THE SHADOW OF CREDIT: THE HISTORICAL ORIGINS OF RACIAL PREDATORY LENDING AND ITS IMPACT UPON AFRICAN AMERICAN WEALTH ACCUMULATION

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I. INTRODUCTION[1]

Responding to a controversy regarding incendiary remarks that surfaced in the media from his former pastor, Reverend Jeremiah A. Wright Jr., United States Senator and Democratic presidential candidate Barack Obama came to the City of Philadelphia to deliver a major address on the issue of race in the United States.[2] In a remarkable and widely-praised speech delivered on March 18, 2008, Senator Obama grounded his examination of the "complexities of race" on an analysis of the historical legacy of discrimination faced by African Americans.[3] After invoking the words of William Faulkner for the proposition that "'The past isn't' dead and buried. In fact, it isn't even past,'" he proceeded to explain that " . . . many of the disparities that exist in the African American community today can be directly traced to inequalities passed on from earlier generation that suffered under the brutal legacy of slavery and Jim Crow."[4] He proceeded to elaborate on some of the specific historical reasons behind racial inequalities, explaining:

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[2] Jeff Zeleny, *Obama Urges U.S. to Grapple With Race Issue*, N.Y. TIMES, March 19, 2008, at A1.

[3] Senator Barack Obama, Remarks at the Constitution Center: A More Perfect Union (March 18, 2008), http://go.philly.com/obamarace.

[4] *Id.*

> Legalized discrimination – where blacks were prevented, often through violence, from owning property, or loans were not granted to African American business owners, or black homeowners could not access FHA mortgages, or blacks were excluded from unions, or the police force, or fire departments – meant that black families could not amass any meaningful wealth to bequeath to future generations. That history helps explain the wealth and income gap between black and white, and the concentrated pockets of poverty that persists in so many of today's urban and rural communities.[5]

Senator Obama explained that only when the white community comes to an understanding of the historical dimension that often serves as the basis for anger in the black community will it be possible to establish a path to a "more perfect union."[6]

While Senator Obama's eloquent comments on racial inequality are rare in the political realm, a number of scholars in the academic sphere have also examined the issue of racial wealth inequality and have demonstrated the existence of a continuing significant wealth gap between whites and African Americans.[7] In 2002, the median African American household had a net worth of $5,998.[8] In contrast, the median white family had $88,651 in net worth, fifteen times that of African Americans.[9] Furthermore, such scholars have demonstrated the profound implications that the wealth gap has upon African Americans in education, employment,

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[5] Id.

[6] Id.

[7] See MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995); THOMAS SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY (2004); DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999).

[8] Griff Witte & Nell Henderson, Wealth Gap Widens For Blacks, Hispanics: Significant Ground Lost After Recession, WASH. POST, Oct. 18, 2004, at A11.

[9] Id. Oliver and Shapiro have defined wealth in the following manner: "Wealth is the total extent, at a given moment, of an individual's accumulated assets and access to resources, and it refers to the net value of assets ... less debt held at one time. Wealth is anything of economic value bought, sold, stocked for future disposition, or invested to bring an economic return." OLIVER & SHAPIRO, supra note 7, at 30.

family, and life opportunities.[10]

These scholars have also argued that the single most important means of accumulating assets is homeownership. Indeed, Melvin Oliver and Thomas Shapiro state that: "Home ownership is without question the single most important means of accumulating assets" and thus increasing wealth.[11] As a result, one of the explanations for the enormous racial wealth disparity is the substantial gap in the homeownership rates between white and African American households. Indeed, despite efforts by Presidents Bill Clinton and George W. Bush to make minority homeownership a national priority, in 2003, the African American home ownership rate was 26.7 percentage points below the white rate.[12] Furthermore, while it has fluctuated, the gap has consistently exceeded twenty-five percent throughout the 20th century.[13]

As demonstrated by numerous scholars, such a durable homeownership gap between African Americans and whites, in large measure, is attributable to the nation's history of racial discrimination in the housing markets as exemplified by such practices as discriminatory zoning ordinances, racial steering, blockbusting, racially restrictive covenants, and physical violence. This article will argue that the greatest obstacle confronted by African Americans, however, was the inability to obtain credit or the increased cost of obtaining credit for the purchase of property. Indeed, this article will show that since the Emancipation, African Americans have

[10] See generally, CONLEY, supra note 7, at 55-132 (providing a detailed analysis of the impact of wealth accumulation upon a number of socioeconomic issues).

[11] Id. at 8.

[12] Joint Center for Housing Studies, Harvard University, "The State Of The Nation's Housing 2005," http://www.jchs.harvard.edu /publications/markets/son2005/ son2005.pdf.
Following President Clinton's efforts to increase homeownership rates, in June 2002, President George W. Bush announced that he intended to increase minority homeownership by an additional 5.5 million families. David Sanger, Bush Calls Transformed Area A Model Program for Housing, N.Y. TIMES, June 18, 2002, at A20. Pursuant to his objective, the United States Department of Housing and Urban Development issued a report that detailed various barriers impeding minority homeownership and set forth an administrative action plan to overcome such barriers. See US Department of Housing and Urban Development, "Barriers to Minority Homeownership" (June 17, 2002), http://www.hud.gov/news/releasedocs/barriers.cfm.

[13] George Masnick, "Homeownership Trends and Racial Inequality In the United States in the 20th Century" 19 (Feb. 2001), http://www.jchs.harvard.edu/publications/ homeownership/masnick_w01-4.pdf.

often been foreclosed from traditional sources of credit available to whites and forced to turn to other informal, and often predatory, sources of credit. As a consequence, this article will demonstrate that one of the primary explanations for the large racial disparities in terms of wealth is a direct consequence of discrimination in credit markets which acted to limit African American access to home ownership and increase the cost of achieving home ownership.

While scholars do provide some brief background context, they do not provide a comprehensive historical analysis of credit discrimination and predatory lending and its impact upon African American efforts to achieve homeownership and, thus accumulate assets.[14] Furthermore, scholars often overlook the role of legal instruments such as the crop lien and installment contract, in examining predatory lending practices. This article will seek to provide a historical and legal dimension to the debate on racial wealth inequality through the lenses of credit and homeownership.

This article first examines in Part II the efforts of African Americans to accumulate wealth during the Slavery era. Such an analysis will focus on legal impediments erected to preclude property accumulation among both slaves and free African Americans. Next, Part III of this article evaluates the largely unsuccessful efforts of land reform in the Reconstruction era as well as the efforts of African Americans to define their freedom through land ownership. Part IV of the article explores the post-bellum era with a focus on the rise of sharecropping and the integral role of credit in such a labor system.

[14] A number of historians have examined wealth inequality in the context of African American poverty in the post-bellum period. In particular, several neoclassical economic historians have generally advanced two main theories, which Stephen De Canio has coined the discrimination theory and the initial conditions of emancipation, to explain the reasons for such poverty. Stephen J. De Canio, *Accumulation and Discrimination in the Postbellum South*, 16 EXPLORATIONS IN ECONOMIC HISTORY 183 (1979). In short, the discrimination school of thought argues that African American poverty is attributable to relatively low incomes and lack of wealth caused by the denial of equal employment and educational opportunities in conjunction with discrimination in credit and retail markets in the postbellum era. *Id.* The initial conditions of emancipation school of thought argues that the failure of Emancipation and Reconstruction to provide any land or other property to the ex-slaves resulted in wealth inequality and income inequality. *Id. See i.e.*, ROBERT HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY 1865-1914 (1977); STEPHEN DE CANIO, AGRICULTURE IN THE POSTBELLUM SOUTH: THE ECONOMICS OF PRODUCTION AND SUPPLY (1974); Joseph Reid, Jr., *Sharecropping as an Understandable Market Response: The Post-Bellum South*, 33 J. ECON. HIST. 106-130 (1973); Robert Margo, *Accumulation for Property by Southern Blacks before World War I: Comment and Further Evidence*, 74 AM. ECON. REV. 768-781 (1984).

In particular, this section focuses on the role of merchant in providing predatory credit and the role of the crop lien in the credit transaction. Despite crippling obstacles, the successful efforts of African Americans to acquire land will be discussed in Part V.

Next, in Part VI, the article turns its examination to the Great Migration, as thousands of African Americans left the rural South for the urban cities of the North. Part VII will present a review of the historical origins of the dual housing finance market encountered by whites and African Americans. In particular, this aspect of the article reviews the racially discriminatory policies of the Home Owners Loan Corporation and the Federal Housing Administration and their impact upon African American homeownership. Part VIII of the article evaluates alternative, often predatory, financing arrangements utilized by African Americans in the absence of traditional financing to purchase homes, including, the installment land contract. Finally, this article offers concluding remarks regarding the overall impact of such discriminatory credit practices upon African American homeownership and their historical relationship to the recent issues of predatory lending in the subprime mortgage lending market.

II. AFRICAN AMERICAN PROPERTY OWNERSHIP DURING SLAVERY

Throughout United States history, African Americans have faced enormous, often state-sponsored, obstacles in acquiring assets and, thus wealth. At the time of the Constitutional Convention in 1787, there were approximately 757,000 black persons in America, of whom 697,000 were slaves and 59,000 were free.[15] Further, ninety-two percent of persons of African descent who were held in bondage as slaves were confined to the South.[16] On the eve of the Civil War, the black population in the United States had increased to nearly four and half million persons with slaves, working primarily as field hands and domestic servants, accounting for nearly ninety percent of the total population.[17]

Throughout this time period, a central element of white hegemonic rule was a legal regime which proclaimed it illegal for slaves to own property

[15] LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 77 (5th ed. 1982).

[16] *Id.*

[17] PETER KOLCHIN, AMERICAN SLAVERY 1619-1877 241-242 (1993) (providing tables of free black and slave populations).

or acquire any form of wealth.[18] As early as the colonial period, laws were passed precluding enslaved persons from purchasing, acquiring, or owning property.[19] For example, a Virginia law from 1692 provided that " 'all horses, cattle and hoggs (sic) marked of any negro or other slaves marke, (sic) or by any slave kept' and not 'converted by the owner of such slave to the use and marke (sic) of the said owner' would be forfeited to the use of the parish poor."[20] As slavery became more entrenched in the South, the legal regime, with increasing specificity, sought to limit property ownership among slaves. In 1846, Texas instituted a law that prevented African Americans from "pretended ownership over property," including: horses, sheep, cattle, goats, hogs, or any other animals.[21] Also, Tennessee prohibited slaves "from owning a pig, cow, mule, horse, or 'other such like description of property.'"[22] Even "[p]roperty held by the slave with the owner's consent was liable to forfeiture."[23]

Furthermore, recognizing that commercial activity could provide a vehicle for asset accumulation, slave laws also prohibited slaves and whites from trading with one another. As early as 1705, a Virginia law made it a

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[18] OLIVER & SHAPIRO, *supra* note 7, at 37. Some scholars have compared the issue of slave ownership of property with the concept of peculium in ancient Roman law. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 348 (1996). Under ancient Roman law, *peculium* was defined as follows: "a fund which masters allowed slaves to hold and, within limits, to deal with as owners." *Id.* at 348 (*citing* W.W. BUCKLAND, THE ROMAN LAW OF SLAVERY: THE CONDITION OF THE SLAVE IN PRIVATE LAW FROM AUGUSTUS TO JUSTINIAN 187 (1908)). The slaves' disposition of the peculium, however, was limited as it was subject to the consent of the master. *Id.* at 349. At least one state, Louisiana, codified peculium. In particular, Article 174 of the Louisiana civil code of 1838 states: "all that a slave possesses belongs to his master; he possesses nothing of his own except his *peculium*, that is to say, the sum of money or moveable estate which his master chooses he should possess." *Id.* at 348 (*citing* UPTON S. WHEELOCK & NEEDLER R. JENNINGS, THE CIVIL CODE OF THE STATE OF LOUISIANA, WITH ANNOTATIONS (1838)).

[19] LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH 1790-1915 52 (1990).

[20] MORRIS, *supra* note 18, at 349 (*citing* 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 103 (1819-23)).

[21] SCHWENINGER, *supra* note 19 (*citing* THE LAWS OF TEXAS, 1822-1897, 762-63 (Gamble Book Co. vol. 6 1898)).

[22] *Id.* (*citing* J. GEORGE HARRIS, ACTS PASSED AT THE FIRST SESSION OF THE TWENTY-THIRD GENERAL ASSEMBLY OF THE STATE OF TENNESSEE 82-3 (1840)).

[23] A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 173 (Oxford University Press 1978).

criminal offense for anyone to buy, sell, or receive "any coin or commodity" from a slave without the consent of the master.[24] Such an offense was punishable by either thirty-nine lashes or a fine of four times the value of the item.[25] Subsequently, the punishment was increased to a jail sentence of up to six months.[26] "In 1826, Georgia prohibited blacks from buying or selling 'any quantity or amount whatever of cotton, tobacco, wheat, rye, oats, corn, rice or poultry or any other articles, except such as are known to be usually manufactured or vended by slaves.'"[27] Such laws were designed to eliminate any degree of economic self-sufficiency, to reinforce the notion of African American inferiority, and to prevent slaves from obtaining weapons for use in insurrection.[28] The ex-slave Harriet Jacobs succinctly stated the relationship between slaves and property ownership in her autobiography: "according to Southern laws, a slave, *being* property, can *hold* no property."[29]

While such laws established a rigid system limiting property ownership, custom and practice within the construct of the domestic slave economy on occasion provided opportunities for enslaved persons to acquire limited amounts of property. In large measure, the ability of slaves to acquire property was dictated by the system of labor utilized by the slave's owner. Perhaps, the best avenue available to slaves to earn money to acquire assets was by the hiring process whereby the master would hire out his slave, or the slave with the permission of his or her master would hire himself out.[30] In such circumstance, a slave was required to pay his or her master a stipulated sum and any monies earned above such a sum were the slave's property.[31] Although such a practice was illegal throughout most of the South, a few slaves, usually skilled artisans in the cities of the Upper South, were able to take advantage of such a labor relationship as a means to accumulate assets or

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[24] MORRIS, *supra* note 18, at 351 (*citing* 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 451-52(1819-23)).

[25] SCHWENINGER, *supra* note 19, at 52.

[26] *Id.*

[27] *Id.*

[28] HIGGINBOTHAM, JR., *supra* note 23, at 173-174.

[29] HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL [BY] LINDA BRENT 4 (L. Maria Child ed., Harvest/HBJ Books 1973) (1861).

[30] KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 71-72 (1967).

[31] *Id.* at 72.

even as a means to obtain freedom.[32]

Likewise, the task system also provided an avenue for property accumulation. Under such a system, a slave was assigned a certain number of tasks and, upon their completion, he could use his time as he saw fit, including asset-producing activities.[33] For example, a study of Liberty County, Georgia, where the task system dominated, discovered that on the eve of Emancipation, slaves had acquired a wide variety of property, including: horses, livestock, foodstuffs and, even, some buggies and wagons.[34] The average value of such assets was $357.43 with the highest values totaling $2,290.00 and the lowest $49.00.[35]

Most commonly, however, slaves labored in a gang system that provided extremely limited opportunities for property accumulation. In such a system, slaves were divided into gangs subject to the command of a driver or overseer.[36] Such a system provided little discretionary time for slaves. One of the few available wealth creation avenues in such a system consisted of garden plots accorded to the slaves by their masters. Slaves were able to raise food and livestock that they were able to sell or trade for the purchase of small luxuries such as clothing or kitchen utensils.[37] Such a practice was

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[32] *Id.* Perhaps, the most famous example of a hired out slave was the noted abolitionist, Fredrick Douglass. According to Douglass, he and his master, Hugh Alud, agreed to the following labor terms: "I was to be allowed all my time; to make all bargains for work; to find my own employment, and to collect my own wages; and, in return for this liberty, I was required, or obliged, to pay him three dollars at the end of each week, and to board and clothe myself, and buy my own calking tools. A failure in any of these particulars would put an end to my privilege. This was a hard bargain." FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 328 (Arno Press 1968) (1855). Such monies could be used by slaves to buy a set of free papers carried by every free black person or, perhaps, even to buy their freedom from their master. WILLIAM MCFEELEY, FREDRICK DOUGLAS 65 (1991). *See also* JACOBS, *supra* note 29 at 1 (describing how Ms. Jacobs' father was allowed to work his trade as a carpenter and manage his affairs in return for the yearly fee of two hundred dollars).

