income inequality, and ability to build wealth.[36] The distress of these households, as this Article sets forth, is, as Guiner and Torrres wrote, "the first sign of danger that threaten us all."[37] The exacerbation of income and wealth inequalities among communities of color in recent decades signals a potential coming economic and social collapse in the United States, potentially hastened by the economic fallout from the pandemic.[38] This Article concludes by return-

30. *See, e.g.*, *Report on the Economic Well-Being of U.S. Households in 2017*, FED. RES. (May 2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf [https://perma.cc/G497-75JG] (reporting that less than a quarter of lower-income Americans have enough savings to cover basic expenses for three months); Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Folly of Credit as Pandemic Relief*, 68 UCLA L. REV. DISC. 126, 134–36 (2020) (discussing savings and expenses); Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *CARES Act Gimmicks: How Not To Give People Money During a Pandemic and What to Do Instead*, 2020 U. ILL. L. REV. ONLINE 81, 87–88 (2020) [hereinafter *CARES Act Gimmicks*], https://illinoislawreview.org/online/cares-act-gimmicks/ [https://perma.cc/AB4E-WHDF] (discussing savings and expenses).

31. Coronavirus Economic Stabilization (CARES Act), 15 U.S.C. § 116. The bill is available at https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf [https://perma.cc/NLY2-SZK9].

32. *See CARES Act Gimmicks*, *supra* note 30, at 88–89 (discussing the relief rebates). The Treasury Department decided to deliver relief rebates on prepaid debit cards, but not until months after the CARES Act's enactment and when people needed the cash infusion. *See also* Press Release, U.S. Dep't Treasury, Treasury is Delivering Millions of Economic Impact Payments by Prepaid Debit Card (May 18, 2020), https://home.treasury.gov/news/press-releases/sm1012 [https://perma.cc/E9TC-BZ6G].

33. Evan Weinberger, *Coronavirus Could Be New Housing Crisis for Communities of Color*, BLOOMBERG L. (May 20, 2020, 4:30 AM), https://news.bloomberglaw.com/banking-law/coronavirus-could-be-new-housing-crisis-for-communities-of-color [https://perma.cc/QZ45-NCWY]; *see* Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 240 (2020); Lee Fang, *Debt Collection Industry Deems Itself Essential to "Financial Health" of Consumers, Fights COVID-19 Shutdown*, THE INTERCEPT (Mar. 27, 2020, 1:40 PM), https://theintercept.com/2020/03/27/debt-collection-industry-deems-itself-essential-to-financial-health-of-consumers-fights-covid-shutdown/ [https://perma.cc/3GVN-VNV6].

34. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11 (2002).

35. *See id.*

36. *See infra* Part III.

37. GUINER & TORRES, *supra* note 34, at 11.

38. *See id.* at 11–12 ("[T]he association between those who are left out and social justice deficiencies in the larger community.").

ing to the "miner's canary" metaphor to emphasize the gravity of adequately accounting for debt inequality's place in answering the income and wealth inequality conundrum.[39]

II. THE DISPARATE ECONOMY: INCOME INEQUALITY AND THE WEALTH GAP

Economic equality, the equal distribution of income and economic opportunity,[40] is fundamental to comprehensive human and civil rights, and America has been moving backwards in this regard for decades.[41] In real dollars, wages effectively have remained stagnant since the 1960s despite rising productivity.[42] Over the past thirty years, low-wage workers have experienced declines in real wages while higher-wage earners have seen double-digit increases in their real wages.[43] The racial income gap is particularly stark, with median Black and Latinx households making over $10,000 a year less than white households.[44] Part of the disparity traces to differences in educational opportunities and attainment,[45] but education alone cannot account for racial and ethnic wage disparities or income inequality more generally. Instead, income inequality leads to a host of interrelated problems that keep ordinary Americans in a state of constant financial struggle.[46]

39. *See infra* Part V.

40. *See* Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 393–94 (2014) (discussing leading factors identified as contributing to economic inequality); *Concepts of Inequality*, U.N. DEP'T ECON. & SOC. AFFS. (Oct. 21, 2015), https://www.un.org/en/development/desa/policy/wess/wess_dev_issues/dsp_policy_01.pdf [https://perma.cc/Z5BR-C4U3] (discussing various definitions of economic inequality).

41. *See* Bill Chappel, *U.S. Income Inequality Worsens, Widening to a New Gap*, NPR (Sept. 26, 2019, 2:12 PM), https://www.npr.org/2019/09/26/764654623/u-s-income-inequality-worsens-widening-to-a-new-gap [https://perma.cc/P6TQ-THXK] ("The gap between the richest and the poorest U.S. households is now the largest it's been in the past 50 years. . . . U.S. income inequality was 'significantly higher' in 2018 than in 2017 . . .."); Van Loo, *supra* note 8, at 213 (discussing using consumer law to target economic inequality).

42. *See* James Kwak, '*Take Back Our Party' Chapter 2: Bad Policy*, Am. PROSPECT figs. 2.2, 2.3 (Dec. 13, 2019), https://prospect.org/takebackourparty/chapter-2-bad-policy/ [https://perma.cc/H8V7-RUV6] (detailing average pre-tax income for all Americans and the bottom 50% of Americans); Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR. (Aug. 7, 2018), https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/ [https://perma.cc/HH9X-N2CA] (reporting average hourly wages between 1964 and 2018); Jay Shambaugh et al., *Thirteen Facts About Wage Growth*, BROOKINGS iii fig. B (2017), https://www.brookings.edu/wp-content/uploads/2017/09/thp_20170926_thirteen_facts_wage_growth.pdf [https://perma.cc/7XXH-JRVN] (comparing real wages to real labor productivity from 1947 to 2017).

43. *See* Desilver, *supra* note 42; Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. 6 (Jan. 6, 2015), https://termadiary.org/wp-content/uploads/2017/05/wage-stagnation-in-nine-charts.pdf [https://perma.cc/7Q63-K83N] (providing an overview of real hourly wages based on wage percentile from 1979 to 2013).

44. *See* Shambaugh et al., *supra* note 42, at 3–6 (discussing the education wage premium, technological changes, and wage disparities between racial disparities); *see also* Gilman, *supra* note 40, at 392 (noting research linking economic inequality with changes in technology and how education no longer provides workers with the requisite skills).

45. *See 20 Facts About U.S. Inequality that Everyone Should Know*, STAN. CTR. ON POVERTY & INEQ. (2011), https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know [https://perma.cc/9RWD-ANR8] (reporting that only college graduates have seen growth, in real dollars in median earnings since 1979 and that college enrollment is highest among white Americans).

46. *See infra* notes 74–94.

Growing income inequality, in large part, has created America's disparate economy and widening wealth gap, leading to a society in which those people with resources grow wealthier to the detriment of others.[47] Indeed, in 2014, President Barack Obama called economic inequality the "defining challenge of our time."[48] In this Part, we discuss income inequality, in general and as it relates to racial and ethnic inequality. We then link income inequality to America's wealth gap, again focusing on racial and ethnic wealth gaps, particularly as connected with Black home ownership. Overall, this Part demonstrates how income and wealth inequality has become one of America's most defining features.[49]

A. Widening Income Inequality over the Past Decades

The United States presently has the highest level of income inequality among those countries with the largest economies in the world,[50] including India, the land of the untouchables and the caste system.[51] The United States did not always hold such a distinction. The decades from the end of World War II into the early 1970s brought widespread prosperity, during which most Americans saw their incomes grow as they shared in productivity gains.[52] In contrast, between 1970 and 2016, the gap between American households at the bottom and the top of the income spectrum increased more than a quarter, with income concentration at the top of the ladder rising to levels last seen at the beginning of nineteenth century, a time known as the "Roaring Twenties," when wealthy industrialists controlled America.[53]

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47. *See* Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 SOCIO. SCI. 182, 182 (2018).

48. President Barack Obama, *Remarks on Mobility at the Town Hall Education Arts Recreation Campus (THEARC)* (Dec. 4, 2014), https://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility [https://perma.cc/944W-XR97].

49. *See generally* RONALD P. FORMISANO, PLUTOCRACY IN AMERICA: HOW INCREASING INEQUALITY DESTROYS THE MIDDLE CLASS AND EXPLOITS THE POOR (2015).

50. *See* Kochhar & Cilluffo, *supra* note 18. Across countries, income inequality is measured by the Gini coefficient (or index). It ranges from zero, perfect equality, to one, perfect inequality, where all wealth is held by one person. *See* Hershey H. Friedman & Sarah Hertz, Is the United States Still the Best Country in the World? Think Again 3–4 (June 24, 2015) (unpublished manuscript), https://ssrn.com/abstract=2622722; *see also* Kochhar & Cilluffo, *supra* note 18 (describing Gini coefficient and U.S. ranking relative to other advanced economies). In 2016, the US's Gini coefficient was 0.415, as compared to France's 0.327 and Sweden's 0.292, both as of 2015. *Gini Index (World Bank Estimate)*, WORLD BANK, https://data.worldbank.org/indicator/SI.POV.GINI (last visited Jan. 17, 2021) [https://perma.cc/V646-NA5G].

51. *See Gini Index (World Bank Estimate)-India*, WORLD BANK, https://data.worldbank.org/indicator/SI.POV.GINI?locations=IN (last visited Jan. 17, 2021) [https://perma.cc/PRG5-Q4UC] (listing India's Gini index at 0.378 in 2011).

52. *See* Stone et al., *supra* note 17 (noting that from the late 1940s to the early 1970s, "[i]ncomes grew rapidly and at roughly the same rate up and down the income ladder" and that the "[income] gap between those high up the income ladder and those on the middle and lower rungs—while substantial—did not change much during this period.").

53. *See id.*; Kochhar & Cilluffo, *supra* note 18; KWAK, *supra* note 16 ("From 1980 to 2014, the total incomes of the top 1 percent more than tripled, while those of the bottom 50 percent remained essentially unchanged. The previous 34 years, from 1946 to 1980, saw the opposite pattern: Income growth was substantially higher for the bottom 50 percent than for the top 1 percent.").

Income inequality is so stark that America's top 10% of earners now make on average nine times as much income than the bottom 90%.[54] The top 1% makes on average over thirty-nine times more income than the bottom 99%.[55] And the top 0.1% makes on average almost 190 times more than the bottom 99.9% of Americans.[56]

Two primary factors contribute to continued income inequality.[57] First is the wage gap. The top echelon of Americans experience growth in income from their salaries and hourly wages, while other workers see their real wages decline despite contributing to increasing their employers' productivity.[58] Second is the interest that those Americans with savings make every year passively through investments, including houses.[59] This passive income allows Americans with the ability to save to get wealthier, while leaving those Americans with depressed real wages to struggle to meet their basic expenses—let alone save money that will allow them to begin to grow their own wealth.[60]

This inequality has caused America's middle class to shrink, forcing more families into poverty.[61] As of 2013, nearly 15% of the population lived below the poverty line.[62] Income inequality also harms economic growth. It lowers productivity, decreases efficiency, and leads to more instability, all of which makes recession more likely.[63] Part of this dampening in growth stems from the social instability correlated with disparate earnings: crime, educational failures, substance abuse, mental health issues, and overall lower life expectancy, all of

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54. *See Income Inequality in the United States*, INEQ., https://inequality.org/facts/income-inequality/ (last visited Jan. 17, 2021) [https://perma.cc/WJT5-EJGX] (reporting on data from the United States Census Bureau and University of California, Berkeley).

55. *Id.*

56. *Id.*

57. *See id.* (defining income as "the revenue streams from wages, salaries, interest on a savings account, dividends from shares of stock, rent, and profits from selling something for more than you paid for it").

58. *See* Josh Bivens, *Inequality is Slowing US Economic Growth*, ECON. POL'Y INST. (Dec. 12, 2017), https://www.epi.org/publication/secular-stagnation/ [https://perma.cc/PC46-HSMU] ("By far the most important driver of this upward redistribution is the growing wedge between economy-wide productivity growth (a measure of income generated in an average hour of work in the United States) and hourly pay of typical American workers since the mid-1970s."); Gilman, *supra* note 40, at 394; Chappell, *supra* note 41.

59. *See* Bivens, *supra* note 58, at tbl.1 (disaggregating income based on wages and investments).

60. *See infra* Section II.A (discussing further the connection between passive income and wealth disparities).

61. *See* Keith Miller & David Madland, *As Income Inequality Rises, America's Middle Class Shrinks*, CTR. FOR AM. PROGRESS (Dec. 18, 2014, 5:00 AM), https://www.americanprogress.org/issues/economy/news/2014/12/18/101790/as-income-inequality-rises-americas-middle-class-shrinks [https://perma.cc/C6EP-MTPF] (noting America's shrinking middle class); PETER TEMIN, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY 3 (2017) ("The middle class's share of total income fell 30 percent in forty-four years.").

62. *See* Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 3 (2016) (discussing poverty statistics).

63. *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 117 (2012) (reviewing how inequality threatens the United States' continued growth); *see also* Gilman, *supra* note 40, at 398–401(detailing the effects of economic inequality); Heather Boushey & Somin Park, *Fighting Inequality is Key to Preparing for the Next Recession*, ECON. POL'Y INST. (May 15, 2019, 4:15 PM), https://www.epi.org/blog/fighting-inequality-is-key-to-preparing-for-the-next-recession/ [https://perma.cc/A9EG-8A6J].

which impose even more costs on Americans and the economy.[64] The American dream of upward mobility, which remains a dominant cultural touchstone, even if it never fully described socio-economic accession in America, is metamorphosing into a nightmare.[65] In noting the multiple factors that have set America on its current course, economist Peter Temin describes America as having devolved into a third-world nation for many of its citizens.[66]

Even those with the highest incomes have recognized the ill effects of this disparity.[67] As self-styled plutocrat and billionaire Nick Hanaur explains: "At the same time that people like [me] are thriving beyond the dreams of any plutocrats in history, the rest of the country—the 99.99 percent—is lagging far behind. The divide between the haves and have-nots is getting worse really, really fast."[68] Income inequality guts the middle class, rendering people unable to make discretionary and necessary purchases, potentially triggering economic stagnation.[69] As the economy fails, the likelihood of violence increases.[70] Even some in corporate America are sounding the alarm that falling incomes may hinder economic growth.[71]

B. Persistent Income Inequality Among Racial and Ethnic Minorities

Race and ethnicity and income inequality are interrelated.[72] Minorities have experienced the least growth in income over the past decades.[73] For example, in 2016, the median income for white Americans was $48,000, while the median income for Black Americans was $31,100, meaning Black Americans

64. *See* Gilman, *supra* note 62, at 4 (noting these effects); Bivens, *supra* note 58 (noting that income inequality "drags on demand growth as consumption grows more slowly"); STIGLITZ, *supra* note 63, at 117 (noting these effects of inequality); MICHAEL D. YATES, THE GREAT INEQUALITY 172 (2016) (providing an overview of how income inequality negatively affects nearly every aspect of American's lives).

65. *See* KWAK, *supra* note 16 ("Only one in five Americans think that today's youth will have a better life than their parents' generation—stark skepticism about what for centuries we have been calling the American dream."); LUKE WINSLOW, ECONOMIC INJUSTICE AND THE RHETORIC OF THE AMERICAN DREAM 88–89 (2017); JAMIE L. BRONSTEIN, TWO NATIONS, INDIVISIBLE: A HISTORY OF INEQUALITY IN AMERICA ix–x (2016); Eleanor Krause & Isabel V. Sawhill, *Seven Reasons to Worry About the American Middle Class*, BROOKINGS (June 5, 2018), https://www.brookings.edu/blog/social-mobility-memos/2018/06/05/seven-reasons-to-worry-about-the-american-middle-class/ [https://perma.cc/4JAU-PVQ8] (showing that the rate of upward mobility has declined steadily since 1940s, with a brief period of increase in the 1970s).

66. *See generally* TEMIN, *supra* note 61.

67. *See* Heather Long, *Ahead of Davos, Even the 1% Worry About Inequality*, WASH. POST (Jan. 23, 2018, 1:00 AM), https://www.washingtonpost.com/business/economy/ahead-of-davos-even-the-1-percent-worry-about-inequality/2018/01/21/551392d0-fd2f-11e7-ad8c-ecbb62019393_story.html [https://perma.cc/8SL2-H7QK].

68. Nick Hanauer, *The Pitchforks Are Coming . . . For Us Plutocrats*, POLITICO: MAG. (2014), https://www.politico.com/magazine/story/2014/06/the-pitchforks-are-coming-for-us-plutocrats-108014 [https://perma.cc/SM7F-RCLA].

69. *See* Miller & Madland, *supra* note 61.

70. *See* Hanauer, *supra* note 68.

