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Wage Enslavement: How the Tax System Holds Back Historically Disadvantaged Groups of Americans

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WAGE ENSLAVEMENT: HOW THE TAX SYSTEM HOLDS BACK HISTORICALLY DISADVANTAGED GROUPS OF AMERICANS

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ABSTRACT

Despite the importance placed on equality of opportunity within United States political culture, the existing tax system inhibits historically disadvantaged groups from building wealth or catching up with historically more privileged groups. This effectively then traps many members of historically disadvantaged groups into a continued cycle of dependence on tax-disfavored wage and salary income, a phenomenon that we metaphorically label as "wage enslavement." This Article explains this phenomenon and then calls for reform.

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INTRODUCTION

The United States aspires to be a land of opportunity. In many respects, this aspiration is a reality. Yet, at the same time, the United States is also a land of large racial wealth gaps and where members of historically disadvantaged groups often lack the economic and social resources enjoyed by those born into greater privilege. This Article documents this disconnect between aspiration and reality, and then explains how the existing tax system exacerbates these inequities by holding back historically disadvantaged groups of Americans.[2] To address these problems, this Article calls for reform.

To be clear, this Article in no way attempts to comprehensively evaluate how the existing United States tax system affects all historically disadvantaged groups. Instead, we mostly focus on sketching out some important ways in which the existing tax system inhibits Black Americans (and especially those descended from slaves) from catching up with other Americans whose ancestors benefitted from less oppression and from greater opportunities provided by law and by governmental policies.

Our overall argument builds on our own prior scholarship as well as on the prior work of other scholars. Specifically, this Article elaborates on how, "by heavily taxing wage and salary incomes, and only lightly taxing the returns to owning wealth, the tax system obstructs historically disadvantaged groups from building wealth and economic power while protecting the comparative economic power of historically advantaged groups that started accumulating wealth during more illiberal periods."[3]

This Article was written for a symposium session titled "Wage Enslavement and Prison Entrapment."[4] We are unsure who came up with that session title, and we do not necessarily agree with prior usage of the related term "wage slavery."[5] Nevertheless, we agree that the term "wage enslavement" succinctly and provocatively conveys what we consider to be a central injustice of the existing tax system, and so we have decided to embrace that term for this Article.

To understand what we mean by "wage enslavement," first consider that Americans born into greater family wealth and privilege can often at least substantially escape the income tax and other federal taxes, effectively forcing other comparatively disadvantaged Americans to pay for the governmental services and protections that have made accumulations of great wealth and privilege possible.[6] By contrast, Black Americans and other members of historically disadvantaged groups

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[2] Except as otherwise noted with specific footnote citations, the support for all claims in this Introduction can be found in the body of the Article, as the Introduction is intended as a preview summary of the arguments developed in the body of the Article.

[3] David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 487, 514 (2022).

[4] *See The Racial Wealth Gap*, KY. L.J., https://www.kentuckylawjournal.org/symposium [https://perma.cc/7MU5-JHLE].

[5] *Wage Slave*, DICTIONARY.COM, https://www.dictionary.com/browse/wage-slave [https://perma.cc/8UN3-9KDG].

[6] *See* David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 86 (2011) ("Crucially, any amounts calculated as gross income—or as other pretax resource measurements—are dependent on the existence of government in its current form.").

often lack equivalent access to family wealth or to other opportunities for borrowing or for otherwise benefitting from familial social networks or other forms of social capital, to facilitate getting a head start in economic life.

Thus, to get started economically, Americans born into comparative disadvantage must typically rely on the limited opportunities for earning wages or salaries offered by employers. Then, the existing tax system places a relatively heavy burden on this wage and salary income. This is because the federal income tax, state and local taxes, payroll taxes, and other tax and related fiscal burdens, all combine to make it difficult for Americans born into comparative disadvantage to earn enough in wages to cover their tax and non-tax living expenses and then to also save enough to start building wealth.

Education, home ownership, and tax-preferred retirement accounts all provide paths out of this metaphorical wage enslavement for many Americans. Yet these paths for escaping wage enslavement are comparatively much less available for many Black Americans and for other members of historically disadvantaged groups.

In this sense, the existing tax system inhibits historically disadvantaged groups from building wealth or catching up with historically more privileged groups. This effectively then traps many members of historically disadvantaged groups into a continued cycle of dependence on tax-disfavored wage and salary income. Of course, by calling this phenomenon "wage enslavement," we do not mean to imply that this is an injustice at anywhere near the level of true, literal slavery. Nevertheless, and as the remainder of this Article will further explain and elaborate, we consider the phrase "wage enslavement" to be an apt metaphor for how the existing tax system holds back historically disadvantaged groups of Americans.

I. INTERSECTIONS OF RACIAL INJUSTICES AND WEALTH INEQUALITY IN AMERICA

This Article is largely about the problems created by how the existing tax system favors income derived from owning wealth, as compared to wage and salary income. To start with, readers might thus ask: what is "wealth" anyway? Without fully answering that question, this Part defines wealth as an asset-based concept that is distinct from income and then sketches the now familiar problem of wealth inequality. This Part underscores the intergenerational, compounding nature of wealth and explains how this inequality undermines principles of equal opportunity. This leads to discussing the persistent problem of the racial wealth gap. By briefly summarizing some of the proposed explanations for the racial wealth gap, we underscore that these accounts are partial and ultimately lead us back to historical systemic discrimination and public policy choices that have disproportionately harmed Black Americans.

A. How Wealth Is Different from Income and Why It Matters

Because of its everyday connotations, wealth can sometimes be a confusing concept to discuss and understand. Wealth is usually thought to be an "abundance of valuable material possessions or resources."[7] We can think of someone who is wealthy as being someone who is quite rich, easily able to live off of the returns to their prior wealth accumulations without needing to work for a paycheck or cash salary.

Scholars have differed on how to define wealth more precisely.[8] In this Article we are interested in a more general definition of wealth—encompassing anything of monetary value. For this purpose, wealth can be defined as an individual's economic assets or net worth. Thus, wealth is measured as an individual's assets minus his or her debts.[9] Assets can be bank accounts, houses, stock, 401(k)s, etc. Debts include mortgages, vehicle loans, credit card balances, payday loans, etc.[10] Of course, there are also less material components to wealth that may be even more important than material assets.[11] For example, social networks can be vital to both status attainment and asset accumulation.[12] There are many intangible advantages that parents pass on to their children that could be considered cultural wealth.[13] We do not necessarily mean to exclude these from our conception of wealth, but because these can be harder to measure, and also because of other complicating factors such as respect for family privacy, we primarily focus on material assets which are typically more easily taken account of for purposes of designing tax and other governmental policies.[14]

The asset-based conception of wealth is important because traditionally the story of economic inequality in the United States has disproportionately focused on

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[7] *Wealth*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/wealth [https://perma.cc/39GU-C77T].

[8] *Compare* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979) (defining wealth as "the value in dollars or dollar equivalents . . . of everything in society"), *with* D. Bruce Johnsen, *Wealth* Is *Value*, 15 J. LEGAL STUD. 263, 268 (1986) (criticizing Posner's definition of wealth for only accounting for values at a given point of time instead of considering flows of value through time).

[9] A more sophisticated way of saying this is the net value of all goods available for an individual's exclusive use through time discounted to the present at the appropriate interest rate.

[10] *See* MEIZHU LUI, BÁRBARA J. ROBLES, BETSY LEONDAR-WRIGHT, ROSE M. BREWER & REBECCA ADAMSON, THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE 2 (2006) (examining racial wealth disparities between white and non-white in the United States); SIGNE-MARY MCKERNAN, CAROLINE RATCLIFFE, EUGENE STEUERLE & SISI ZHANG, URB. INST., LESS THAN EQUAL: RACIAL DISPARITIES IN WEALTH ACCUMULATION 1, 6 n.1 (2013) (arguing that income inequality understates the size between whites and non-whites in the United States).

[11] These noneconomic components of wealth include social networks, love, integrity, and family morale, which make it difficult to reach unless society is prepared to compromise its commitment to privacy of the family and private ownership.

[12] *See, e.g.*, Nan Lin, *Social Networks and Status Attainment*, 25 ANN. REV. SOCIO. 467, 470–72 (1999) (tracing the development of social resources theory, which argues that social capital enhances chances of attaining better statuses and is contingent on initial positions in the social hierarchy).

[13] Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 504 (1952) ("[T]he gravest source of inequality of opportunity in our society is not economic but rather what is called cultural inheritance . . . ."); *see also* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 158–59 (2002) (noting that this source of inequality may be more important than inherited wealth and yet it may be impossible to eliminate).

[14] *See* Blum & Kalven, *supra* note 13, at 504; *see also* MURPHY & NAGEL, *supra* note 13, at 158–59.

income.[15] Income refers to the flow of dollars over a period of time. These can be derived from salaries, wages, investments, alimony, government transfers, etc. For most Americans, income data is typically easier to obtain from pay stubs, bank records, and tax returns, for example, whereas wealth is harder to measure, with individuals often underestimating their wealth holdings.[16] As such, income is often used as a proxy for wealth and the two concepts can be conflated.[17] But the relative ease of measuring income as compared to wealth breaks down when it comes to the wealthiest Americans (and other Americans who primarily earn investment income) for whom an asset-based conception of wealth may often be easier to measure with greater accuracy as compared to income.[18]

A useful way to think about some of the differences between income and wealth is that income is more sensitive to life's ups and downs. Thus, an individual may lose her job (her source of income), but still have substantial investments (her source of wealth), to survive until she finds a new job. Wealth usually changes over longer periods of time and can reach across generations. Importantly, wealth can derive from interfamilial gifts and inheritances, which are often excluded from measures of taxable income.[19] Income is unequally distributed but much less so than wealth.[20]

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[15] Lisa A. Keister & Stephanie Moller, *Wealth Inequality in the United States*, 26 ANN. REV. SOCIO. 63, 64 (2000). One important exception to this disproportionate focus on income is the reparations literature. *See, e.g.*, BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 129–37 (1973); Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475, 483 (2003); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 536 (2003); Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1193 (2004); Lisa A. Crooms, *Remembering the Days of Slavery: Plantations, Contracts, and Reparations*, 26 U. HAW. L. REV. 405, 412 (2004); Adrienne Davis, *Reparations and the Slave Trade*, 101 AM. SOC'Y INT'L L. PROC. 285, 286 (2007); Maria Grahn-Farley, *The Master Norm: On the Question of Redressing Slavery*, 53 DEPAUL L. REV. 1215, 1219–20 (2004); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2550 (2001); Stephen Kershnar, *Reparations for Slavery and Justice*, 33 U. MEM. L. REV. 277, 287–88 (2003); Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353, 364–65 (2003); Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 257–58 (2003); George Schedler, *Responsibility for and Estimation of the Damages of American Slavery*, 33 U. MEM. L. REV. 307, 338–39 (2003); Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT'L L.J. 177, 196 (2002); Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 424 (2003). *But see* Richard A. Epstein, *The Case* Against *Black Reparations*, 84 B.U. L. REV. 1177, 1185–86 (2004); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 692 (2003); *contra* Roy L. Brooks, *Getting* Reparations for Slavery *Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 255–56 (2004).