[33] Phillip D. Morgan, *The Ownership of Property by Slaves in the Mid-Nineteenth-Century Low Country*, 49 J. S. HIST. 399 (1983) (describing the task system and what slaves did with "their time").

[34] *Id.* at 409.

[35] *Id.*

[36] STAMPP, *supra* note 30, at 54.

[37] EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 535-36 (Pantheon Books 1974). W.E.B. Du Bois argued that such small garden plots served as the basis for the freed person's belief that economic independence could be achieved through land ownership following Emancipation. W.E.B. DU BOIS, BLACK

widespread throughout the South, and masters implicitly recognized the slave's ownership interest in production by declining to make any type of claim on the property.[38] As one South Carolina slave recalled, while his master was strict in his control, he allowed "every one of he plantation family so much land to plant for dey garden, and den he give em every Saturday for dey time to tend dat garden."[39]

Furthermore, on rare occasions, a slave's ownership of property was even accorded sanction of law. In *Waddill v. Martin*, the Supreme Court of North Carolina provided a vivid example of custom overriding law and allowing for slaves to accumulate minor assets.[40] In particular, Thomas Waddill and Charlotte Martin served as co-executors of the estate of James Martin, a wealthy planter and considerable slave holder.[41] Prior to his death in 1836, Mr. Martin allowed his slaves a garden plot to grow small crops of cotton.[42] Mr. Martin sold the cotton on behalf of his slaves and, following deductions for his expenses, paid them the remaining proceeds. After his death, a dispute emerged between the executors regarding whether the estate was liable to continue to pay the slaves the proceeds of the cotton they had raised on their garden plots.[43]

The Court, in overruling Ms. Martin's exception, advanced a number of rationales to support a custom that was arguably contrary to the established law regarding slave property ownership. First, the Court explained that Mr. Martin's custom conformed to usage that was nearly universal throughout North Carolina.[44] Second, while the Court recognized that a slave could not

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RECONSTRUCTION IN AMERICA 1860-1880 123 (1935).

[38] SCHWENINGER, *supra* note 19, at 33.

[39] *Id.* at 31 (*citing* THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY 58 (George Rawick ed., vol. 7 pt.2) (1979)).

[40] Waddill v. Martin, e.g., 38 N.C. (3 Ired. Eq. 562) (1845) (noting that the executor can pay slaves what master traditionally had paid them for cultivating their own crops during the testator's life).

[41] *Id.*

[42] *Id.*

[43] *Id.* In 1836 following Mr. Martin's death, Mr. Waddill, acting as co-executor of the estate, sold the cotton raised on the plantation as well as the cotton raised by the slaves on their garden plots. *Id.* Following the sale of the cotton, he gave the estate credit for the proceeds of all of the cotton. *Id.* He proceeded to pay the slaves their share of the money - $143.97 and debited the estate by way of a cross entry. *Id.* Ms. Martin took exception to the entry of payment to the slaves. *Id.*

[44] *Id.* at 3-4.

own property, it explained, that "the negro's little crops" were not assets any more than their poultry, dogs or extra clothing.[45] The Court invoked a gendered analogy by explaining that the slave's ownership of petty assets was justified by policy and law under the same principle that "the savings of a wife in housekeeping, by sales of milk, butter, cheese, vegetables and so forth, are declared to be, by the husbands consent, the property of the wife."[46]

Third and most importantly, the Court argued such a custom was "most beneficial" to both slaves and masters in several important ways.[47] It allowed the slave to purchase items that would otherwise have to be provided by their master.[48] Thus, it represented a vehicle for financial savings for a plantation. The Court also explained that such minor assets promoted health, cheerfulness and contentment among the slaves, and thus enhanced the slaves' value.[49] Finally, the Court noted, in racially patronizing language, that such "slight indulgencies" were repaid by the "attachment of the slave to the master and his family..." and encouraged industry and honesty among the slaves.[50]

In its discussion, the Court noted that since a number of laws regulated trading among slaves, this implicitly recognized that slaves were entitled some sort of ownership of property that was grounded in utility and necessity.[51] The Court cautioned, however, that such slave ownership rights were subject to the whim of the master as "if he will, he may take all."[52] Thus, while the Court's decision recognized limited asset accumulation, it was largely reflective of the prevailing attitude throughout the South that precluded slave ownership of anything but the most meager of assets.

Nor were the obstacles to wealth acquisitions limited to slaves. Free blacks, though not prevented by law from acquiring wealth, were subject to numerous problems ranging from overt discrimination to intimation and

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[45] *Id.* at 4.

[46] *Id.* The Court was careful to note that a married woman could own no property in money or personal chattels and those assets belong to the husband. *Id.* Unlike slaves, the Court explained that a wife could make claims for property against the executor. *Id.*

[47] *Id.* at 3.

[48] *Id.* at 4.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

violence. Nowhere was such hostility more entrenched than with regards to the acquisition of homes or real estate by African Americans. Such hostility was often driven by white fear of depreciating property values should African Americans acquire homes in white residential neighborhoods.[53] Indeed, "[a]s early as 1793, the attempt to locate 'a Negro hut' in Salem, Massachusetts, prompted a white minister to protest that such buildings depreciated property, drove out decent residents, and generally injured the welfare of the neighborhood."[54] Similar concerns were voiced by a white resident of Indiana who complained that "the proposed establishment of a Negro tract of real estate would reduce the value of nearby white-owned lots by at least 50 per cent."[55]

Nevertheless, there were exceptions, and some free African Americans were able to overcome the obstacles and acquire assets, including land and homes in both the North and South. For example, in New York City, free African Americans owned property worth over one million dollars and in Cincinnati, Baltimore, Washington and Boston, African Americans owned property worth approximately 500,000 dollars.[56] In Philadelphia, a house-to-house survey conducted by the Abolition Society in 1837 determined that, of the 3,652 African American households listed, 282 owned real estate with a total value of $322,532, an average of $1,143 per parcel.[57] The study determined that property ownership among African American households in 1837 was 7.7 percent, a decline from the rate of 11.6 percent in 1820.[58] Furthermore, such a property ownership rate was approximately fifty percent of white households. [59] In addition, W.E.B. Du Bois, in his landmark sociological study *The Philadelphia Negro*,

[53] LEON LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860 169(1961).

[54] *Id.*

[55] *Id.* at 170.

[56] RAYFORD LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 118-119 (First Da Capo Press 1997).

[57] GARY B. NASH, FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720-1840 248 (1988).

[58] *Id.*

[59] Tom W. Smith, The Dawn of the Urban Industrial Age: The Social Structure of Philadelphia, 1790-1830, 151 tbl.60 (1980) (unpublished Ph.D. dissertation, University of Chicago) (on file with The University of Chicago Library) (noting that white household property ownership rates in Philadelphia were 20.9 percent in 1820 and 15.7 percent in 1830).

surveyed the housing conditions of African Americans in Philadelphia and determined that in 1848, 241 African Americans owned their homes.[60]

In the South, historian Loren Schweninger concluded that in 1860, one out of every six African American family heads in rural Maryland and Virginia had managed to become a land owner.[61] Further, one in every seven urban African American families in the upper South managed to acquire land by the eve of the Civil War.[62] While such gains demonstrate the tenacity and resilience of African Americans seeking to acquire assets in a racially-hostile environment, the vast majority of African Americans were legally precluded from not only acquiring land or homes but also acquiring any type of significant assets.

Further, those free blacks who were legally able to acquire property often met with vicious discrimination and violence as such ownership was viewed as a potential threat to white hegemonic control. In Columbia, Pennsylvania, a mob of angry whites drove African Americans from their neighborhood and into the surrounding woods.[63] After order was restored, a group of white leaders met with African Americans to discuss the sale of their property at "a fair valuation" with the majority agreeing to "sell as fast as funds could be raised."[64] Fredrick Douglas eloquently explained the perilous jeopardy faced by African Americans in 1848 following a series of race riots: "No man is safe – his life – his property – and all that he holds dear, are in the hands of a mob, which may come upon him at any moment at midnight or mid-day, and deprive him of his all."[65]

In contrast, whites faced no such obstacles or burdens. As Oliver and Shapiro explained, "[n]o matter how poor whites were, they had the right - if they were males, that is - if not the ability, to buy land, enter into contracts, own businesses, and develop wealth assets that could build equity and economic self-sufficiency for themselves and their families."[66] Furthermore, whites were often successful in translating such rights into actual wealth accumulation. For example, "historian Gavin Wright demonstrated (that) the average wealth of slaveholders in the Cotton South in 1860 (was)

[60] W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY, 288 (1899).

[61] SCHWENINGER, *supra* note 19, at 74.

[62] *Id.* at 77-78.

[63] LITWACK, *supra* note 53, at 102.

[64] *Id.*

[65] *Id.*

[66] OLIVER & SHAPIRO, *supra* note 7, at 37.

$24,748, (while) the average wealth of non-slaveholders (was) $1,781."[67] Thus, at the conclusion of the Civil War, despite modest acquisitions, the overwhelming majority of African Americans had neither land, homes, nor significant assets.

III. EMANCIPATION, RECONSTRUCTION, AND THE FAILURE OF LAND REFORM

In the wake of Emancipation and the defeat of the Confederacy in 1865, the ex-slaves rapidly identified wealth in the form of land ownership as a central component in defining their new found freedom. A black Mississippi resident accurately summarized the aspirations of a newly freed people, stating: "All I wants is to git to own fo' or five acres ob land, dat I can build me a little house on and call my home."[68] Indeed, African Americans' "mania for owning a small piece of land" was driven by the duel perspective of restitution and economic independence.[69] First, most blacks believed that their past labor as slaves should be compensated with land from their previous owners' estates.[70] In essence, African Americans advanced the equitable argument of unjust enrichment to demonstrate their deserved claim to land.

Second, African Americans firmly believed that land ownership was necessary to ensure economic autonomy from their former owners.[71] The years of servitude in an agricultural economy dominated by cotton production had impressed upon the former slaves the relationship between land ownership and independence. Indeed, a former slave in Charleston stated the general sentiment: "Gib us our own land and we take care ourselves, but widout land, de ole massas can hire us or starve us, as dey please."[72] With

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[67] KOLCHIN, *supra* note 17, at 180. According to economic historians Roger Ransom and Richard Sutch, in 1860 in South Carolina, Georgia, Alabama, Mississippi, and Louisiana, ownership of slaves accounted for nearly forty-six percent of the total accumulated wealth in the region. ROGER L. RANSOM & RICHARD SUTCH, ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION xii, 52 (1977).

[68] LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 401 (1979).

[69] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 104 (1988).

[70] *Id.* at 105. A black convention in Alabama declared that "[t]he property which they hold was nearly all earned by the sweat of *our* brows."

[71] *Id.* at 104.

[72] WHITELAW REID, AFTER THE WAR: A TOUR OF THE SOUTHERN STATES: 1865 TO 1866 59 (1866).

land, African Americans felt they would be able to engage in small-scale agricultural activity sufficient to provide for themselves and their families, thereby diminishing the ability of whites to utilize economic tools of oppression. Overall, African Americans considered the ownership of land as the one necessary ingredient to "complete their independence."[73]

The former slave owners were also keenly aware of the importance of landownership. While whites reluctantly came to understand that the institution of slavery was a relic of the past, they vigorously sought to maintain their hegemonic control by preserving the base of their power: land. One white land owner in Alabama confronted a group of former slaves attempting to take control of part of his land, exclaiming: "Listen, niggers, what's mine is mine, and what's yours is yours. You are just as free as I and the missus, but don't go foolin' around my land."[74] Furthermore, whites realized that land would be a crucial ingredient in the reordering of the labor relationship between whites and blacks in the post-bellum era. The essence of the role of land in dictating labor relations was captured by one white southerner when questioned regarding the problem with land distribution to the former slaves. He replied by explaining:

> The real reason . . . why it wouldn't do, is that we are having a hard time now keeping the nigger in his place, and if he were a landowner he'd think he was a bigger man than old Grant, and there would be no living with him in the Black District . . . Who'd work the land if the niggers had farms of their own . . . ?[75]

Such comments revealed the fierce determination of whites to utilize economic weapons as a methodology to relegate the ex-slaves to a position of subordination in the immediate aftermath of the Civil War.

Nevertheless, in the months following the Confederacy's surrender at Appomattox Court House in Virginia, African Americans believed that the government was prepared to institute a massive program of land distribution. As one African American preacher in Florida told a group of field hands: "It's de white man's turn ter labor now. He ain't got nuthin' lef' but his lan',

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[73] FONER, *supra* note 69, at 104.

[74] LITWACK, *supra* note 68, at 402.

[75] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 227 (1944).

an' de lan' won't be his'n long, fur de Guverment is gwine ter gie ter ev'ry Nigger forty acres of lan' an' a mule."[76] That African Americans harbored such aspirations may be attributed to several events which occurred during the closing stages of the Civil War. On January 12, 1865, as Union General William T. Sherman was concluding his March to the Sea, he and Edwin Stanton, Secretary of War, met with twenty African American leaders in Savannah.[77] The purpose of the meeting was develop a plan of action to handle the thousands of African Americans who were flocking to Sherman's 60,000 man army as it cut its trail of destruction through the South.[78] Garrison Frazier, a former slave and Baptist minister, explained to Sherman and Stanton that the best way to deal with the problem would be to provide the former slaves with land to "turn it and till it by our own labor."[79] Shortly after the meeting, General Sherman issued Special Field Order No. 15 that provided African Americans with the exclusive right to settle on land that had been abandoned in costal South Carolina and Georgia.[80] Pursuant to the Order, the former slaves were promised titles to forty acres of land, and later Sherman's army provided assistance with the loan of mules.[81] Just six months after the issuance of the Order, 40,000 ex-slaves had occupied 400,000 acres of "Sherman land."[82]

Following General Sherman's actions, on March 3, 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedman's Bureau, whose purpose was to assist the former slaves in the transition to freedom.[83] In establishing the Bureau, Congress

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[76] LITWACK, *supra* note 68, at 402 (*citing* NICHOLAS EPPES, NEGRO OF THE OLD SOUTH: A BIT OF PERIOD HISTORY 133 (1925)).

[77] FONER, *supra* note 69, at 70.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] LITWACK, *supra* note 68, at 400; FONER, *supra* note 69, at 70.

[82] FONER, *supra* note 69, at 70-71. As the advancing Union armies came into increasing contact with the former slaves during the course of the American Civil War, a number of other attempts were implemented to assist their transition to freedom prior to formal Reconstruction efforts, including: in the Sea Islands region in South Carolina and the Hampton region in Virginia.

[83] *Id.* at 68-69. *See generally*, GEORGE BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU (1955); MARTIN ABBOTT, THE FREEDMEN'S BUREAU IN SOUTH CAROLINA (1967); HOWARD WHITE, THE FREEDMEN'S BUREAU IN LOUISIANA (1970); WILLIAM MCFEELY, YANKEE STEPFATHER: GENERAL O.O. HOWARD AND THE

included a provision that authorized it to rent, and eventually sell, to ex-slaves forty acre plots of confiscated and abandoned land.[84] Such a Congressional authorization was potentially significant as the Bureau controlled over 850,000 acres of land.[85] In anticipation of the distribution of land, one freedman in Virginia reported that African Americans were depositing savings with "responsible" persons in order to purchase lots of "de confiscated land, as soon as de Gov'ment ready to sell it."[86] Pursuant to its mandate, in several areas in the South, Bureau officials commenced actions to settle the freemen on the abandoned or confiscated land.[87]

The land distribution actions of General Sherman and various Bureau officials, however, were rapidly stopped and reversed when President Andrew Johnson issued a general proclamation of amnesty whereby most ex-Confederates were to be pardoned and any land that had been abandoned or confiscated was restored to the owner.[88] Throughout the South, including the "Sherman land," Bureau agents were forced to confront ex-slaves and deliver the following disheartening news:

> The government owns no lands in this State. It therefore can give away none. Freedmen can obtain farms with the money which they have earned by their labor. Every one, therefore, shall work diligently, and carefully save his wages till he may

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FREEDMEN (1968); BARRY CROUCH, THE FREEDMEN'S BUREAU AND BLACK TEXANS (1992); DONALD NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868 (1979).