71. *See* Erik Sherman, *Business Leaders Worry About Income Inequality and Revolution*, FORBES (Sept. 9, 2014, 9:49 AM), https://www.forbes.com/sites/eriksherman/2014/09/09/business-leaders-worry-about-income-inequality-and-revolution/#7785ab2021a6 [https://perma.cc/38BP-SNV4].

72. *Cf.* Gilman, *supra* note 62, at 9 (recognizing the intersections with economic inequality in the context of gender).

73. *See* Kochhar & Cilluffo, *supra* note 18.

make about 65% of what white Americans make.[74] Assessing entire households, the income gap is even larger, with Black households making just over 60% of white households.[75] This income gap has remained the same, or worsened, since 1976.[76]

The gap has persisted, in large part, because Black Americans are concentrated in the low-wage sector.[77] Nonetheless, the gap remains, though decreases somewhat, across education levels.[78] In 2014, the median income of a household headed by a college-educated Black American was $82,300, compared to the $106,600 median income of a household headed by a college-educated white American, a percentage gap of 23%.[79] Overall, Black households constitute 13% of American households, but make up only 5% of households in the top 5% of income.[80]

Income gaps among Latinx Americans are similar.[81] In 2014, the median income of Latinx households was approximately the same as Black households.[82] The disparity in income between Latinx and white households likewise has increased over the past decades. In 1970, the median income of households headed by Latinx Americans was 67% of the median income of white household, as compared to 61% of the median income of white households in 2014.[83] Similar to Black households, Latinx households are 13% of total households in America, but comprise 6% percent of those in top 5% of all households.[84]

Likewise, in 2017, Native Americans' household income was 69% of the national median household income.[85] This places the median income of Native

74. *Id.*

75. In 2014, the median income of households headed by Black Americans was approximately $43,300, while median income of households headed by white Americans was approximately $71,300. *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RSCH. CTR. (June 27, 2016), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf [https://perma.cc/546M-ELHG]. In 2015, these figures were $44,100 and $75,100, respectively. Kristen Bialik & Anthony Cilluffo, *6 Facts About Black Americans for Black History Month*, PEW RSCH. CTR. (Feb. 22, 2017) https://www.pewresearch.org/fact-tank/2017/02/22/6-facts-about-black-americans-for-black-history-month/ [https://perma.cc/DM7X-HBMS].

76. *On Views of Race and Inequality, Blacks and Whites are Worlds Apart*, *supra* note 75, at 21–22, 24; *see also* Manduca, s*upra* note 47, at 182 (noting that if not for rapid income growth among white families, the income gap between Black and white families would have decreased by about 30%).

77. *See* TEMIN, *supra* note 61, at 153.

78. *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, *supra* note 72, at 22.

79. *Id.*

80. *See* Darrick Hamilton & Michael Linden, *Hidden Rules of Race Are Embedded in the New Tax Law*, ROOSEVELT INST. 3 (May 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-HRR-Tax-Code-201805.pdf [https://perma.cc/DA9Y-VBA5] (discussing these statistics and noting that the Tax Cuts and Jobs Act, passed in 2018, is likely to exacerbate the racial income gap).

81. *See Income Inequality in the United States*, *supra* note 54.

82. *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, *supra* note 75, at 22.

83. *Id.*

84. *See* Hamilton & Linden, *supra* note 80, at 3.

85. *See* Valerie Wilson, *Digging Into the 2017 ACS*, ECON. POL'Y INST. (Sept. 14, 2018, 4:27 PM), https://www.epi.org/blog/digging-into-2017-acs-income-native-americans-asians/ [https://perma.cc/7EK5-PLH6].

American and Alaska Native households slightly below that of Black households.[86] Asian-Americans' income inequality also is concerning: income inequality in the United States increased the most among Asians from 1970–2016.[87] Asian Americans have displaced Black Americans as the United States' most economically divided group.[88] Across these racial and ethnic minorities, unemployment rates generally are higher than those of white Americans, which further contributes to persistent income inequality.[89]

C. Income Inequality's Contribution to the Widening Wealth Gap

Adam Smith warned that "wherever there is great property, there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many."[90] The United States' wealth gap is even starker than its wage and income gaps. Since the 1980s, the top 10% of Americans have amassed roughly 43% of total income and other economic growth, which amounts to owning 77% of the "wealth pie."[91] In contrast, the bottom 10% of the wealth distribution now have average negative net worth of *owing* $2,000.[92] The entirety of the bottom 50%, which includes roughly 63 million families, owns a mere 1% of the pie.[93] This means that America's top 1% alone has more wealth than the middle class.[94]

86. *See* Dedrick Asante Muhammad et al., *Racial Wealth Snapshot: American Indians/ Native Americans*, NAT'L CMTY. REINVESTMENT COAL. (Nov. 18, 2019), https://ncrc.org/racial-wealth-snapshot-american-indians-native-americans/ [https://perma.cc/74TV-LU64]; Courtney E. Martin, *Closing the Racial Wealth Gap*, N.Y. TIMES (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/opinion/closing-the-racial-wealth-gap.html [https://perma.cc/7D7L-L4K4] ("[N]early 34 percent of Native American children live in poverty (in contrast to 10 percent of white children)").

87. Kochhar & Cilluffo, *supra* note 18.

88. *Id.*

89. *See Unemployment Rate Hits Record Low for Asian Americans*, ASSOCIATED PRESS (July 5, 2019), https://apnews.com/9dc65bd2a3414afead299ef7fb2bc9a1 (noting that Asian Americans' unemployment rate fell in 2019); Valerie Wilson, *Black Unemployment is at Least Twice as High as White Unemployment at the National Level and in 14 States and the District of Columbia*, ECON. POL'Y INST. (Apr. 4, 2019), https://www.epi.org/publication/valerie-figures-state-unemployment-by-race/ [https://perma.cc/9756-8L7P]; Janelle Jones, *African American and Hispanic Unemployment Rates Continue High*, AM. PROSPECT (Nov. 15, 2018), https://prospect.org/civil-rights/african-american-hispanic-unemployment-rates-continue-high/ [https://perma.cc/RX75-EJJB]; *Labor Market Trends for American Indians and Alaska Natives*, 2000–17, U.S. BUREAU LAB. STATS. (Nov. 8, 2018), https://www.bls.gov/opub/ted/2018/labor-market-trends-for-american-indians-and-alaska-natives-2000-17.htm https://perma.cc/B3NY-FLEP (reporting a 7.8% unemployment rate for Native Americans and Native Alaskans in 2017).

90. ADAM SMITH, THE WEALTH OF NATIONS 766 (Edwin Cannan ed., 1994).

91. *See* Ana Kent et al., *What Wealth Inequality in America Looks Like: Key Facts & Figures*, FED. RSRV. BANK ST. LOUIS: OPEN VAULT BLOG (Aug. 14, 2019), https://www.stlouisfed.org/open-vault/2019/august/wealth-inequality-in-america-facts-figures [https://perma.cc/8RPM-WJMV]; Baodong Liu et al., *Social Capital, Race, and Income Inequality in the United States*, 9 SUSTAINABILITY 248, 248 (2017).

92. *See* Signe-Mary McKernan et al., *Nine Charts About Wealth Inequality in America*, NONPROFIT Q. (Mar. 27, 2015), https://nonprofitquarterly.org/nine-charts-about-wealth-inequality-in-america/ [https://perma.cc/L4AB-AFH7] (reporting based on 2013 figures).

93. *See* Kent et al., *supra* note 91.

94. *See* Isabel V. Sawhill & Christopher Pulliam, *Six Facts About Wealth in the United States*, BROOKINGS (June 25, 2019), https://www.brookings.edu/blog/up-front/2019/06/25/six-facts-about-wealth-in-the-united-

Much of the widening wealth gap accrued after the Great Recession, fueled by booming stock markets and a collapse in the housing market, driving the haves and have nots further apart.[95] The stock market's contribution to accumulated wealth is a key link between income inequality and wealth inequality.[96] Year after year, the richest Americans experience gains in income that add to their wealth, which creates a snowball effect by which their wealth rises exponentially, while more families plummet into poverty.[97]

Because of income inequality, wealth inequality is not felt equally across all races and ethnicities, even within the same socio-economic groups.[98] Compared to income disparities, racial wealth disparities are far greater and generationally entrenched.[99] The median net worth of white households is 1,200% higher than Black households.[100] One in five Black households has no net worth, compared to less than one in ten white households.[101] Black households' wealth gap remains even after controlling for education: "White families with a head of household who dropped out of high school have more wealth than Black families with a head of household who finished college."[102] And as with the wealth gap overall, the racial wealth gap increased rapidly after the Great Recession.[103]

The wealth gap between white and Latinx households also has remained large.[104] In 2016, the average white family has over seven times the wealth of the average Latinx family.[105] Across Black and Latinx households, the wealth gap also grows with age. In their 30s, white Americans have an average wealth $140,000 higher than Black Americans; in their 60s, white Americans have over

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states/ [https://perma.cc/QKJ7-J5L3]; Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 20625, 2014), https://www.nber.org/papers/w20625.pdf [https://perma.cc/KJ46-YNUW] (noting that wealth inequality in the US is due almost entirely to the rise of wealth owned by the top 0.1%).

95. *See* Moritz Kuhn et al., *Research: How the Financial Crisis Drastically Increased Wealth Inequality in the U.S.*, HARV. BUS. REV. (Sept. 13, 2018), https://hbr.org/2018/09/research-how-the-financial-crisis-drastically-increased-wealth-inequality-in-the-u-s [https://perma.cc/9VV9-J46K].

96. *See* Moritz Kuhn et al., Income and Wealth Inequality in America, 1949-2016, at 3 (Apr. 15, 2019) (unpublished manuscript), https://www.wiwi.uni-bonn.de/kuhn/paper/Wealthinequality_April2019.pdf [https://perma.cc/PC2Z-F4AZ] (linking income and wealth inequality).

97. *See id.*; Kuhn et al., *supra* note 95 (summarizing research regarding the accrual of stock market gains primarily to the wealthy); *see also* Miller & Madland, *supra* note 61 (discussing poverty statistics); Gilman, *supra* note 62 (exploring poverty statistics).

98. *See* Rodney E. Hero & Morris E. Levy, *The Racial Structure of Economic Inequality in the United States: Understanding Change and Continuity in an Era of "Great Divergence"*, 97 SOC. SCI. Q. 491, 493 (2016); Edorado Ortiz, *How Inequality in the US Follows Racial Lines*, CHI. POL'Y REV. (May 10, 2019), https://chicagopolicyreview.org/2019/05/10/how-inequality-in-the-us-follows-racial-lines/ [https://perma.cc/M2FN-7J6L].

99. *See* Hamilton & Linden, *supra* note 80, at 3–4.

100. *See id.* at 4.

101. *See id.*

102. *Id.*

103. *See* EDWARD N. WOLFF ET AL., THE DECLINE OF AFRICAN-AMERICAN AND HISPANIC WEALTH SINCE THE GREAT RECESSION (2018) (noting that the gap in net worth between Black and white Americans remained the same from 1983 to 2007, but increased thereafter).

104. *See id.* (noting that, in 1983, the median net worth of white households was approximately twenty-six times the median net worth of Latinx households and in 2013, the median net worth of white households was approximately sixty times the net worth of Latinx households).

105. *See* Kent et al., *supra* note 91.

$1 million more in average wealth than Black Americans.[106] The wealth gap naturally links with income inequality. Lower earnings add up over time.[107]

Income inequality also links with another main contributor to the wealth gap—disparities in homeownership. The more income a family has, the more likely that family will own a home.[108] Houses are assumed to be the leading vehicle to preserve and grow wealth, and homeownership represents the lion's shares of most families' wealth.[109] Because white Americans are more likely to receive inheritance and assistance from their families in the form of down payments on houses, they often own homes sooner than other Americans, which allows white Americans to accumulate wealth faster, adding to racial and ethnic disparities in net worth.[110] As of 2019, 73% of white Americans owned a home, compared to 43% of Black Americans, and 48% of Latinx Americans.[111] The homeownership rate for Asian Americans is in between these groups, at 59%,[112] and, like most groups, has not budged for decades.[113]

106. *See* McKernan et al., *supra* note 92; Tyson H. Brown, *Diverging Fortunes: Racial/Ethnic Inequality in Wealth Trajectories in Middle and Late Life*, 8 RACE & SOC. PROBS. 29 (2016) (detailing that, on average, white households have a net worth of $105k by midlife, compared to less than $5,000 for Black families and $39,000 for Latinx families).

107. There is little information about the wealth gap between Native American, Asian American, and other households. *See* Meizhu Lui, *Doubly Divided: The Racial Wealth Gap*, *in* WEALTH INEQUALITY READER 42, 42 (Dollars & Sense & United for a Fair Economy eds., 2008) ("[Native Americans'] poverty rate is 26% compared to 8% for whites, even though more than half own their own homes. . . . What we do know is that [Asian Americans'] poverty rate is 13%, and that 60% of Asian Americans own their own homes, compared to 77% of whites.").

108. *See* Jennifer Rudden, *Homeownership Rate in the United States Between 2001 to 2009 and 2010 to 2017, by Income*, STATISTA (Aug. 31, 2018), https://www.statista.com/statistics/205440/homeownership-experience-in-the-us-by-income-group/ [https://perma.cc/J6TU-YCM7].

109. *See* A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 189 (2009) ("Home ownership is said to be a fundamental part of the American Dream because of the economic security it gives homeowners."); Kuhn et al., *supra* note 95 ("[H]ousing booms lead to wealth gains for leveraged middle-class households and tend to decrease wealth inequality"); MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS (2014) (discussing why the promise of homeownership as part of the American dream is flawed, particularly for Black and other minority families).

110. *See* DICKERSON, *supra* note 109, at 248; Jeffrey P. Thompson & Gustavo A. Suarez, *Updating the Racial Wealth Gap* 3 (Fed. Rsrv. Bd., Working Paper No. 2015-76, 2017), https://ssrn.com/abstract=3072923 [https://perma.cc/4LVM-YQR9] (describing the role of inheritance and family wealth across racial lines); Michelle Maroto, *Growing Farther Apart: Racial and Ethnic Inequality in Household Wealth Across the Distribution*, 3 SOC. SCI. 801 (2016) (detailing the components of wealth inequality, including family structure, education, employment, income, and credit usage).

111. *Quarterly Residential Vacancies and Homeownership, Second Quarter 2020*, U.S. CENSUS BUREAU (July 28, 2020, 10:00 AM), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/9V4P-USLZ].

112. *Id.*

113. *See* McKernan et al., *supra* note 92 (noting homeownership rates in 1983 and that white American homeownership has increased slightly over this period). The homeownership gap persists when adjusted for income and education levels. *See* Brian J. McCabe, *Why Buy a Home? Race, Ethnicity, and Homeownership Preferences in the United States*, 4 SOCIO. RACE & ETHNICITY 452, 453 (2018).

That Black Americans' homeownership rates have not increased since the 1970s may seem perplexing.[114] The past decades have brought anti-discrimination laws aimed at housing, such as the Fair Housing Act,[115] along with a concerted national effort to transition families from renting to owning.[116] The federal government actively encouraged homeownership, at least outwardly.[117] Yet, as David Skeel has noted, Black banks have remained consistently undercapitalized and open discrimination in mortgage credit markets in New York and Boston has gone on for centuries.[118]

But when considered from America's history post-slavery, it is predictable that Black households did not actually benefit from the government's outward desire to see the wealth gap close.[119] America has a deep history of intolerance for the accumulation of wealth by Black households.[120] The same proved true of the homeownership push of the late 1960s through the Great Recession.[121] Instead of helping Black families build wealth, they became trapped by subprime mortgages with high interest rates, redlined into areas where their homes' value was unlikely to appreciate, and forced from their homes when the market crashed.[122] The next Part focuses on debt inequality and returns to homeownership as a leading example of how racial and ethnic disparities in access to banking and credit services deplete the already lower incomes of families of color, making it even more difficult to save. Understanding debt inequality's part in

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114. *See* Caitlin Young, *These Five Facts Reveal the Current Crisis in Black Homeownership*, URB. INST: URB. WIRE (July 31, 2019), https://www.urban.org/urban-wire/these-five-facts-reveal-current-crisis-black-homeownership [https://perma.cc/PZ8S-V69V].

115. *See generally* Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247 (2016) (discussing the passage of the Fair Housing Act and the history of its enforcement).

116. *See* TAYLOR, *supra* note 22, at 3–4 (noting how the federal government passed laws and policies to encourage Black homeownership).

117. *Id.* at 8.

118. David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1694, 1700–703, 1713–714 (2004).

119. *See* Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html [https://perma.cc/9R5P-ECEL].