[16] *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 57 (1995) ("Surveys of assets and wealth invariably underrepresent the upper levels, primarily because of the difficulty in obtaining the cooperation of enough very wealthy subjects. Thus random field surveys conservatively understate the magnitude of wealth inequality.").

[17] Su Jin Jez, *The Differential Impact of Wealth Versus Income in the College-Going Process*, 55 RSCH. HIGHER EDUC. 710, 711–12 (2014) (noting the stark differences between wealth and income and arguing that income is not a suitable proxy for wealth).

[18] Gamage & Brooks, *supra* note 3, at 493–94; *see also* DAVID GAMAGE, ARI GLOGOWER & KITTY RICHARDS, ROOSEVELT INST., HOW TO MEASURE AND VALUE WEALTH FOR A FEDERAL WEALTH TAX REFORM 5 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817773 [https://perma.cc/S7N2-R565].

[19] I.R.C. § 102(a) (excluding gifts, bequests, and devices from gross income).

[20] Marco Cagetti & Mariacristina De Nardi, *Wealth Inequality: Data and Models*, 12 MACROECONOMIC DYNAMICS (INEQ.) 285, 286 (2008); Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/most-americans-say-

Therefore, observing income alone does not fully capture the degree of wealth concentration in the United States.

Despite the difficulties in measuring wealth, there are some clear data regarding relative wealth disparities in the United States.[21] Wealth disparities and inequalities in the United States are by no means a new phenomenon. But the inequality has worsened in recent decades. For the past century, wealth has been concentrated in the hands of a small minority. By the 1920s, the top one percent of wealth holders owned an average of thirty percent of the nation's wealth.[22] This number decreased during the Great Depression and in the post-World War II period but began to rise again in the 1980s.[23] On the other hand, over ten percent of the population has no wealth at all.[24]

The intergenerational reach of wealth is especially important because it can undermine equality of opportunity. Despite its widespread embrace, equality of opportunity remains a thorny concept. While it may be impossible (or even undesirable) to achieve complete equality of opportunity, the goal of moving toward greater equality of opportunity is a widely shared value.[25]

The legacy of wealth disparities partly continues because of the intergenerational nature of wealth. Wealth disparities thus potentially fall within the second category of unacceptable sources of inequality that philosophers Liam Murphy and Thomas Nagel identify.[26] This consists of "hereditary class stratification, under which people are born with very unequal life prospects and opportunities simply by virtue of the success or luck of their parents and grandparents, and the society does nothing to repair this."[27] Because of the importance of wealth, the average poor person in America is still living under a system wherein she faces unequal life prospects solely as a result of her ancestry.[28] In Murphy and Nagel's framework, this then raises the

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there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority/ [https://perma.cc/3HNS-H67L].

[21] *See, e.g.*, *Wealth and Asset Ownership Data Tables*, U.S. CENSUS BUREAU, https://www.census.gov/topics/income-poverty/wealth/data/tables.html [https://perma.cc/F7D9-5YHU] (Nov. 22, 2021).

[22] Keister & Moller, *supra* note 15, at 63.

[23] Cagetti & De Nardi, *supra* note 20, at 292.

[24] *Id.* at 288.

[25] Complete equality of opportunity would require that each individual have equal wealth at the beginning of life and that opportunities to accumulate further wealth be equal throughout life, which is probably impossible to achieve so long as parents can transmit opportunities to their children. But moving toward greater equality of opportunity need not require any drastic restrictions on parental transmission of opportunities to children and can instead by achieved through a combination of taxing those with the greatest opportunities and providing more opportunities through governmental programs (like education) and transfers for those who would otherwise have relatively few opportunities. *See* MURPHY & NAGEL, *supra* note 13, at 119–21.

[26] *See id.* at 56–57.

[27] *Id.* at 57.

[28] CHUCK COLLINS, JOE FITZGERALD, HELEN FLANNERY, OMAR OCAMPO, SOPHIA PASLASKI & KALENA THOMHAVE, INST. FOR POL'Y STUD., SILVER SPOON OLIGARCHS: HOW AMERICA'S 50 LARGEST INHERITED-WEALTH DYNASTIES ACCELERATE INEQUALITY 4–5 (2021), https://inequality.org/wp-content/uploads/2021/06/Silver-Spoon-Oligarchs-Full-Report.pdf [https://perma.cc/K29Z-M9DG] (arguing that dynastic wealth is increasingly concentrating wealth into a few hands and undermining equality of opportunity for other families).

question of whether the government and broader society are taking sufficient measures to repair that inequality.

There has been increasing focus placed on wealth in the past decade, which has led to more individuals realizing its central place. This is at least partly due to Thomas Piketty's book, *Capital in the Twenty-First Century*,[29] which became a best seller and prompted robust discussions about wealth disparities. More recently, economists Emmanuel Saez and Gabriel Zucman further helped to revive interest in a wealth tax with their book, *The Triumph of Injustice*.[30] The debate they helped to spur was especially vibrant during the 2020 election season when Saez and Zucman served as a policy adviser for Elizabeth Warren and helped to write her wealth tax proposal.[31] Yet neither of these important works focused on the racial wealth gap. This could be because policies to tackle inequality would disproportionately help disadvantaged minorities, but it represents a notable blind spot, nevertheless. As the next section will show, the racial wealth gap has its own nuanced set of issues that are not captured by a more general focus on wealth inequality in the United States.

B. *The Frustratingly Persistent Racial Wealth Gap*

A crucial, and to date largely unaddressed part of wealth inequality in the United States is the racial wealth gap. According to the Urban-Brookings Tax Policy Center the total racial wealth gap is $10.14 trillion.[32] According to data from the 2019 Survey of Consumer Finances, white families have median wealth of $188,200 and mean wealth of $983,400.[33] Black families have considerably less wealth: their median wealth is $24,100 and the mean is $142,500.[34] Both of those figures represent less than fifteen percent of the wealth holdings of white families. The racial wealth

[29] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1–2 (Arthur Goldhammer trans., 2014) (arguing that inequitable returns on capital exacerbate wealth inequality which in turn threatens democratic values).

[30] EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY 14 (2019) (showing how regressive tax policy and tax avoidance fuel America's wealth inequality); *see also* Jonathan Curry, *UC Berkeley Economists Chosen as* Tax Notes Federal's *Persons of the Year*, TAXNOTES (Dec. 30, 2019), https://www.taxnotes.com/special-reports/tax-policy/uc-berkeley-economists-chosen-tax-notes-federals-persons-year/2019/12/13/2b617 [https://perma.cc/6VM4-H36G] (discussing Saez and Zucman's roles in popularizing discussions of wealth inequality and in tax reforms aimed at taxing wealth).

[31] *See* Benjamin Wallace-Wells, *The French Economist Who Helped Invent Elizabeth Warren's Wealth Tax*, NEW YORKER (Oct. 19, 2019), https://www.newyorker.com/news/the-political-scene/the-french-economist-who-helped-invent-elizabeth-warrens-wealth-tax [https://perma.cc/PAP7-N74B]. One of us (Gamage), also helped draft Senator Warren's wealth tax reform proposal, and has also worked with Saez and Zucman (and other co-collaborators) on other proposed wealth tax and related tax reform proposals at both the federal and state levels.

[32] Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS, (Dec. 9, 2020), https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/ [https://perma.cc/P57K-B975].

[33] Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/V7TW-LAJ3].

[34] As with many papers on this topic, for the sake of simplicity, this Article will primarily focus on the Black-white wealth gap, partly because it is the most stark and because many of the proposed interventions would also help other disadvantaged groups. The median and mean wealth of other racial and ethnic minority groups is less than that of white families but more than that of Black families. *See id.* Having said that, a more nuanced treatment of those wealth gaps is also necessary, but beyond the scope of this Article.

gap widens with age. White Americans' wealth compounds over time, so that white persons started with 3.5 times more wealth in their thirties but ended up with seven times more wealth in their sixties.[35] In the past twenty years two events have further exacerbated the racial wealth gap: the Great Recession[36] and the COVID-19 pandemic.[37]

The racial wealth gap matters partly because it is a direct link to the past. Because of the intergenerational reach of wealth, the racial wealth gap gives a more nuanced picture of racial progress in America. By focusing on the law and Supreme Court cases one might assume that Black Americans have fully overcome past discrimination, but wealth provides a more sobering assessment.[38] As noted sociologists Melvin Oliver and Thomas Shapiro have stated, the gap also underscores the path on which the nation is headed and provides "a reliable racial justice filter for policy and institutional practice."[39] Economic research has revealed that on our current path it would take over two hundred years to close the racial wealth gap.[40] Further research has confirmed that without major interventions the wealth gap will take hundreds of years to close.[41]

Again, this does not mean that racial poverty and the racial income gap are not important, but rather that they tell an incomplete story. Oliver and Shapiro warn that there are dangers to a one-sided focus on income when analyzing economic inequality in the United States.[42] In their groundbreaking 1995 study of racial wealth, they argued that a focus on income was part of a Black progress narrative, which linked Civil Rights era gains to Black prosperity.[43] That's because the income gap is not as profound as the wealth gap. At the time of Oliver and Shapiro's study Black Americans represented a 9.2 percent share of the population and held a 7.4 percent

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[35] MCKERNAN ET AL., *supra* note 10, at 1–2.

[36] *Id.* at 3.