[84] LITWACK, *supra* note 68, at 401. During the course of the Civil War, President Abraham Lincoln and Congress passed a series of laws designed to assist the war effort by imposing additional financial hardships on the South. CLAUDE OUBRE, FORTY ACRES AND A MULE: THE FREEDMAN'S BUREAU AND BLACK LAND OWNERSHIP 1 (1978). In particular, on August 6, 1861, the first confiscation act provided the President with the authority to take property used in the aid of the rebellion. *Id.* Subsequently, on July 17, 1862, the second confiscation act provided for the seizure of property of persons guilty of disloyalty to the Union. *Id.* at 2. President Lincoln successfully insisted that confiscation act include language limiting its application to the life of the guilty person and he used his authority under the act sparingly. *Id.* at 3. In addition to the confiscation acts, land also became subject to seizure with the passage of a law imposing a direct tax on property. *Id.* at 8. In July 1865, President Andrew Johnson ordered all abandoned and confiscated property to be turned over to the Freedman's Bureau. *Id.* at 23.

[85] FONER, *supra* note 69, at 158.

[86] LITWACK, *supra* note 68, at 400.

[87] FONER, *supra* note 69, at 158-59.

[88] LITWACK, *supra* note 68, at 404.

be able to buy land and possess his own home.[89]

While ex-slaves often fiercely resisted returning the occupied land, the vast majority of it was restored to the original owners within several years.[90]

Several other legislative efforts to enact major land reform met with similar fates. Some radical Republicans led by Charles Sumner, Thaddeus Stevens, and George W. Julian believed that Southern society must be remade by destroying the existing plantation economic system, seizing land, and giving it to ex-slaves.[91] Indeed, Stevens advanced nothing short of a social revolution by suggesting the confiscation of four hundred million acres from the wealthiest members of the Southern aristocracy and redistribution of that land in forty acre plots to every adult freedman, with the remainder to be sold in plots no larger than five hundred acres.[92] In the eyes of the radicals, such land reform was crucial to eradicate the economic legacy of slavery and usher in the ideology of free labor throughout the South.

While such massive proposals were ultimately rejected by moderate Republicans, the radicals were successful in 1866 in passing the Southern Homestead Act.[93] The Act allowed public land to be homesteaded "for actual settlement" for blacks and loyal whites in eighty-acre parcels in Arkansas, Alabama, Florida, Louisiana, and Mississippi until January 1, 1867.[94] The program, however, was a failure, as the claim process was poorly organized and the land was of marginal quality.[95] Four years after the passage of the law, approximately 6,500 African Americans had attempted to acquire land; less than 1,000 of those were actually successful in completing the ownership process.[96]

By 1867, it was clear that land reform was not going to be an element of Reconstruction. Without land reform, the former slave owners were largely able to maintain their plantations as they existed prior to the Civil War.[97] Its failure left a lasting bitterness with the ex-slaves for decades. As

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[89] *Id.* at 403.

[90] FONER, *supra* note 69, at 161.

[91] *Id.* at 228, 235.

[92] *Id.*

[93] OUBRE, *supra* note 84, at 87.

[94] *Id.* at 93.

[95] *Id.* at 187.

[96] *Id.* at 188.

[97] GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 84 (1986).

one black Mississippian recalled: "De slaves . . . spected a heap from freedom dey didn't git . . . . Dey promised us a mule an' forty acres o' lan'."[98] Furthermore, its failure was a lost opportunity resulting in a perpetuation of racial wealth inequality that arose as a result of slavery. As W.E.B. Du Bois lamented, "to have given each one of the million Negro free families a forty-acre freehold would have made a basis of real democracy in the United States that might easily have transformed the modern world."[99]

IV. SHARECROPPING AND CREDIT IN THE POST-BELLUM ERA

A. The Rise of Sharecropping as a Labor System

Despite the failure of Reconstruction to provide land to the ex-slaves, African Americans continued to strive to acquire assets in the context of a new system of labor relations between the former slaves and the former slave owners. In the immediate aftermath of the Civil War in 1865 and 1866, several hundred thousand African Americans entered into wage labor contracts with their former masters, supervised by the Freedman's Bureau, as a means to accumulate savings to achieve landownership.[100] The wages paid under the contracts, however, were barely sufficient to survive. One Bureau agent recalled in 1866, "[w]ith labor at fifteen dollars a month, it is one endless struggle to beat back poverty."[101] By 1867 and 1868, the number of labor contracts declined as African Americans sought a more favorable labor system as a vehicle to accumulate assets. As Gavin Wright explained "[w]hat they aspired to was not an ever-increasing wage as their productivity increased, because the labor market did not offer that, but accumulation of wealth leading to eventual farm ownership."[102] The vehicle African Americans hoped would lead to such wealth accumulation was a new system of tenancy labor that emerged during the post-bellum era in the South.

Determined to avoid the system of gang labor prevalent in the slavery era and convinced that the wage contracts were unfair, African Americans sought to develop a new system of labor relations in the context of the Southern agricultural economy. Gradually, over a period of time, a

[98] FONER, *supra* note 69, at 164.

[99] DU BOIS, *supra* note 37, at 602.

[100] Ralph Sholomowitz, *The Origins of Southern Sharecropping*, 53 AGRIC. HIST. 557, 558 (1979).

[101] FONER, *supra* note 69, at 166.

[102] WRIGHT, *supra* note 97, at 99.

compromise was effectively negotiated with the establishment of a tenancy system whereby ex-slaves retained a degree of personal autonomy while land owners maintained their economic hegemony over black labor.[103] In essence, the plantations throughout the South were divided into small plots of land which the planters rented to the ex-slaves.[104] The precise contours of the tenancy relationship were dictated by an "agricultural ladder."[105]

On the top rung of the agricultural ladder were fixed tenants (also known as cash tenants). Such farmers rented land from the owner and paid the owner either a fixed sum of cash or its equivalent in crop values.[106] The second rung of the ladder was occupied by share tenants. Share tenants also rented the land from the planter and paid for it with a share of the raised crop, ranging from one-fourth to one-third.[107] Both fixed and share tenants typically owned their own farm equipment and animals.[108] The distinction between fixed and share tenants related to the degree of control, with regards to output and management, exerted by the landlord over the farm production process. Typically, fixed tenancy was reserved for "the highest class" of tenants who were regarded by landlords as trustworthy and "who are by that fact emancipated in the main from the directing authority of the landlord."[109]

[103] RANSOM & SUTCH, *supra* note 67, at 94. Scholars have debated the historical origins of sharecropping in considerable detail. In particular, some scholars have argued that sharecropping was not a compromise, but rather that it was imposed upon planters by the ex-slaves. *See* RONALD L. F. DAVIS, GOOD AND FAITHFUL LABOR: FROM SLAVERY TO SHARECROPPING IN NATCHEZ DISTRICT, 1860-1890 (1982); CHARLES FLYNN, WHITE LAND, BLACK LABOR: CASTE AND CLASS IN LATE NINETEENTH-CENTURY GEORGIA (1983). Other scholars have argued that sharecropping was the preference of the planters as opposed to the ex-slaves. *See* GERALD DAVID, BRANCHES WITHOUT ROOTS: THE GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862-1882 (1986); JAY R. MANDLE, THE ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR (1978); James Oakes, *The Present Becomes the Past: The Planter Class in the Postbellum South*, in NEW PERSPECTIVES ON RACE AND SLAVERY IN AMERICA: ESSAYS IN HONOR OF KENNETH M. STAMPP (Robert H. Abzug & Stephen E. Maizlish eds., 1986).

[104] LEON LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 128 (1998).

[105] WRIGHT, *supra* note 97, at 99.

[106] ARTHUR RAPER, PREFACE TO PEASANTRY: A TALE OF TWO BLACK BELT COUNTIES 146-47 (1936).

[107] *Id.*

[108] *Id.*

[109] Wright, *supra* note 97 at 100 (*citing* Benjamin Hibbard, *Tenancy in the Southern States*, 27 Q. J. Econ. 486 (1913)

On the bottom rung of the ladder were sharecroppers. Sharecroppers, who did not own any farm equipment or animals, worked the land and were paid by the planter with a share of the raised crop, usually one-half.[110] The sharecropper was supplied with land, housing, farm equipment, animals, and seed by the owner.[111] The crucial distinction on the agricultural ladder was between renters and croppers. Historian Harold Woodman explained: "[T]he cropper was a wage laborer, his wages being a portion of what he produced paid *to* him *by* the landlord. The tenant was a renter who paid rent *to* the landlord for use of the land . . . ."[112] Since a sharecropper was, in essence, an employee, the landlord was able to assert a substantial degree of control in directing and managing the cropper's agricultural output in sharp contrast to the tenant relationship that provided a degree of independence to the farmer.[113]

Thus, the decisive factor in determining the applicable rung on the agricultural ladder and in turn the degree of independence from the landlord was the farmer's wealth accumulation. If a farmer owned his own farm equipment and animals and had other capital, he could rent his land and operate with a substantial degree of independence while also retaining a greater portion of his crop, thereby increasing his income and ability to accumulate wealth. However, since African Americans had few assets and little wealth in the wake of their Emancipation, the majority were relegated to the status of sharecroppers on the bottom rung of the agricultural ladder. As historian Lerone Bennett, Jr. concluded, "Without land, without tools, without capital or access to credit facilities, the freedmen drifted into a form of peonage: the sharecropping system."[114]

B. The Credit System in the Post-Bellum Era

Sharecropping not only created an agricultural relationship, but also resulted in the establishment of a credit relationship.[115] Generally, in the South, a farmer planted his crop, usually cotton, in early spring and did not

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[110] WRIGHT, *supra* note 97, at 100.

[111] RANSOM & SUTCH, *supra* note 67, at 90.

[112] HAROLD WOODMAN, NEW SOUTH - NEW LAW: THE LEGAL FOUNDATIONS OF CREDIT AND LABOR RELATIONS IN THE POSTBELLUM AGRICULTURAL SOUTH 68 (1995).

[113] *Id.* at 93.

[114] BENNETT, JR., *supra* note 15, at 224.

[115] WRIGHT, *supra* note 97, at 97.

harvest and sell the crop until November or December.[116] With few or no assets to fall back on during such a growing and harvest season, African Americans required a source of short term credit to sustain themselves and their families.[117] Consequently, the new credit system of the post-bellum era was born.

The Civil War and the Emancipation not only destroyed the economic institution associated with slavery but also the financial system of the South, including the credit and banking system. For example, in 1860, Georgia and South Carolina had a total of forty-nine state-chartered banks.[118] After the Civil War, only four of those banks remained in business.[119] Further, the National Banking Act, enacted during the Civil War, effected numerous major changes to the United States financial system which impeded the growth of banks in the South.[120] Among the Act's changes was a prohibition on national banks from making mortgage loans for periods longer than five years.[121] Indeed, in the three years following the Civil War only 20 of the 1,688 national banks established were located in Southern states (Arkansas, Alabama, South Carolina, Georgia, and Mississippi).[122]

Further, state-chartered and private banks were unable to fill the credit vacuum created by the dearth of national banks. Such banks were generally

[116] RANSOM & SUTCH, *supra* note 67, at 120.

[117] *Id.* at 121.

[118] *Id.* at 109.

[119] *Id.*

[120] *Id.* at 110.

[121] *Id.* at 341 n.9. In order to obtain a national charter, the Act required a bank to have $50,000 paid-in capital. *Id.* at 110. Further, the Act placed restrictions on note issuance and deposit establishment. *Id.*

[122] *Id.* at 110. Along with the Freedman's Bureau, Congress also established the Freedman's Savings and Trust Bank to act as a financial savings institution for African Americans. FONER, *supra* note 69, at 69, 531. Thousands of African Americans deposited their meager savings with the Freedman's Bank, often with the hope of eventually saving enough to purchase land. *Id.* at 531. Unfortunately, the Bank was poorly managed and a series of poor investment decisions resulted in its collapse in June of 1874. *Id.* at 532. Approximately half of the depositors lost all of their savings and the remainder received compensation from the federal government in the average amount of $18.51 per person, or sixty percent of their total deposits. *Id.* The collapse of the Freedman's Bank instilled a lack of confidence in financial institutions among African Americans for decades. *Id. See also*, CARL OSTHAUS, FREEMEN, PHILANTHROPY, AND FRAUD: A HISTORY OF THE FREEDMAN'S SAVINGS BANK (1974).

located in commercial centers and had no interest in extending credit to small farmers.[123] Even when national banks did operate in rural areas, such as the National Bank of Newberry, South Carolina, they provided credit to farmers "purely on personal security or on collateral; liens or mortgages [were] not asked for or given."[124] Essentially, banks chose not to provide service to rural areas due to the increased expenses generated by assessing the risks of lending to small farmers.[125] Economic historians Roger Ransom and Richard Sutch concluded that there was no evidence that rural banks "provided short-term credit to small farmers unable to offer land or other assets as collateral."[126]

While the post-bellum period witnessed a gradual increase in the number of national, state-chartered, and private banks, such banks were unable to meet the credit needs of the predominantly small-scale agricultural economy of the South, particularly millions of ex-slaves without any assets. The effect was that bank credit in the South was "inadequate," resulting in the development and reliance upon other, more costly forms of credit.[127] Hence the roots of predatory lending are embedded in the soil of the economic and financial institutions that emerged in the post-bellum era.

C. The Merchant and the Origins of Predatory Lending

As the South struggled to rebuild from the ashes of the Civil War, the merchant rapidly became "the most important economic power in the Southern countryside."[128] A merchant would run a general store that offered a wide variety of goods for sale ranging from basic food and clothing staples to luxury items such as whiskey and tobacco.[129] By the end of the nineteenth-century, the South had 150,653 general stores, or

[123] *Id.* at 110-111, 113.

[124] *Id.* at 114 (internal quotations omitted).

[125] *Id.* at 127-28.

[126] *Id.* at 116.

[127] CHARLES S. JOHNSON ET AL., THE COLLAPSE OF COTTON TENANCY: SUMMARY OF FIELD STUDIES & STATISTICAL SURVEYS 26 (1935).

[128] HAROLD D. WOODMAN, KING COTTON & HIS RETAINERS: FINANCING AND MARKETING THE COTTON CROP OF THE SOUTH, 1800-1925 296 (1968).

[129] RANSOM & SUTCH, *supra* note 67, at 122-23.

about 144 per county.[130] Thomas Clark adeptly described the importance of the ubiquitous merchant as:

> [A]ll things to his community . . . . His store was the hub of the local universe. It was the market place, banking and credit source, recreational center, public forum, and news exchange. There were few aspects of farm life in the South after 1870 which were not influenced by the country store.[131]

However, the key to the merchant's power did not reside in his sale of goods or his influence on rural culture, but rather in his territorial and monopolistic control over credit.[132] With financial institutions unwilling or unable to provide short-term credit, the merchant rapidly filled this decisive financial vacuum. Indeed, with few people able to pay with cash, the merchant almost exclusively operated with credit. For example, one store had cash sales of $21.35 in the month of June 1874 with credit advances in the amount of $1,191.46.[133] More importantly, the merchant's use of credit played a pivotal role in limiting the ability of African Americans to achieve land ownership and accumulate wealth. Indeed, in many ways, the merchant represented the origin of racial predatory lending.

As African Americans sought to define their freedom in the tenancy relationship, they were without assets sufficient to commence small-scale agricultural endeavors. Invariably, African Americans were "furnished" by the landlord or the merchant with basic food necessities, farming equipment, and the supplies necessary to plant a crop.[134] Since farmers rarely had cash to pay for such items, the merchant advanced the goods on a fixed credit "limit" established at the beginning of each season.[135] While African American farmers occasionally arranged for the advance themselves, an advance was typically arranged by the landlord and he allowed the tenants to charge advances known as "orders" to his personal

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[130] EDWARD AYERS, THE PROMISE OF THE NEW SOUTH 81 (1992).

[131] RANSOM & SUTCH, *supra* note 67, at 126 (*citing* THOMAS CLARK, PILLS, PETTICOATS AND PLOWS: THE SOUTHERN COUNTRY STORE vii-viii (1944)).

[132] RANSOM & SUTCH, *supra* note 67, at 126-27.

[133] Glenn N. Sisk, *Rural Merchandising In The Alabama Black Belt, 1875-1917*, 37 J. FARM ECON. 706, 710 (1955).

[134] WRIGHT, *supra* note 97, at 97.

[135] RAPER, *supra* note 106, at 176.

account.[136] The farmer was able to draw upon the advance up to his limit throughout the course of the year.[137] Furthermore, the advance limit could be increased during the course of the year, particularly when it appeared that a good crop was likely.[138] The annual advance generally ranged from forty dollars to eight hundred dollars, with the typical amount being around two hundred and fifty dollars.[139] In effect, the advance acted as a short-term credit transaction.