120. *See* BARADARAN, *supra* note 22, at 10–34 (discussing the Freedman's Savings Bank and the Tulsa Race Riots); TEMIN, *supra* note 61, at x (discussing America's history of slavery contribution to income and wealth disparities); THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE __ (2017) ("[Racial and ethnic wealth gaps] have been forged by history and preserved by policy, and only bold, race-conscious reforms can move us toward a more just society").

121. *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 190, 196 (2011) (noting that "in the late 1960s, the federal government sought a way to channel capital into America's rioting cities . . . [s]olving the urban crisis would require solving the housing crisis," and discussing how the government passed laws and established programs to promote homeownership).

122. *See* TAYLOR, *supra* note 22, at 160; *infra* Section III.A. Black households also less likely to keep their homes if they file chapter 13 bankruptcy, which generally is thought of as the bankruptcy chapter that allows people to save their houses. *See* Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231 (2009) (finding that Black and LatinX households are less likely to obtain chapter 13 relief); Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031 (2017) (finding that Black households that file chapter 13 are more than twice as unlikely to receive debt relief than other households that file chapter 13).

feeding the wealth gap is crucial to assessing how law can reverse the wealth gap and contribute to achieving racial and ethnic equality.[123]

III. Debt Inequality's Role in the Disparate Economy

Not having enough income to meet expenses—that is, economic insecurity—is expensive.[124] Along with income inequality, the variety and use of consumer credit products in the United States has risen exponentially since the 1980s.[125] Americans take out mortgages to purchase their houses, student loans to finance their education, auto loans to buy their cars, and credit cards and other short-term loans to meet daily expenses.[126] While these debts can help families make large investments, smooth their consumption, and succeed in their quest to achieve the American dream,[127] income inequality means that more and more people turn to high-cost credit products that can trap them in a cycle of debt and poverty.[128] The hollowing out of the middle class that has come with increased income inequality and a widening wealth gap also has driven Americans from

123. Wealth inequality has a persistently negative effect on socio-economic mobility. *See* Hamilton & Linden, *supra* note 80, at 4; Shapiro, *supra* note 120 (following 200 families of different races and income levels for over twelve years to discover why some families build wealth while others do not); Cedric Herring & Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 Race & Soc. Probs. 4 (2016) (describing the roles of head of households, bankruptcy, spending patterns, stock ownership, business ownership, home ownership, inheritance, education, income, occupation, age, and number of children in creating and sustaining the wealth gap).

124. *See* Baradaran, *supra* note 8, at 1–10 (discussing how lower-income Americans pay more than others for credit and to use their own money); Jacob Hacker, The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream 12 (2008) ("[E]conomic insecurity . . . is a problem faced by a wide swath of Americans . . . Problems once confined to the working poor . . . have crept up the income ladder to become an increasingly normal part of middle-class life.").

125. *See* Andrea Ryan et al., *A Brief Postwar History of U.S. Consumer Finance*, 85 Bus. Hist. Rev. 461, 465 tbl.1 (2011) (discussing consumer credit products from 1949 through the 2000s); Chris Kirk, *Five Charts That Show American Families' Debt Crisis*, Slate (May 12, 2016, 8:01 AM), http://www.slate.com/articles/business/the_united_states_of_debt/2016/05/the_rise_of_household_debt_in_the_u_s_in_five_charts.html [https://perma.cc/3NK8-WAWQ] (relying on data from the Federal Reserve Bank of St. Louis to show that household debt relative to GDP has increased nearly five-fold since 1980). Americans always have used credit to meet expenses. Before the rise of credit cards, installment loans, rent-to-own, and other more mainstream consumer credit products, people turned to loan sharks. *See generally* Anne Fleming, City of Debtors: A Century of Fringe Finance 24 (2018) (detailing loan sharks and other disreputable credit outfits in New York in the 1890s); Hyman, *supra* note 121, at 44 (detailing consumer credit in the first half of the twentieth century); Lendol Calder, Financing the American Dream: A Cultural History of Consumer Credit 49–50 (1999) (detailing consumer credit in the first half of the twentieth century); *Credit History: The Evolution of Consumer Credit in America*, Fed. Rsrv. Bank Boston (2004), https://www.bostonfed.org/publications/the-ledger/2004/spring-summer/spring-summer-2004.aspx [https://perma.cc/9RGV-KKUL] (detailing credit usage from the 1800s through the 1960s).

126. *See* Michael Corkery & Stacy Cowley, *Household Debt Makes a Comeback in the U.S.*, N.Y. Times: Deal Book (May 17, 2017), https://www.nytimes.com/2017/05/17/business/dealbook/household-debt-united-states.html [https://perma.cc/L34N-W79W] (showing data from the Federal Reserve Bank of New York detailing the breakdown of consumer credit among housing, credit cards, auto loans, student loans, and other).

127. *See id.* (noting that debt "allows Americans to make large investments in education and housing, which can help build personal wealth and financial stability.").

128. *See* Lisa Servon, The Unbanking of America: How the New Middle Class Survives xv–xvi (2017) (discussing why people turn to alternative financial services).

traditional banks and financial products.[129] Paying more for credit, such as subprime home and auto loans, short-term financing, such as payday loans, and reliance on alternative financial services, such as check cashing outfits, are hallmarks of the debt inequality that is now part of middle-class life.[130]

The increase in American households' debt loads is telling. In the early 1980s, the top 5% of American households, based on income, had $0.80 of debt per dollar of income, as compared to the bottom 95% of households having $0.60 of debt per dollar of income.[131] By 2007, the top 5% had $0.65 of debt per dollar of income, as compared to $1.40 in debt for every dollar of income for all other households.[132] Stated differently, the bottom 95% of American households saw their debt loads almost triple in the span of a few decades.

As a matter of accessing credit, banking, and other financial services, being Black also is expensive. The same is true for Latinx and Native Americans. Research consistently shows that people of color pay more for credit and banking services.[133] For example, consider the increased costs of using alternative financial services to access money rather than traditional banks.[134] In 2017, 6.5% of all households in America were unbanked, meaning they had no bank account, and another 18.7% were underbanked, meaning they have bank accounts but still use alternative financial services.[135] In comparison, 16.9% of Black households and 14% of Latinx households were unbanked.[136] Just under 13% of "other" households, which includes Native Americans, were unbanked.[137] Another

129. *See id.*

130. *See* BARADARAN, *supra* note 8, at 139; Michael Kumhof, *Income Inequality Causes Higher Debt Leverage Among All but the Richest Households, and Makes Economies More Vulnerable to Financial Crises*, LSE U.S. CTR.: USAPP (May 12, 2015), https://blogs.lse.ac.uk/usappblog/2015/05/12/income-inequality-causes-higher-debt-leverage-among-all-but-the-richest-households-and-makes-economies-more-vulnerable-to-financial-crises/ [https://perma.cc/3JV9-9QT4] (linking debt loads and income inequality).

131. *See Inequality, Debt and the Financial Crisis*, N.Y. TIMES (May 3, 2012), https://www.nytimes.com/2012/05/04/opinion/inequality-debt-and-the-financial-crisis.html [https://perma.cc/4AGC-P75F] (overviewing these statistics).

132. *See id.*

133. The mechanics behind the increased costs include increased risk and costs to providers and what likely amounts to disparate treatment of similarly situated people, forces that are difficult to tease apart. One of this Article's authors has compiled these studies this in her research. *See* Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 54 HOUS. L. REV. 1079, 1096–98 (2017) (overviewing research). Black Americans also pay more to file bankruptcy, which leads to access to justice issues. Pamela Foohey, *Access to Consumer Bankruptcy*, 34 EMORY BANKR. DEV. J. 341 (2018); Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055 (2017); *see also* Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. Rev. 1071 (2017) (noting that credit card companies charge Black and Latinx customers more fees and higher interest rates).

134. *See* BARADARAN, *supra* note 8, at 1–10 (discussing the increased costs of people's use of alternative financial services rather than traditional banks).

135. *See* SERVON, *supra* note 128, at xvii (defining unbanked and underbanked); Gerald Apaam et al., *2017 FDIC National Survey of Unbanked and Underbanked Households* 1 (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017report.pdf (reporting 2017 figures).

136. Apaam et al., *supra* note 135, at 3 fig.ES.3.

137. *Id.*; Martha Perine Beard, *In Depth: Reaching the Unbanked and Underbanked*, FED. RSRV. BANK ST. LOUIS (Jan. 1, 2010), [https://perma.cc/HQM9-HJAR] (reporting that the 15.5% of Native Americans are unbanked). Asian American households have a lower unbanked rate of 2.5%, on par with white American households' 3% unbanked rate. Apaam et al., *supra* note 135, at 3 fig.ES.3.

30.4% of Black, 28.9% of Latinx, and 28% of "other" households were underbanked in 2017.[138]

In the remainder of this Part, we focus on three examples at the intersection of race and ethnicity and debt inequality: home loans, student loans, and payday and other alternative financial services. Through these examples, we detail how debt inequality compounds income inequality and exacerbates the racial and ethnic wealth gaps. In Part IV, we call upon these examples' lessons to critique emerging fintech "innovations" in consumer banking and lending.

A. Debt Inequality in the Home Mortgage Market

The promise of the socio-economic benefits of homeownership is central to the story of the American dream.[139] Instead of reaping rewards from homeownership, racial and ethnic minorities instead have fallen prey to sub-prime home loans and have experienced the worst of the Great Recession's housing market collapse.[140] The rise of federal policies designed to encourage homeownership brought the advent of "nontraditional" mortgage products, including loans with high "subprime" interest rates, balloon payments, and relaxed lending requirements.[141] Bankers characterized these loans as "affordability" products that would help lower-income Americans realize the dream of homeownership.[142] In reality, many of these products were "toxic."[143] Fueled in large part by an unregulated securitization market, in the years leading to the housing market's collapse, their availability skyrocketed.[144]

These products were marketed forcefully to prospective Black and Latinx homeowners. In 2005 and 2006, about 34% and 36% of all homebuyers, respectively, were sold a nontraditional mortgage.[145] Yet around the same time, over 40% of these subprime mortgages and 25% of refinanced loans were sold to

138. Apaam et al., *supra* note 135, at 20 tbl.3.3. Asian American households also have a lower underbanked rate of 17.5%, again on par with white American households' 14.1% underbanked rate. *Id.*

139. *See* Dickerson, *supra* note 109, at 189.

140. *See supra* text accompanying notes 109–22.

141. *See* Dickerson, *supra* note 109, at 196–98 (overviewing these explicit and implicit programs, such as tax subsidies).

142. *See id.* at 196–202 (discussing these "affordability products").

143. *See id.* As David Skeel and others have noted, while access to credit increased, that increased access is an expensive double-edged sword. Skeel, *supra* note 118, at 1723–24.

144. *See* Dickerson, *supra* note 109, at 203–06 (detailing these rise of "affordability products"); andré douglas pond cummings, *Families of Color in Crisis: Bearing the Weight of the Financial Market Meltdown*, 55 HOWARD L.J. 303, 304 (2012) (noting the "impact of Wall Street's fascination with securitizing subprime mortgages, creating worthless collateralized debt obligations, and trading these unregulated exotic instruments"); JENNIFER TAUB, OTHER PEOPLE'S HOUSES: HOW DECADES OF BAILOUTS, CAPTIVE REGULATORS, AND TOXIC BANKERS MADE HOME MORTGAGES A THRILLING BUSINESS, at X (2015) (detailing how lax government regulation allowed for the growth of the subprime "toxic" mortgage market); KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 17 (2011) (discussing the home loan securitization market).

145. *See* Dickerson, *supra* note 109, at 203.

Black Americans, despite that Black Americans made up just 13% of the population.[146] Black and Latinx borrowers were more than five times as likely to have a subprime mortgage than white borrowers.[147] They also were more likely to carry subprime mortgages even if they qualify for better, traditional mortgages.[148]

These subprime and adjustable rate mortgages disproportionally sold to Black, Latinx, and other minority borrowers contributed to the Great Recession.[149] They also wiped out what little wealth many minority families had managed to accumulate in homes.[150] In *Foreclosed*, Christopher Odinet details how Wells Fargo and other lenders made a point of targeting Black borrowers for home loans and refinancing.[151] Lenders referred to subprime loans made in minority communities as "ghetto loans."[152] Some lenders used biblical names to attract religious borrowers and even held events at Black churches to try to sell the loans as good deals.[153] By 2008, 50% of all loans made to Black borrowers were subprime and Black borrowers were 2.4 times as likely as white borrowers to purchase a subprime loan.[154] Again, this was true even though many borrowers were equally creditworthy.[155]

That lenders nicknamed these loans "ghetto loans" is telling of how banks and real estate agents marketed homeownership to Black and other minority families. As detailed by Mechele Dickerson in *Homeownership and America's Financial Underclass* and as evidenced by the neighborhood segregation that persists today across America, minorities were steered toward predominately minority neighborhoods.[156] Homes in these neighborhoods were worth less than similar homes in predominately white neighborhoods and were less likely to appreciate in value over time, both of which made it harder for minorities to reap

146. *See* Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 177–78 (2010).

147. *See id.* at 178; Theresa Singleton et al., *Subprime and Predatory Lending in Rural America: Mortgage Lending Practices That Can Trap Low-Income Rural People*, CARSEY INST. (2006), https://scholars.unh.edu/cgi/viewcontent.cgi?article=1014&context=carsey [https://perma.cc/6ZUA-426E] (finding that rural minorities are more like than rural whites to take out high APR loans).

148. *See* Orin Bar-Gil & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 66 (2008) (noting that "minority borrowers are incurring prices on their loans that are higher than is warranted by their credit characteristics."); Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 679–87 (2008) (detailing data pre-Great Recession regarding mortgage rates sold to minorities versus white Americans).

149. *See* Johnson, *supra* note 146, at 181–82; Manuel Adelino et al., *The Role of Housing and Mortgage Markets in the Financial Crisis*, 10 ANN. REV. FIN. ECON. 25 (2018) (detailing the role of subprime mortgages and the inflated housing prices had in the Great Recession).

150. *See* cummings, *supra* note 144, at 309.

151. CHRISTOPHER K. ODINET, FORECLOSED: MORTGAGE SERVING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA 21 (2019).

152. *Id.*

153. *Id.*

154. *Id.* at 22.

155. *Id.*; *see also* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1280–297 (2002) (detailing how lenders moved from subprime mortgages to even more costly loans).

156. *See* DICKERSON, *supra* note 109, at 191

the wealth rewards of homeownership.[157] Likewise, even when Black and other minority families live in predominately white neighborhoods, their homes are often worth less.[158] In addition, because Black and other minorities carried subprime loans, more of their monthly mortgage payments went to paying accrued interests and fees than principal, which hindered wealth building.[159]

The effects of location and loan prices meant that Black and Latinx homeowners entered the Great Recession with 13% more mortgage debt than comparable white homeowners.[160] They also had accrued 26% less equity in their homes as compared to similar white homeowners.[161] Once the recession hit, Black and Latinx homeowners witnessed their property values decrease by 20%, as compared to the 13% decrease experienced by white homeowners.[162] In part because of their higher use of subprime loans, Black and Latinx families' homes also were disproportionately foreclosed upon by their lenders, which served to destabilize home values in predominately minority neighborhoods even more.[163] The ultimate result was that the collapse of the housing market obliterated the vast majority of Black and Latinx families' wealth, much more so than white families.[164]

There are three key takeaways from the story of debt inequality in the home mortgage market. First, the government played a large role in promoting homeownership through policies and laws, while simultaneously allowing the subprime mortgage and securitization markets to grow exponentially in a short period of time.[165] These factors made it economically tenuous for Black Americans and other minorities to purchase homes.[166] Second, debt inequality exacerbates the racial wealth gap. High foreclosure rates, fueled by the higher incidence of subprime loans, eliminated most of the wealth gains that Black and Latinx families managed to achieve in the preceding decades.[167] Given that white Americans saw gains from homeownership over the same period, the debt inequality

157. *See id.* at 188–90 (discussing home price disparities).

158. *See id.*; Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1140 (2019) (arguing that mixed-income housing, designed to facilitate racial and economic integration, replicates race and class assumptions).

159. *See* DICKERSON, *supra* note 109, at 191–92 (discussing the impact of subprime loans on wealth accumulation); TAYLOR, *supra* note 22 (discussing how the promise of homeownership failed Black and Latinx Americans).

160. DICKERSON, *supra* note 109, at 192.

161. *See id.*

162. *See id.* (overviewing these figures).