[37] Christian E. Weller & Richard Figueroa, *Wealth Matters: The Black-White Wealth Gap Before and During the Pandemic*, CTR. FOR AM. PROGRESS (July 28, 2021), https://www.americanprogress.org/article/wealth-matters-black-white-wealth-gap-pandemic/ [https://perma.cc/V78Y-UHU5] (showing that Black households faced more financial emergencies during the pandemic, widening the racial wealth gap).

[38] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (ending racial segregation in schools); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (suggesting that in twenty-five years race-based affirmative action programs would no longer be necessary).

[39] Melvin L. Oliver & Thomas M. Shapiro, *Disrupting the Racial Wealth Gap*, CONTEXTS, Winter 2019, at 16, 18.

[40] DIONISSI ALIPRANTIS & DANIEL CARROLL, FED. RSRV. BANK OF CLEVELAND, ECONOMIC COMMENTARY: WHAT IS BEHIND THE PERSISTENCE OF THE RACIAL WEALTH GAP? (2019).

[41] Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *The Racial Wealth Gap, 1860–2020*, RUSSELL SAGE FOUND. 3 (Aug. 26, 2021) (showing that even under ideal conditions, racial wealth convergence is a distant scenario given vastly different starting conditions under slavery).

[42] *See* OLIVER & SHAPIRO, *supra* note 16, at 25; *see also* MCKERNAN ET AL., *supra* note 10, at 1; Maury Gittleman & Edward N. Wolff, *Racial Differences in Patterns of Wealth Accumulation*, 39 J. HUM. RES. 193, 194 (2004) ("While studies of earnings and income are important for assessing the extent to which labor market discrimination exists and the ability of African Americans to move closer to whites in terms of acquiring the skills and connections that are currently rewarded by the markets, they provide what is clearly an incomplete picture." (footnote omitted)).

[43] OLIVER & SHAPIRO, *supra* note 16, at 103. For racial wealth studies before Oliver and Shapiro see, for example, Henry S. Terrell, *Wealth Accumulation of Black and White Families: The Empirical Evidence*, 26 J. FIN. 363, 363 (1971) (finding that race studies are focused on income and earnings rather than wealth because of the greater availability of data).

share of total income.[44] Currently, for every dollar that Black and Hispanic Americans earned, whites earned two.[45] In stark contrast, looking at wealth disparities reveals that there's an equally compelling "no progress" narrative. While the income gap has not changed much over the past three decades, the wealth gap has grown.[46] Other scholars have noted that "[i]n 1983, the average wealth of whites was about five times as much as that of black and Hispanics."[47] By 2010, the income gap had grown to six times that of those racial minorities.[48]

Despite the American aspiration for equality of opportunity, extraordinary wealth inequality between races has persisted throughout the history of the United States. Currently, for every dollar of wealth owned by the average white family in the United States, the average Black family has less than one dime.[49] A 2013 Urban Institute report provides a worrisome glimpse into the future.[50] Their research revealed that over the last few decades wealth disparities continue to worsen, and the racial wealth gap "grows sharply with age."[51] Black Americans are less likely to own homes and retirement accounts and generally do not have the same asset building opportunities as white Americans.[52] For example, Black and Hispanic families are less likely than white families to inherit money that can help with a down payment for a home.[53] A lack of assets translates into vulnerability during tough times like the Great Recession and the COVID-19 pandemic. It also means less money in the bank for an education and less funds to retire on.

In practice the United States aspires to something more akin to sufficiency of opportunity, rather than equality of opportunity. Policymakers tend to believe that all citizens should have a sufficient, if not equal start.[54] This includes adequate healthcare, nutrition, and education. Sufficiency of opportunity policies do indeed help to remove the most harmful barriers to the attainment of success. Nevertheless, given the nation's history of racial discrimination and the persistence of racial wealth disparities, only partial results can be achieved through these policies.[55] According

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[44] OLIVER & SHAPIRO, *supra* note 16, at 102–03.

[45] MCKERNAN ET AL., *supra* note 10, at 1.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Paul Caine, *Study: Black Families Have 1 Cent for Every Dollar White Families Have*, WTTW (June 10, 2020, 7:59 PM), https://news.wttw.com/2020/06/10/study-black-families-have-1-cent-every-dollar-white-families-have [https://perma.cc/7PUA-C65B].

[50] MCKERNAN ET AL., *supra* note 10, at 1 (arguing that income inequality understates the size of the economic disparity between whites and non-whites in the United States).

[51] *Id.*

[52] *Id.* at 2.

[53] Bhutta et al., *supra* note 33.

[54] For example, the federal government has also invested heavily in programs for feeding low-income children. *See, e.g.*, KARA CLIFFORD BILLINGS, CONG. RSCH. SERV., R46234, SCHOOL MEALS AND OTHER CHILD NUTRITION PROGRAMS: BACKGROUND AND FUNDING 1 (2021).

[55] *See* OLIVER & SHAPIRO, *supra* note 16, at 177 ("Given the mutually reinforcing and historically accumulated race and class barriers that blacks encounter in attempting to achieve a measure of economic security, we argue that a focus on job opportunity is not sufficient to the task of eradicating racial disadvantage in America."); Adam Swift, *Justice, Luck, and the Family: The Intergenerational Transmission of Economic Advantage from a Normative Perspective*, *in* UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS 256, 263 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005) ("Taking equality of opportunity seriously does not mean

to political philosophers Murphy and Nagel, "[t]he most clearly unacceptable sources of inequality in a social order are deliberately imposed caste systems or other explicit barriers, by which members of certain racial, ethnic, religious, or sexual categories are excluded from desirable positions in political, social, or economic life."[56] This view would place prime importance on ridding the nation of explicit, *de jure*, and barriers such as Jim Crow laws.

Racial wealth disparities pose a more nuanced problem. They are partly borne of explicit barriers that denied Blacks the right to acquire wealth. Those explicit barriers largely do not exist anymore though.[57] Instead, their legacy continues because of the intergenerational nature of wealth. Because of the importance of wealth, the average Black person in America is still living under a system wherein she faces unequal life prospects solely as a result of her ancestry.

There are several supposedly neutral factors that are sometimes offered to explain the size of the racial wealth gap, but, as we will explain below, these only provide partial explanations. Ultimately, we argue that historical (and some ongoing) discriminatory public policies and governmental practices are a primary cause of the current racial wealth gap.

i. Consumption Patterns and Savings

One frequently cited explanation for the racial wealth gap is differences in consumption and saving patterns. Initially articulated by Franco Modigliani and Richard Brumberg in 1954, the life-cycle hypothesis ("LCH") posits that households seek to smooth household consumption over their lifetime.[58] According to this model, wealth accumulation is essentially about household saving and wealth is simply a store of future consumption. This has sometimes been used to argue that the average Black family has a poor future orientation, relying more on instant gratification, and so saving less.[59]

This supposedly neutral explanation for the racial wealth gap has not been borne out by the data. One study examined savings by race and found no evidence that African Americans have a lower savings rate than white Americans.[60] A more recent study, by economists Maury Gittleman and Edward Wolff found that the racial wealth gap would have narrowed if Blacks devoted as high a share of their income

reducing inequalities to those that result from responsible choices. It means merely removing factors that prevent the similarly talented and motivated from enjoying the same prospects of success.").

[56] MURPHY & NAGEL, *supra* note 13, at 56–57.

[57] But one may also consider current policies such as predatory lending that exacerbated the effects of the Great Recession for Black Americans.

[58] FRANCO MODIGLIANI & RICHARD BRUMBERG, UTILITY ANALYSIS AND THE CONSUMPTION FUNCTION: AN INTERPRETATION OF CROSS-SECTION DATA (1954), *reprinted in* 6 THE COLLECTED PAPERS OF FRANCO MODIGLIANI 3, 5–6 (2005).

[59] *See, e.g.*, John H. Young, Crystal R. Hudson & Edward L. Davis, *A Survey of Retirement Readiness Among African-Americans*, 21 J. AFR. AM. STUD. 551, 552–53 (2017) (discussing the lack of retirement readiness by African Americans and their lack of savings compared to white Americans).

[60] Francine D. Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q.J. ECON. 321, 332 (1990). Blau and Graham found that even after controlling for racial differences in income and other demographic factors, as much as three quarters of the wealth gap remains unexplained.

to savings as whites.[61] Yet much of this difference stemmed from the fact that saving rates rise with incomes and Blacks have lower incomes than whites.[62] The savings rate difference was not significant when the authors controlled for income.[63]

Thus, savings rates cannot account for the observed differences in wealth levels, and it appears that the wealth gap is instead ultimately driven by unequal life opportunities. For example, a 2015 study found little evidence of expected net worth age profile—the model's central prediction—among Black households.[64] Gittleman & Wolff found Blacks have a slight savings rate edge over whites, again after adjusting for household income.[65] Economists Darrick Hamilton and William Darity conclude that its "meager economic circumstance" and not deficient decision making that have left disadvantaged groups with "no other option but to use predatory and abusive alternative financial services."[66]

ii. Income

The differences between wealth and income become starker when Blacks and whites of comparable incomes are contrasted. The data reveals that current differences in income levels are not sufficient to explain the large racial wealth disparities.[67] Specifically, middle-class Blacks hold fewer wealth holdings in capital building assets than similarly situated whites.[68] Because of this, Blacks with high incomes are less able to pass on the wealth they may have accrued, which then reproduces the wealth gap in the next generation.[69]

Evaluating this dynamic nature of wealth accumulation, two research economists at the Federal Reserve Bank of Cleveland recently found that the historical income gap is the primary driver behind the current racial wealth gap.[70] In their words, "[t]he current racial wealth gap is the consequence of many decades of racial inequality that imposed barriers to wealth accumulation either through explicit prohibition during slavery or unequal treatment after emancipation."[71]

iii. Education

Education, which is often seen as an equalizer, is less of a panacea when viewed through the lens of wealth. White wealth surpasses that of Blacks with similar

61 Gittleman & Wolff, *supra* note 42, at 195–96.

62 *Id.*

63 *Id.*

64 Jeffrey P. Thompson & Gustavo A. Suarez, *Updating the Racial Wealth Gap* 2–3 (FEDS, Working Paper No. 2015-76, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072923 [https://perma.cc/J68Z-D78H].