The merchant was able to utilize his control over credit in a predatory manner through several avenues. First, the merchant maintained a two-tiered pricing system with one price for goods purchased with cash and a second price for goods purchased with credit.[140] The price differentials were concealed by a secret code system and, not surprisingly, the credit price was substantially higher than the cash price, often by at least twenty-five percent.[141] One study compared the cash and credit prices of eleven staple articles and determined that the average credit price was 55.3 percent higher than the cash price (the price differential ranged from a minimum of 33.6 percent to maximum of 89.6 percent).[142]

Second, some merchants established an additional interest rate for goods purchased on credit. The exact interest rate was determined by evaluating a number of factors designed to assess the risk and measure the cost of the loan, including: the creditworthiness of the borrower, the costs associated with processing the loan, and the degree of supervision required to ensure a return on the merchant's investment.[143] Typically, an additional interest rate charge of eight to fifteen percent was added to the price of the advance.[144] Finally, it was not unusual for a merchant to add an additional interest rate charge of two to five dollars on smaller accounts ranging from

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[136] Sisk, *supra* note 130, at 710.

[137] *Id.* at 707-08.

[138] Thomas D. Clark, *The Furnishing And Supply System In Southern Agriculture Since 1865*, 12 J. S. HIST. 24, 31 (1946).

[139] Sisk, *supra* note 133, at 707.

[140] Clark, *supra* note 138, at 28.

[141] *Id.*

[142] Jacqueline Bull, *The General Merchant in the Economic History of the New South*, 18 J. S. HIST. 37, 49 (1952)(citation omitted).

[143] RANSOM & SUTCH, *supra* note 67, at 130-31.

[144] Sisk, *supra* note 133, at 708; Clark, *supra* note 138, at 30-31.

ten to twenty-five dollars.[145]

Overall, the credit price or the combination of a credit price and an additional interest rate charge resulted in a total effective interest rate ranging "from twenty-five percent to grand larceny."[146] One commentator reported that "the cotton farmer has to pay the usurious percentage charged by his merchant broker, who is never less than thirty per cent, and frequently runs up to seventy per cent."[147] Ransom and Sutch demonstrated that the total interest rates charged by merchants in Georgia between 1881 and 1889 ranged from a low of 44.2 percent to a high of 74.6 percent, confirming such an estimate.[148] In contrast, the short-term interest rates in New York City at this time ranged from four to six percent, and never above eight percent.[149]

Further, the degree of the "mark-up" and the interest rate was not controlled by any type of universal system, but rather dictated solely by "personal factors known only to the merchant."[150] Since creditors were nearly all white, subjective determinations of creditworthiness were undoubtedly tainted with racism. Indeed, African Americans were looked upon with great disdain by white planters, as "the negro renters' foot [was] poison to the land."[151] The notion of black inferiority was evident in the comments of Georgian R.P. Brooks, who stated, "The mass of the race are wholly unfit for independence. . . . [Planters] know that skill, industry, knowledge, and frugality are essential to successful farming, and they know that negroes in general lack these qualities."[152] In fact, many whites were convinced that African Americans could only be made to work if they remained in debt.[153] Such racism invariably infected the local credit market, requiring blacks to demonstrate an "extra measure of proof" to gain

[145] Clark, *supra* note 138, at 31.

[146] Bull, *supra* note 142, at 47.

[147] RANSOM & SUTCH, *supra* note 67, at 128 (citing Henry W. Grady, *Cotton and Its Kingdom*, HARPER'S NEW MONTHLY MAG., Oct. 1881, at 723).

[148] *Id.* at 129.

[149] *Id.*

[150] *Id.* at 28.

[151] WRIGHT, *supra* note 97, at 100-101.

[152] *Id.*

[153] HORTENSE POWDERMAKER, AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH 88 (1939).

creditworthiness.[154] In short, the merchant's predatory use of credit operated to impede African American property ownership by limiting their ability to accumulate the wealth, due to exorbitant interest rates and credit prices, necessary to purchase land.

D. The Merchant and the Crop Lien

The entire merchant system of finance was dependent upon the legal instrument of the crop lien. Following the Civil War, it became readily apparent that a new source of security was necessary in order to encourage lending activity.[155] In response, legislators throughout the South passed crop lien laws in an effort to reestablish a credit system for the region's agricultural economy.[156] Since a tenant did not own any land or assets to act as collateral, he could provide a landlord or merchant with a lien upon his future crop "to secure advances for agricultural purposes."[157] Under a typical crop lien, a tenant pledged "the entire crop of corn, cotton, cotton seed, fodder, peas and potatoes, which may be made and grown on the plantation . . . , or any other place which I . . . (my) family and my hands are cultivating during the present year."[158] The crop lien provided the merchant with the legal right to all the crops produced by the farmer necessary to satisfy the advance.[159] Furthermore, since the merchant had legal control of the crops from the time of planting, he could claim and sell the crop at any time if he believed his interest was at risk.[160]

In addition to the crop lien laws, a number of Southern states also passed laborers' lien laws to ensure that the agricultural workers received payment for their services.[161] For example, Georgia provided for "liens upon the property of their employers for labor performed" by agricultural workers.[162] A number of the initial crop and laborers' lien laws, however, did

[154] WRIGHT, *supra* note 97, at 100.

[155] WOODMAN, *supra* note 128, at 6.

[156] *Id.* at 5-6.

[157] *Id.* at 6.

[158] Sisk, *supra* note 133, at 708.

[159] *Id.*

[160] *Id.*

[161] WOODMAN, *supra* note 128, at 78.

[162] *Id.* at 78 (citing GA. CONST. of 1868, art. I, § 30).

not address the issue of priority among potentially competing liens on a given crop. Indeed, it was possible that a crop could be subject to four separate liens, including: a landlord's lien for rent; a landlord's lien for an advance; a merchant's lien for an advance; and a laborers' lien for wages.[163]

To address such a problem, the Southern states gradually amended their various lien laws to establish clear distinctions among lien priorities. While there was substantial variation among the Southern states, landlords and merchants were accorded clear priority for rent and advances over sharecroppers' liens for wages based upon labor.[164] In 1872, the Georgia Supreme Court elaborated upon the "obvious distinction between a cropper and a tenant":

> One has a possession of the premises exclusive of the landlord, the other has not. The one has a right for a fixed time, the other has only a right to go on the land to plant, work and gather the crop . . . The case of the cropper is rather a mode of paying wages than a tenancy. The title to the crop subject to wages is in the owner of the land.[165]

In other words, while the share tenant retained legal title to the proceeds of his crop subject to any liens, the sharecropper retained only a laborer's lien against the landowner for his portion of the crop constituting his wages. The right of ownership of the crop remained with the landowner.[166] If the crops fell short, the landlords' and merchants' liens were paid first ahead of any laborers' liens. If a cropper remained unpaid after the other liens were satisfied, his only recourse was to sue his employer under the laborer's lien.[167] As Gavin Wright explained, the effect of such was "to transfer financial risk to the croppers, making it all the more difficult for them to accumulate the assets needed to climb the tenure ladders."[168]

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[163] *Id.* at 32.

[164] WRIGHT, *supra* note 97, at 102.

[165] Appling v. Odom, 46 Ga. 583 (1872). A Tennessee court rendered a similar distinction in Mann v. Taylor, 52 Tenn. 267 (1871), explaining that "an agreement on the part of one who is to do the labor, to take charge of and manage the land on shares, is not regarded as a lease but more in the nature of payment for services rendered, by a part of the crops raised."

[166] WOODMAN, *supra* note 128, at 82.

[167] *Id.*

[168] WRIGHT, *supra* note 97, at 102.

In addition to the crop lien laws, a landlord or merchant could also provide an advance or loan and obtain a "general lien on the property of the debtor" as collateral.[169] In such transactions, historian Sharon Holt's examination of county mortgage and lien records in North Carolina demonstrated that merchant creditors demanded excessive collateral from blacks in comparison to white farmers.[170] For example, in 1886, Thomas Clement, a major merchant in Granville County, North Carolina, made a loan to an African American in the amount of fifteen dollars that was secured by a one horse wagon and his crop of tobacco.[171] In contrast, Mr. Clement loaned nineteen dollars to a white man that was secured only by a buggy and harness set.[172] Finally, since few farmers had any cash, nearly all were forced into similar credit transactions.

The effect of the crop liens and the general property liens was to provide the landlord or merchant with an additional mechanism of control over the agricultural labor force.[173] Perhaps the exercise of such control was best manifest in the merchant or landlord's insistence that the farmer produce cotton in order to ensure his investment as opposed to food products.[174] The effect of such cotton production was to create a vicious cycle, as historian Steven Hahn explained: "[T]he acquisition of credit demanded an expansion of cotton production, an expansion of cotton production meant proportionately shorter food crops, and shorter food crops set the farmer back to the merchant's door for provisions."[175] As cotton prices declined throughout the late nineteenth-century, tenants increasingly became ensnared in a system of credit and crop liens from which there was little chance of escape.[176]

While both whites and African Americans were subject to the predatory nature of the provision of credit, the system undoubtedly had a harsher impact upon African Americans due to efforts to maintain African

[169] WOODMAN, *supra* note 112, at 39.

[170] SHARON HOLT, MAKING FREEDOM PAY: NORTH CAROLINA FREEDPEOPLE WORKING FOR THEMSELVES 1865-1900, 26 (2000).

[171] *Id.*

[172] *Id.*

[173] WOODMAN, *supra* note 112, at 93.

[174] STEVEN HAHN, THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1855- 1890 182 (1983).

[175] *Id.* at 185.

[176] *Id.* at 186.

Americans in a position of economic inferiority central to the continued maintenance of white hegemony in the South. As Ransom and Sutch explained:

> Racism in the capital markets meant that black farmers had less capital, smaller farms, and fewer acres of untilled land than whites. This meant that the typical black farmer was more dependent upon purchased supplies than his white counterpart and was thereby more susceptible to exploitation by the merchant's credit monopoly.[177]

The combination of a malignant credit system and white racism had a devastating effect upon African Americans which related them to continued poverty. The full extent of its impact was often felt at settlement time.

E. "Settlin Time" and "The Moment of Truth"[178]

The tenant generally harvested the crops in the fall with accounts settled during the months of October, November and December.[179] Since the landlord or the merchant had legal title to the crop by virtue of the crop lien, the tenant was required to turn his portion of the crop over to the landlord or the merchant who proceeded to sell the crop.[180] At settlement time, the tenant was told the amount that the cotton sold for on the open market. The merchant or landlord proceeded to add the total of the advance based upon the total purchase made during the course of the year and entered an interest charge against the total account.[181] The total was then deducted from the sale proceeds to determine whether there was a profit or a loss for the year.

At settlement time, tenants were often not given any sales receipts or itemized statements regarding their yearly advances.[182] Henry Blacke, an African American sharecropper, recalled, "[N]o matter how good accounts

177 RANSOM & SUTCH, *supra* note 67, at 185.

178 LITWACK, *supra* note 104, at 131.

179 CLARK, *supra* note 138, at 31.

180 SISK, *supra* note 133, at 710.

181 CLARK, *supra* note 138, at 31.

182 POWDERMAKER, *supra* note 153, at 84.

you kept, you had to go by [white landowners'] account, and – now brother, I'm telling you the truth about this – it has been that way a long time."[183] Furthermore, since the records were maintained by the merchants and many of the freed people were illiterate and inexperienced with business transactions, they were often cheated out of the rewards of their labor.[184] Indeed, as one Freedman Bureau official recalled, white "men who are honorable in their dealings with their white neighbors will cheat a Negro without feeling a single twinge of their honor."[185] The practice of cheating African Americans at settlement time was apparently widespread. Benjamin Mays, a noted educator and minister, polled 118 African Americans in rural South Carolina: 101 responded that they were "cheated badly by their white 'bosses.'"[186]

Without access to the records and with no economic or political power, African Americans were left with little recourse to challenge the numbers at settlement. One African American sharecropper in Arkansas explained that when he attempted to challenge the accounting, he was simply informed that "figures didn't lie."[187] Furthermore, the mere act of challenging a white man's word was dangerous: "You dassent dispute a [white] man's word then."[188] Indeed, in Promised Land, South Carolina, a black farmer was lynched for arguing with a white store owner about the price offered for his corn.[189] A Mississippi sharecropper succinctly explained the dilemma faced by African Americans:

> I have been living in this Delta thirty years and I know that I have been robbed every year; but there is no use jumping out of the frying pan into the fire. If we ask any questions we are

[183] JAMES HORTON & LOIS HORTON, SLAVERY AND THE MAKING OF AMERICA 215 (2005) (citing AFRICAN AMERICAN VOICES: THE LIFE CYCLE OF SLAVERY, 166, 170 (Steven Mintz ed., 1993)).

[184] HAHN, *supra* note 174, at 174. In 1880, nearly eighty-three percent of African American farm renters and nearly seventy-seven percent of African American farm sharecroppers were illiterate in the Cotton South. Ransom & Sutch, *supra* note 67, at 180.

[185] HORTON & HORTON, *supra* note 183, at 215.

[186] LITWACK, *supra* note 104, at 512 n.36 (citing BENJAMIN MAYS, BORN TO REBEL: AN AUTOBIOGRAPHY 6 (1971)).

[187] HORTON & HORTON, *supra* note 183, at 215.

[188] *Id.*

[189] ELIZABETH RAUH BETHEL, PROMISELAND: A CENTURY OF LIFE IN A NEGRO COMMUNITY 223-25 (1981).

> cussed, and if we raise up we are shot, and that ends it.[190]

Thus, Southern black sharecroppers opted to take a vow of silence-—to save themselves from retaliatory violence, they kept quiet about their injustices.

Since the value of the crops often was less than the advances, African Americans often submerged deeper into debt with each year, unable to acquire the monies or assets necessary to achieve land ownership. A study of African American tenant farmers in Macon County, Alabama in 1932 demonstrated that 61.7 percent "broke even", 26.0 percent "went in the hole", and 9.4 percent made a profit.[191] A similar study in Indianola, Mississippi in 1932 found that 17 to 18 percent of the tenants made a profit, averaging from $30 to $150, while the remainder either broke even or were left in debt.[192] One tenant described his settlement as follows:

> We had 60 acres last year and paid $200 for rent and made 13 bales of cotton and turned hit all over. [This should have netted $400 at 10 cents a pound] The thing about hit, we ain't had no settlement. All we got last year was $51 in trade, they claimed. I ain't nothing like satisfied. I was settin' there at diner looking at the house and the condition. I was settin' under the tree there last night studyin' 'bout the same thing. Me and my wife ain't had a string of nothing ter wear in two years.[193]

Such economic hardship was visited by thousands of African Americans each year. Manda Walker explained a tale that was likely familiar to many: "After de last bale was sold . . . him come home wid de same sick smile and de same sad tale: 'Well, Mandy, as usual, I settled up and it was "Naught is naught and figger is a figger, all for de white man and none for de nigger."'"[194]

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[190] LEON LITWACK, *supra* note 104, at 132 (citing LAURENCE C. JONES, THE BOTTOM RAIL: ADDRESSES AND PAPERS ON THE NEGRO IN THE LOWLANDS OF MISSISSIPPI AND ON INTER-RACIAL RELATIONS IN THE SOUTH DURING TWENTY-FIVE YEARS 26 (1935)).

[191] CHARLES S. JOHNSON, SHADOW OF THE PLANTATION 124 (1934).

[192] POWDERMAKER, *supra* note 153, at 86-87.

[193] JOHNSON, *supra* note 191, at 120.

[194] LITWACK, *supra* note 104, at 131 (citing THE AMERICAN SLAVE: A

V. AFRICAN AMERICANS AND LANDOWNERSHIP

In spite of innumerable obstacles, African Americans were able to accomplish land ownership in relatively surprising numbers in the South. The process to accomplish land ownership was not uniform and was subject to wide variations depending on geography, crop culture, demography, economic cycles, local culture, and politics.[195] Nevertheless, it usually required two central elements: protracted and, often, Herculean efforts by African American households and the toleration and participation of white people.[196]

Historian Sharon Holt, in a study of Granville County, North Carolina, examined the toils and sacrifices of African Americans seeking to achieve land acquisition. With the opportunity to accumulate wealth severely circumscribed in the sharecropping system, African Americans were forced to resort to additional income-producing activities as a means to accumulate the capital necessary for the purchase of land.[197] The crucial "escape clause" was household production.[198] Unlike tenancy where any income was potentially subject to liens and credit charges, any income generated by household production was discretionary.[199] Of equal importance, few landlords recognized that such production allowed for the generation of surpluses and, thus, it was unlikely to draw attention and possible hostile responses from whites.[200]

In order to succeed, household production demanded several key elements, including the following: full family participation, control over the labor of women and children, and utilization of the after-hours and off-season labor of adult males.[201] Household production consisted of any

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COMPOSITE AUTOBIOGRAPHY 173 (George Rawick ed., 1972)).