163. *See id.* at 192–93 ("Two years after the recession ended, approximately 25 percent of Latin[x] and [B]lack homeowners had either lost their homes to foreclosure or were seriously delinquent on mortgage loans that were approved between 2004 and 2008, while only 12 percent of white homeowners had lost their homes or were seriously delinquent."); Johnson, *supra* note 146, at 181–82 (discussing the neighborhood effects of foreclosure).

164. *See* DICKERSON, *supra* note 109, at 193–94; LINDA E. FISHER & JUDITH FOX, THE FORECLOSURE ECHO: HOW THE HARDEST HIT HAVE BEEN LEFT OUT OF THE ECONOMIC RECOVERY 2 (2019) (discussing the effects of foreclosure on home prices and on wealth building).

165. *See* DICKERSON, *supra* note 109, at 264–65 (noting these dynamics).

166. *See id.* at 264.

167. *See id.* at 192–94.

also may have transferred wealth from minority to other households.[168] Third, communities of color still face debt inequality when taking out home mortgages.[169] A 2018 study found that Black and Latinx families are denied mortgage loans at higher rates than similarly situated white families, meaning they likely continue to face discrimination in mortgage lending.[170]

B. Debt Inequality in the Student Loan Market

Education also is part of the American dream. Across racial and ethnic groups, higher education generally confers economic and social benefits, and brings lower rates of unemployment and higher incomes.[171] Because the cost of college has skyrocketed in recent decades, parents and students have turned to public (federal and state governments) and private student loans to finance the cost of education.[172] In 2016, 69% of all graduates left school with student loans, which averaged $29,650.[173] By comparison, in 1996, 58% of students graduated with student loans, which averaged $12,750.[174] Americans now owe $1.5 trillion in student debt, more than double what they owed a decade ago.[175]

A key factor in the increase of incurrence and amount of student loans is the emergence and growth of private educational institutions. In 2016, 66% and 68% of graduates from public and nonprofit colleges had student loans, averaging $26,900 and $31,450, respectively.[176] In comparison, 83% of graduates from for-profit colleges had student loans, averaging $39,900.[177]

As with homeownership, the loans that Black students take out to finance this part of the American dream decrease their ability to accumulate wealth.[178] Black students are more likely to take out loans, are more likely to pay more for those loans, and are more likely to attend for-profit colleges.[179] Focusing again

168. *See id.* at 191–92.

169. *See id.* at 192.

170. Aaron Glantz & Emmanuel Martinez, *Kept Out: For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL (Feb. 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership [https://perma.cc/V8C2-S9DS].

171. *See* Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J. COLL. & U. L. 47, 64 (2011) (overviewing these benefits).

172. *See* Christopher Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617, 1625–28 (2019) (overviewing the student loan market); Jonathan Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 1561, 1575–79 (2015) (discussing the rise in student loans).

173. *See Quick Facts About Student Debt*, INST. FOR COLL. ACCESS & SUCCESS (April 2019), https://ticas.org/files/pub_files/qf_about_student_debt.pdf [https://perma.cc/WRT8-G3V7].

174. *See id.*

175. *See* Anthony Cilluffo, *5 Facts About Student Loans*, PEW RSCH. CTR.: FACTTANK (Aug. 13, 2019), https://www.pewresearch.org/fact-tank/2019/08/13/facts-about-student-loans/ [https://perma.cc/RPT8-WDPD].

176. *Quick Facts About Student Debt*, *supra* note 173.

177. *See id.*

178. *See* Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOCIAL CURRENTS 199, 199 (2017).

179. *See id.* at 199–200 (explaining that the growth in educational debt among people of color resulted from "predatory inclusion," in which lenders offered loans to Black households on exploitative terms); Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2017, 9:00 AM), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/ [https://perma.cc/2R38-26YB].

on 2016 data, 85% of Black students graduate college carrying loans, as compared to 69% of white students, 66% of Latinx students, and 45% of Asian students.[180] Their loan balances also are significantly higher: $34,000, on average, as compared to the $30,100 owed by white students and the $25,450 owed by Latinx and Asian students.[181] A Brookings Institute study from 2016 likewise found that Black students owed more on their federal undergraduate loans four years after graduation than they did immediately upon graduation, a result caused by negative amortization.[182] In comparison, the same study found that only 17% of white students saw their loans rise during that four-year period post-graduation.[183]

Nearly half of Black students, overall, default on their loans.[184] The percent is even higher, two-thirds, for Black students holding loans to pay for education at for-profit colleges.[185] In comparison, the default rate is 21% for white students and 36% for Latinx students.[186] Debt to finance education at for-profit institutions similarly hits Latinx students harder than white students. Latinx students are more likely to drop out of those institutions, which impacts their earnings potential and ability to pay educational debt.[187]

The consequence of debt inequality in the student loan market is that Black students, in particular, carry a larger than proportionate share of the increasing costs of a higher education, so much so that the current student loan system has been called "a crisis for African American borrowers."[188] Student loan debt imperils the ability of families to save money, purchase homes, and otherwise begin

180. *See Quick Facts About Student Debt*, *supra* note 173. Asian-American students' loan loads may be lower because they have the highest unmet financial need. *See* Mythili Sampathkumar, *Asian-American College Students Have Highest Amount of Unmet Financial Need, Study Finds*, NBC NEWS (Jan. 24, 2019, 7:36 AM), https://www.nbcnews.com/news/asian-america/asian-american-college-students-have-highest-amount-unmet-financial-need-n961476 [https://perma.cc/4282-BN2G].

181. *See Quick Facts About Student Debt*, *supra* note 173; Miller, *supra* note 179.

182. Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation*, BROOKINGS (Oct. 20, 2016), https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/ [https://perma.cc/G225-UCCJ].

183. *Id*. Latinx students also see their student loan balances fall as they pay post-graduation. *See* Miller, *supra* note 179.

184. *See* Miller, *supra* note 179.

185. *See id.*

186. *See id.* at tbl.4. The default rate is also lower for white and Latinx students with loans to finance their education at for-profit colleges. *See id.* at tbl.5.

187. *See Quicksand: Borrowers of Color & the Student Debt Crisis*, CTR. FOR RESPONSIBLE LENDING 8–9 (Sept. 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student-debt-crisis-jul2019.pdf [https://perma.cc/G3KX-3F7U] (discussing outcomes for Latinx students with loans). There is a dearth of information about educational outcomes and loans for Native American students. *See* Francie Diep, *Why Student Loans Don't Work for Native American Students*, PAC. STANDARD (June 14, 2017), https://psmag.com/news/why-student-loans-dont-work-for-native-american-students [https://perma.cc/EC42-SCQB] (discussing what little data exists).

188. Ben Miller, *Who Are Student Loan Defaulters*, CTR. FOR AM. PROGRESS (Dec. 14, 2017, 12:01 AM), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/12/14/444011/student-loan-defaulters/ [https://perma.cc/2GGJ-D8QK]; *see also* Dalié Jiménez & Jonathan Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 131 (detailing how "student indebtedness works systematically to disadvantage those students who belong to groups historically subordinated on the basis of race").

to accumulate wealth.[189] Debt inequality in the student loan market further reinforces existing social stratification and contributes to the inheritance of racial economic disparities across generations.[190] A recent study showed that 5% of the mean wealth gap between Black and white households can be explained by their differing use of student loans.[191] Stated simply, student loans have become yet another instance of racial and ethnic inequality in contemporary consumer debt markets.[192]

C. Debt Inequality in the Payday and Other High-Cost, Short-Term Loan Markets

The "fringe economy"—payday and other short-term loans—is perhaps the best-known market for consumer debt built partly on racial and ethnic disparities in the need for credit.[193] Research has shown that more than 75% of Americans live paycheck-to-paycheck and nearly 40% of Americans cannot cover a $400 emergency expense with cash, savings, or a credit card paid off within a month.[194] Many of these people also are unbanked or underbanked.[195] To cover daily expenses, such as food and utilities, every year, about 30 million Americans will turn to payday and other high-cost loans marketed as short-term stopgaps.[196] Despite being the most financially vulnerable, these Americans spend the most for access to credit to meet their everyday expenses.[197] For instance, they spend $3.4 billion in fees per year on payday loans alone.[198]

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189. *See* Venoo Kakar et al., *Does Student Loan Debt Contribute to Racial Wealth Gaps? A Decomposition Analysis*, 53 J. CONSUMER AFFS. 1920, 1922–24 (2019) (discussing these studies).

190. *See* Jiménez & Glater, *supra* note 188, at 7–8.

191. Kakar et al., *supra* note 189, at 1922.

192. In response to the private student loan market, lenders are using non-traditional data to make lending decisions. These lenders promise to deliver lower-cost, better tailored credit to students, with the potential for improving lending outcomes, allowing Black and other minority students to better reap the benefits of education. *See* Odinet, *New Data*, *supra* note 172, at 1619–21.

193. *See* Christopher K. Odinet, *Payday Lenders, Vehicle Title Loans, and Small-Value Financing: The CFPB's Proposal to Regulate the Fringe Economy*, 133 BANKING L.J. 263, 263, 265–68 (2015) (defining "fringe economy").

194. Emmie Martin, *The Government Shutdown Spotlights a Bigger Issue: 78% of US Workers Live Paycheck to Paycheck*, CNBC (Jan. 9, 2019, 10:39 AM), https://www.cnbc.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-live-paycheck-to-paycheck.html [https://perma.cc/R34L-CUXF]; *Report on the Economic Well-Being of U.S. Households in 2018*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (May 2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/G497-75JG]; *see also* Foohey et al., *supra* note 30, at 136 (detailing more recent studies about Americans' little savings).

195. *See supra* notes 135–138 and accompanying text.

196. *See* Odinet, *supra* note 193, at 265; *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, PEW CHARITABLE TRUSTS 5 (July 18, 2012), https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2012/payday-lending-in-america [https://perma.cc/YP4B-R9ZR] (finding that 69% of payday loan customers use the loan to cover recurring expenses).

197. *See* Nathalie Martin, *Regulating Payday Loans: Why This Should Make the CFPB's Short List*, 2 HARV. BUS. L. REV. ONLINE 44, 44–45 (2011).

198. *See* Anand Giridharadas, *Want a Steady Income? There's an App for That*, N.Y. TIMES (Apr. 25, 2019), https://www.nytimes.com/2015/05/03/magazine/want-a-steady-income-theres-an-app-for-that.html [https://perma.cc/S329-CVC4].

Payday loans (and newer, but similarly high-cost installment loans) are the most common fringe products.[199] There are more payday lending outlets in America than there are McDonalds or Starbucks.[200] Payday loans require borrowers to have a paycheck against which to borrow, usually around $100 to $500, with a typical term of a week to a month.[201] Borrowers also give lenders access to their bank accounts or postdated checks, against which lenders charge interest and fees.[202] Payday loans are marketed as temporary, short-term loans, and, as such, lenders state that they depend on high-volume and relatively high interest rates to make any profit.[203] Nonetheless, most payday loans are rolled-over at least once, the average payday loan customer remains indebted for 55% of the year, and 90% of payday lenders' profits are made from borrowers with a sequence of five or more loans per year.[204]

Because customers roll over the loans, stating interest rates in annual terms is most accurate. Typical payday loans' fees and fees for high-cost installment loans interests equate to 400% to over 1,100% annual percentage rates ("APRs").[205] These interest rates and fees, combined with roll-overs, amount to paying an average of between $500 and $600 in interest per loan, equaling about 36% of a borrower's pretax paycheck.[206] Stated differently, payday loan customers use more than a third of their income to repay payday loans, ultimately paying more in fees than the original loan amount.[207] Payday lenders are analogized to loan sharks with good reason.[208]

The federal government has played a key role in allowing payday loans' annual interest rates to remain high. Although usury laws historically were important to state and federal governments, the Supreme Court's 1978 decision in *Marquette National Bank v. First Omaha Service Corp.* created an unregulated

199. *See* Odinet, *supra* note 193, at 266; Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564 (2010) (noting the growth of the industry); Caroline Malone & Paige Marta Skiba, *Installment Loans*, 1–2 (Vand. U. L. Sch., Working Paper No.20-04, 2019), https://ssrn.com/abstract=3497095 [https://perma.cc/ZA7M-WTAE] (describing installment loans, noting that lenders typically charge an APR of 125% for these loans, and concluding that "installment loans may cause additional financial strain rather benefits to consumers.").

200. *See There Are More Payday Lenders in U.S. Than McDonald's*, NBC NEWS (Nov. 24, 2014, 2:16 PM), https://www.nbcnews.com/business/economy/there-are-more-payday-lenders-u-s-mcdonalds-n255156 [https://perma.cc/52EJ-ZKCX].

201. Odinet, *supra* note 193, at 266.

202. *See id.* at 275; BARADARAN, *supra* note 8, at 111.

203. *See* Odinet, *supra* note 193, at 266.

204. *See* BARADARAN, *supra* note 8, at 111–12 (overviewing these statistics); Martin, *supra* note 199, at 573–76 (detailing the importance to payday lenders of repeat customers); Kathleen Burke et al., *CFPB Data Point: Payday Lending*, CONSUMER FIN. PROT. BUREAU 4 (Mar. 1, 2014), https://ssrn.com/abstract=3274836 [https://perma.cc/Z2WS-NTG2] (overviewing similar statistics).

205. *See* BARADARAN, *supra* note 8, at 112; Martin, *supra* note 199, at 564–65 (discussing lenders in New Mexico).

206. *See* BARADARAN, *supra* note 8, at 112; SERVON, *supra* note 128, at 81–83 (describing payday loans).

207. *See Payday Loan Facts and the CFPB's Impact*, PEW CHARITABLE TRUSTS (Jan. 14, 2016), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact [https://perma.cc/39JP-N9F7].

208. *See* Robert Mayer, *Loan Sharks, Interest-Rate Caps, and Deregulation*, 69 WASH. & LEE L. REV. 807, 809 (2012) (comparing loan sharks and payday lenders); Martin, *supra* note 199, at 577 (concluding that "the debt trap *is* the business plan" of payday lenders).

regime that payday loan providers have exploited to maintain high APRs.[209] Some states, cities, and small municipalities have enacted local legislation, but with the proliferation of online payday loan outlets and other loopholes, federal regulation is needed to tamp down on high interest rates.[210] Prior to the 2016 election, the Consumer Financial Protection Bureau ("CFPB"), which is tasked with consumer protection in the financial sector, entered the regulatory fray.[211] But even if it was to regulate payday loans in the future, the CFPB does not have the ability to set interest rates, which is left to Congress.[212] The only context in which Congress has regulated interest rates is loans made to military personnel via Military Lending Act ("MLA"), enacted in 2007, which places a 36% interest rate cap on consumer loans.[213] Most recently, Representative Maxine Waters, chairwoman of the House Financial Services Committee, stated that in the 2020 session, she will advance a bill to impose a limit on interest rates which will extend the MLA to all Americans.[214]

The demographics of payday loan customers reflect the demographics of income inequality in America, combined with marketing targeted to specific communities.[215] Payday loan customers have low to moderate incomes and generally have steady jobs.[216] Single women with children, Black Americans, Latinx Americans, and recent immigrants are more likely to use payday loans and other fringe products than other groups.[217]

In California in the 2000s, for example, less than 5% of all adult residents eligible for a payday loan, such as because they had a bank account, were Black,

209. *See* Christopher L. Peterson, *"Warning: Predatory Lender"–A Proposal for Candid Predatory Small Loan Ordinances*, 69 WASH. & LEE L. REV. 893, 897 (2012); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1111–22 (2008).

210. *See* Robert N. Mayer & Nathalie Martin, *The Power of Community Action: Anti-Payday Loan Ordinances in Three Metropolitan Areas* 1 (Jan. 2017), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1355&context=law_facultyscholarship [https://perma.cc/DAE2-XY4S] (analyzing campaigns in three locales to enact ordinances that restrict payday lending).

211. *See generally* Odinet, *supra* note 193.

212. *See* Martin, *supra* note 199, at 48.

213. 10 U.S.C. § 987(b); *see* Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 649 (2012); Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653, 687–89 (2005).

214. *See* Sylvan Lane, *House Chairwoman Backs Interest Rate Cap on Payday Loans*, HILL (Dec. 20, 2019, 1:58 PM), https://thehill.com/policy/finance/475511-house-chairwoman-eyes-interest-rate-cap-on-payday-loans [https://perma.cc/TL7Y-J7Q7].

215. *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, *supra* note 196, at 4.

216. *See* BARADARAN, *supra* note 8, at 115.