65 Gittleman & Wolff, *supra* note 42, at 195.

66 Darrick Hamilton & William A. Darity, Jr., *The Political Economy of Education, Financial Literacy, and the Racial Wealth Gap*, 99 FED. RSRV. BANK ST. LOUIS REV. 59, 59 (2017) (examining the mismatch between the political discourse around individual agency, education, and financial literacy, and the actual racial wealth gap).

67 OLIVER & SHAPIRO, *supra* note 16, at 101; Gittleman & Wolff, *supra* note 42, at 205.

68 OLIVER & SHAPIRO, *supra* note 16, at 44.

69 *Id.* at 158.

70 ALIPRANTIS & CARROLL, *supra* note 40.

71 *Id.*

educational accomplishments.[72] Moreover, the pattern of racial wealth differences does not change in any significant way when education is controlled for. Education increases asset accumulations for both whites and Blacks, but white wealth still outpaces that of Blacks with similar education five to tenfold.[73] Education raises all boats, and it narrows the income gap, but it places Blacks even further behind similarly situated whites.[74] This makes the eradication of the wealth gap vitally important in achieving equal opportunity in the United States.

The roots of the racial wealth gap spread far beyond educational attainment: "The median white adult who attended college has 7.2 times more wealth than the median Black adult who attended college and 3.9 times more wealth than the median Latino adult who attended college."[75] Indeed, educational inequalities may actually be exacerbating the wealth gap.[76] Additionally, "it is also likely influencing a number of other variables that shape unequal asset-building opportunities."[77] In models, equalizing education and the returns on education only has a modest effect on the wealth gap.[78] Viewed in this way we can turn the traditional understanding on its head. As some economists have suggested, instead of education leading to wealth, higher wealth allows and primes certain families to have greater access to better educational opportunities.[79]

iv. Asset Holdings

Economists have found that there are substantial differences in the asset holdings of Black and white Americans.[80] In 1994, Back families were six times less likely to own assets in a business or a farm.[81] Fewer than two-fifths of Black families owned their own residence, while nearly two-thirds of white families did.[82] Finally, only ten percent of Black families owned any stock, while thirty-seven percent of white families did.[83] Asset portfolios do help explain the racial wealth gap, but

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[72] OLIVER & SHAPIRO, *supra* note 16, at 111; Gittleman & Wolff, *supra* note 42, at 203.

[73] OLIVER & SHAPIRO, *supra* note 16, at 114.

[74] *Id.*

[75] Oliver & Shapiro, *supra* note 39 at 16, 18.

[76] *Id.*

[77] LAURA SULLIVAN, TATJANA MESCHEDE, LARS DIETRICH, THOMAS SHAPIRO, AMY TRAUB, CATHERINE RUETSCHLIN & TAMARA DRAUT, INST. FOR ASSETS & SOC. POL'Y, BRANDEIS UNIV. & DEMOS, THE RACIAL WEALTH GAP: WHY POLICY MATTERS 18 (2015).

[78] *Id.* at 19–22.

[79] *See, e.g.*, DARRICK HAMILTON, WILLIAM A. DARITY, JR., ANNE E. PRICE, VISHNU SRIDHARAN & REBECCA TIPPETT, THE NEW SCH., DUKE CTR. FOR SOC. EQUITY & INSIGHT CTR. FOR CMTY. ECON. DEV., UMBRELLAS DON'T MAKE IT RAIN: WHY STUDYING AND WORKING HARD ISN'T ENOUGH FOR BLACK AMERICANS 5–6 (2015); JANELLE JONES & JOHN SCHMITT, CTR. FOR ECON. & POL'Y RSCH., A COLLEGE DEGREE IS NO GUARANTEE *passim* (2014).

[80] *See, e.g.*, Erik Hurst, Ming Ching Luoh, & Frank P. Stafford, *The Wealth Dynamics of American Families, 1984–94*, 1998 BROOKINGS PAPERS ON ECON. ACTIVITY, no. 1, at 267, 299 ("There appear to be strong differences in account ownership and account transitions by race . . . .").

[81] Gittleman & Wolff, *supra* note 42, at 205.

[82] *Id.*

[83] *Id.*

researchers have found that at least one-half of a family's net worth is derived from handed-down transformative assets.[84]

Research is mixed on just how much of an impact asset holdings have on the racial wealth gap. Recently, federal reserve economists used the SCF to explore the wealth gap and found that "the mean wealth difference between white and black families is due to assets."[85] Other studies, however, have found that asset holdings and returns on such assets alone cannot explain the entirety of the gap.[86] While portfolio differences are real and impactful, these studies suggest that portfolio differences are not the most significant factor contributing to the racial wealth gap. For instance, the Gittleman and Wolff study based on data before the subprime and mortgage market crisis found no significant racial differences in asset appreciation rates for families with positive assets.[87] They estimated that between 1984 and 1994 the wealth gap would have closed by only an additional five percentage points if Black households had held the same portfolios as white households.[88] As will be discussed below, these assets disparities are further exacerbated by the tax system, which subsidizes the assets of wealthy white families.[89]

v. The Birth Lottery

Being born into the right family matters. Families whose parents hold high status jobs were most likely to control a greater share of net worth.[90] According to bankers, young white couples are more likely than similar Black couples to receive help from their parents when purchasing their first home.[91] Other than death, the purchase of the first home triggers the largest wealth transfer between generations.[92] White parents were also more likely to help their children with other milestone events such as weddings, starting a family, and attending college. Ross Levine and Yona Rubinstein have shown that the significant edge in entrepreneurship held by white males originates in their serendipitous birth into more affluent families. [93]

Black families, on the other hand, tend to face pressures to help their relatives who are less well off, including transfers upward to their parents.[94] This further

[84] William G. Gale & John Karl Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, J. ECON. PERSPS., Fall 1994, at 145, 154.

[85] Thompson & Suarez, *supra* note 64, at 3.

[86] Gittleman & Wolff, *supra* note 42, at 213.

[87] *Id.*

[88] *Id.* at 223–24.

[89] *See infra* Part III.

[90] OLIVER & SHAPIRO, *supra* note 16, at 81.

[91] *Id.* at 145.

[92] *Id.* at 154. *But see* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 730 (1988) (arguing that education is the main occasion for wealth transmission in the United States).

[93] Ross Levine & Yona Rubinstein, *Smart and Illicit: Who Becomes an Entrepreneur and Do They Earn More?*, 132 Q.J. ECON. 963, 1015 (2017).

[94] N. S. Chiteji, & Darrick Hamilton, *Family Connections and the Black-White Wealth Gap Among Middle-Class Families*, REV. BLACK POL. ECON., May 2002, at 9, 9–10 (considering the effect of Black individuals having to support poor relatives on the Black-white wealth gap).

constrains the ability of Black families to accumulate wealth.[95] Some studies have found that inheritances, bequests and intra-family transfers account for more of the racial wealth gap than any other demographic and socioeconomic indicators—including education, income, and household structure.[96]

vi. Economic Stratification

Many studies find that there is some unexplained portion of the racial wealth gap.[97] Often this is left open as a black box for all past and current discrimination, including historical legacy, public policy, and institutional racism.[98] In the past fifteen years, this black box has been filled in by stratification economics.[99] This approach questions the traditional approach by assuming that discrimination is rational in maintaining social hierarchy and promoting the relative status of the privileged group(s).[100] This is an explicit move away from orthodox approaches that use cultural differences between Blacks and whites to explain the racial wealth gap. Importantly, it "considers various institutional and systemic factors that offer sources of privilege to members of the favored group."[101]

For instance, one stratification economist, Robert Williams, has developed a wealth privilege ("WP") model that recognizes the "the role of power and hierarchy within the wealth accumulation system."[102] He considers three pathways of wealth accumulation: (1) household saving, (2) family support and inheritances, and (3) asset appreciation.[103] Williams considers these "a self-reinforcing feedback loop beyond some threshold" which explains "why the racial wealth gap persists and grows over time."[104] Importantly, the three pathways reinforce and exacerbate each other.[105]

This economic stratification approach looks to deep seated structures that perpetuate racism and points us back to history.[106] The next part of this Article will thus seek to summarize some of that history to show how yesterday's discriminatory

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[95] *Id.* at 24.

[96] *See, e.g.*, Blau & Graham, *supra* note 60, at 334; Paul L. Menchik & Nancy Ammon Jianakoplos, *Black-White Wealth Inequality: Is Inheritance the Reason?*, 35 ECON. INQUIRY 428, 428 (1997); Gittleman & Wolff, *supra* note 42, at 195.

[97] *E.g.*, Thompson & Suarez, *supra* note 64, at 3.

[98] *Id.* at 4; Oliver & Shapiro, *supra* note 75, at 18–19.

[99] William A. Darity Jr., Darrick Hamilton & James B. Stewart, *A Tour de Force in Understanding Intergroup Inequality: An Introduction to Stratification Economics*, 42 REV. BLACK POL. ECON. 1, 2 (2015).

[100] William Darity Jr. & Melba J. Nicholson, *Racial Wealth Inequality and the Black Family*, *in* AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL & CULTURAL DIVERSITY 78, 81 (Vonnie C. McLoyd, Nancy E. Hill & Kenneth A. Dodge eds., 2005).

[101] Robert B. Williams, *Wealth Privilege and the Racial Wealth Gap: A Case Study in Economic Stratification*, 44 REV. BLACK POL. ECON. 303, 304 (2017).

[102] *Id.* at 309.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 310.

[106] *See* Hamilton & Darity, *supra* note 66, at 70–71 (examining the mismatch between the political discourse around individual agency, education, and financial literacy, and the actual racial wealth gap).

public policies and governmental choices are directly linked to the current racial wealth gap.

II. DISCRIMINATORY PUBLIC POLICIES AND THE ORIGINS OF THE RACIAL WEALTH GAP

The current racial wealth gap provides us an unbroken link to the nation's past. From the moment African slaves arrived on American shores they were placed on a path of wealth inferiority. As slaves they could have zero or negligible wealth. Rather, they themselves were seen as an asset owned by others. Recently, economic historians have reviewed historical economic data and revealed that we can break up the post-slavery history of the racial wealth gap into three periods: (1) the decades after Civil War which were characterized by some closure of the wealth gap because Black families began with no wealth, (2) beginning in the 1910s, convergence slows considerably but continues for another sixty to seventy years, and (3) the last four decades, from the 1980s onwards, which have been characterized by complete stagnation of the racial wealth gap.[107] This Part provides a brief overview of some of the policies and choices that led us to the current period of stagnation.