195 STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 458 (2003).

196 *Id.*

197 HOLT, *supra* note 170, at 2-3.

198 *Id.*

199 *Id.*

200 *Id.* at 3.

201 *Id.* at 15-16.

number of income producing activities such as basket weaving, sewing dresses or quilts, growing fruits and vegetables, foraging for berries, hunting for fish and game, wood cutting or hauling, and performing other odd jobs.[202] Also, all members of the household and even extended family members - young and old, male and female - were able to contribute to production capacity.

With the surpluses of household production, African American families followed a gradual pattern of property accumulation that culminated in land ownership.[203] Typically, property that accentuated household production was acquired, such as livestock and personal property, to serve as wealth-producing building blocks.[204] Usually, African American families first sought to acquire poultry and pigs followed by cows.[205] Such acquisitions generated income through the household economy by the sale of eggs, butter, milk, cheese, and pork.[206] The key acquisition prior to land ownership was often a horse or a mule.[207] The ownership of such a draft animal could often propel a family up the agricultural ladder from sharecropping to renting and thus enhancing the possibility of turning a profit with farming.[208]

The travails of the Trotter family is illustrative of the difficult process of land acquisition as well as the key role of household production. In Natchitoches Parish, Louisiana, Daniel and Rose Trotter, with the assistance of numerous relatives, labored for fifteen years as renters on five different plantations in an effort to save $700 for a down payment to purchase some land.[209] In addition to farming, both Daniel and Rose Trotter performed other odd jobs in an effort to save money for a down

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202 *Id.* at 6-7.

203 *Id.* at 64.

204 *Id.*

205 *Id.* at 64-65. A dozen chickens could lay approximately twenty dozen eggs in a year and one cow's milk could produce thirty to fifty pounds of butter a year. *Id.* A healthy cow was worth approximately eight to ten dollars, a heifer was worth approximately five dollars and a calf about one to two dollars. *Id.*

206 *Id.*

207 *Id.* at 65-66. An old mule was worth about ten dollars and a good one could cost as much as forty dollars with horses costing forty dollars and up. *Id.* Due to the high cost, it was not unheard of for African American families to share the use of a horse or a mule on several farms. *Id.*

208 *Id.*

209 HAHN *supra* note 195, at 458.

payment, including: selling eggs, raising and selling pigs, sewing dresses and jeans, "fixing miller machinery," "fixing water clock," and fixing guns.[210] The Trotter's many years of toil was rewarded in 1900 when they were finally able to purchase thirty-five acres of land.[211]

While certain market conditions, such as low land prices and wartime deaths were favorable for buyers,[212] whites generally sought to prevent the sale of land to potential African American purchasers through the use of a wide range of repressive tactics.[213] In addition to social pressures and threats, foremost among such tactics was violence against any white seller and African American purchaser.[214] Such a tactic was particularly strong in the Deep South, where a witness recalled:

> As a general rule a man is very unpopular with his neighbors who will sell land to colored people; and then a colored man is in danger if he buys land. In Winston County [Mississippi] a dozen men were whipped, and the only charge against them was that they bought land.[215]

Thus, even if an African American had the necessary resources to purchase land, a second requirement to consummate the purchase was necessary: a white supporter.[216]

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[210] AYERS, *supra* note 130, at 15. Trotter's literacy may have also assisted him in his efforts to purchase land as he maintained a meticulous cashbook, where, in exacting detail, he recorded the family's household production and farming incomes. HAHN, *supra* note 195, at 459. The Trotters' also belonged to the St. Mary's Baptist Church and were active in the church's benevolent association. *Id.*

[211] HAHN, *supra* note 195, at 458.

[212] SCHWENINGER, *supra* note 19, at 148, 151-52. Following the American Civil War, farm land was selling for $2.00 to $8.00 per acre, where previously the same land had sold for $15.00 to $25.00 per acre. *Id.* at 148. In addition, the Civil War resulted in the death of almost one in five Southern males between the ages of thirteen to forty-three with thousands more physically and mentally disabled. *Id.* at 151-52.

[213] *See id.* at 151-52 (referencing the practice of white landowners signing agreements not to hire a neighbors sharecroppers, as well as offering only "subsistence wages, refus[ing] to sell or rent acreage to blacks, and adopt[ing] nonemployment agreements for any former slave who left his former owner.").

[214] RANSOM & SUTCH, *supra* note 67, at 86-87.

[215] *Id.* at 87 (citing Testimony of Cornelius McBride, schoolteacher, H.R. REP. NO. 22-42, pt. 2, at 335 (1872)).

[216] HAHN, *supra* note 195, at 458.

According to Arthur Raper, a noted sociologist, a potential purchaser had to be "acceptable to the white community" and "have a white sponsor."[217] In other words, he must know "his place" and remain in it despite his ownership of land.[218] In Greene and Macon counties in Georgia, approximately three quarters of African American landowners who held greater than twenty-five acres purchased their land after initially being approached by a white seller who had advised them to buy the land and, as well as who even offered to assist them in the purchase; ninety percent of African American landowners actually purchased their land from white landowners.[219] Approximately sixty percent of African Americans in Green and Macon counties bought land from former landlords, and a number of others purchased from persons with whom they had previously conducted business.[220] While African Americans were certainly successful in purchasing land without white patronage, it often proved an invaluable facet of an intensely personal business transaction.[221]

In the context of such a foreboding environment, African Americans made steady, albeit slow, progress in entering the ranks of landownership. By 1870, one in thirty-one African Americans owned real estate in the rural areas of the lower South—Georgia, Alabama, Mississippi, South Carolina, Florida, Louisiana, Texas and Arkansas—with an average value of $544 per family.[222] Similarly, in an extensive study of land ownership in Georgia based upon reports of the state comptroller general, W.E.B. Du Bois determined that in 1874 African Americans owned 338,769 acres of land, or 1.0 percent of owned land.[223] By 1880, African Americans land ownership had increased to

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[217] RAPER, *supra* note 106, at 122.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 122-23.

[221] *Id.* at 124 ("[T]he active interest and oversight of some white man protect[ed] the Negro purchaser.").

[222] SCHWENINGER, *supra* note 19, at 146 tbl.9. The immediate growth of African American realty owners in the Lower South following the Civil War may be measured by comparing 1860 to 1870. The number of real estate owners in Alabama rose from 142 to 2,417; in Arkansas from 4 to 1,548; in Florida from 62 to 1,170; in Georgia from 116 to 3,729; in Louisiana from 1,262 to 3,250; in Mississippi from 35 to 2,875; in South Carolina from 680 to 3,977; and in Texas from 18 to 1,508. *Id.* at 148 tbl.10.

[223] RANSOM & SUTCH, *supra* note 67, at 83-4 (*citing* W.E.B. DU BOIS, THE NEGRO LANDHOLDER IN GEORGIA, H.R. DOC. NO. 56-315 647, 665. (2d Sess. 1901).

586,660 acres or 1.6 percent.[224]

In areas of the Upper South — Delaware and portions of Maryland and Virginia — the number of rural African American landowners declined in spite of major increases in the overall African American population.[225] In Virginia, by 1870, only one out of thirty-four rural African American families owned real estate.[226] In general, however, African Americans were slightly more successful throughout the Upper South with one out of sixteen families owning land by 1870.[227] Overall, in the Upper South, one African American family out of twenty-one owned land worth an average of $625.[228]

In the urban areas in the South, African Americans encountered economic circumstances that were more favorable to homeownership. Unlike African Americans in the rural areas of the South, those in the cities usually earned direct wages that were not subject to the decimating impact of high interest rates and crop liens.[229] Furthermore, with many areas of the urban South in ruins following the Civil War, there was a strong and rising demand for skilled and unskilled labor.[230] Finally, urban whites were less reluctant to sell property to African Americans as it was not essential to the hegemonic system of control in such areas.[231] The confluence of such factors resulted in one in nine African Americans families in the cities and towns of the Lower South acquiring real estate by 1870, with an average value of $1,229 per

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[224] *Id.*

[225] SCHWENINGER, *supra* note 19, at 152. The population of African Americans in rural areas of Maryland increased "from 56,000 in 1860 to 130,657, and in Virginia from 48,000 to 451,108 . . . ." *Id.* The number of African American landowners in rural areas in Delaware declined "from 522 in 1860 to 439 in 1870, in Dorchester and Harford counties, Maryland, from 642 to approximately 350, and in Prince George, Southampton, and Surry counties, Virginia, from 76 to fewer than a dozen." *Id.*

[226] *Id.* at 153 tbl.12.

[227] *Id.* at 159.

[228] *Id.* at 153 tbl.12. The immediate growth of African American realty owners in the Upper South following the Civil War may be measured by comparing 1860 to 1870. The number of real estate owners in Delaware rose from 662 to 755; in the District of Columbia from 531 to 1,043; in Kentucky from 605 to 4,818; in Maryland from 2,332 to 3,333; in Missouri from 196 to 2,419; in North Carolina from 1,055 to 3,421; in Tennessee from 271 to 3,039; and in Virginia from 1,669 to 3,966. *Id.* at 158 tbl.14.

[229] *Id.* at 147.

[230] *Id.* at 147, 155.

[231] *See id.* at 147 ("Property values generally remained below prewar levels, but unlike their counterparts in rural areas, urban whites, in need of capital and less fearful of blacks, were often anxious to sell them property.").

owner.[232] Likewise, in cities of the Upper South, African Americans homeownership rose markedly from 1860 to 1870.[233]

Overall, by 1870, approximately 4.8 percent of the 900,000 African American families in the South owned real estate; factoring in those who did not own property, the average African American family owned a total of \$36.00.[234] In contrast, approximately forty-three percent of white men in the United States owned real estate; taking into account the property-less, the average white male owned \$1,782.00.[235] In terms of total wealth accumulation, the average African American had a net worth of \$76.00, whereas the average white southerner had accumulated wealth in the amount of \$2,034.[236]

Over the next forty years, African Americans made significant gains in land ownership throughout the South. By 1910, approximately nineteen percent—or about one in five—African American farmers had become land owners in the Lower South, with an average value of \$1,253 per owner.[237] Likewise, in urban areas in the Lower South, nearly one in five African Americans had entered the ranks of homeownership.[238] In the Upper South, African American farmers were even more successful with forty-four percent entering the ranks of land ownership with an average value of \$1,058 per farm owner.[239] Nowhere was their success more pronounced than in Virginia, where African American farm ownership increased a stunning 3,641 percent in forty years, from one percent in 1870 to sixty-seven percent in 1910.[240] In the urban areas of the Upper South, the homeownership rate for African Americans continued to rise and reached twenty-four percent by 1910.[241] Overall, throughout the South, by 1910, African American land

[232] *Id.* at 147-48.

[233] *Id.* at 154. In Baltimore, the number of African Americans who owned real estate increased from "169 [in 1860] to approximately 435 [in 1870]; in the District of Columbia, from 497 to 1,019; in Lexington, from 44 to 671; and in Wilmington, North Carolina, from 42 to 408." *Id.* at 154-55.

[234] *Id.* at 160.

[235] *Id.*

[236] *Id.* at 161.

[237] *Id.* at 164 tbl.16, 166.

[238] *Id.* at 170.

[239] *Id.* at 174 tbl.18, 175.

[240] *Id.* at 173-75.

[241] *Id.* at 180 tbl.19.

ownership in rural areas was twenty-one percent.[242]

Despite such progress, a significant wealth and land ownership gap remained between African Americans and whites. The mean value of the southern whites' farm property, including livestock, was $2,140 in 1900 and $3,911 in 1910.[243] In contrast, the African American mean value was $779 in 1900 and $1,588 in 1910.[244] Furthermore, the overall rate of farm ownership for whites was sixty-five percent in 1890, although dropping to sixty percent in 1910, in contrast to rates for African Americans of twenty-one percent in 1890 and twenty-four percent in 1910.[245]

However, 1910 represented the zenith of African American rural land ownership in the South. In subsequent decades, the number of African American land owners began to rapidly decline driven by a confluence of factors, including the cotton boll weevil infestation, a sharp drop in the price of cotton, and the post-World War I economic depression.[246] Historians August Meier and Elliott Rudwick concluded that African Americans lost on average 350,000 acres of land each year during this time period.[247] Ultimately, the entire sharecropping system of labor was rendered "obsolete" with the introduction of the mechanical cotton picker in the 1940s.[248] However, as the dream of land ownership became increasingly elusive in the

[242] *Id.* at 180 tbl.19.

[243] *Id.* at 183.

[244] *Id.*

[245] *Id.*

[246] MYRDAL, *supra* note 75, at 238; NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA 15 (1992). *See also*, BLACK RURAL LANDOWNER – ENDANGERED SPECIES: SOCIAL, POLITICAL AND ECONOMIC IMPLICATIONS (Leo McGee & Robert Boone, eds., 1979). *Cf.* Mark Schultz, *The Dream Realized? African American Landownership in Central Georgia Between Reconstruction and World War Two*, 72 AGRIC. HIST. 298-312 (1998)(arguing that African American landowners chose to sell and migrate in order to optimize their economic progress in the face of such difficult agricultural conditions). The boll weevil was a small insect whose larvae ate and destroyed maturing cotton. RANSOM & SUTCH, *supra* note 67, at 172. Originally from Central America, the boll weevil gradually spread across the South in the first decades of the twentieth century. *Id.* The boll weevil destroyed as much as fifty percent of the cotton crop in some areas and gradually resulted in a nearly thirty percent decrease in cotton acreage in Louisiana, Mississippi, Alabama, Georgia, and South Carolina. *Id.* at 174-75.

[247] CONLEY, *supra* note 7, at 36, (citing AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO (1970)).

[248] LEMANN, *supra* note 246, at 4, 5.

South, African Americans began to see a new possible window of opportunity in the North.

VI. AFRICAN AMERICANS AND THE GREAT MIGRATION

At the beginning of the twentieth century, the majority of African Americans resided in the South, trapped in a system of debt peonage driven by predatory lending and crop liens that deprived them of the ability to accumulate assets. Intent on escaping such hardships, African Americans increasingly viewed the North as the Promised Land.[249] The Great Migration, as it became known, was the largest migration in United States history, as millions of African Americans left the rural South for the urban cities of the North, seeking to escape racial animosity and driven by the promise of economic opportunity.[250] From 1910 to 1920, 300,000 African Americans migrated North; from 1920 to 1930, 1.3 million; from 1930 to 1940, 1.5 million; and from 1940 to 1950, 2.5 million.[251] Accordingly, the African American population rapidly exploded in the major urban cities of the North. For example, Chicago's African American population grew from 44,000 in 1910, to 109,000 in 1920, to 234,000 in 1930.[252] Typically, African American migrants left behind either farms or small towns in the rural South.[253] A 1913 study of a group of thirty-five African Americans migrants

[249] *See generally* PETER GOTTLIEB, MAKING THEIR OWN WAY: SOUTHERN BLACKS' MIGRATION TO PITTSBURGH, 1916-1930 (1987); JAMES GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION (1989); FLORETTE HENRI, BLACK MIGRATION: MOVEMENT NORTH, 1900-1920 (1975).

[250] BENNETT, *supra* note 15, at 344. Several scholars have argued that African American migration from the South was greatest where the threat of violence was highest. *See generally* STEWART TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1995). While many forms of violence were used to maintain white hegemony, the ultimate weapon in the arsenal was lynching. During the time period from 1880 to 1930, 3,344 African Americans were lynched throughout the United States, with an overwhelming majority concentrated in the South. W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 8 (1993). Historian W. Fitzhugh Brundage demonstrated that mob violence and lynchings occurred most frequently in the areas that contained large African American populations who worked as sharecroppers in economies dominated by cotton. *Id.* at 106. *See also* ARTHUR RAPER, THE TRAGEDY OF LYNCHING (1933); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002).

[251] BENNETT, *supra* note 15, at 344.

[252] LEMANN, *supra* note 246, at 16.