217. *See id.* (noting who uses payday loans); Jerzy Eisenberg-Guyot et al., *From Payday Loans to Pawnshops: Fringe Banking, The Unbanked, and Health*, 37 HEALTH AFFS. 429, 430 (2018) (noting who uses payday loans); Nathalie Martin, *Giving Credit Where Credit Is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989, 1030–31 (2015) (noting that because undocumented immigrants often do not have the regular paycheck or bank account needed for payday loans, they often use title loans instead); Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI.-KENT L. REV. 65, 67–69 (2014) (discussing why women may use payday loans more often than men).

yet Black residents made up 18.7% of all borrowers in California.[218] A quarter of the population in California eligible for a payday loan was Latinx, and yet 37% of payday borrowers were Latinx.[219] In comparison, 44.5% of all residents in California eligible for a payday loan were white, but only 36% of payday borrowers were white.[220] Similarly, the records of one of the largest Texas-based payday lenders showed that 77% of the loans were issued to Black and Latinx customers despite these groups comprising only 40% of the population.[221] Overall, the odds of payday loan usage are 105% higher for Black households than other households.[222]

Payday lenders understand their customers' reality and feelings, and lenders expertly play on these realities and feelings.[223] Across America, lenders locate their shops in low-income neighborhoods with high Black and Latinx populations.[224] Outlets are more common in minority communities even when those

218. Wei Li et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, CTR. FOR RESPONSIBLE LENDING 4 (Mar. 26, 2009), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/predatory-profiling.pdf [https://perma.cc/G3ZX-3M9W].

219. *Id.*

220. *Id.*

221. Aracely Panameño & Keith Corbett, *Wealth Stripping Payday Loans Trouble Communities of Color*, CTR. FOR RESPONSIBLE LENDING 4 (Oct. 2, 2008), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/az-payday-communities-of-color-10-2-final.pdf [https://perma.cc/QS5D-TBP2].

222. *Payday Lending in America: Who Borrows, Where They Borrow and Why*, *supra* note 196, at 9. Native Americans also face financial issues that lead them to turn to payday loans to income smooth. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 754–55 (2012). Native American tribes also exploit sovereign immunity to operate payday loan outfits that offer high APR loans because they circumvent state usury laws. *See id.* at 755 (noting that these outfits often only benefit non-Native Americans). Payday loan companies' partnerships with tribes have come under heightened scrutiny over the past decade. *See* Kyra Taylor et al., *Stretching the Envelope of Tribal Sovereign Immunity?: An Investigation of the Relationship Between Online Payday Lenders and Native American Tribes*, PUB. JUST. FOUND. 4–5 (Nov. 2017), https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf [https://perma.cc/R5WS-ZVXB].

223. *See generally* GARY RIVLIN, BROKE, USA: FROM PAWNSHOPS TO POVERTY, INC.: HOW THE WORKING POOR BECAME BIG BUSINESS (2011) (detailing payday lenders' business practices). Returning to *Good Girls*, its writers were spot on in crafting dialogue between Ruby Hill and the cashier at a payday loan outfit, where she goes to pay all of her and her husband's loans. *See* Michelle Patterson, *'Good Girls' Recap: 'One Last Time'*, CROOKEDLLAMA (May 7, 2019), https://crookedllama.com/good-girls-recap-one-last-time/ [https://perma.cc/EM2U-CPYW]. Ruby lays out six stacks of cash, which she labels as "my principle, my interest, my service fees, my dignity, my happiness, and my soul." *Id.* As she leaves, the cashier states "I'll see you next month." *Id.* Ruby replies "I won't be coming back," to which the cashier states "everyone comes back." *Id.*; *see also supra* text accompanying notes 2–5.

224. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 100 (2001) (discussing a study that showed that minority households are significantly more likely to live within a mile of such a lender than nonminority households); Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, CTR. FOR RESPONSIBLE LENDING 1, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-mile-high-money-aug2017.pdf (Feb. 2018) [https://perma.cc/VJ4Q-EWLV] ("Majority-minority areas in Colorado (over 50% African-American and Latino) are nearly twice as likely to have a payday store than all other areas . . .."); Brandon Coleman & Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers*, CTR. FOR RESPONSIBLE LENDING 8 (March 2016), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016.pdf [https://perma.cc/56UY-YHDL] (finding that Florida payday lenders are more highly concentrated in minority communities even when accounting for income); Li et al., *supra* note 218, at 2, 10 (finding that in California, Black and Latinx households are two and a half times closer to the nearest payday lender than

communities are not low income, suggesting that race is a factor in store location regardless of income.[225]

The presence of payday lenders and other alternative financial service companies like tax refund loans in communities of color does not automatically mean people in those neighborhoods will use their products. But these lenders market their loans to residents near where they locate their brick-and-mortar stores.[226] They hire celebrities, such as Magic Johnson and Tavis Smiley, to pitch their products as beneficial and to frame their companies as trustworthy.[227] They also hire persons of color to go to Black churches to persuade pastors to argue against regulations limiting the loans, offer money for summer camp, and pay finder's fees for new loans.[228]

Combined with the propensity of people to shop at places near their homes and jobs, people are more likely to use a payday lender when they live near one.[229] A study recently conducted by one of the authors of this Article found that the distance of payday lenders from people's home addresses is associated with a decreased likelihood of payday loan use.[230] It further found that increases in the density of payday lenders within a mile and a half of the people's homes are associated with an increased likelihood of payday loan use.[231] In other words, more payday lenders in a neighborhood leads to more use of payday loans.[232]

Other prominent players in the fringe economy are pawnshops, rent-to-own companies, and title lenders. These lenders extend credit to customers who can offer collateral, such as furniture and cars, and who do not necessarily have a bank account or the ability to write a postdated check, as required by payday

white households, and that payday lenders are almost eight times as concentrated in neighborhoods with the largest shares of Black and Latinx households as compared to white neighborhoods); Uriah King et al., *Race Matters: The Concentration of Payday Lenders in African-American Neighborhoods in North Carolina*, CTR. FOR RESPONSIBLE LENDING 2 (Mar. 22, 2005), https://www.responsiblelending.org/payday-lending/research-analysis/rr006-Race_Matters_Payday_in_NC-0305.pdf [https://perma.cc/YQU4-2GD5] (finding similar in North Carolina).

225. *See* Li et al., *supra* note 218, at 14; Davis, *supra* note 224, at 2.

226. *See* Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 167 (2010) (noting marketing).

227. *See id.* at 197–99 (describing a court decision that noted that using minority persons in advertising is a way to legitimize loan products as discrimination).

228. *See id.* at 195–96.

229. Younghee Lim et al., *Nefarious Neighbors: How Living Near Payday Loan Stores Affects Loan Use*, 88 MISS. L. REV. 333, 339 (2019).

230. *Id.* at 364. This study utilized data collected via Public Access to Court Electronic Records ("PACER") from chapter 7 cases filed in the Bankruptcy Court for the Middle District of Louisiana. Filers' home addresses, as well their rate of payday loan usage, were culled from the schedules. The authors also gathered payday lender locations in the filers' geographical area. Regression analysis was used to assess payday loan usage, as the dependent variable, as against the Euclidean distance or straight-line distance in miles between the bankruptcy filers' home addresses and the nearest payday lender, and the density of payday loan stores, measured as the number of payday lenders within a 1.5-mile radius of the filers' home addresses. The study also measured four community-level control variables—bank distance, bank density, credit union distance, and credit union density—in a manner consistent with the payday lender distance and density variables. *Id.* at 358–62.

231. *Id.* at 364–65.

232. *Id.* at 365.

lenders.[233] These loans come with similarly high interest rates and often high default rates.[234] Title loans also come with the risk of losing the car or other collateral upon default.[235]

As with payday loans, research shows that lower-income individuals, Black Americans, and Latinx Americans disproportionately use these other fringe products.[236] It does not seem coincidental that both of these groups are more likely to be unbanked or underbanked.[237] Part of the puzzle of why minorities turn to payday and other fringe lenders is the flight of traditional banks from neighborhoods of color. Many bankers have decided that "[p]roviding financial services to the poor is fundamentally unprofitable."[238] As a result, banks have moved out of lower-income neighborhoods, where communities of color are concentrated, allowing fringe banking to move in.[239]

Use of payday and other high-cost, short-term loans are an enduring reflection of debt inequality among communities of color.[240] As with subprime mortgages and student loans, they trap customers in a cycle of debt that gets deeper and deeper. The income that borrowers could have saved instead goes to mounting interest and fees, further eroding their financial stability and opportunities to amass assets.[241]

If the growth in the racial and ethnic wealth gaps in America is to be halted and reversed, addressing the terms on which communities of color access credit must be prioritized. The next Part details and critiques three new innovations in consumer banking and lending that promise to provide broader access to banking and credit services at "better" terms and that could siphon less income to lenders, allowing greater savings and wealth building. These products also could increase the wealth gap, demonstrating that they must be designed and regulated with

233. *See* Odinet, *supra* note 193, at 265–67 (discussing these products); Kathryn Fritzdixon et al., *Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1014–15 (2014) (overviewing the title loan industry); Marieke Bos et al., *The Pawn Industry and Its Customers: The United States and Europe* 4–7 (Vand. U. L. Sch., Working Paper No. 12-26, Sept. 2012), https://ssrn.com/abstract=2149575 [https://perma.cc/4R69-RZNZ] (overviewing the pawn industry).

234. *See* Odinet, *supra* note 193, at 265–67; James P. Nehf, *Secured Consumer Credit and the Fringe Banking Industry*, *in* SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 20A (J.B. McDonnell ed., 2005) (overviewing these products); BARADARAN, *supra* note 8, at 113 (discussing title lender interest and default rates). The overall default rate is low for pawning, though most (80% to 90% of) customers default at least once. *See* Bos et al., *supra* note 233, at 11.

235. *See* Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41, 45 (2012).

236. *See* Fritzdixon et al., *supra* note 233, at 1030–34 (overviewing demographic findings); Martin & Longa, *supra* note 5, at 552 (noting that title lenders are more likely to open stores in "low-income neighborhoods with moderate poverty, where a large percentage of the residents are members of racial/ethnic minority groups, young or elderly, or recent immigrants.").

237. *See* Fritzdixon et al., *supra* note 233, at 1035 (finding that 40% of respondents who used title loans likely were unbanked).

238. Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 493 (2013) (quoting Sow Hup Chan, *An Exploratory Study of Using Micro-Credit to Encourage the Setting Up of Small Businesses in the Rural Sector of Malaysia*, 4 ASIAN BUS. & MGMT. 455, 456 (2005)).

239. *Id.* at 491.

240. *Id.* at 494–95.

241. *See* Younghee Lim et al., *Payday Loan Use and Consumer Well-Being: What Consumers and Social Workers Need to Know About Payday Loans*, 18 J. POVERTY 379, 384 (2014).

closing the wealth gap in mind. With this background, Part V sets forth tenets that all proposals for building wealth should include to ensure that consumer credit does not continue to extract people's potential savings.

IV. Fintech "Advances" in Consumer Banking and Lending

The fintech sector has exploded in recent years, so much so that it is "heralded as the future of finance."[242] For this Article's purposes, the key aspect of fintech is a platform that replaces or enhances "traditional" banking and credit services.[243] Fintech firms include payment and settlement companies, such as Venmo and Square, investment companies, such as Acorns and Betterment, and credit firms, which provide loans to individuals and businesses, such as emerging private student loan providers and mortgage lenders.[244]

This Part details three recent innovations in consumer banking and lending that draw on fintech, all of which have been heralded as having the potential to change how Americans access financial services. The first, payroll cards, is the oldest and is the least connected with the evolving fintech market.[245] As the initial "entry" into the market for credit and banking services for lower-income individuals, who often also are unbanked or underbanked, the brief discussion of payroll cards provides a baseline for the analysis of new products. The second and third, wage access programs and auto finance, have emerged in the past couple years and should be central to discussions about the potential benefits of fintech banking and lending. Collectively, these examples show the perils of relying on fintech and similar innovations as the ultimate (and often only) solution to debt inequality's link with income and wealth inequality.

A. Payroll Cards

Payroll cards essentially are reloadable gift cards, similar to the cards one might purchase at Target, Walmart, or the grocery store that allow the recipient

242. Odinet, *supra* note 172, at 1634; *see also* Odinet, *supra* note 13, at 783 (defining "fintech").

243. *See* Odinet, *supra* note 172, at 1634 (noting that "[f]ounders and advocates breathlessly claim that their platforms will change or 'disrupt' everything").

244. *See id.* at 1635 (overviewing the market); Lauren Sanders, *Fintech and Consumer Protection: A Snapshot*, NAT'L CONSUMER L. CTR. 2 (Mar. 2019), https://www.nclc.org/images/pdf/cons-protection/rpt-fintech-and-consumer-protection-a-snapshot-march2019.pdf [https://perma.cc/RT58-SA4U] (listing fintech products); Johnson et al., *supra* note 13, at 500–02 (discussing fintech financial firms that use learning algorithms); *supra* note 192 and accompanying text.

245. Payroll cards nonetheless depend on "technological innovation." Jennifer Romich et al., *A Tool for Getting By or Getting Ahead? Consumers' Views on Prepaid Cards* 3 (Networks Fin. Inst., Working Paper No. 2009-WP-09, 2009), https://ssrn.com/abstract=1491645 [https://perma.cc/3W2L-86KJ].

to spend the loaded amount at any retailer that accepts Mastercard, Visa, or similar.[246] That is, they are debit cards.[247] They are marketed to employers as alternatives to the costly process of issuing paper paychecks to employees who do not have bank accounts and thus cannot get direct deposits.[248]

Unbanked and underbanked employees typically take paper checks to check-cashing outfits, which subtract high fees and costs from the check amounts for their services, leaving employees with about 95% of their paychecks.[249] Instead of issuing paper checks, employers can load an employee's wages onto a payroll card, which the employee then can use like a debit or credit card, saving employees check-cashing fees.[250] Payroll cards can be thought of as precursors to digital money transfer services like Venmo, but without the attached bank accounts that Venmo and similar services require.[251] Payroll cards are estimated to save employers between $2.87 and $3.15 per payment,[252] and at first glance seem like a win-win for employers and employees.

For the purposes of this Article's analysis of emerging fintech innovations in banking and lending, it is useful to review the problems that employees have reported with payroll cards and how payroll cards may inhibit people's entry into mainstream banking. Payroll cards bring heightened expenses and risk of loss for employees. Most payroll cards come with usage fees that deplete employees' wages, perhaps even more so than check-cashing fees.[253] These fees include the expected point-of-sale fees and ATM fees, as well as monthly maintenance fees, "denied transaction fees," "check your balance fees," fees for calling customer service, and "overdraft" fees.[254] For instance, a 2014 New York study found that

246. *Id.*

247. *See* Claes Bell, *The Problem with Payroll Cards*, BANKRATE (July 17, 2013), https://www.bankrate.com/financing/banking/the-problem-with-payroll-cards/ [https://perma.cc/5Y42-DQ3V]; Romich et al., *supra* note 245, at 3–4.

248. *See* Bell, *supra* note 247.

249. *See* Beard, *supra* note 137 ("Unbanked consumers spend . . . between 4 percent and 5 percent of payroll check just to cash them."); Joseph J. Doyle et al., *How Effective Is Lifeline Banking in Assisting the 'Unbanked'?*, 4 CURRENT ISSUES IN ECON. & FIN. 1, 1 (June 1998), https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci4-6.pdf [https://perma.cc/2A76-4GH3] (overviewing how much an employee would save if they were banked).

250. *See* James J. Angel & Douglas McCabe, *The Ethics of Payments: Paper, Plastic, or Bitcoin?* 132 J. BUS. ETHICS 603, 608 (2015) (discussing major employers using payroll cards); Suzanne Martindale & Christina Tetreault, *Pay Me How? What You Should Know About Payroll Cards*, 48 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 69, 69–70 (2014).

251. *See* Johnson et al., *supra* note 13, at 501 (noting these services).

252. *See Regulation of Payroll Card Accounts: A Guide for Policymakers (With Model Payroll Card Legislation)*, AM. PAYROLL ASS'N (Feb. 2018), https://info.americanpayroll.org/pdfs/gov/GRTF-paycard-Reg-Payroll-Card-Accounts-APA-201802.pdf [https://perma.cc/X5H3-CBY5].

253. *See* Martindale & Tetreault, *supra* note 250, at 69–70.