A. Slavery, Jim Crow, and their Legacies

Having defined wealth, as distinct from income, it is now possible to show how discriminatory wealth building policies can have long lasting effects. Racial wealth disparities were not a necessary result of chattel slavery, when slaves could not legally own or transfer assets.[108] Rather, the federal government reinforced disparities after abolition. Beginning with the Civil War and extending into the twentieth century, there were several missed opportunities for meaningful asset redistribution.[109]

Some land redistribution did occur under military jurisdiction during and after the War. Most notably, General William Tecumseh issued Special Field Order No. 15 from his headquarters in Savannah in January 1865.[110] The Order provided for the confiscation of land along the Atlantic Coast of the South, dividing it into forty-acre parcels on which freed slaves living in the area were settled.[111] Yet these orders

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[107] *See* Derenoncourt et al., *supra* note 41, at 2–3.

[108] *But see* Philip D. Morgan, *The Ownership of Property by Slaves in the Mid-Nineteenth-Century Low Country*, 49 J.S. HIST. 399, 410 (1983) (showing that some slaves owned property "on the sufferance of the master").

[109] *See* Oliver & Shapiro, *supra* note 75, at 17.

[110] William T. Sherman, Special Field Order No. 15 (1865), *reprinted in* 47 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. I, pt. 2, at 60, 60 (Washington, Gov't Printing Off. 1895) [hereinafter Special Field Order No. 15]. For the circumstances surrounding the promulgation of the orders, see 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD, MAJOR GENERAL UNITED STATES ARMY 189–91 (1907); 2 WILLIAM T. SHERMAN, MEMOIRS OF GENERAL WILLIAM T. SHERMAN 244–52 (New York, D. Appleton & Co., 2d ed. 1886).

[111] Special Field Order No. 15, *supra* note 110, at 60–61.

were revoked later that same year by President Andrew Johnson and most freed slaves never received any parcels.[112]

President Johnson also attempted to undermine the Freedmen's Bureau bills, a series of laws that represented meaningful attempts to aid former slaves. The first bill was passed during the Lincoln administration to aid former slaves with necessities such as food, education and health care and facilitate employment contracts with landowners.[113] The second bill, which would have opened up millions of acres of unoccupied land,[114] was vetoed by President Johnson on February 19, 1866.[115] Later that year, Congress passed another Freedmen's Bureau bill, overriding a presidential veto, which provided substantial rights to ex-slaves such as schools for their children, the distribution of land, and military courts to ensure these rights.[116]

The Radical Republican Congress passed the last bill in July 1868, again extending the functions of the Bureau.[117] But within a few weeks, Congress decided to renege on this commitment to the former slaves by limiting the functions of the Bureau to processing claims and supporting education.[118] Finally, in 1872 Congress voted to completely shut down the Bureau.[119] Almost all land distributed during the War had by then been returned to its pre-war ownership. The push for land ownership gave way to the implementation of a plantation wage system.[120] Although some freed people continued to expect their forty acres of land, they had no realistic way of getting it.[121]

Enacted during the same period during which the Freedmen's Bureau still existed, the Homestead Acts represented one of the largest transfers of wealth in United States history. These laws gave an applicant ownership of federal land, at little or no cost.[122] This originally consisted of grants totaling 160 acres of unappropriated federal land within the boundaries of the public land states.[123] The

[112] H.R. EXEC. DOC. NO. 11, 39th Cong., 1st Sess. 6 (1865) (dispatching Commissioner Howard to the South to settle land disputes over Sherman lands).

[113] Act of Mar. 3, 1865, ch. 90, § 4, 13 Stat. 507, 508.

[114] EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 72–73 (Washington, Solomons & Chapman, 2d ed. 1875).

[115] John H. Cox & LaWanda Cox, *Andrew Johnson and His Ghost Writers: An Analysis of the Freedmen's Bureau and Civil Rights Veto Messages*, 48 MISS. VALLEY HIST. REV. 460, 460 (1961).

[116] Act of July 16, 1866, ch. 200, §§ 9, 13, 14 Stat. 173, 175–76.

[117] Act of July 6, 1868, ch. 135, 15 Stat. 83

[118] Act of July 25, 1868, ch. 245, § 2, 15 Stat. 193, 193–94.

[119] Act of June 10, 1872, ch. 415, 17 Stat. 347, 366.

[120] Despite the failure of Reconstruction, Blacks continued to acquire land in the South, reaching a peak of fifteen million acres. They were met with fraud, lynchings, eminent domain claims, problems with proper land titling, and racism on the part of the United States Department of Agriculture (USDA). By 1997 Blacks owned 2.3 million acres. Black land ownership diminished more than that of any other group in the twentieth century, while whites experienced steady growth. Jessica Gordon Nembhard & Charlotte Otabor, *The Great Recession and Land and Housing Loss in African American Communities: Case Studies from Alabama, Florida, Louisiana, and Mississippi* 1–2 (Ctr. on Race & Wealth, Howard Univ., Working Paper, 2012).

[121] For a more comprehensive examination of Sherman's land grant and the Freedmen's Bureau, see Paul A. Cimbala, *The Freedmen's Bureau, the Freedmen, and Sherman's Grant in Reconstruction Georgia, 1865–1867*, 55 J.S. HIST. 597, 598 (1989) (providing a detailed picture of the Bureau and illustrating the tensions inherent in the Reconstruction process).

[122] Act of May 20, 1862, ch. 75, § 1, 12 Stat. 392, 392.

[123] *Id.*

first of the acts, the Homestead Act of 1862, allowed anyone who had never taken up arms against the U.S. government (including freed slaves and women), was twenty-one or older, or the head of a family, to file an application to claim a federal land grant.[124] The next attempt at land redistribution, the Southern Homestead Act of 1866 sought to address land ownership inequalities in the South during Reconstruction.[125] Unfortunately, the lowered prices for the land were still too high for many. The Timber Culture Act of 1873 granted land to a claimant who promised to plant trees.[126] The tract could be added to an existing homestead claim. The Kincaid Act of 1904 granted 640 acres to homesteaders in western Nebraska.[127] An amendment to the Homestead Act of 1862, the Enlarged Homestead Act, was passed in 1909 and increased the allotted acreage to 320.[128] Another amended act, the Stock-Raising Homestead Act, was passed in 1916 and again increased the land involved, this time to 640 acres.[129] Black Americans were largely excluded from all of these opportunities, further setting the course for lasting inequities.[130]

The Homestead Acts gave nearly 1.5 million American families title to 287 million acres of land, which is more than half the size of the state of Alaska.[131] Because of the intergenerational nature of wealth, the effect of these policies continues to be felt to this day. For example, one study estimates that about forty-six million American adults are homestead descendants.[132] This means that up to one-quarter of U.S. adults (based on 2005 estimates) can trace their legacy of property ownership, class status, and economic mobility to this federal government policy.[133]

B. Discriminatory Public Policies in the 1900s Through Today

While outright transfers of land from the federal government eventually diminished as a form of asset-building, other programs came to the fore beginning with the Great Depression. Asset-building policies have thus been utilized throughout the nation's history. Much like the Homestead Acts, however, many Black Americans were excluded through discriminatory policies or through the discriminatory delivery of aid. Below we briefly summarize two such policies which helped build the American middle class and which, in the process of doing so, also further exacerbated the racial wealth gap.

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[124] *Id.*

[125] Act of June 21, 1866, ch. 127, 14 Stat. 66.

[126] Act of Mar. 3, 1873, ch. 277, § 1, 17 Stat. 605, 605–06.

[127] Act of Apr. 28, 1904, Pub. L. No. 58-233, § 1, 33 Stat. 547, 547.

[128] Act of Feb. 19, 1909, Pub. L. No. 60-245, § 1, 35 Stat. 639, 639.

[129] Act of Dec. 29, 1916, Pub. L. No. 64-290, § 1, 39 Stat. 862, 862.

[130] Trina Williams Shanks, *The Homestead Act: A Major Asset-Building Policy in American History*, *in* INCLUSION IN THE AMERICAN DREAM: ASSETS, POVERTY, AND PUBLIC POLICY 20, 36 (Michael Sherraden ed., 2005) [hereinafter INCLUSION].

[131] *Id.* at 29, 31.

[132] *Id.* at 32. Blacks were largely excluded from this asset-building policy. *Id.* at 35. When the Homestead Act of 1862 was passed the prospect of Black ownership was questionable. After the Civil War, black codes were put into place to prevent Blacks from acquiring property. *Id.* The Freedmen's Bureau invalidated these codes, but they had a substantial impact nevertheless. *Id.*

[133] *Id.* at 32.

i. The Federal Housing Administration

The Federal Housing Administration ("FHA"), created during the Depression,[134] stimulated asset development across the nation.[135] Specifically, it incentivized homeownership by improving housing standards, providing an adequate home financing system, and stabilizing the mortgage market.[136] To this day the agency insures loans made by banks and by other private lenders for home building and home buying.[137] The FHA has been notoriously discriminatory in both its policies and delivery of aid.[138] In the 1930s, the FHA established its now infamous redlining policies as part of an initiative to develop the first underwriting criteria for mortgages.[139] The FHA guidelines were established to steer private mortgage investors away from minority areas. They marked Black borrowers as bad credit risks and effectively discouraged lending and investment in these areas, even as Black home buyers continued to be excluded from white neighborhoods.[140] This denial of services was done either explicitly or through the selective raising of prices.[141] Black residents were also denied services like healthcare[142] and supermarkets,[143] which were purposely built far away from Black neighborhoods. As a result, in inner city segregated areas distant from and poorly connected to major centers of employment growth (located in general in the U.S. in suburbs), Black Americans faced strong geographic barriers to finding and keeping well-paid jobs.[144]

These practices did not become illegal until the Fair Housing Act of 1968 was enacted.[145] Thus, by preventing housing purchases and depressing home values, FHA policies significantly impeded Black wealth acquisition and transmission. To this day, the resulting patterns of residential segregation persist, with Black households more likely to have higher poverty rates and lower home values.[146] This is in addition to the related spatial discrimination effects. That is, there are still many segregated

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[134] National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246. 1246 (1934).