[253] GILBERT OSOFSKY, HARLEM: THE MAKING OF A GHETTO 29 (2d ed. 1996).

in Harlem concluded that of the twenty-one born on farms, only three had parents who had achieved landownership.[254]

Among the pieces of "cultural baggage" that the migrants brought north was the desire to achieve homeownership.[255] For African Americans, as well as whites, homeownership served several purposes, including: economic security, a means of preserving familial relationships, enhanced social status and, perhaps most importantly, a vehicle for wealth accumulation.[256] Equally important, homeownership also represented the epitome of the American Dream, and African Americans, by the millions, looked North for the realization of that Dream.

VII. HISTORICAL ORIGINS OF DUAL FINANCE SYSTEM

A. Whites and Homeownership

African Americans were not the only ones to bring the "cultural baggage" of homeownership to the North. Indeed, the commencement of the Great Migration came at the heels of a period of tremendous immigration into the United States, primarily from Southern and Eastern Europe. Between 1900 and 1920, over 14 million immigrants entered the United States.[257] The Irish, Italian, Slavic, and other immigrants demonstrated an "ardent ambition" to own a home that even surpassed that of middle class native white Americans.[258] The desire to buy a home was so strong that social service workers worried that immigrants would "starve their families" in order to save the money necessary for the purchase.[259] European immigrants, like African Americans, recognized that homeownership represented economic security against eviction, joblessness, and protection from any other cruel

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[254] *Id.*

[255] Andrew Wiese, *Black Housing, White Finance: African American Housing And Home Ownership In Evanston, Illinois, Before 1940*, 33 J. SOC. HIST. 429, 435 (1999).

[256] *Id.* at 435-36.

[257] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 1492-PRESENT 382 (New ed. 2003).

[258] ARNOLD HIRSCH, MAKING THE GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 187-89 (1998).

[259] DAVID ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE, THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS 160 (2005).

whim of the free market. The desire for land was also rooted in the immigrant's experiences in Europe and represented a "transfiguration of the ancient peasant land hunger . . . ."[260] More importantly, historian David Roediger also argued that homeownership was a central component in the process whereby new immigrant groups assimilated into United States culture by developing their sense of "whiteness."[261]

Immigrants also were remarkably successful in making the dream of homeownership a reality. In Oliver Zunz's study of Detroit, he determined that 38.4 percent of Germans and 32.4 percent of Irish owned their homes.[262] Also, he found that in 1920 no "Polish block" in Detroit had a homeownership rate of less than thirty percent, and in some areas as many as seventy-five percent of heads of households owned a home.[263] Likewise, a Works Progress Administration study of Chicago in 1939 found that 41.3 percent of foreign-born whites owned their homes in contrast to 21.7 percent of the native-born whites.[264] The same study concluded that nearly fifty percent of Lithuanians and Poles as well as approximately forty percent of Italians achieved homeownership.[265]

Nor were such homeownership rates limited to major United States cities. Indeed, in smaller cities, immigrants made similar striking gains in entering the ranks of homeownership. By 1900, sixty-three percent of Polish

[260] HIRSCH, *supra* note 258, at 187.

[261] ROEDIGER, *supra* note 259, at 158. Recent scholarship has witnessed the emergence of "whiteness" studies that have sought to examine the social construction of white racial identity. Such studies have examined the historical development of whiteness as a tool of the ruling classes designed to control the European proletarian immigrants. *See generally* DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE AMERICAN WORKING CLASS (1991); THEODORE ALLEN, THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO AMERICA (1997); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998); MATTHEW JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998); IAN F. HARNEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (1997).

[262] OLIVER ZUNZ, THE CHANGING FACE OF INEQUALITY: URBANIZATION, INDUSTRIAL DEVELOPMENT, AND IMMIGRANTS IN DETROIT, 1880-1920 153 tbl. 6.2 (1982).

[263] *Id.* at 390.

[264] ROEDIGER, *supra* note 259, at 158.

[265] *Id.*

immigrants had become home owners in Toledo, Ohio.[266] Likewise, in Johnstown, Pennsylvania, in 1900, eight percent of Croatian males, five percent of Slovaks, and four percent of Slovenes could claim homeownership.[267] Just forty years later, the number of homeowners had drastically increased, rising to forty percent among Croatians, thirty-two percent among Slovaks, and thirty-three percent among Slovenes.[268] In most United States urban areas, the rates of homeownership increased dramatically, with some areas, such as Baltimore, Omaha, Cincinnati, and Philadelphia, witnessing a one hundred percent increase.[269]

In order to enter the ranks of homeownership, immigrants as well as native-born whites often required some type of credit to finance the purchase transaction. According to the 1890 census, twenty-nine percent of homes in the United States had a mortgage with an average debt of $1,139.[270] This need for credit in home buying, as one journalist commented in 1876, presented "a most interesting problem in practical finance."[271] The problem, in part, was the product of the National Banking Act which prohibited national banks from providing long-term, amortized mortgages for real estate.[272] As a consequence, there developed a diversity of methods for financing the purchase of a home. Most persons utilized one of three outlets to finance the purchase: a private individual with money to lend, a savings bank, or a building and loan association.[273]

Obtaining a loan from a savings bank required a large down payment, often one half or more of the purchase price.[274] One study of twenty-two cities during the time period from 1911 to 1929 concluded that the average down payment ranged from one half to two-thirds of the total purchase

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[266] *Id.* at 159 (citing EWA MORAWSKA, FOR BREAD WITH BUTTER: THE LIFE-WORLDS OF EAST CENTRAL EUROPEANS IN JOHNSTOWN, PENNSYLVANIA, 1890-1940 401 (1985)).

[267] *Id.*

[268] *Id.*

[269] THOMAS J. SCHLERETH, VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE, 1876-1915 100 (1991).

[270] LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 68 (1999).

[271] *Id.* at 64-65.

[272] *Id.* at 68.

[273] *Id.* at 66.

[274] SCHLERETH, *supra* note 269, 101-02.

price.[275] Typically, the remaining amount of the purchase price was raised through a mortgage at an interest rate of six percent for a usual period of five years.[276] Such mortgages were termed "straight" mortgages, meaning that the borrower was required to make interest payments for the duration of the loan and pay the principal in a lump sum at the end of the loan term.[277] Such mortgages often required repeated refinancing at the conclusion of the loan term when the balance of the principal came due.[278] Not surprisingly, the dream of homeownership was often stymied by the large down payments and the short term for mortgages.

Originally founded in Philadelphia in 1831, the rapid rise and expansion of building and loan associations provided persons with low to moderate incomes a promising alternative financing option to achieve homeownership.[279] By 1893, there were nearly six thousand building and loan associations throughout the United States holding five hundred million dollars in mortgages.[280] In 1901 building and loan associations financed mortgages for 50,000 homes; the number increased to 87,000 in 1910, and 114,000 in 1915.[281]

The building and loan associations established a process whereby a perspective home buyer could invest his savings by purchasing shares in the corporation.[282] Eventually, the buyer could borrow against his shares in order to finance the home at a low interest rate, usually six percent.[283] The borrower then made monthly payments on the interest and the shares.[284] The significance of loans provided by building and loan associations was that they provided for fully amortized repayment; in other words, at the conclusion of the loan term, the borrower had paid off both the interest and principal and owned the home free and clear of any debt.

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[275] MASNICK, *supra* note 13, at 3.

[276] SCHLERETH, *supra* note 269, at 101.

[277] CALDER, *supra* note 270, at 65-66.

[278] KEVIN BOYLE, ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE 149 (2004).

[279] CALDER, *supra* note 270, at 67.

[280] *Id.*

[281] SCHLERETH, *supra* note 269, at 102. *See generally*, H. MORTON BODFISH, HISTORY OF BUILDING AND LOAN IN THE UNITED STATES (1931).

[282] CALDER, *supra* note 270, at 67.

[283] *Id.*

[284] *Id.*

While it was certainly difficult, such financing innovations made homeownership a realistic possibility for both native born and immigrant whites. According to Stephan Thernstorm's study of social mobility, "real estate was strikingly available to working class men who remained in Newburyport for any length of time" with home ownership rates ranging from sixty-three to seventy-eight percent.[285] Indeed, at the turn of the twentieth-century, according to the United States census, the overall rate of homeownership in the United States was 46.5 percent. The overall rate dropped slightly to 45.9 percent in 1910 and remained at that level in 1920. A racial breakdown of the rates, however, reveals that the white homeownership rate in 1900 was 49.2 percent in contrast to the African American rate of 22.1 percent for an overall gap of 27.1 percent.[286] Thus, despite the financing innovations and migration patterns of African Americans, the first decades of the twentieth century, witnessed a continuation of the substantial racial homeownership gap in the Untied States.

B. The Federal Government and Homeownership

Prior to the 1930s, the United States government had traditionally refrained from involvement with the selection, construction, and purchase of residences, viewing such activities as inherently individual and private decisions.[287] Such a position was irrevocably altered by the Great Depression in 1929 and the crippling damage it wrought upon both the homeowner and the housing industry.[288] Between 1928 and 1933, home construction declined by 95 percent and spending on home improvements fell by 90 percent.[289] In response to the crisis, in December 1930, President Herbert Hoover convened a national conference to address the issue of homeownership.[290] Following this conference, President Hoover and Congress passed the Home Loan Bank

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[285] KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 118 (1985) (citing STEPHAN THERNSTROM, POVERTY AND PROGRESS: SOCIAL MOBILITY IN A NINETEENTH CENTURY CITY 117 (1964)).

[286] Thomas Maloney, *African Americans in the Twentieth Century* tbl.1, http://eh.net/encyclopedia/article/maloney.african.american (last visited Apr. 11, 2008)

[287] JACKSON, *supra* note 285, at 191-92.

[288] *Id.* at 193.

[289] *Id.*

[290] Amy Hillier, *Who Received Loans? Home Owners' Loan Corporation Lending and Discrimination in Philadelphia in the 1930s*, 2 J. PLAN. HIST. 1, 4 (Feb. 2003).

Act that sought to provide a system of credit reserves to stabilize mortgage lenders. The Bank Act, however, was small and poorly managed, and thus unable to stem the rapidly rising foreclosure tide.[291] Indeed, by 1933, one half of all home mortgages in the United States were technically in default with foreclosures reaching the rate of over 1,000 per day.[292]

Following his election in the spring of 1933, President Franklin Roosevelt formally defined a new relationship between the federal government and homeowners with a new national policy, explaining:

> This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government.[293]

Pursuant to his national policy, President Roosevelt introduced a series of programs, including: the Home Owners Loan Corporation, the Fair Housing Administration, and the Veterans Administration.[294] While these programs had enormous impact upon housing in the Unites States, they also developed and implemented the practice of racial redlining. As a result, it is necessary to examine each program to ascertain the historical origins of racial redlining.

C. Home Owners' Loan Corporation

In 1933, the Home Owners' Loan Corporation ("HOLC") under the governance of the Federal Home Loan Bank Board ("FHLBB") was established as an emergency measure to assist families with delinquent mortgages in danger of foreclosure.[295] In particular, the HOLC provided for an exchange with lenders of HOLC bonds with federal government guarantees for the home mortgages in default as well as "cash loans for payment of taxes and mortgage refinancing . . . ."[296] Following the exchange

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[291] *Id.* at 5.

[292] JACKSON, *supra* note 285, at 193.

[293] Hillier, *supra* note 290, at 5.

[294] *Id.*

[295] *Id.*

[296] C. LOWELL HARRISS, HISTORY AND POLICES OF THE HOME OWNERS' LOAN CORPORATION 1 (1951).

between the lender and the HOLC, homeowners were eligible to refinance their mortgages with new fifteen-year, fully amortized mortgages at interest rates of five percent.[297] The HOLC was the first government sponsored program to utilize low interest, fully amortized mortgage loans with uniform payments extended over a fixed period.[298] American homeowners responded to the HOLC with roughly forty percent of all qualified mortgage properties seeking assistance.[299] Between July 1933 and June 1935, the HOLC supplied over three billion dollars for over one million mortgages.[300]

Since the HOLC was dealing with mortgages in default with the possibility of foreclosures, it introduced standardized appraisals of the fitness of particular properties and communities for both individual and group loans.[301] As C. Lowell Harriss stated, "[T]he success of the HOLC in its over-all program and in its handling of individual cases hinged on its appraisal policies."[302] In particular, while the appraisal itself was standard in the real estate industry, the HOLC created a "formal and uniform system of appraisal, reduced to writing, structured in defined procedures, and implemented by individuals only after intensive training."[303]

As the HOLC was completing its lending activities in 1935, it commenced a City Survey Program to appraise the level of real estate risk in 239 cities in the United States.[304] Essentially, HOLC appraisers divided cities into neighborhoods and developed forms, which were distributed to real estate professionals, requiring specific answers related to the inhabitants and

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[297] Hillier, *supra* note 290, at 5. The HOLC loans were restricted to mortgages in default and secured by non-farm properties with not more than four families and appraised by the HOLC at less than $20,000. HARRISS, *supra* note 293, at 1. An HOLC loan could not exceed eighty percent of the HOLC appraisal and could not exceed a total of $14,000. *Id.*

[298] JACKSON, *supra* note 285, at 196.

[299] HARRISS, *supra* note 296, at 1.

[300] *Id.* The HOLC received 1,886,491 applications for $6.2 billion dollars for an average of $3,272 per application. *Id.* Nearly half the applications were rejected or withdrawn. *Id.* Approximately one million refinancing loans totaling $3.1 billion were approved averaging $3,039 per loan. *Id.*

[301] JACKSON, *supra* note 285, at 197.

[302] HARRISS, *supra* note 296, at 41.

[303] JACKSON, *supra* note 285, at 197.

[304] Amy Hillier, *Redlining And The Home Owners' Loan Corporation*, 29 J. URB. HIST. 394, 394-95 (2003).

housing stock.[305] Following the completion of the forms, the HOLC developed a rating system that established four color-coded categories of quality.[306] The first category (A) was coded green and "the areas were described as new, homogenous, and in demand as residential locations in good times and bad."[307] Homogeneous was defined as "American business and professional men."[308] The second category (B) was coded blue and consisted of areas that had reached their peak, but were still desirable and could be expected to remain stable.[309] The third category (C) was coded yellow with the neighborhoods described as "definitely declining."[310] The fourth category (D) was coded red and the neighborhoods were defined as areas "in which the things taking place in (C) areas have already happened."[311] Following completion of the rating system, the HOLC prepared color-coded residential security maps that detailed the various grades.[312]

In the process of rating neighborhoods, the HOLC incorporated the "notions of ethnic and racial worth" utilized by real estate appraisers.[313]

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[305] JACKSON, *supra* note 285, at 197. First, the appraiser conducted an informal appraisal, typically a look at the property from the street, to determine if there was a reasonable prospect that the property would qualify for a loan. HARRISS, *supra* note 296, at 45. If the informal appraisal was favorable, a detailed appraisal was ordered. *Id.* The appraisal utilized a form containing ninety-eight terms to be filled in by the appraiser and eleven items to be completed by the reviewers. *Id.* Each report contained a photograph of the building, a location map, dimensions of the lot and other relevant information concerning the neighborhood and property. *Id.* In valuing the buildings, the appraiser considered the building code classification, the material used, the quality of the structure, the number and type of rooms, necessary repairs and an estimate of reproduction cost less depreciation. *Id.* at 46. The final element considered was the capitalized value of rentals based upon a ten-year average normal rental. *Id.*

[306] JACKSON, *supra* note 285, at 197.

[307] *Id.* (internal quotations omitted).

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.* at 197-98.

[312] Hillier, *supra* note 304, at 395.

[313] JACKSON, *supra* note 285, at 199 (noting that the HOLC applied these notions "on an unprecedented scale"). A widely reproduced list ranked ethnic groups in order of most desirable to those which had the most adverse effect on property values. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO: THE RELATIONSHIP OF THE GROWTH OF CHICAGO TO THE RISE IN ITS LAND VALUES, 1830-1933 314-16 (1933). The

Appraisers assumed that the natural tendency of any area was to decline due to the age of the physical structure and the transition of the housing to families with lower incomes.[314] Indeed, Richard Hurd, an economist, explained that socioeconomic characteristics of a neighborhood were much more important in determining the value of a dwelling than structural characteristics.[315] None of the socioeconomic criteria were more important than race, as noted real estate expert Frederick Babcock explained:

> Most of the variations and differences between people are slight and value declines are, as a result gradual. But there is one difference in people, namely, race, which can result in a very rapid decline. Usually such declines can be partially avoided by segregation and this device has always been in common usage in the South where white and negro populations have been separated.[316]

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list was later reproduced in MCMICHAEL'S APPRAISING MANUAL, the "bible" of appraising. The list ranks the ethnic groups as follows:

(1) English, Germans, Scotch, Irish, Scandinavians

(2) North Italians

(3) Bohemians or Czechs

(4) Poles

(5) Lithuanians

(6) Greeks

(7) Russians, Jews (lower class)

(8) South Italians

(9) Negroes

(10) Mexicans.