254. *See id.* at 70 (overviewing fees); *Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers*, N.Y. STATE ATT'Y GEN.: LAB. BUREAU 6 (June 2014), https://ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf [https://perma.cc/2UDU-AL7L] (finding that almost all payroll card programs charged fees for card-related activities); Dana Dratch, *It Pays to Know These 5 Things About Payroll Cards*, CREDITCARDS.COM (Aug. 27, 2013), https://www.creditcards.com/credit-card-news/payroll_cards-fees-employer-1271.php [https://perma.cc/47W6-8P8C] (noting that some issuers "offer what they call 'balance protection' or 'overdraft protection,' to let transactions go through when there isn't enough money in the account to cover them," which costs upwards of $25 per incident).

payroll card fees averaged between $15.00 per employee per year to $20.00 per employee per month.[255] The report notes that "[f]or a minimum wage worker . . ., $20.00 was equivalent to almost three hours of work per month."[256]

Payroll cards also can result in employees not having access to paystubs, which provide information on hours worked, tax withholdings, and expense reimbursement.[257] In addition, payroll cards discourage bank relationships, which are thought to be one of the entry points to the middle class.[258] A banking relationship allows for easy, low-cost access to one's own money, encourages saving, and builds wealth.[259] An employer that relies on paper checks and direct deposits necessarily encourages employees to consider opening a checking account. Payroll cards, in contrast, may steer employees away from mainstream banks, exacerbating their reliance on high-cost fringe banking and credit.

Indeed, increased "use of payroll cards has paralleled the decline of other traditional financial products," particularly among the unbanked and underbanked.[260] Approximately 3.2% of unbanked and 4.2% of underbanked households used payroll cards in 2009.[261] By 2011, these percentages had increased to 5.5% and 5.3%, respectively.[262] Every year, employers load more wages onto payroll cards. In 2012, U.S. employers loaded $34.1 billion onto payroll cards.[263] By 2017, the industry expected that amount to nearly double to $68.9 billion.[264] Overall, roughly 12 million Americans use a prepaid card every month, many (but not all) of which are payroll cards provided by employers.[265] Among the unbanked and underbanked, demographically, the most likely users of payroll and prepaid cards are Black Americans.[266]

255. *Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers*, *supra* note 254, at 9.

256. *Id.*

257. Martindale & Tetreault, *supra* note 250, at 71.

258. *Id.* at 69.

259. *Benefits of a Bank Account*, WESTCHESTER, https://www.consumer.westchestergov.com/financial-education/money-management/benefits-of-a-bank-account (last visited Jan. 17, 2021) [https://perma.cc/6SJF-NHEB]; *cf.* Bell, *supra* note 247.

260. Martindale & Tetreault, *supra* note 250, at 69.

261. *Id.* at 70.

262. *Id.*

263. Dratch, *supra* note 254.

264. *See U.S. Payroll Card Programs: Paving the Path for New Revenue*, AITE GROUP (Feb. 22, 2013), https://www.aitegroup.com/report/us-payroll-card-programs-paving-path-new-revenue [https://perma.cc/8CJT-Z9LY].

265. *Why Americans Use Prepaid Cards: A Survey of Cardholders' Motivations and Views*, PEW CHARITABLE TRUSTS 1 (Feb. 2014), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardssurveyreportpdf.pdf [https://perma.cc/58M7-NMPS].

266. *Banking on Prepaid: Survey of Motivations and View of Prepaid Card Users*, PEW CHARITABLE TRUSTS 4 (June 2015), http://www.pewtrusts.org/~/media/assets/2015/06/bankingonprepaidreport.pdf [https://perma.cc/Y3G7-857R] (finding that, in the unbanked category of prepaid card users, 42% were white, 32% were Black, 16% were Latinx, and 10% were defined as another race/ethnicity.) In the banked category of prepaid card users, 60% were white, 15% were Black, 16% were Latinx, and 9% were other race/ethnicity. *Id.*

The world of payroll cards and prepaid cards more generally has been referred to as "the wild, wild west of finance."[267] Some federal and state regulations apply to payroll cards. These rules generally speak to educating people about cards' fees, and thus have not prevented these cards from being criticized as detrimental to people's savings.[268] Payroll cards receive the same protections as debit cards under the Federal Reserve Board's Regulation E, implementing the Electronic Funds Transfer Act, which requires disclosure of fees, limitations on liability, and protections from fraud.[269] Federal law also provides that employees cannot be forced to accept payroll cards.[270] About half of the states have enacted some sort of regulation dealing with payroll cards.[271] A majority of these regulations provide enhanced protections for employees receiving their wages via payroll cards.[272]

Most recently, the CFPB, which has jurisdiction over Regulation E, enacted additional rules that mainly require disclosures and limit fees.[273] Despite these regulations, including one requiring that employers who use payroll cards offer at least one alternative to employees for getting paid, worries remain.[274] Because low-wage workers are at-will employees, they have an incentive to heed employers' suggestion that employees "choose" the payroll card option.[275] This will contribute to keeping these consumers out of mainstream banking, inhibit savings, and ultimately further widen the wealth gap.

267. Dana George, *The (Mostly) Bad News About Prepaid Cards*, ASCENT (Sept. 22, 2019), https://www.fool.com/the-ascent/credit-cards/articles/the-mostly-bad-news-about-prepaid-cards/ [https://perma.cc/7VN7-WVSD].

268. *Id.*; Heather Morton, *Regulating Payroll Cards*, NAT'L CONF. STATE LEGISLATURE: LEGISBRIEF (July 2015), https://www.ncsl.org/research/financial-services-and-commerce/regulating-payroll-cards.aspx [https://perma.cc/6XT8-3Q4J].

269. *See* Morton, *supra* note 268 (detailing these regulations); Martindale & Tetreault, *supra* note 250, at 71–72 (describing federal laws applicable to payroll cards).

270. *See* Martindale & Tetreault, *supra* note 250, at 72.

271. Morton, *supra* note 268.

272. *See id.* (overviewing the state of regulation as of 2015); Martindale & Tetreault, *supra* note 250, at 73 (describing state laws applicable to payroll cards).

273. *See Summary of the Consumer Financial Protection Bureau's Prepaid Card Rule*, NAT'L CONS. L. CTR., https://www.nclc.org/issues/summary-of-cfpb-prepaid-card-rule.html (last visited Jan. 17, 2021) [https://perma.cc/U2W9-PT7N] (summarizing the new rules); *Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/ (last visited Jan. 17, 2021) [https://perma.cc/B7QZ-76MW].

274. Morton, *supra* note 268.

275. Scholars have critiqued similar instances of regulation by "nudge" and disclosure that do not benefit consumers in the ways the regulations anticipate. *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665 (2011) (concluding that "mandated disclosure repeatedly fails to accomplish its ends"); Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1174 (2013) (arguing that defaults are "slippery" such that businesses can convince consumers to opt into the behavior that the default is meant to discourage); Van Loo, *supra* note 8, at 243–44 (discussing problems with nudges and mandatory disclosures as to consumer financial products).

B. Early Wage Access Programs

Early wage access programs are one of the most recent entrants into the fintech consumer finance market, first appearing around 2014.[276] As detailed by Nakita Cuttino and Jim Hawkins in the first scholarly articles to consider the potential and pitfalls of early wage access, these programs use online platforms to allow employees to access earned but unpaid wages prior to their usual paydays.[277] These programs claim to be revolutionary alternatives to payday loans and other fringe financing, to which employees otherwise may turn in order to deal with shortfalls in income.[278] Instead of paying fees and interest on loans people use to smooth their income, early wage access programs charge per-use or monthly subscription fees.[279]

Understanding how these programs work behind-the-scenes is critical to assessing whether these programs are as revolutionary as claimed. Program providers either partner with employers for access to payroll and time-entry data or ask for similar data, such as mobile location tracking for Uber drivers, from employees.[280] From these data, providers calculate accrued wages.[281] To access their wages, as of now, employees are offered four different fees structures. Per transaction fees range from $1.99 to $5.00.[282] Per pay period fees, such as biweekly, are about $5.[283] Monthly subscriptions fees range from $6 to $8.[284] Some employers, such as Walmart, will cover employees' fees for a set, limited number of annual transactions.[285] And some services allow users to "tip," with

276. Leading wage access programs include PayActiv, DailyPay, and Earnin, each of which was launched in 2014 or 2015. *See Evolution of Pay*, PAYACTIV, https://www.payactiv.com/evolution-of-pay/ (last visited Jan. 17, 2021) [https://perma.cc/G2MJ-BMH5] (stating that PayActiv launched in 2014); *The DailyPay Movement*, DAILYPAY, https://web.dailypay.com/movement (last visited Jan. 17, 2021) [https://perma.cc/4VM4-L933] (stating that DailyPay's first customer signed up in 2015); Sage Lazzaro, *This App Promises Easy Cash, But It's a Security Nightmare Waiting to Happen*, MEDIUM (Dec. 20, 2018), https://onezero.medium.com/this-app-promises-easy-cash-but-its-a-security-nightmare-waiting-to-happen-9b5758f91d23 [https://perma.cc/926Y-WXJC] (noting that Earnin began as ActiveHours, which launched in 2014); Louis DeNicola, *These 8 Apps Can Help You Make It to Your Next Payday*, MAGNIFY MONEY (May 17, 2019), https://www.magnifymoney.com/blog/banking-apps/these-apps-can-help-you-make-it-to-your-next-payday/ [https://perma.cc/SGS2-5KWQ] (listing early wage access apps); Sanders, *supra* note 244, at 11 (noting apps).

277. Nakita Q. Cuttino, *The Rise of "Fringetech": Regulatory Risk in Early Wage Access*, 115 NW. L. REV. (forthcoming 2021) (manuscript at 1), https://ssrn.com/abstract=3531798 [https://perma.cc/LBE3-9J7C]; Jim Hawkins, *Earned Wage Access and the End of Payday Lending*, 101 B.U. L. REV. (forthcoming Mar. 2021) (manuscript at 1); *see also* Nathalie Martin & Lydia Pizzoni, *Shadow Credit and the Devolution of Consumer Credit Regulation*, 24 LEWIS & CLARK L. REV. 1439, 1485 (mentioning early wage access programs in discussing "advances" in rent-to-own).

278. Cuttino, *supra* note 277; Chris Opfer, *'Early Wage' Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, BLOOMBERG L. (Aug. 1, 2019, 5:15 AM), https://news.bloomberglaw.com/daily-labor-report/early-wage-apps-aim-to-disrupt-payday-loans-two-week-cycle [https://perma.cc/D54G-5JD4].

279. *See* Cuttino, *supra* note 277 (manuscript at 10–11); Opfer, *supra* note 278.

280. Cuttino, *supra* note 277 (manuscript at 1–2).

281. *See id.* at 2; Hawkins, *supra* note 277 (manuscript at 7–12).

282. Cuttino, *supra* note 277 (manuscript at 10).

283. *Id.* (manuscript at 10–11).

284. *Id.* (manuscript at 11).

285. *Id.*

suggested tips of $9 for a $100 withdrawal.[286] Not tipping, at all or too little, may result in the program limiting services.[287]

As with payday loans, these fees seem low at first glance. But annualizing the fees to interest rates shows that these programs can be as expensive as payday loans. For instance, under the tip-based model, for a two-week advance, the $9 suggestion calculates to an APR over 450%.[288] As Cuttino notes, even the most "affordable" programs come with fees equivalent to 73% APRs, which is more than double the interest rate of most credit cards.[289] Similarly, Hawkins calculates potential APRs as between 390% and 1,200%.[290]

Because early wage access programs are so new, there is little information about users' demographics. That the programs are marketed to lower-income individuals, such as Walmart and Noodles & Company employees, and gig-economy workers, such as Uber and Lyft drivers,[291] suggests that lower-income Americans predominately use these programs. Data from program providers, such as DailyPay, confirm that the average transfer is $66, further suggesting that people are "advancing" themselves small amounts, possibly to meet daily expenses, similar to how payday loan customers use their loans.[292] Over 90% of DailyPay users report that they use the money to pay their bills on time.[293]

How exactly early wage access programs fit within banking and credit regulation remains unexplored. Providers claim that their programs are money transmission services, not credit products, and thus not loans.[294] If the programs are

286. *Id.*

287. *Id.* (manuscript at 10–11) (overviewing fee structures); Hawkins, *supra* note 277 (manuscript at 12–14).

288. *See* Lisa Rowan, *Early Wage Apps Are a Little Too Much Like Payday Loans*, LIFEHACKER (Aug. 13, 2019, 2:00 PM), https://twocents.lifehacker.com/early-wage-apps-are-a-little-too-much-like-payday-loans-1837206504 [https://perma.cc/W7NZ-ZVLM] (noting this APR).

289. *See* Cuttino, *supra* note 277 (manuscript at 12) (calculating interest rates).

290. *See* Hawkins, *supra* note 277 (manuscript at 30–31) (calculating interest rates).

291. *See* Anneken Tappe, *These Companies Are Revolutionizing How People Get Paid*, CNN (Nov. 13, 2019, 11:46 AM), https://www.cnn.com/2019/11/13/economy/instant-access-pay-employees/index.html [https://perma.cc/US6B-AAWP]; *The Employer's View Of Early Wage Access*, PYMTS (July 25, 2019), https://www.pymnts.com/news/b2b-payments/2019/early-wage-access-employers/ [https://perma.cc/X99B-HWEK] (noting that "nearly 44 percent of gig workers in the U.S. have received either full or partial advance payment for their services—and are willing to pay fees for that advance payment, too"); Tom Groenfeldt, *Early Access To Wages, A Prized Benefit, Costs Employers Little Or Nothing*, FORBES: ENTERPRISE TECH (Apr. 18, 2019, 3:46 PM), https://www.forbes.com/sites/tomgroenfeldt/2019/04/18/early-access-to-wages-a-prized-benefit-costs-employers-little-or-nothing/#7810b5716312 [https://perma.cc/3T7Y-FK9J] (noting that Walmart partners with PayActiv); Kelsey Gee, *Workers Get Faster Access to Wages With These New Apps*, WALL ST. J. (Nov. 24, 2017, 5:20 PM), https://www.wsj.com/articles/apps-let-workers-make-every-day-a-payday-1511528400 [https://perma.cc/M6LL-JNGB] (noting Uber drivers).

292. *See* Karl Pawlewicz, *What Are On-Demand Payment Solutions?*, DAILYPAY (Aug. 8, 2018), https://www.dailypay.com/blog/what-are-on-demand-payment-solutions/ [https://perma.cc/8C6Q-T6FX]; *supra* note 196 and accompanying text.

293. Meaghan Shields, *DailyPay Announces $9 Million in Series B Funding*, CISION: PRWEB (Feb. 15, 2018), https://www.prweb.com/releases/2018/02/prweb15210839.htm [https://perma.cc/UZ7A-XLL5]; *see also* Cuttino, *supra* note 277 (manuscript at 13) (discussing early wage access program users).

294. *See* Cuttino, *supra* note 277 (manuscript at 15).

not loans, then federal and state lending laws do not apply.[295] Even so, regulators, policymakers, and consumer advocates are concerned that these program act like loans and should come with usury limits and disclosures applicable to short-term, high-cost products, such as the payday loans they seem to replace.[296] As argued by Cuttino, early wage access programs include key features of loans, most notably the intertemporal decision-making that comes with taking out money for a fee (that is, the time value of money) and the risk that people will repeatedly use the apps, leading to a cycle of over-indebtedness similar to that created by fringe lending.[297] In response, providers argue that their programs can bring unrecognized benefits to users, including financial management tools, which often come with the programs' apps.[298]

Because they are new, these products are largely unregulated.[299] As of August 2019, California legislators were considering a bill to cap transaction fees charged by early wage access programs.[300] This bill recognizes the key concern with these programs: that users will end up paying high sums simply to be paid.[301] As with check cashing and payroll cards, early wage access programs have the potential to erode employees' already slim pay.[302] They likewise have the potential to steer people away from establishing bank accounts.

Also, as with other alternative financing products, allowing people to get money they have earned before their payday does not solve the income shortage that they face. Regardless of how these products are categorized within the current banking and lending regulatory structure, like other leading products used by lower-income and minority Americans, paying fees to access income chips away at the ability to build wealth.[303] To the extent that people must access credit to smooth necessary consumption and cover unexpected expenses, it is critical to ensure that credit products minimize the potential for people to be trapped in a cycle of debt. At this time, especially given their unregulated and seemingly unclear fee structures, it remains questionable whether early wage access programs provide this assurance.[304]

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295. *See id.* at 15–23.

296. *See* Dan M. Clark, *New York Leads Multistate Investigation Into Payroll Advance Industry*, LAW.COM: N.Y.L.J. (Aug. 6, 2019), https://www.law.com/newyorklawjournal/2019/08/06/new-york-leads-multistate-investigation-into-payroll-advance-industry/?slreturn=20191131094520 [https://perma.cc/V394-X68Q] (reporting that New York was launching a nine-state investigation into early wage access programs); Penny Crosman, *A Payday Lender in Disguise? New York Investigates the Earnin App*, AM. BANKER (Apr. 3, 2019, 9:03 PM), https://www.americanbanker.com/news/a-payday-lender-in-disguise-new-york-investigates-the-earnin-app [https://perma.cc/3E2Q-GTKA].