[135] James Midgley, *Asset-Based Policy in Historical and International Perspective*, *in* INCLUSION, *supra* note 130, at 42, 49–50.

[136] John D. Landis & Kirk McClure, *Rethinking Federal Housing Policy*, 76 J. AM. PLAN. ASS'N 319, 326–27 (2010).

[137] *Id.*

[138] *See* LaDale C. Winling & Todd M. Michney, *The Roots of Redlining: Academic, Governmental, and Professional Networks in the Making of the New Deal Lending Regime*, 108 J. AM. HIST. 42, 42 (2021).

[139] *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 64–65 (2017).

[140] Beth J. Lief & Susan Goering, *The Implementation of the Federal Mandate for Fair Housing*, *in* DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 227, 229 (Gary A. Tobin ed., 1987).

[141] *Id.*

[142] Anthony L. Nardone, Joan A. Casey, Kara E. Rudolph, Deborah Karasek, Mahasin Mujahid & Rachel Morello-Frosch, *Associations Between Historical Redlining and Birth Outcomes from 2006 Through 2015 in California*, PLOS ONE, Aug. 7, 2020, at 1, 2–3, https://doi.org/10.1371/journal.pone.0237241 [https://perma.cc/XSK3-AVAV].

[143] Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125, 127–28 (2001).

[144] Jeffrey S. Zax & John F. Kain, *Moving to the Suburbs: Do Relocating Companies Leave Their Black Employees Behind?*, 14 J. LAB. ECON. 472, 473, 496 (1996).

[145] 42 U.S.C. §§ 3601–3619.

[146] SULLIVAN ET AL., *supra* note 77, at 10.

Black neighborhoods where residents find it difficult to access services and find jobs.[147] For instance, one study concluded that Black men who grew up in racially segregated neighborhoods were substantially less likely to gain upward economic mobility.[148]

ii. The G.I. Bill

While less pervasive than the FHA, the G.I. Bill provided a range of benefits to World War II veterans including low-cost mortgages, low-interest loans to start a business, cash payments of tuition and living expenses to attend college, high school or vocational education, and one year of unemployment insurance.[149] Yet, because of discriminatory policies and discriminatory delivery of aid, military service has also led to uneven patterns of wealth building by Blacks and whites. Although the G.I. Bill increased the population of Blacks owning homes and attending college, several factors prevented them from taking full advantage of its policies.[150] For instance, the United States Department of Veteran Affairs ("VA"), which was closely linked to the all-white American Legion and Veterans of Foreign Wars, could and did deny claims of Black veterans.[151] Banks and mortgage agencies also refused loans to Black veterans.[152] In addition, Black Americans often could not forego the pressing revenue needs back at home in order to attend universities.[153]

Moreover, even those who could leave home faced substantial obstacles gaining admission to colleges.[154] Black veterans were often unable to take advantage of the education benefits because many white colleges refused to admit them.[155] Historically Black Colleges and Universities were swamped with applications from G.I.s, and as a result, had to turn away fifty-five percent of their veteran applicants.[156] In addition, the average Black veteran had a fifth grade education, compared to an "unusually high" education level for white veterans.[157] This is especially significant "because education is the next single, largest correlated variable of an individual's

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[147] *See* Yves Zenou & Nicolas Boccard, *Racial Discrimination and Redlining in Cities*, 48 J. URB. ECON. 260, 260–61 (2000).

[148] Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711, 711 (2020).

[149] Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, §§ 400(a)–(b), 500(a)–(b), 503, 600(a), 700(a), 58 Stat. 284, 287, 289, 291–93, 295.

[150] For a fuller picture of racism under the G.I. Bill, see Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, J. BLACKS HIGHER EDUC., Winter 1994/1995, at 104, 104; Ronald Roach, *From Combat to Campus*, BLACK ISSUES HIGHER EDUC., Aug. 21, 1997, at 26, 27; Mark Boulton, *How the G.I. Bill Failed African-American Vietnam War Veterans*, J. BLACKS HIGHER EDUC., Winter 2007/2008, at 57, 57.

[151] *See* Herbold, *supra* note 150, at 105–06. One survey conducted in 1947 found that only seven of the 1,700 veterans employed by the VA in one southern state were Black. *Id.* at 105.

[152] *Id.* at 106.

[153] *Id.* at 105.

[154] *Id.* at 106.

[155] LUI ET AL., *supra* note 10, at 96.

[156] *Id.*

[157] *Id.* at 97.

ability to earn an income and, in turn, amass wealth, other than intergenerational wealth transfers."[158]

iii. Other Discriminatory Public Policies

The FHA and the G.I. Bill are only two examples of explicit asset-building policies that Black individuals were largely excluded from. There are many other public policies beyond these that have contributed to creating or exacerbating the racial wealth gap. For instance, educational inequities going back to slavery prevented many Black Americans from learning to read and write, which then subsequently inhibited the intergenerational transmission of literacy and other skills.[159] After emancipation, so-called separate-but-equal policies and unequal educational funding more generally all depressed the potential of Black Americans.[160] Today, almost seventy years after *Brown v. Board of Education*,[161] large swaths of American education still remain segregated and unequal.[162]

The labor market was also segregated by law for much of U.S. history, until Title VII of Civil Rights Act of 1964.[163] Continuing to this day, the persistence of job discrimination remains a substantial hurdle for many Black Americans.[164] The Social Security system also excluded Black individuals in a number of ways. Southerners blocked efforts to include rural Black workers, and domestic and agricultural workers were initially excluded as well, at a time when at least sixty percent of Black workers performed such work.[165] Finally, a substantial portion of America's wealth was directed through its housing and transportation policies toward white suburbs.[166]

Altogether, it should be evident that governmental policies and other public actions have played at least a substantial role in creating and exacerbating the racial wealth gap. Thus, even if all forms of discrimination (both explicit and implicit) could be fully ended today, this would not on its own create equality of opportunity for the many Black Americans and others who have been disadvantaged by historical governmental policies and public actions.

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[158] Alice M. Thomas, *The Racial Wealth Divide through the Eyes of the* Younger Family*: Undoing America's Legacy of Wealth Inequality in Search of the Elusive American Dream Utilizing a Sankofa Model of Transitional Justice*, 5 FLA. A & M L. REV. 1, 37 (2009).

[159] *See* CARTER GODWIN WOODSON, THE MIS-EDUCATION OF THE NEGRO 17 (2d prtg. 1973).

[160] *See* John K. Pierre, Commentary, *History of* De Jure *Segregation in Public Higher Education in America and the State of Maryland Prior to 1954 and the Equalization Strategy*, 8 FLA. A&M U. L. REV. 81, 81 (2012).

[161] 347 U.S. 483 (1954).

[162] *See* Graziella Bertocchi & Arcangelo Dimico, *The Racial Gap in Education and the Legacy of Slavery*, 40 J. COMPAR. ECON. 581, 581–82 (2012).

[163] 42 U.S.C. § 2000e.

[164] *See* Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 2–3 (2019).

[165] LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935 at 275–76 (1994).

[166] For a more in-depth exploration of these issues, see Thomas, *supra* note 158, at 31–41 (summarizing the history of wealth inequality in America for Native Americans, African Americans, Latino Americans, and Asians Americans).

III. THE ROLE OF THE TAX SYSTEM

As we explained in Parts I and II above, discriminatory governmental policies have played at least a substantial role in creating and exacerbating the racial wealth gap. Because of America's history of discriminatory public policies and outright governmental oppression, many Black Americans have been deprived of the familial wealth building opportunities enjoyed by other Americans whose ancestors were not similarly disadvantaged.

This is especially troubling because wealth inequality has intergenerational snowballing effects, and particularly so under the rules of the existing tax system. As Emmanuel Saez and Gabriel Zucman explain, "wealth generates income, income that is easily saved at a high rate when capital taxes are low; this saving adds to the existing stock of wealth, which in turn generates more income, and so on."[167]

It is also important to emphasize that the tax code has further favored the forms of asset holdings that many white (historically more privileged) families tend to have. For instance, in their pioneering empirical study of the relevant provisions of the Internal Revenue Code, Beverly Moran and William Whitford analyzed the net holdings of Blacks and whites and concluded that Blacks are less likely to hold assets that are tax favored such as stocks, mutual funds, and real estate equity.[168] Instead, Blacks held a greater percentage of their wealth in vehicles, which are generally tax disfavored.[169] Moreover, the results of Moran and Whitford's analysis of gifts and inheritance was even more dramatic. Again, they controlled for income, education, age, region, and marital status, and found that whites are much more likely to enjoy the tax benefits associated with gifts and inheritance than Blacks.[170]

More recently, Dorothy Brown has shown that the tax system has over time disproportionately depressed wealth building for Black Americans.[171] For example, she has argued that the tax code, "by allowing deductions for wages paid in a racially discriminatory manner and allowing deductions for actual damage awards," effectively subsidizes race discrimination.[172] She has also elaborated upon the housing tax preferences that Moran and Whitford studied, showing that these increase the racial wealth gap by favoring assets more typically owned by white Americans.[173] As she explains, "roughly half of the aggregate mortgage interest deductions are claimed by twenty percent of zip codes; zip codes with high claiming rates tend to be disproportionately white, middle-aged, and married."[174] She further argues that the exclusion from income for gains on the sale of owner-occupied homes

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[167] SAEZ & ZUCMAN, *supra* note 30, at 97.

[168] Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 769–71.

[169] *Id.*

[170] *Id.* at 771–72.

[171] DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT 198–99 (2021).

[172] Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 765–66 (1999).

[173] Dorothy A. Brown, *Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequity*, 49 U. MEM. L. REV. 205, 223–24 (2018).

[174] BROWN, *supra* note 171, at 72.