STANLEY MCMICHAEL, MCMICHAEL'S APPRAISING MANUAL: A REAL ESTATE APPRAISING HANDBOOK FOR USE IN FIELD WORK AND ADVANCED STUDY COURSES 160 (4th ed. 1951).

[314] JACKSON, *supra* note 285, at 198.

[315] *Id.*

[316] Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. Q. 313, 321 (1979) (citing FREDERICK BABCOCK, THE

This relationship between race and property values was adopted by the HOLC and reflected in its rating of neighborhoods.

Indeed, in evaluating socioeconomic characteristics, HOLC officials monitored the movement of African American families and charted the density of African American neighborhoods.[317] Such philosophical conceptions of property value combined with the anemic racism existing in American society invariably resulted in black neighborhoods being rated fourth and "redlined".[318] For example, in Detroit, every neighborhood with any degree of African American population was rated "D" or "hazardous" by federal appraisers.[319] Also, any location subject to "infiltration" by "an undesirable population" received a "D" rating.[320] Such "infiltration" invariably included African Americans seeking to challenge segregation by purchasing homes in white neighborhoods.

Despite such ratings, a number of historians have concluded that the HOLC issued mortgage loans impartially and made large numbers of loans in neighborhoods rated yellow and red.[321] For example, in Chicago, the HOLC made sixty percent of its loans to homes located in the yellow and red areas.[322] Likewise, an analysis of HOLC lending in Philadelphia determined that it made sixty percent of its loans for homes located in areas designated red and an additional twenty percent to areas designated yellow.[323] The HOLC, however, did avoid making loans to African Americans in white neighborhoods.[324] In particular, when the HOLC obtained a property through

VALUATION OF REAL ESTATE 91 (1932)).

[317] JACKSON, *supra* note 285, at 201.

[318] *Id.* at 199. For example, Lincoln Terrace in St. Louis was originally intended for middle class white families. *Id.* at 200. The project, however, was unsuccessful and it developed into a black neighborhood. *Id.* Despite the fact the homes were relatively new and of good quality, the HOLC gave the area a D rating in 1937 and 1940. *Id.* It asserted that the houses had "little or no value today, having suffered a tremendous decline in values due to the colored element now controlling the district." *Id.*

[319] THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 44 (1996).

[320] *Id.*

[321] JACKSON, *supra* note 285, at 202.

[322] Hillier, *supra* note 304, at 397.

[323] *Id.*

[324] Hillier, *supra* note 290, at 19.

foreclosure, it relied upon local real estate brokers to sell the property and typically its sales policy was to "respect segregation and encourage it."[325]

Overall, however, the major damage that the HOLC caused was by adopting, elaborating, and implicitly placing the federal government's seal of approval upon notions of real estate value and race.[326] While there is some debate regarding the extent of the distribution of the actual residential security maps, it is clear that the rating system that served as the basis for such maps was emulated by the lending industry.[327] For example, the FHLBB encouraged private financial institutions to prepare maps and provided directions to assist in the preparation of such maps.[328] Consequently, private banks adopted the HOLC's racially discriminatory policies, thereby institutionalizing and disseminating the practice of racial redlining. The greatest effect of the HOLC rating system was its influence on the underwriting practices of the Federal Housing Administration (FHA) and the Veterans Administration (VA).[329]

D. Federal Housing Administration and Veterans Administration

Historian Kenneth Jackson proclaimed: "No agency of the United States government has had a more pervasive and powerful impact on the American people over the past half-century than the Federal Housing Administration (FHA)."[330] Following the work of the HOLC, the FHA, established in 1937, and the VA, established in 1944, were designed "to encourage improvement in housing standards and conditions, to facilitate sound home financing on reasonable terms, and to exert a stabilizing influence on the mortgage market."[331] While the FHA and the VA did not lend money, they provided financial incentives to encourage lenders to invest in residential mortgages by insuring them against losses on such

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[325] *Id.* (citing CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 237 (Ralph Adams Brown ed., Kennikat Press 1971) (1955)).

[326] Hillier, *supra* note 304, at 398; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 52 (1993).

[327] Hillier, *supra* note 304, at 402-05

[328] *Id.* at 404.

[329] JACKSON, *supra* note 285, at 203.

[330] *Id.*

[331] *Id.*

instruments.[332] In particular, the FHA program guaranteed over ninety percent of the value of collateral for loans made by private banks which decreased the size of the down payment to ten percent.[333] In addition, the FHA program extended the repayment period to twenty-five or thirty years, which resulted in low monthly payments; FHA also demanded that the loan be fully amortized, thereby allowing the borrower to own the home at the end of the loan term.[334]

With risk greatly reduced to the lender, the FHA's success was remarkable as housing starts exploded from 332,000 in 1937 to 619,000 in 1941 while the national rate of mortgage foreclosure fell from 250,000 non-farm units in 1932 to 18,000 in 1951.[335] Overall, by 1972, nearly eleven million families had entered the ranks of homeownership with the assistance of the FHA and an additional twenty-two million families were able to make improvements to their homes.[336] For the first time in United States history homeownership became a reality for many Americans. This remarkable success came at a price, as it was largely confined to whites in the suburbs to the detriment of African Americans residing in urban areas. As Charles Abrams explained:

> A government offering such bounty to builders and lenders could have required compliance with nondiscriminatory policy . . . Instead, FHA adopted a racial policy that could well have been culled from the Nuremberg laws. From its inception FHA set itself up as the protector of the all-white neighborhood. It sent agents into the field to keep Negroes and other minorities from buying houses in white neighborhoods.[337]

As a result, it is necessary to examine the FHA's policies and their impact upon African American homeownership.

The administrative dictates in the FHA functioned in several ways to

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[332] *Id.* at 204.

[333] *Id.*

[334] *Id.*

[335] *Id.* at 204-205. In 1933, there were 93,000 housing starts. *Id.* at 205. Following the establishment of the FHA, housing starts and sales dramatically increased as follows: 1937 - 332,000; 1938 - 399,000; 1939 - 458,000; 1940 - 530,000; 1941 - 619,000. *Id.*

[336] *Id.*

[337] ABRAMS, *supra* note 325, at 229.

favor the suburbs at the expense of the nation's center cities, thereby creating a disparate impact upon African Americans who were migrating to urban areas. Indeed, by 1960, nearly three-fourths of the African American population was concentrated in cities throughout the United States.[338] First, the FHA favored the financing of single-family detached homes over multi-family projects by adopting polices which favored open areas outside the congested center city.[339] In particular, the FHA established minimum standards for lot size, setbacks, and separation from existing structures which in effect precluded many center city residences from loan eligibility, including row houses and attached dwellings.[340] Second, the FHA favored new purchases over repairs of existing homes by providing only small home improvement loans for short durations.[341] Again, such a requirement operated to the detriment of African Americans as it favored new construction in white suburban areas over urban areas. Third, the FHA required an "unbiased professional estimate" as a prerequisite to any loan guarantee in order to ensure that the value of the property would exceed the outstanding mortgage debt.[342] Acting on the HOLC's rating system, the FHA developed even more elaborate advice for its appraisers in its *Underwriting Manual*.[343] Foremost among the variables considered by the FHA appraisal were the location of the property and the racial composition of the surrounding neighborhood.[344] Indeed, the *Underwriting Manual* stated "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."[345] Further, appraisers were warned of the dangers of infiltration of "inharmonious racial groups or

[338] AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANATAION TO GHETTO 232 (3d ed. 1976).

[339] *See* OLIVER & SHAPIRO, *supra* note 7, at 17.

[340] JACKSON, *supra* note 285, at 208.

[341] *Id.* at 206.

[342] *Id.* at 207.

[343] OLIVER & SHAPIRO, *supra* note 7, at 18.

[344] *See generally* JACKSON, *supra* note 285, at 207. (stating that the FHA utilized eight weighted factors to assess the quality of a residential area, including: relative economic stability (40 percent); protection from adverse influences (20 percent); freedom from special hazards (5 percent); adequacy of civic, social, and commercial centers (5 percent); adequacy of transportation (10 percent); sufficiency of utilities and conveniences (5 percent); level of taxes and special assessments (5 percent); and appeal (10 percent).)

[345] *Id.* at 208 (citing U.S. FED. HOUS. ADMIN., UNDERWRITING MANUAL § 1301 (rev. Jan. 1, 1947)).

nationality groups."[346] To prevent such infiltration, the *Underwriting Manual* "recommended 'subdivision regulations and suitable restrictive covenants'" as an excellent method to maintain neighborhood stability via racial segregation.[347] The FHA did not officially change this policy until February 1950, two years after racial covenants were declared unenforceable and contrary to public policy by the United States Supreme Court.[348] Thus, the entire appraisal process was based upon the premise that racial segregation was necessary to ensure maintenance of property values.[349]

While exact figures regarding the FHA's discrimination against African Americans are not available, data analyzed on a county level show a clear pattern of redlining in center city counties and abundant loan activity in suburban counties.[350] For example, between 1946 and 1960 over 350,000 homes were constructed with FHA financing in northern California of which less than 100 went to African Americans.[351] Indeed, white developers would often undertake extraordinary efforts in order to secure FHA mortgages. For example, in Detroit, a developer proposed an all-white subdivision next to a black neighborhood in the Eight Mile-Wyoming area of the city which a HOLC appraiser had rated as "D" or "hazardous."[352] The FHA denied the developer financing due to its close proximity to the "hazardous" black neighborhood.[353] In a compromise, the FHA agreed to provide loans and mortgage guarantees for the proposed development provided the developer

[346] *Id.*; MASSEY & DENTON, *supra* note 326, at 54.

[347] JACKSON, *supra* note 285, at 208. "Such covenants, which were legal provisions written into property deeds, were a common method of prohibiting black occupancy...." *Id.* By the 1940's, it was estimated that 80% of the residential land in Chicago was subject to restrictive covenants. U.S. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 68 (1947).

[348] JACKSON, *supra* note 285, at 208. *See*, Shelley v. Kraemer, 334 U.S. 1 (1948).

[349] OLIVER & SHAPIRO, *supra* note 7, at 18.

[350] JACKSON, *supra* note 285, at 209. "Of a sample of 241 new homes insured by FHA throughout metropolitan St. Louis between 1935 and 1939, a full 220 or 91 percent were located in the suburbs." *Id. See also*, Raymond Mohl, *Making the Second Ghetto in Metropolitan Miami*, *in* THE NEW AFRICAN AMERICAN URBAN HISTORY (Kenneth Goings & Raymond Mohl eds., 1996); THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POST WAR DETROIT (1996).

[351] Troy Duster, *The 'Morphing' Properties of Whiteness*, *in* THE MAKING AND UNMAKING OF WHITENESS, at 119 (Birgit Rasmussel et al. eds., 2001).

[352] SUGRUE, *supra* note 350, at 64, 300 n.25.

[353] *Id.* at 64.

build a foot-thick, six-foot-high wall for a half mile in order to separate the black and white neighborhoods.[354]

Perhaps, the most significant aspect of the FHA and VA was their impact upon private financial institutions.[355] As Kenneth Jackson summarized:

> The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities. More seriously, Washington actions were later picked up by private citizens, so that banks and savings-and-loan institutions institutionalized the practice of denying mortgages "solely because of the geographical location of the property."[356]

Such damage was captured by an examination of 141 commercial banks and 229 life insurance companies in Chicago that found the institutions refused to make "even a token number of conventional mortgages . . . for the typical Negro home buyer."[357] Likewise, in Detroit, financial institutions were reluctant to provide mortgages to areas inhabited by prosperous African Americans and refused to originate any mortgage loans to African Americans seeking to acquire property in the vicinity of white neighborhoods.[358] Indeed, an Urban League study determined "that to make such mortgages . . . would incur the hostility and wrath of their white depositors" and "court the great

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[354] *Id.*

[355] Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. Q. 313, 318 (*citing* U.S. COMM'N ON CIVIL RIGHTS, COMM'N ON CIVIL RIGHTS REPORT - HOUSING 1961 (1961); U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER (1971); J. F. Kain & J. M. Quigley, Housing Market Discrimination, Home Ownership and Savings (1971) (unpublished); ADVANCED MORTGAGE CORP., MIDWESTERN MINORITY HOUSING MARKETS (1962); E. GRIER & G. GRIER, EQUALITY AND BEYOND: HOUSING SEGREGATION AND THE GOALS OF THE GREAT SOCIETY (1966); J. Feins, Urban Housing Disinvestment and Neighborhood Decline: A Study of Public Policy Outcomes (1977) (unpublished Ph.D. Dissertation, University of Chicago)(on file with The University of Chicago Library); CHICAGO COMM'N ON HUMAN RELATIONS, SELLING AND BUYING REAL ESTATE IN RACIALLY CHANGING NEIGHBORHOODS: A SURVEY (1962).

[356] JACKSON, *supra* note 285, at 217.

[357] HIRSCH, *supra* note 258, at 31.

[358] SUGRUE, *supra* note 350, at 46.

disfavor of other investors, realtor, and builders."[359]

Given the importance of the HOLC, FHA and VA in residential housing markets, by the late 1950's many blacks were denied access to traditional sources of housing finance by institutionalized procedures, resulting in a spiral of decline in many large cities. Overall, during the time period from 1930 to 1960, scholars have demonstrated that "fewer than one percent of all mortgages in the nation were issued to African Americans."[360] With African Americans unable to obtain the same type of financing available to whites from traditional financial institutions, they were forced to rely on less favorable, often predatory, forms of mortgage financing.[361]

VIII. ALTERNATIVE FINANCING

In the absence of traditional sources of mortgage financing, one of the most common methods available for African Americans to finance a home purchase was the installment or land contract.[362] Under such a contract, the owner of the property sold the property to a buyer at an agreed upon price and the purchase was financed through a series of monthly installment payments to the original owner.[363] The contract was subject to predatory abuse in a number of manners. First, the buyer often did not gain title to the property until the last installment payment was made. Second, the installment contract acted to prevent the buyer from gaining any equity in the property over the course of the agreement term. Such a contractual arrangement could be utilized in a predatory manner because if the buyer missed a single payment, the seller could take back the property without foreclosure proceedings, and the buyer would lose not only the property but all payments previously made on the contract.[364] Third, usury laws and mortgage interest rate ceilings did not apply since the installment contract was a private contract between the parties, a seller could charge any interest rate that the buyer was willing to pay. Fourth, the buyer could be kept ignorant of the actual value of the property since appraisals were not necessary to finance the transaction. Thus,

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[359] *Id.*

[360] DANIEL KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA 7 (1995).

[361] Bradford, *supra* note 316, at 318.

[362] *Id.* at 319.

[363] *Id.*

[364] *Id.*

it was possible to have great disparities between the fair market value and the sales price which further facilitated exorbitant pricing practices and other predatory practices.

The story of Ossian and Gladys Sweet provides an example of the operation of an installment contract. In May 1925, Ossian Sweet, an African American doctor, and his wife, Gladys, after months of searching, found an attractive house they wanted to purchase in a white neighborhood in Detroit.[365] The standard selling price in the neighborhood for such a house was $12,000 to $13,000.[366] Realizing that the Sweets' purchase options were limited due to the racially segregated housing market in Detroit, Ed and Marie Smith, the properties' owners, increased their asking price for the Sweets to $18,500.[367] Since the Sweets' had three previous offers rejected by sellers in white neighborhoods, they decided to accept the Smith's sales price.[368] The Sweets' agreed to a down payment of twenty percent of the purchase price.[369] Since the Sweets' were unlikely to obtain a bank loan, the Smiths' financed the transaction with an installment contract.[370] Under the terms of the contract, the Sweets' were to pay 120 month installments of $150.00.[371] The Smiths' would retain title to the house until the final payment was made in 1935.[372] During the course of the ten year contract, the Sweets' were to pay the Smiths' an extraordinary interest rate of eighteen percent on the balance.[373] On June 7, 1925, the Sweets' paid $3,500 as a down payment and signed the contract, moving in on August 1.[374]

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[365] BOYLE, *supra* note 278, at 145-46.