297. *See* Cuttino, *supra* note 277 (manuscript at 24–40) (discussing the lack of transparency and competitiveness that come with these apps); Hawkins, *supra* note 277 (manuscript at 33–42) (discussing the "uncertain status" of early wage programs); *supra* Section III.C (discussing payday loans and other fringe lending).

298. *See* Sanders, *supra* note 244, at 11–12 (detailing promises and concerns).

299. *See* Cuttino, *supra* note 277 (manuscript at 5).

300. *See* Opfer, *supra* note 26 (discussing California's legislation); Hawkins, *supra* note 277 (manuscript at 47–49) (reviewing California's legislation).

301. Opfer, *supra* note 26.

302. *See supra* Section IV.A.

303. *Id.*

304. *See* Cuttino, *supra* note 277 (manuscript at 41).

C. Auto Lending Platforms

Many people also must use credit to purchase larger ticket, but still essential items, such as automobiles. Most Americans need an automobile to get to work, get kids to daycare, travel to the doctor, and even to access healthy food.[305] Although car ownership is lower for Millennials, research shows that going "car free" is a not a lifestyle choice for most Americans, but rather an economic reality that correlates with poverty and unemployment.[306] Most Americans do not own their cars outright. Instead, they take out loans, secured by the cars, to finance their purchase.[307]

As with mortgages and student loans, historically, Black and Latinx Americans have paid more for their auto loans than other Americans, and also experienced higher rates of loan default and car repossession.[308] Native Americans also face discrimination in the auto loan market.[309] Minorities also are more likely to be sold subprime auto loans, which is a growing sector of consumer finance.[310] Indeed, the subprime auto loan sector is growing so rapidly that concerns about its stability intensify every quarter with the release of new data about originations, defaults, and repossessions.[311]

Similar to mortgages and student loans, the fintech sector is expanding into auto loans.[312] Online lenders such as AutoGravity and AutoFi partner with banks and other established lenders to pre-qualify customers for auto loans.[313] Customers are invited to shop for a car online, get loan approval, test drive the car, and

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305. *See* Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Driven* to Bankruptcy, 55 WAKE FOREST L. REV. 287, 289–90 (2020) (discussing Americans' use of automobiles).

306. *See id.*

307. *See id.* at 290, n.11 (nothing that two-thirds of Americans purchase automobiles, new and used, by taking out loans).

308. *See id.* at 292–93 (overviewing the racial and ethnic demographics of auto loan origination and repossession); Johnson, *supra* note 146, at 183–84 (discussing auto loan fees and added costs).

309. *See* Megan Horning, *Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem Among Navajo Nation Car Buyers*, 73 NAT'L LAWYERS GUILD REV. 193 (2016).

310. *See* Foohey et al., *supra* note 305, at 292–93; Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 GEO. L.J. 1257, 1257 (2020) (discussing how the "car loan market is rife with abuses" and proposing a way to disaggregate car buying from lending to deal with some of those abuses); Alexander W. Butler et al., Racial Discrimination in the Auto Loan Market 2, 4 (June 25, 2020) (unpublished manuscript), https://ssrn.com/abstract=3301009 [https://perma.cc/G4JP-8HHE] (finding that Black and Latinx applicants' auto loan approval rates are 1.5% lower, even controlling for creditworthiness, and that minorities pay 70 basis point higher interest rates).

311. *See* Foohey et al., *supra* note 305, at 292–93; Anjali Kamat, *The Other Subprime Debt Problem*, WNYC News (Dec. 12, 2019), https://www.wnyc.org/story/other-subprime-debt-problem/ [https://perma.cc/RZB3-UVNN] (noting that auto debt has increased 75% since the Great Recession).

312. *See* Ryan Lichtenwald, *Fintech Firms in Auto Gaining Traction*, LENDACADEMY (Feb. 23, 2017), https://www.lendacademy.com/fintech-firms-auto-gaining-traction/ [https://perma.cc/5U75-LZPQ].

313. *See* Sanders, *supra* note 244, at 13–14 (overviewing fintech auto loans); Matthew DeBord, *Fintech Continues to Push Into Car Lending as Chase Partners With AutoFi*, BUS. INSIDER (Jan. 14, 2018, 3:47 PM), https://www.businessinsider.com/chase-partners-with-autofi-fintech-2018-1 [https://perma.cc/GH6A-C4WV].

then immediately "buy" it.[314] Other platforms, such as Fair and Flexdrive, promise access to cars without long-term commitments and other costs.[315] These platforms likewise partner with traditional banks.[316]

These platforms promise to reduce transaction fees, enabling access to credit at more competitive terms.[317] But, like early wage access programs, these platforms may encourage fast decision making and create a disincentive to shop around for loans, possibly leading to higher prices, as well as the potential to trap users in a cycle of paying to use automobiles without ever moving toward owning those vehicles.[318] The rapidity of receiving an auto loan and the delivery of documents to consumers via tablets and smartphones could result in people signing agreements they have not read, let alone understood. Although this can happen in other circumstances, delivery of key documents on tablets and smartphones may particularly impair consumer's consideration of these auto loans' terms and fees.[319] In addition, some platforms market their services first and foremost to auto dealers, not loan customers, raising concerns that the dealers are their customers, not the auto buyers.[320] As a result, the platforms may prioritize the welfare of auto dealers over auto buyers.[321]

Uber's now defunct auto loan program—which proceeded under several names, including its Vehicle Solutions Program, Uber Xchange Car Financing, and Uber Xchange Leasing—illustrates some of the potential pitfalls of fintech innovations in consumer lending.[322] Through its program, in addition to offering

314. *See AutoFi is Built for Remote Sales*, AUTOFI, https://www.autofi.com/ (last visited Jan. 17, 2021) [https://perma.cc/Z7RA-Z2QM] (marketing the platform as "[a] complete digital retail solution with real-time lender decisions").

315. *See* Sanders, *supra* note 244, at 13–14 (overviewing fintech auto loans). Some platforms, such as Lending Club and Finova Financial, offer auto loan refinancing and alternatives to title loans. *See* Lichtenwald, *supra* note 312.

316. *See Ally Bank Inks $100MM Debt Facility with Vehicles Fintech Fair*, ABL ADVISOR (Aug. 28, 2019, 8:55 AM), https://www.abladvisor.com/news/16982/ally-bank-inks-100mm-debt-facility-with-vehicles-fintech-fair [https://perma.cc/EMH9-4DD6].

317. *See* Sanders, *supra* note 244, at 13–14; *Blend Expands From Mortgages and Consumer Loans Into Auto Financing*, AUTO FIN. J. (Oct. 29, 2019, 5:18 PM), https://www.autoremarketing.com/autofinjournal/blend-expands-mortgages-and-consumer-loans-auto-financing [https://perma.cc/S277-BQYD] (discussing a fintech company, Blend, that processes $2 billion in mortgage and consumer loans daily that recently decided to enter the auto loan market).

318. *See* Sanders, *supra* note 244, at 13–14 (overviewing promises and concerns with fintech auto loan platforms).

319. *See* Shankar Vedantam, *Do You Read Terms Of Service Contracts? Not Many Do, Research Shows*, NPR: MORNING EDITION (Aug. 23, 2016, 5:06 AM), https://www.npr.org/2016/08/23/491024846/do-you-read-terms-of-service-contracts-not-many-do-research-shows [https://perma.cc/7QYR-GEWZ] (discussing how people share information and do not read agreements online). In the past, rent-to-own transactions raised these concerns. *See generally* Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. The Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385 (1997) (overviewing concerns about customer-seller interactions with rent-to-own transactions).

320. Sanders, *supra* note 244, at 13.

321. *See* Martin & Huckins, *supra* note 319.; *AutoFi is Built for Remote Sales*, *supra* note 314 (focusing primarily on the benefits of the platform for auto dealers).

322. *See* Greg Bensinger, *Uber Plans to Wind Down U.S. Car-Leasing Business*, WALL ST. J. (Aug. 8, 2017, 8:28 PM), https://www.wsj.com/amp/articles/uber-plans-to-wind-down-u-s-car-leasing-business-1502200046 [https://perma.cc/4YX4-GUYL].

drivers what later were described as subprime auto leases,[323] Uber connected its drivers with auto dealers and lenders. Uber automatically deducted loan payments from drivers' income.[324] If a driver's income was insufficient or if a driver stopped working for Uber, the driver was required to pay the lender directly.[325] Uber claimed that its program allowed low-credit-worthy drivers to purchase cars necessary to create better lives for themselves via driving with Uber.[326] Although some drivers praised the program, others struggled to make monthly payments on subprime loans with interest rates over 20%.[327] Drivers said they felt stuck: "it's either drive or meet the repo man."[328]

The program came under the FTC's scrutiny for connecting drivers with subprime lenders that charged Uber drivers significantly higher interest rates than industry averages for consumers with similar credit scores.[329] This led to higher than average monthly payments, which contradicted Uber's marketing materials.[330] These marketing materials promised that the program would allow drivers to "own a car for as little as $20/day."[331] Uber ultimately settled with the FTC for $20 million.[332] When Uber shuttered its program, it stated that it lost eighteen times more than it had expected.[333] Commentators in the auto industry deemed the program a "financial and ethical disaster."[334]

The alleged misrepresentation in Uber's description of its program reflects two major concerns with fintech advances in consumer banking and lending. First, as noted with other auto loan apps, the programs may place the interests of partner companies ahead of consumers.[335] This means that consumers are at risk of paying more in interest and other fees than those charged for traditional and even fringe banking and credit products.

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323. *See* Andrew J. Hawkins, *Uber is Phasing Out Its Subprime Car-Leasing Division After Massive Losses*, VERGE (Aug. 8, 2017, 12:02 PM), https://www.theverge.com/2017/8/8/16112498/uber-phase-out-xchange-car-leasing-losses [https://perma.cc/TV5E-P8EU] (detailing the Vehicle Solutions Program).

324. *See* Molly Wood, *Uber Drivers Struggle to Pay Subprime Auto Loans*, MARKETPLACE (May 13, 2015), https://www.marketplace.org/2015/05/13/uber-drivers-struggle-pay-subprime-auto-loans/ [https://perma.cc/9R32-28SK] (overviewing the car financing program).

325. *See id.*

326. *See id.*

327. *See id.*

328. *Id.*; *see also* Emily Badger, *Uber's Program to Help You Buy a Car Sounds Like a Sweet Deal. But It's Actually Really Risky.*, WASH. POST (Nov. 6, 2014, 7:30 AM), https://www.washingtonpost.com/news/wonk/wp/2014/11/06/ubers-program-to-help-you-buy-a-car-sounds-like-a-sweet-deal-but-its-actually-really-risky/ [https://perma.cc/LJ8X-ND3U] (anticipating some drivers' concerns when the program was launched).

329. Complaint at 3–4, FTC v. Uber Tech. Inc., No. 3:17-cv-00261 (N.D. Cal., Jan. 19, 2017), https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf [https://perma.cc/D4GP-ZSVM].

330. *Id.* at 4.

331. *Id.* at 9; *see* Gary Wollenhaupt, *Uber Car Financing Has Ended: What You Can Do Instead*, LENDINGTREE (May 21, 2020), https://www.lendingtree.com/auto/uber-car-financing/ [https://perma.cc/472L-BXYJ] (summarizing the FTC complaint).

332. *See* Press Release, FTC, *supra* note 26.

333. *See* Bensinger, *supra* note 322.

334. Aaron Gordon, *Uber Launches New Program to Get Drivers Who Can't Afford Cars to Drive Cars for Them*, JALOPNIK (May 30, 2019, 12:25 PM), https://jalopnik.com/uber-launches-new-program-to-get-drivers-who-cant-affor-1835122927 [https://perma.cc/RQN5-8SP7].

335. *See supra* notes 320–21 and accompanying text.

Second, partnering with employers like Uber or Walmart raises concerns that consumers not only will be tied to their lending arrangements, but may also feel unable to leave their place of employment because of their debts.[336] Besides smacking of indentured servitude, feeling unwilling or unable to leave an employer because of debt could impede people's education and career advancement, further entrenching income and wealth inequalities. If either or both of these concerns come to realization, fintech "advances" in consumer banking and lending could cause America to regress even further in terms of equality.

Fintech innovations in consumer banking and lending also bring additional concerns. Recent research has found initial evidence of racial and ethnic discrimination in fintech lending, such as mortgage lending.[337] Scholars increasingly warn that the "tech" part of fintech results in inadvertent racial, ethnic, and gender discrimination based on algorithms that leverage big data and that transcend human understanding.[338] This is particularly concerning because fintech companies, like more traditional lenders, have been found to facilitate low-income households' borrowing beyond their means.[339]

The perils of these products may outweigh the promises made by companies offering these fintech advances. Nonetheless, fintech innovations continue to be touted as leading solutions to income and wealth inequality.[340] The next Part draws on these critiques of fintech financial products to support our recommendations for how consumer banking and lending can stop contributing to the wealth gap.

336. *See e.g.*, Badger, *supra* note 328; Cuttino, *supra* note 277 (manuscript at 41).

337. *See generally* Robert Bartlett et al., *Consumer Lending Discrimination in the FinTech Era*, (Working Paper Nov. 2019) (unpublished manuscript), https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf [https://perma.cc/4S92-FBAY] (discussing fintech lending discrimination).

338. *See id.* (noting algorithms' "inadvertent discrimination"); Rory Van Loo, *The Corporation As Courthouse*, 33 YALE J. ON REG. 547, 579–80 (2016) (explaining how automated systems could contribute to racial economic inequality); Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1291, 1327 (2017) (discussing the link between algorithms and racial inequality); Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 25–29 (2018) (discussing concerns about fintech innovations in lending); Anya Price & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1262–66 (2020) (detailing proxy discrimination and big data); MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN 1–14 (2020) (introducing concerns about big data and algorithms); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016) (detailing several instances in which mathematical models or algorithms that purport to identify certain traits, such as credit worthiness, actually serve to enforce inequality); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 101–39 (2015) (detailing data's role in finance).

339. *See generally* Marco Di Maggio & Vincent W. Yao, FinTech Borrowers: Lax-Screening or Cream-Skimming?, (Sept. 2018) (unpublished manuscript), https://www.newyorkfed.org/medialibrary/media/research/conference/2019/fintech/Yao_fintech [https://perma.cc/3M4P-ECJK].

340. *See, e.g.*, Hawkins, *supra* note 277 (manuscript at 48) (concluding that early wage access programs are a superior substitute to payday lending).

V. ENSURING BANKING AND LENDING DOES NOT EXACERBATE WEALTH GAPS

Over the past several decades, home loans, student loans, payday loans and other fringe products have contributed to racial and ethnic wealth gaps because, put simply, people of color pay more for these products.[341] This hinders people's ability to convert income into savings.[342] Over the past several years, payroll cards, early wage access programs, auto lending, and other seeming innovations in banking and lending have replaced prior mainstays of consumer banking and finance.[343] A closer look at these products brings heightened concerns about their likelihood of trapping people of color, in particular, in a cycle of debt that further bleeds them of income and impedes their savings.[344] This Part details lessons about how consumer banking and lending can, on the one hand, obstruct savings and widen wealth gaps, and on the other, be an integral part of reducing wealth gaps. Through this discussion, we propose four tenets for combating debt inequality: access to low-cost credit, variety in credit options, policing of discrimination and the use of big data, and trustworthy places to put income and build savings.

Scholars, policy makers, and politicians increasingly appreciate the seriousness of the widening income and wealth gaps and are publicly discussing how to reverse them.[345] Many recent proposals that focus on debt inequality are animated by our first tenet—access to lower-cost credit. On a small scale, for example, Representative Katie Porter calls for the Federal Deposit Insurance Corporation ("FDIC") to "heighten its vigilance" in monitoring online lenders that partner with banks.[346] As noted by Representative Porter, monitoring will police banks' ability to charge higher interest rates than those provided by state usury caps through these partnerships.[347] Also, as noted, when Congress convened in 2020, Representative Maxine Waters advanced the Veterans and Consumer Fair Credit Act, which would provide a federal 36% usury limit on all payday loans.[348] Similarly, during the 2020 presidential primaries, candidates discussed interest rate and fee caps.[349]

341. *See supra* Part III.

342. *See supra* Part III.

343. *See supra* Part IV.

344. *See supra* Part IV.

345. *See supra* note 14.

346. Anna Hrushka, *Lawmaker Wants FDIC to Monitor 'Rent-a-Bank' Arrangements*, BANKING DIVE (Dec. 23, 2019), https://www.bankingdive.com/news/porter-fdic-monitor-rent-a-bank-arrangements/569606/ [https://perma.cc/4JNY-PRHQ].