(of up to $500,000 for married couples and up to $250,000 for single individuals) is discriminatory in practice, because the legacy of past discrimination and oppressive public policies has created a world in which Black Americans are largely denied the wealth-building opportunities of owner-occupied housing that are so important for building wealth for groups of middle-class Americans who have not similarly suffered from historical disadvantage.[175] Brown also argues that many other important tax law provisions (such as the seemingly innocuous joint tax return) similarly serve to disproportionately harm Black families (e.g., because they are more likely to have two wage earners).[176]

Beyond the examples noted above, a larger literature documents numerous ways in which seemingly neutral tax code provisions may serve to disadvantage Black Americans and other members of historically disadvantaged groups.[177] Space constraints prevent us from adequately reviewing all of that prior scholarship here. Instead, this Article aims to build on that prior scholarship by elaborating on how, by heavily taxing wage and salary incomes, as compared to only lightly taxing the returns to owning wealth, the tax system obstructs Black Americans and other historically disadvantaged groups from building wealth and economic power and catching up to more advantaged groups.

Because the history of governmental oppression and discriminatory public policies has deprived Black families of wealth and social capital building opportunities, Black Americans are disproportionately dependent on wage and salary income. The existing tax system then places a relatively heavy burden on building wealth from such wage and salary income. This, again, is the phenomenon that we metaphorically label as "wage enslavement."[178]

A. How the Tax System Favors Historically Advantaged Groups

As is well known in the tax legal literature, both the income tax and the estate and gift tax are essentially voluntary when it comes to income derived from wealth.[179] The simplest strategy for escaping the income tax on the returns to owning wealth is often called "buy, borrow, die."[180] This strategy consists of three steps.

The first step ("buy," or alternatively, "defer realization of gains") is to plan one's economic affairs so as to earn income in the form of asset appreciation, such as stock

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[175] Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 361–62 (2009).

[176] Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 792 (1997).

[177] *See, e.g.*, Phyllis C. Taite, *Tax Code Bias and Its Starring Role in Perpetuating Inequalities*, 72 S.C. L. REV. 735, 755 (2021); Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL'Y 265, 266 (2020); Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 39–42 (2019) (listing numerous studies finding that tax policies have disparate racial outcomes).

[178] *See supra* notes 4–6 and accompanying text.

[179] *See* Gamage & Brooks, *supra* note 3, at 500–06; Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 920 (2005) ("Taxes on capital are easily avoided and virtually voluntary."); Edward J. McCaffery, *Taxing Wealth Seriously*, 70 TAX L. REV. 305, 326 (2017) [hereinafter McCaffery, *Taxing Wealth Seriously*] ("[T]he gift and estate or unified wealth transfer tax system is *not* taxing wealth seriously. The estate tax has long been essentially a 'voluntary tax,' as it was dubbed in 1977. It is easily avoided with fairly standard planning techniques." (footnote omitted)).

[180] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 306; Gamage & Brooks, *supra* note 3, at 503–04.

in a company one owns or appreciation of real estate or other physical or financial assets.[181] Because of the realization-based nature of the income tax, such appreciation is not taxed unless and until there is some future realization event.[182]

The second step is to borrow to the extent one needs money either to pay for living expenses or to purchase assets or to invest in businesses or other income-earning opportunities (such as those needed for the first step, above).[183] Such borrowing is not taxable under the current rules of the income tax. For those who already have substantial wealth—obtained from inheritances or otherwise—it is typically quite easy to borrow at very low rates. Alternatively, many Americans born into greater privilege can borrow from or with the assistance of family members.

The third step is to die—eventually, and presumably inevitably.[184] Under the rules of the existing income tax, all untaxed gains from prior asset appreciation go away upon death, so that one's estate can pay off prior borrowing by selling assets and without triggering any income tax on untaxed prior appreciation.[185] There are also other means for escaping the income tax on the back end, upon the relinquishment of assets with built-in gains, but taking advantage of the stepped-up basis upon death rules is the easiest.[186]

There are numerous, more complicated variations on this "buy, borrow, die" strategy.[187] But the key point remains, that for those who start with substantial wealth or with the ability to borrow from family or from social networks, both the income tax and the estate and gift tax are essentially voluntary, and federal payroll taxes are similarly largely voluntary also—as Edward McCaffery has explained: "Buy/Borrow/Die avoids all federal taxes."[188]

Of course, a good number of Americans born into comparative privilege nevertheless do end up working primarily for wage and salary incomes, rather than being compensated in forms that the tax system treats as asset appreciation, and thus these Americans may well pay substantial income tax on that wage and salary income.[189] The full scope of "buy, borrow, die" and other related tax-gaming strategies[190] is only completely available in certain economic sectors, and is thus only partially available for taxpayers who opt to work for professions in which

[181] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 317–19; Gamage & Brooks, *supra* note 3, at 501–02.
[182] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 317; Gamage & Brooks, *supra* note 3, at 501–02.
[183] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 319; Gamage & Brooks, *supra* note 3, at 503–04.
[184] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 319.
[185] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 319–21; Gamage & Brooks, *supra* note 3, at 503–04.
[186] Gamage & Brooks, *supra* note 3, at 504.
[187] *Id.*
[188] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 320–21.
[189] *See* David Gamage, Emmanuel Saez & Darien Shanske, *Op-Ed: California Should Pass a Small Tax on Big Wealth*, L.A. TIMES (Apr. 22, 2021, 3:22 AM), https://www.latimes.com/opinion/story/2021-04-22/california-wealth-tax [https://perma.cc/G9K4-64EE] ("The ordinary rich—say, a well-compensated doctor—pay a lot in California income tax; they do their share to help support the state. Indeed, many working-class individuals, such as nurses, teachers or firefighters, pay tax on a much larger share of their economic gains than do the wealthiest Californians.").
[190] As in prior work, we use the term "gaming" to include legal forms of tax avoidance, illegal forms of tax evasion, and the large category of tax planning transactions that are neither clearly legal nor clearly illegal. See David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1, 5 n.18 (2014).

compensation mostly takes the form of cash wages and salaries paid by large employers.[191]

Yet even these taxpayers often benefit quite substantially from the large tax benefits provided for owner-occupied housing,[192] employer-provided health insurance plans,[193] and tax-favored retirement savings and pension plans.[194] Because of the legacies of discrimination and oppression, all of these tax benefits are disproportionately much less available to Black Americans and to many other members of historically disadvantaged groups.[195] More generally, as Edward McCaffery argues:[196]

> The income tax, as is, is a highly limited tool for addressing social and political concerns over economic inequality, in theory as well as in practice, constrained by economic facts, political realities, popular perceptions, and more. Wealth inequality is greater, more enduring, and

[191] *But see* McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 326 ("Simple devices such as home equity loans, reverse mortgages, and cash value life insurance make Buy/Borrow/Die pervasive and available to many.").

[192] Larry Ozanne, *Taxation of Owner-Occupied and Rental Housing* 2 (Cong. Budget Off., Working Paper 2012-14, 2012) ("The federal income tax treats home ownership more favorably than most other investments. People who own and occupy their own homes can deduct mortgage interest and property taxes from income while the rental value of the home—that is, the benefits they derive from home ownership, sometimes referred to as 'imputed rent'—is excluded from taxable income. In addition, capital gains on sales of primary residences are largely excluded from tax.").

[193] David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 681 (2012) ("The exclusion for employer-provided health insurance is the largest federal tax expenditure.").

[194] Steven M. Rosenthal, *Tax-Favored Retirement Plans*, TAX POL'Y CTR. (Apr. 20, 2017), https://www.taxpolicycenter.org/publications/tax-favored-retirement-plans/full [https://perma.cc/8PCV-GVDG] ("In aggregate, the tax benefits for retirement savings are large. For 2017, the Tax Policy Center estimates the net present value of retirement savings tax benefits as $187 billion. Retirement tax benefits are among the largest tax expenditures . . . .").

[195] On homeownership tax benefits, see *supra* notes 175–177; Taite, *supra* note 177, at 749–54. On employer-provided health insurance tax benefits, see BROWN, *supra* note 171, at 161–64; Bobbi M. Bittker, *Racial and Ethnic Disparities in Employer-Sponsored Health Coverage*, A.B.A. (Sept. 7, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/ [https://perma.cc/V2ER-73U3]; Rosemarie Day & Deb Gordon, *Employer-Sponsored Health Insurance Contributes to Structural Racism*, HILL (Sept. 5, 2020, 8:00 AM), https://thehill.com/opinion/healthcare/515184-employer-sponsored-health-insurance-contributes-to-structural-racism [https://perma.cc/GH49-UEJE]. On tax-favored retirement plans benefits, see Steven M. Rosenthal, *Retirement Tax Benefits Exacerbate Racial Inequities*, TAX POL'Y CTR. (Aug. 24, 2021), https://www.taxpolicycenter.org/taxvox/retirement-tax-benefits-exacerbate-racial-inequities-0 [https://perma.cc/JR9J-EB9W]; Monique Morrissey, *White Workers Have Nearly Five Times As Much Wealth in Retirement Accounts As Black Workers*, ECON. POL'Y INST. (Feb. 18, 2016), https://www.epi.org/publication/white-workers-have-nearly-five-times-as-much-wealth-in-retirement-accounts-as-black-workers/ [https://perma.cc/LZ4P-4297].

[196] McCaffery, *Taxing Wealth Seriously*, *supra* note 179, at 310 (emphasis omitted) (footnote omitted) (citing PIKETTY, *supra* note 29, at 25–26). For further discussion on how the difficulties of raising revenues from the wealthy under the existing tax system inhibit egalitarian spending policies, also see David Gamage & Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 NW. U. L. REV. 295, 370 (2017) (explaining how when a proposed tax reform is estimated to raise little revenue for the policymakers considering proposing the reform that this tends to make those policymakers lose interest in the reform); David Gamage & Darien Shanske, *The Trouble with Tax Increase Limitations*, 6 ALB. GOV'T L. REV. 50, 79 (2013) ("There is ample evidence that voters desire both lower taxes and increased spending on all of the major programs on which governments spend significant resources.").

> more problematic than income inequality. And the U.S. tax system is a significant contributor to wealth inequality. The income tax allows those with capital to get richer, while making it harder for those living off labor returns, or wages, to get capital in the first place. This is at a time when the rich are getting richer anyway, because, as Piketty points out, the return on assets is higher than the overall growth rate: Economic forces are generating greater returns to capital than labor. Attempting both to finance the modern state and to address economic inequality through the income tax has done considerable collateral damage to the progressive agenda, leading to a conservative ascension personified by Ronald Reagan and fueled by an anti-tax fervor, one that has left liberals such as Barack Obama, when they have been able to obtain power at all, hand-tied from advancing any form of meaningful egalitarian agenda.