[366] *Id.* at 146.

[367] *Id.* Ed Smith was actually a light skinned African American who passed for white and ran a successful real estate business. *Id.* at 146. Marie Smith, Mr. Smith's wife was white. *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.* Ultimately, Mr. Sweet completed payments on the contract in 1950, finally obtaining ownership of the home. *Id.* at 346.

[373] *Id.*

[374] *Id.* Shortly after purchasing and moving into the home, the Sweets and nine of their friends and relatives, who were assisting with the move, were surrounded by a white mob intent on forcing them out of the residence. *Id.* at 168-69. After the mob began pelting the home with rocks, Henry Sweet, Ossian's brother, fired a gun into the crowd killing one person and wounding another. *Id.* at 169-181. All eleven persons were

The Sweets' experience was hardly unusual as installment contracts continued to be one of the principal financing mechanisms for African Americans seeking to achieve homeownership. An attorney in Chicago familiar with such transactions estimated that eighty-five percent of the properties sold to African Americans in neighborhoods undergoing racial change utilized installment contracts.[375] Likewise, a study conducted by the Chicago Commission of Human Relations of one square block in the Englewood area of the city found that between 1953 and 1961, a total 29 parcels changed ownership.[376] Of the 29 properties, 24 were purchased with installment contracts.[377] The study found that "[m]any of the interviewed contract purchasers conveyed the impression that the installment contract was the only means by which Negro families in Chicago could acquire property."[378] In addition, the study found evidence that installment contracts were subject to predatory practices, as the African American consumer's price paid in the contract ranged anywhere from thirty-five percent to one hundred fifteen percent, with an average of seventy-three percent, greater than the original price paid by the investor.[379] One real estate speculator recalled that he made more than 150 percent on his original investment in less than a year by evicting any one who missed a payment and collecting subsequent down payments.[380] Generally, most sellers were able to recoup their entire cash equity in the property within two years with the remaining payments sheer profit.[381] As a result, the inability to obtain traditional financing necessitated the use of the installment contract that often culminated in African Americans being charged high interest rates to purchase homes at inflated prices.

The racially discriminatory application of installment land contracts containing predatory terms and conditions was vividly discussed in *Clark v.*

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charged with murder and, after a sensational trial whose defense was headed by Clarence Darrow, a mistrial was declared. *Id.* at 260-99. A second trial of Henry Sweet resulted in a not guilty verdict with charges against the remaining defendants dropped by the prosecution. *Id.* at 312-36. Unfortunately, Ms. Sweet died several years later and Mr. Sweet committed suicide in 1960. *Id.* at 346.

[375] HIRSCH, *supra* note 258, at 32.

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] Hirsch, *supra* note 258, at 32.

[381] *Id.*

Universal Builders. From 1958 to 1968, a group of African Americans in Chicago purchased newly constructed homes financed with land installment contracts.[382] Subsequently, the plaintiffs sued the building contractor and a number of land companies that facilitated the sale of the homes alleging racial discrimination in violation of the Thirteenth Amendment, Fourteenth Amendment and the Civil Rights Act of 1866.[383] In particular, the plaintiffs argued that the defendants exploited a racially segregated housing market by selling homes to African Americans at prices that greatly exceeded those offered to whites in similar nearby neighborhoods, and sold such properties to African Americans on grossly unfair terms in comparison to whites.[384] Following the plaintiff's case in chief, the district court granted a directed verdict in favor of the defendants.[385]

On appeal, the court agreed that the plaintiff's exploitation theory was clearly a permissible cause of action under Section 1982 of the Civil Rights Act of 1866.[386] Relying on the landmark United State Supreme Court ruling in *Jones v. Mayer, Co.*, the court explained that Section 1982 was a broad tool designed to eliminate discrimination in the "ownership of property" and to ensure "that a dollar in the hands of a black man will purchase the same thing as a dollar in the hands of a white man."[387] Accordingly, in order to set forth a prima facie case under an exploitation theory, the plaintiffs must establish (1) that a dual housing market exists as

[382] Clark v. Universal Builders Inc., 501 F.2d 324, 327 (7th Cir. 1974).

[383] *Id.*

[384] *Id.*

[385] *Id.* Prior to the trial, District Court Judge Hubert Will rejected defendant's Motion to Dismiss and recognized the plaintiff's exploitation theory as a viable cause of action under Section 1982. Contract Buyers League v. F & F Inv., 300 F.Supp. 210 (1969), *aff'd on other grounds*, 420 F.2d 1191 (7th Cir. 1970); Action Realty Co. v. Baker, 400 U.S. 821 (1970). The case proceeded to trial where District Court Judge Joseph Sam Perry concluded that the defendants' actions were motivated by profit as opposed to race. Clark, 501 F.2d at 327. His conclusion was based on the fact that there was no evidence that the defendants refused to sell a house to a black person or refused to sell at a higher or lower price. *Id.*

[386] *Id.* at 334. Section 1982 provides "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C.S. § 1982.

[387] Clark, 501 F.2d at 330, 334. *See* Jones v. Mayer Co., 392 U.S. 409 (1968) (holding that Section 1982 prohibited racial discrimination in the sale or rental of property not only to public actors but also to private actors).

a result of racial residential segregation and (2) the defendants utilized the dual housing market to their advantage by charging "prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing."[388] If plaintiffs are able to set for a prima facie case, the defendant must "articulate some legitimate nondiscriminatory reason" for the differences in the price and terms for African Americans and whites.[389] Based upon such an analytical model, the court proceeded to evaluate the evidence in order to determine whether the directed verdict was appropriate.

After taking judicial notice that Chicago was clearly a racially segregated city, the court proceed to examine the terms and conditions of the installment contracts offered to the African American buyers in comparison to white buyers in similar neighborhoods. Initially, the court noted that the plaintiff's five expert appraisal witnesses testified that the prices offered by the defendants to African Americans were substantially higher than the prices for whites.[390] On average, the experts testified that the installment contract price exceeded the fair market value of the homes by $4,568.20 or 22.6 percent.[391] The court also noted that defendant's gross profit on its sales to African Americans was 27.6 percent.[392] In contrast, average gross profits on sales to whites in three different developments were 16.7 percent, in line with the industry average of 14 to 19 percent.[393] Likewise, the ratio of gross profit to direct costs, in other words the mark-up on the sales price, was 37.96 percent for the African American buyers and 20.11 percent for the white buyers.[394]

The court also explained that the defendants insisted that its African American buyers finance the home purchases through land installment contracts despite the fact that they may have been able to qualify for traditional mortgages.[395] The court opined that such a practice allowed the defendants to mask the fair market value of the property in

[388] Clark, 501 F.2d at 334.

[389] *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972)).

[390] Clark, 501 F.2d at 334.

[391] *Id.*

[392] *Id.* at 338.

[393] *Id.* at 339 n.19.

[394] *Id.* at 339 n.20.

[395] *Id.* at 335-36.

relation to the sales price.[396] Indeed, traditional mortgage financing would have necessitated an appraisal that would have presumably revealed to the buyer the vast difference between the actual sales price and the fair market value of the property. In other words, the court concluded that installment contract financing "facilitated defendants' exorbitant pricing practices."[397]

Next, the court reviewed the precise terms of installment contract utilized by the defendants which included down payments of up to forty-five percent of the contract price:

> A pre-printed form installment sales contract was used setting forth the total sales price, the deferred balance after down payment, the minimum monthly principal and interest payment, and the interest rate. None of the contracts specified the term over which payments were to be made. The average contract term was 28 years; some terms ranged upwards to 40 or more years. The contracts prohibited installation of improvements such as storm windows, fences, patios, and garages, unless prior permission was obtained from the land company. Title to the real estate was retained by the land company until the entire amount of the deferred balance was satisfied. Upon default and repossession the land companies were permitted to retain the entire amount which the contract purchaser had paid on the property and any improvements.[398]

After considering the evidence, the court concluded: "[t]hrough the medium of exorbitant prices and severe, long-term land contract terms blacks are tied to housing in the ghetto and segregated inner-city neighborhoods from which they can only hope to escape someday without severe financial loss."[399] The court also recognized that such predatory practices forced African Americans to devote more of their incomes to housing to the detriment of other basic necessities, including: education, medical care, food, clothing, home improvements and recreation.[400] In turn, the impact of the duel housing market was to relegate "blacks to a

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[396] *Id.* at 336 n.14.

[397] *Id.*

[398] *Id.* at 336 n.12.

[399] *Id.* at 331.

[400] *Id.* at 331 n.5.

continuing position of social inequality and inferiority while those who exploit the dual housing market enjoy the benefits of enormous wealth exacted from black citizens."[401] The court proceeded to reverse the district court and remanded the case for a new trial.[402]

The impact of such discriminatory allocation of credit was to suppress home ownership among African Americans, particularly in the major urban centers of the North. At the end of the Great Depression, twenty-three percent of dwellings occupied by African Americans were owner occupied whereas forty-six percent of such dwellings were owner occupied by whites.[403] Indeed, during the time period from 1900 to 1940, African American home ownership rates consistently ranged from twenty-three to twenty-five percent.[404] The home ownership rates for African Americans were much lower in the urban areas. In 1940, only three percent of African Americans in New York owned a home, four percent in Newark, seven percent in St. Louis and Chicago, and ten percent in Philadelphia.[405] The advent of the Federal Housing Administration and the Veterans Administration had the effect of dramatically increasing the number of white homeowners. In 1940, the white homeownership rate was forty-six percent whereas the African American homeownership rate was twenty-four percent – a gap of twenty-two percent.[406] By 1960, the white rate had increased dramatically to sixty-four percent fueled in large measure by the FHA and VA.[407] In contrast, while the black rate increased to thirty-eight percent, it failed in increase at the same rate as whites.[408] In fact, the racial homeownership gap actually increased to twenty-six percent. Thus, despite the efforts to escape the credit system of the South, African Americans attempts to achieve homeownership remained significantly impeded by the actions of the federal government and private financial institutions that allocated credit in a racially discriminatory manner.

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[401] *Id.*

[402] *Id.* at 342.

[403] STEPHAN THERNSTROM & ABIGAIL THERNSTORM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 82 (Simon & Schuster 1997).

[404] Karl E. Taeuber & Alma F. Taeuber, *The Black Population in the United States*, *in* BLACK AMERICAN REFERENCE BOOK 190-91 (Mabel Smythe ed., 1976).

[405] Wiese, *supra* note 255, at 432 tbl.2.

[406] LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 222 (2003).

[407] *Id.*

[408] *Id.*

IX. CONCLUSION

Beginning in 2006, the subprime mortgage market began to collapse, creating a major credit and foreclosure crisis in the United States, causing estimated total losses of 1.2 trillion dollars.[409] The subprime credit market proclaims it provides a source of credit to borrowers who may be unable to obtain credit from the prime market due to a variety of reasons, such as poor credit histories, high debt levels, or limited incomes. However, the subprime market provides such credit at a premium price due to the perceived risks and increased costs associated with lending to such a borrower. The growth of subprime lending has been disproportionately concentrated among African Americans and in African American neighborhoods. In 1993, subprime refinancing loans accounted for just eight percent of home loans in African American neighborhoods and one percent in white neighborhoods.[410] By 1998, the number of subprime refinancing loans had dramatically increased to fifty-one percent of the total loans in African American neighborhoods compared to only nine percent in white neighborhoods.[411] Such concentrated subprime lending remained relatively constant for a number of years. Indeed, in 2005, fifty-two percent of the total mortgage loans to African Americans were subprime loans, in contrast to nineteen percent for whites.[412]

While the subprime market may serve a socially beneficial function, it is also more susceptible to abusive lending practices, often resulting in more foreclosures than in the prime market. One study estimated that 15.6 percent of all subprime loans originated during the time period from 1998 to 2004

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[409] Harold Brubaker, *Delco Ordeal Offers Look At Lending Practices*, PHILADELPHIA INQUIRER, Mar. 30, 2008, at C1.

[410] U.S. DEP'T OF THE TREASURY AND THE U.S. DEP'T OF HOUS. AND URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING 3 (2000). The U.S. Department of Housing and Urban Development adopted the census tract classifications utilized in the Woodstock Institute report, TWO STEPS BACK: THE DUAL MORTGAGE MARKET, PREDATORY LENDING, AND THE UNDOING OF COMMUNITY DEVELOPMENT (Nov. 1999). In particular, a white neighborhood consisted of census tracts where the minority population is less than fifteen percent and an African American neighborhood consisted of census tracts were African Americans constitute at least seventy-five percent of the population. Further, the racial composition of the neighborhoods is based on 1990 census data.

[411] *Id.*

[412] ELLEN SCHLOEMER ET AL., LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 23 (Dec. 2006), http://www.responsiblelending.org/pdfs/ forclosure-paper-report-2-17.pdf.

would result in foreclosures and loss of homeownership.[413] Further, since African Americans receive a disproportionate share of subprime loans, they also are more susceptible to abusive predatory lending and foreclosure. Indeed, in 2005 alone, a study estimated that 47,101 African Americans would lose their home due to foreclosures on subprime mortgage loans.[414] The resulting loss of wealth for African Americans caused by the subprime lending debacle is estimated between 72 and 93 billion dollars.[415]

In short, the subprime mortgage market represents yet another example of the impact of the discriminatory allocation of credit upon African American wealth accumulation. Such wealth impediments are a manifestation of historical process of discrimination and racism which have existed since the founding of the United States. Indeed, as economist Andrew Brimmer explained:

> [t]o a considerable extent [lack of wealth] can be traced to a long history of deprivation in this country. This means that blacks have had much less opportunity than whites to earn, save or inherit wealth. Because of this historical legacy, black families have had few opportunities to accumulate wealth and to pass it on to their descendants.[416]

As this article has argued, a major example of this historical deprivation is discrimination in the credit markets which acted to limit African Americans access to homeownership and increased the cost of achieving home ownership.

Indeed, following Emancipation, African Americans rapidly became ensnared in the clutches of a labor system that was dependent upon credit. Not surprisingly, the credit was provided on predatory terms in several regards. First, African Americans paid higher prices for necessary goods purchased on credit. Second, African Americans also were charged an

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[413] CTR. FOR RESPONSIBLE LENDING, SUBPRIME LENDING: A NET DRAIN ON HOMEOWNERSHIP 3 (Mar. 27, 2007), http://www.responsible lending.org/pdfs/Net-Drain-in-Home-Ownership.pdf.

[414] *Id.* at 4.

[415] AMAAD RIVERA, ET AL., FORECLOSED: STATE OF THE DREAM 2008 1 (Jan. 15. 2008), http://www.faireconomy.org/files/StateOfDream _01_16_08_Web.pdf

[416] CONLEY, *supra* note 7, at 13 (citing Andrew Brimmer, *Income, Wealth, and Investment Behavior in the Black Community*, *in* A.E.A. PAPERS AND PROCEEDINGS 78, 151-55 (1988)).

additional interest rate on the purchase. The combination resulted in exorbitant interest rate charges that ranged from forty percent to as high as seventy-five percent. Third, such debts were typically secured with a crop lien that effectively limited the ownership rights of African Americans. Finally, African Americans were subjected to discriminatory practices at settlement time, often depriving them of the fruits of their labor and perpetuating credit debt. The combination of a malignant credit system and white racism had a devastating impact upon African Americans, relegating them to debt peonage and impeding homeownership.

In an effort to escape the economic hardships, African Americans commenced the Great Migration, leaving the rural South to move to the urban areas of the North. Again, however, their dream of homeownership was stymied by yet another discriminatory credit system. In particular, the federal government in the form of the HOLC, FHA, and VA implemented the practice of redlining whereby African American neighborhoods were effectively denied access to traditional forms of credit. Since African Americans were unable to obtain credit from the formal market, they were either precluded from property acquisition or forced to turn to other sources of credit. While such informal sources, such as installment land contracts, provided credit to African Americans, they generally did so in a predatory fashion with significantly higher costs and increased risks. In conclusion, this article has demonstrated that one of the primary explanations for the large racial disparities in terms of wealth is a direct consequence of discrimination in credit markets which has acted to both limit minorities' access to home ownership and to increase the cost of achieving home ownership. Until such racial wealth disparities, the result of the haunting legacy of slavery and Jim Crow, are addressed in a substantive manner, it will continue to impede the realization of Dr. Martin Luther King, Jr.'s "beloved community" and Senator Barack Obama's "more perfect union" in the United States.