347. *See* Lydia Beyound, *FDIC Urged to Monitor Online Lenders' Bank Partnerships*, BLOOMBERG L. (Dec. 20, 2019, 1:26 PM), https://news.bloomberglaw.com/banking-law/fdic-urged-to-monitor-online-lenders-bank-partnerships [https://perma.cc/RF4W-DBUJ] (discussing Representative Porter's letter to the FDIC).

348. Neil Haggarty, *Why House Democrats Are at Odds Over Rate Cap Bill*, AM. BANKER (Feb. 5, 2020, 3:30 PM), https://www.americanbanker.com/news/why-house-democrats-are-at-odds-over-rate-cap-bill; *see supra* text accompanying note 214.

349. *See End Wall Street's Stranglehold on Our Economy*, *supra* note 14; *Fair Banking for All*, *supra* note 14.

Disparate terms and interest rates, however, are part of a handful of key aspects of mainstream and fintech consumer products that create debt inequality between white Americans and racial and ethnic minorities.[350] Debt inequality as a contributor to wealth inequality and redistribution is extensive and adaptable.[351] Regulations and programs must attack it from multiple angles, leading to additional tenets.

Our second tenet is access to a variety of different credit products. Providing a variety of lower-cost credit products to all, including communities of color, is critical to addressing debt inequality. As demonstrated by how payday lenders successfully market to communities of color,[352] many people still go to physical, brick-and-mortar locations to take out loans.[353] Likewise, because of the ubiquity of the Internet and because many lower-income Americans use their phones to access the Internet and banking,[354] banking and credit options must have online platforms that provide people the same lower-cost credit products.

Black students' experience with private student loans demonstrates how access and choice are critical tenets of reducing debt inequality.[355] One component in debt inequality in the student loan market is the emergence of for-profit educational institutions, which in turn direct their students to private lenders who charge higher interest rates and fees.[356] Private colleges and universities also have high drop-out rates; not completing education makes it harder for students to pay back the loans.[357] The coupling of for-profit institutions with private student loan providers limits access and limits choice while increasing the price, the effects of which create racial inequality in the student loan market.

Race inequality can be ameliorated through programs and regulation that encourage banks and lenders to offer lower-cost services to lower-income communities and communities of color.[358] As demonstrated by the history of payday loans and other fringe lending products, people need choices in their access to credit and banking products.[359] Lack of choice leaves people feeling stuck and hopeless, which exacerbates tendencies to not shop around among service or

350. *See supra* Part III.

351. *See supra* Part III.

352. *See supra* text accompanying notes 223–28.

353. *See supra* text accompanying notes 226–32.

354. *See* Kurt Bauman, *New Survey Questions Do a Better Job Capturing Mobile Use*, U.S. CENSUS BUREAU (Aug. 8, 2018), https://www.census.gov/library/stories/2018/08/internet-access.html [https://perma.cc/Y83N-35ZF] (detailing how Americans report accessing the Internet); Ellen A. Merry, *Mobile Banking: A Closer Look at Survey Measures*, BD. OF GOVERNORS OF FED. RES. SYS. (Mar. 27, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/mobile-banking-a-closer-look-at-survey-measures-20180327.htm [https://perma.cc/VEU3-EHKB] (noting an upward trend in mobile banking and that "[i]n 2017, about half of U.S. adults with bank accounts had used a mobile phone to access a bank account in the past year").

355. *See supra* Section III.B.

356. *See supra* Section III.B.

357. *See supra* Section III.B. *See generally* Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE AND L. 1 (2010) (discussing the returns that accrue upon graduation).

358. *See infra* text accompanying notes 391–92.

359. *See supra* Section III.C.

product providers.[360] Lack of choice intensifies power imbalances between providers and consumers, which allows banks and lenders to increase the cost of their products. Similarly, lack of choice hinders competition between providers in the marketplace and increases prices.[361] This cumulatively exacerbates debt inequality.

The consequences of lack of choice are apparent in payroll cards and early wage access programs. These programs may keep users out of mainstream banking and tie employees to their employers.[362] Importantly, these effects ripple through other aspects of racial and ethnic disparities in income and wealth.[363] Turning away from mainstream banking—because brick-and-mortar outlets are not accessible, or because the use of other fringe products and now online platforms makes traditional banking seem obsolete, or because America's history of discrimination in banking and lending has led to mistrust of the traditional system—ultimately inhibits the ability to save. People instead pay high sums to access their own money, leaving nothing to put away. To the extent that people are able to save some of their income, they do not have a safe place to put it where that money can grow and begin to build wealth.[364]

Likewise, feeling tied to an employer, whether it is true or not, inhibits people's ability to transition to higher paying, more fulfilling, and potentially more stable employment.[365] Feeling stuck also inhibits people's ability to receive training to move into other fields, as discussed in connection with early wage access programs and auto lending platforms.[366] Again, this stuck feeling leads to wage stagnation separate and apart from the stagnation in wage growth Americans have experienced in the prior decades.[367] This too inhibits people's ability to save as their income never grows despite rising costs of living.

Our third tenet to reducing debt inequality is combating discrimination in lending. That some communities of color distrust traditional banks and mainstream lending products is understandable given the long history of discrimination faced by almost all minority groups in banking and credit services.[368] Beyond the access to credit and choice among products, combating discrimination is critical to reducing debt inequality.

We intentionally discuss discrimination third, even though it may be the leading component of debt inequality. Lack of access and lack of choice breed

360. *See infra* notes 362–67.

361. *See* Van Loo, *supra* note 13, at 245–47, 254–55, 271–75 (noting fintech distributional implications on inequality and proposing ways to improve consumers' access and choice, such as the CFPB taking a role in promoting competition in fintech).

362. *See supra* Sections IV.A., IV.B.

363. *See supra* Sections IV.A., IV.B.

364. Because this subpart focuses on debt inequity and access to productive banking and lending products, it does not address systemic issues with homeownership as wealth-building vehicle. For more on that topic, *see supra* Section III.A.

365. *See supra* Sections IV.A., IV.B.

366. *See supra* Sections IV.B., IV.C.

367. *See supra* text accompanying notes 42–44.

368. *See supra* Part III.

discrimination.[369] These two tenets to reducing debt inequality focus on demand-side issues. Stunted demand incentivizes the supply side—banks and other lenders—to exploit failures in the market that arise from the demand disruptions.[370] How discrimination historically has played out demonstrates the importance of addressing both the demand and supply side. For instance, debt inequality in the home mortgage market resulted from marketing subprime loans to credit worthy individuals based on race and ethnicity.[371] Black and Latinx families reluctantly accept subprime loans, in part, because of a lack of options, real or perceived.[372] They also arguably had to accept these loans because of how discrimination manifested: as hard-to-prove implicit bias bolstered by seemingly logical reasons for primarily offering subprime loans, such as the slower appreciation of house values in minority neighborhoods, which subprime loans themselves fed.[373]

Combating discrimination requires a holistic view of how discrimination arises in particular lending markets. Discrimination in the home mortgage market undoubtedly is evolving every day, as people turn from traditional mortgage loans to using products like Quicken Loans' Rocket Mortgage and mobile lending platforms.[374] As noted with auto lending platforms, the introduction of machine learning and algorithms into lending decision rubrics requires different tactics to identify and stop racial and ethnic discrimination.[375] Any proposal to reduce debt inequality must address the rapidly changing use of online platforms, big data, and machine learning.

Our fourth (and final) tenet for combating debt inequality does not deal directly with consumer credit. Instead, it recognizes that debt and savings are two sides of the same coin. Just as people need access, choice, and a system that identifies and addresses discrimination in the consumer credit sector, they also need accessible, trustworthy places to put income and build savings. Banks traditionally were those places.[376] Over the past decades, however, many Americans have fallen out of mainstream banking,[377] and American banks repeatedly have failed Black households.[378]

Falling out or being driven from those places designed to help people build their wealth leads to an inability to save productively and to the opportunity for fringe lenders and other institutions to establish themselves as the sole provider of all "money services" to their customers.[379] These services often cost people

369. *See supra* notes 359–61 and accompanying text.

370. *See* Van Loo, *supra* note 13, at 246–47.

371. *See supra* Section III.A.

372. *See id.*

373. *See id.*

374. *See Rocket Mortgage*, https://www.rocketmortgage.com/ (last visited Jan. 17, 2021) [https://perma.cc/YLF6-SSTY].

375. *See supra* text accompanying note 338.

376. *See generally* Baradaran, *supra* note 238 (noting how the United States government previously enlisted banks and other financial institutions to provide services to lower-income communities).

377. *See supra* text accompanying notes 127–30.

378. *See generally* BARADARAN, *supra* note 22.

379. *See supra* text accompanying notes 127–30.

even more money, a burden that falls disproportionately on communities of color.[380]

One viable alternative to traditional banks is public banking. This idea is less controversial than its critics suggest.[381] As detailed by Mehrsa Baradaran, in 1910, President Taft created the Postal Savings System, which turned post offices into banks that accepted small deposits.[382] The program was "wildly successful."[383] At present, most developed countries have some sort of public banking option, usually attached to their postal service.[384] Postal banking using already established United States Postal Service ("USPS") locations would offer accessible branches to people across the country and a system backed by the government.[385] The security and convenience of postal banks may encourage unbanked and underbanked individuals to deposit small sums—sums that could grow over time. Indeed, the Postal Savings System saw $20 million deposits in its first year, "most of which had been coaxed out of hiding."[386] Postal banking could also cause traditional banks to lower their rates to compete for business.

The USPS Inspector General published a white paper in 2014 that floated the idea of postal banking.[387] At the time, Senator Elizabeth Warren spoke publicly in favor of postal banking.[388] Senator Kristin Gillibrand and Congresswoman Yvette Clarke subsequently picked up the idea in 2018 when they sponsored legislation to allow people to open small checking and interest-bearing savings accounts via the USPS.[389]

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380. *See supra* text accompanying note 130.

381. Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 164, 170–72 (2014) (detailing historic support for postal banking); *see also* Adam Levitin, *Postal Banking: Maybe Not So Crazy After All*, AM. BANKER (Jan. 31, 2014, 10:00 AM), https://www.americanbanker.com/opinion/postal-banking-maybe-not-so-crazy-after-all [https://perma.cc/3V93-9GS4] (discussing the Postal Saving System); Thomas Herndon & Mark Paul, *A Public Banking Option*, ROOSEVELT INST. (Aug. 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Public-Banking-Option-201808.pdf [https://perma.cc/3TYZ-BT92] (arguing for postal banking).

382. Baradaran, *supra* note 381, at 170–72; Levitin, *supra* note 381; Herndon & Paul, *supra* note 381.

383. Baradaran, *supra* note 381, at 170.

384. *See* Levitin, *supra* note 381.

385. *See id.* (detailing the benefits of postal banking); Baradaran, *supra* note 381, at 166–69 (illustrating the benefits of postal banking).

386. *See* Baradaran, *supra* note 381, at 170 (quoting JAMES GRANT, MONEY OF THE MIND 90 (1992)).

387. *Providing Non-Bank Financial Services for the Underserved*, U. S. POSTAL SERV.: OFF. OF INSPECTOR GEN. (Jan. 27, 2014), https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf [https://perma.cc/8TJS-5A9U]; *see also The Road Ahead for Postal Financial Services*, U.S. POSTAL SERV.: OFF. OF INSPECTOR GEN. (May 21, 2015), https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-011_0.pdf [https://perma.cc/L96D-HUM5].

388. *See* Alan Pyke, *Elizabeth Warren Proposes Replacing Payday Lenders with The Post Office*, THINK PROGRESS (Feb. 3, 2014, 5:21 PM), https://thinkprogress.org/elizabeth-warren-proposes-replacing-payday-lenders-with-the-post-office-ed9d53dab947/ [https://perma.cc/WDD3-E3CF].

389. S. 2755, 115th Cong. (2018); H.R. 5816, 115th Cong. (2018); *see also* Abby Vesoulis, *Millions of Americans Can't Afford a Checking Account. The Post Office Could Fix That*, TIME (Aug. 7, 2018, 11:04 AM), https://time.com/5351706/postal-banking-kirsten-gillibrand/ [https://perma.cc/L9DV-BCBH] (reporting on the proposed legislation). Senators Warren and Sanders both proposed postal banking during the 2020 presidential primaries. *See End Wall Street's Stranglehold On Our Economy*, *supra* note 14; *Fair Banking for All*, *supra* note 14.

Alternatively, the history of American banking includes decades of public-private partnership. The current system in which a handful of massive banks operate largely unregulated is best characterized as an aberration.[390] Reviving the social contract between banks and the government, thereby infusing a public purpose into now almost exclusively private operations will require banks once again to provide safe and accessible options to all Americans.[391] The result has the potential to be similar to establishing postal banks.

In summary, we identify four tenets to reducing the debt inequality that is an integral part of racial and wealth gaps in America. First is access to lower-cost credit. Second is choice among products, both the products themselves and how customers find providers. Third is to develop tactics for identifying and combating discrimination that recognize discrimination manifests differently depending on the type of product. Fourth is a public option for safely building savings.

America's growing income and wealth inequality stems from a variety of long-standing, systemic issues.[392] The debt inequality focused on in this Article is but one aspect of an economic, social, and political system stacked against people of color. Because debt inequality is a key component of this system, however, combating this inequality is critical to curbing America's current course toward an even more disparate society.

VI. CONCLUSION: MOVING PAST DEBT INEQUALITY AND BUILDING WEALTH

For the past several decades, America has been in the midst of the greatest redistribution of wealth from the poor to the rich in its history.[393] As outstanding debt has ballooned in reaction, debt inequality has played an increasingly important role in exacerbating the wealth distribution.[394] The gap between the haves and have nots in America is so drastic that wealth and income inequality threaten to undermine the American economy and society, as recognized by some of the wealthiest Americans and by some policy makers.[395]

This recognition brings a pivotal moment in the United States. This moment was evident before the COVID-19 pandemic, but now it is even more palpable in light of the depth and gravity of America's racial and ethnic economic inequality that the ensuing economic and health crisis has exposed.[396] America may well be at the brink of deciding how to try to reverse the wealth gap, which makes

390. *See generally* Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014) (overviewing the history of the relationship between banks and the government).

391. *See id.*

392. *See supra* Part II.

393. *See supra* Part II.

394. *See supra* Part III.

395. *See* Greg Jaffe, *Capitalism in Crisis: U.S. Billionaires Worry About the Survival of the System That Made Them Rich*, WASH. POST (Apr. 20, 2019, 6:46 PM), https://www.washingtonpost.com/politics/capitalism-in-crisis-us-billionaires-worry-about-the-survival-of-the-system-that-made-them-rich/2019/04/20/3e06ef90-5ed8-11e9-bfad-36a7eb36cb60_story.html [https://perma.cc/9JR7-CPGN]; *supra* text accompanying notes 14 and 68.

396. *See supra* text accompanying notes 28–33.

this *the* time to address the interrelated factors that have fed the United States' widening wealth gap. Each of these factors is a link in the chain of events and struggles that prevent American households from building wealth. The need to take out credit at high interest rates and fees, and the need to pay for access to one's own money—that is, debt inequality—is one of these key factors. Debt inequality can result in a transfer of money from lower-income households (the have nots) to wealthier households (the already haves). Debt inequality thereby exacerbates the effects of income inequality and feeds the wealth gap.

Communities of color have been hit the hardest by these links in the chain that generate the wealth gap.[397] Focusing on these communities allows for a robust assessment of the ways in which debt inequality has fed and may continue to feed the wealth gap. Both in the past and continuing into the present, communities of color face discrimination in home mortgages, student loans, alternative financial services, and access to mainstream banks.[398] In recent years, fintech banking and lending companies have offered communities of color (and other lower-income Americans) new "advances" in accessing money and credit.[399] A review of these advances shows that they likely replicate many long-standing banking and credit problems that foster debt inequality, while also raising new concerns about people's relationship with their employers and the use of big data.

That these new products are marketed as solutions to the problems that people previously have faced with banking and lending institutions only heightens the need for a comprehensive plan to address debt inequality. Otherwise, debt inequality will continue to feed wealth inequality, impeding other efforts to help communities of color and lower-income Americans build their wealth. The public discourse fostered by the recognition of the economic and social precipice America is teetering on has shone much-needed light on the most important tenets in tackling debt inequality. Now is the time to move forward with a broad set of plans for reforming Americans' access to banking and lending services necessary to close the wealth gap.

397. *See supra* Part II.
398. *See supra* Part III.
399. *See supra* Part IV.