In other words, the existing tax system generally serves to further advantage those born into greater wealth and privilege, while holding back historically disadvantaged groups of Americans who do not start life with inherited wealth or with the ability to borrow on favorable terms from family or from familial social networks.

B. How the Tax System Holds Back Historically Disadvantaged Groups

Despite the limitations of the existing tax system, the United States federal government does raise substantial tax revenues, as do state and local governments.[197] As explained above, these revenues primarily come from taxpayers earning wage and salary incomes.

More specifically, for most poorer Americans, the largest source of tax burdens comes from payroll taxes and from state and local sales taxes.[198] As the Tax Policy Center's Briefing Book explains, for Social Security, "[e]mployers and employees each contribute 6.2 percent of the workers' wages for a combined 12.4 percent," up to a maximum taxable earnings of $137,700 for 2020, and "[m]ost economists believe that the employer portion of the tax, just like the employee portion, is borne by employees in the form of lower compensation."[199] Additional payroll taxes that serve to reduce employees' wages include the combined 2.9 percent Medicare

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[197] *But see* David Gamage, *Comments on Daniel Shaviro's* Tax Reform Implications of the Risk of a U.S. Budget Catastrophe, 50 U. LOUISVILLE L. REV. 599, 599 (2012) ("Shaviro predicts that . . . the U.S. is on 'an unsustainable long-term fiscal path' . . . . I generally agree with these predictions." (footnote omitted) (quoting Daniel Shaviro, *Tax Reform Implications of the Risk of a U.S. Budget Catastrophe*, 50 U. LOUISVILLE L. REV. 577, 577 (2012))); David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749, 770 (2010) (discussing the federal government's use of deficit financing to pay for federal spending).

[198] SAEZ & ZUCMAN, *supra* note 30, at 15–16 ("The heavy tax burden imposed on the least fortunate Americans has two culprits. The first is payroll taxes. . . . The second and primary culprit for the high tax rates paid by working-class Americans is consumption taxes. The United States may not have a value-added tax, but it has a proliferation of sales and excise taxes that, like a VAT, make prices higher. . . . The United States does not have a VAT; it has a poor man's VAT.").

[199] *Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-are-major-federal-payroll-taxes-and-how-much-money-do-they-raise [https://perma.cc/9JHK-8LHT] (May 2020).

payroll taxes,[200] and the federal and state-level unemployment insurance payroll taxes.[201]

Because poorer Americans spend most of their money on goods, which are typically included in sales tax bases, whereas richer Americans often spend more of their money on services excluded from sales tax bases, studies find that sales taxes are quite regressive and serve to exacerbate racial wealth gaps.[202] Studies have also found racial bias in property tax administration.[203] Combined with the legacy of discriminatory policies and practices that have depressed the growth of property values in majority Black neighborhoods, as compared to white neighborhoods, property taxes along with the tax treatment of real estate more generally have thus also served to exacerbate racial wealth gaps.

Moreover, most state-level income taxes are only minimally progressive even when measured by reported (that is, realized) income, and quite likely are regressive accounting for unrealized gains.[204] Also, various excise taxes, fines, penalties, and the like, are another significant source of financing for state and local governments, and these are generally regressive and often administered in a racially discriminatory manner that further holds back many Black Americans and other members of historically disadvantaged groups.[205]

By contrast to most state-level taxes, the federal income tax is progressive as measured by reported income, but this progressivity breaks down at the top once unrealized gains are taken account of.[206] Scholars estimate that over three-quarters of the investment income of the wealthiest taxpayers fully and permanently escapes the existing income tax.[207] Even looking just at the middle-classes, the most important forms of wealth appreciation enjoyed by most historically privileged white families are income tax-favored or tax-exempt, most notably owner-occupied

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[200] *Id.*

[201] *Id.*

[202] *See, e.g.*, CARL DAVIS, MARCO GUZMAN & JESSICA SCHIEDER, INST. ON TAX'N & ECON. POL'Y, STATE INCOME TAXES AND RACIAL EQUITY: NARROWING RACIAL INCOME AND WEALTH GAPS WITH STATE PERSONAL INCOME TAXES 4 (2021) ("At the state and local levels these taxes are particularly important because so many other revenue sources on which these governments rely—including sales taxes, excise taxes, fines, and fees—disproportionately impact lower- and middle-income families and worsen racial disparities."); David Gamage, Darien Shanske, Gladriel Shobe & Adam Thimmesch, *Weathering State and Local Budget Storms: Fiscal Federalism with an Uncooperative Congress*, 55 MICH. J.L. REFORM (forthcoming 2022) (on file with authors) ("Raising sales tax rates would be regressive and is not a good reform option for coping with economic crises.").

[203] *E.g.*, Carlos F. Avenancio-León & Troup Howard, The Assessment Gap: Racial Inequalities in Property Taxation 1 (July 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465010 [https://perma.cc/4ZAV-C4NW]; Andrew T. Hayashi, *Dynamic Property Taxes and Racial Gentrification*, 96 NOTRE DAME L. REV. 1517 (2021).

[204] *See* Francine J. Lipman, *State and Local Tax Takeaways Redux*, 101 TAX NOTES ST. 683, 693–94 (2021) (explaining how state income taxes are typically only minimally progressive or can even be regressive—and this is as measure by reported income); Gamage & Brooks, *supra* note 3, at 501–02 ("We can thus estimate that most ultra-wealthy taxpayers only ever realize less than a quarter of their true investment income as taxable income.").

[205] *See, e.g.*, N.Y. L. SCH. RACIAL JUST. PROJECT, DRIVING WHILE BLAKE AND LATINX: STOPS, FINES, FEES, AND UNJUST DEBTS (2020), https://finesandfeesjusticecenter.org/content/uploads/2020/02/RJP.-Drivers-License-Suspension.-Final.pdf [https://perma.cc/9H6Q-ADJB]; Lipman, *supra* note 204, at 691 ("Current excise taxes are sixteen times greater on low-income households and eight times greater on middle-income households as compared to the highest-income households.").

[206] Gamage & Brooks, *supra* note 3, at 502.

[207] *Id.* at 501–02.

housing, IRAs, and other tax-favored retirement accounts and insurance plans.[208] Because of the legacy of discrimination and oppression, most Black Americans and many other members of historically disadvantaged groups do not have equivalent access to these tax-favored forms of investment.[209]

The nature of the United States system for financing healthcare also imposes substantial burdens on many members of historically disadvantaged groups. The tax-exclusion for employer-provided health insurance is one of the largest tax preferences codified by Congress, but studies have found that Black Americans are disproportionately unable to obtain the employer-provided health insurance offerings needed to qualify for this preference.[210] Saez and Zucman have analogized the costs of paying for healthcare for lower-income Americans as akin to a form of a hidden payroll tax, in the sense that health care costs are effectively often non-optional and so take a large cut out of lower-income Americans' wages and thus inhibit attempts at building wealth.[211] Taking account of their disproportionate lack of access to well-funded employer-provided health insurance plans and related tax subsidies, it seems likely that historically disadvantaged groups of Americans are especially held back by the costs of paying for healthcare.

Altogether, for Americans who are not born into familial wealth or privilege, the United States tax and fiscal systems thus place substantial barriers on earning sufficient wage or salary income to start building wealth. Many Americans overcome these barriers through some combination of educational attainment, home ownership, and tax-preferred retirement accounts,[212] or by taking advantage of familial or schooling-based social networks to obtain sufficiently lucrative career opportunities.[213] But all of these paths for escaping wage enslavement are disproportionately much less available for many Black Americans and other members of historically disadvantaged groups.[214] As a result, many families who have been historically deprived of wealth-building opportunities—because of the legacies of discriminatory public policies and governmental oppression—today continue to be effectively trapped in an ongoing cycle of dependence on tax-disfavored wage and salary income.

CONCLUSION AND A CALL FOR REFORM

In this Article, we have explained the phenomenon that we call "wage enslavement" and have argued that it is a central injustice of our tax system. We thus intend this Article as a call for reform. There are many possible options for reform,

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[208] *See supra* notes 192–196 and accompanying text.

[209] *See supra* notes 192–196 and accompanying text.

[210] *See supra* notes 193, 195.

[211] SAEZ & ZUCMAN, *supra* note 30, at 94–95.

[212] *See supra* notes 70–79, 192–195 and accompanying text; BROWN, *supra* note 171, at 198–99.

[213] *See* MARK GRANOVETTER, GETTING A JOB: A STUDY OF CONTACTS AND CAREERS 22 (2d ed. 1995) (explaining research finding that familial, schooling-based, and other related social networks are critical for how most lucrative career opportunities are first obtained).

[214] *See supra* notes 212–213.

however, and space constraints prevent us from evaluating reform options here. We thus plan to take up the task of evaluating reform options in future scholarship.

Space constraints also prevent us from addressing many other important aspects of "wage enslavement" in this Article. For instance, how do the class-based and race-based elements of the wage enslavement problem interact, and can further insight be gained by disentangling these elements? Looking beyond the Black American descendants of slaves who are our primary focus in this Article, how does the wage enslavement problem affect other historically disadvantaged groups or individuals who have experienced other forms of disadvantage? To what extent is the wage enslavement problem best addressed through tax reforms or through spending policy reforms or through other public policies?

Ultimately, we mean for this Article to raise more questions than it attempts to answer. We hope to address at least some of those questions in future scholarship, but we also hope that this Article will help motivate further work related to the wage-enslavement problem by other scholars. As Robinson and Das argue:

> The pendulum is swinging toward tax justice, but it faces formidable inertia.
>
> . . . .
>
> Tax justice is deeply connected to the movements for equality and racial justice. Progressive tax policy can ensure more of us share in the prosperous economy that our collective tax dollars make possible. It can mitigate economic disparities by class and race. And it can make sure the government has the resources it needs to function for all of us.[215]

We believe that addressing the problem of wage-enslavement should be central both to the broader pursuit of tax justice and to the deeply connected pursuit of racial justice. Only through addressing the wage-enslavement problem can we effectively promote a more just future of shared prosperity for all Americans.

[215] Jenice R. Robinson & Kamolika Das, *The Pendulum Is Swinging Toward Tax Justice*, 102 TAX NOTES ST. 151, 161 (2021).