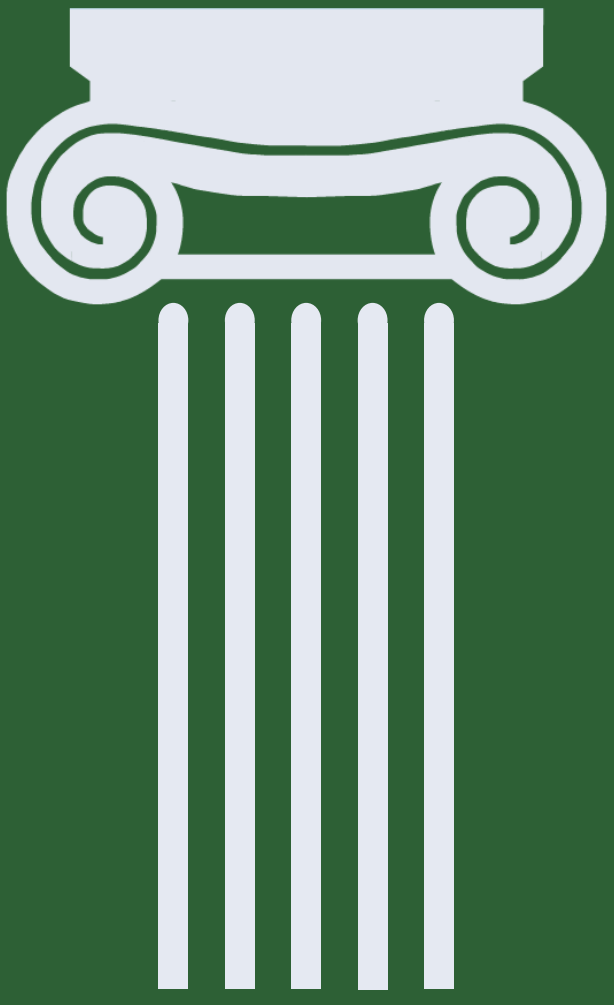
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Letter from the Editor-in-Chief

Dear Reader,

Welcome to Volume 7, Number 2 of the *Claremont Journal of Law and Public Policy*! We received a record number of submissions for this edition, which includes analyses of campaign finance reform, pre-natal healthcare in prisons, insulin pricing, and much more. We also have a wide-ranging interview with Professor Ken Kersch of Boston College; Staff Writer Sarah Wilson talked with Professor Kersch about President Trump and the conservative movement, methods of constitutional interpretation, and popular constitutionalism. The *CJLPP*, as always, maintains an active online presence at www.5clpp.com.

Coming off the tails of Thanksgiving in the United States, I want to express how thankful I am for all of our wonderful journalers. Our Print Edition Editors for Volume 7, Number 2 — Talia Bromberg, Sean Volke, Ciara Chow, and Calla Li — worked incredibly hard and under tight deadlines to prepare this print edition. Preparations for our upcoming symposium on migration, which will become Volume 7, Number 3, are being led by Katya Pollock — who is in essence preparing an entire edition on her own! Credits for the print edition's updated design go to Sofia Muñoz, our Design Editor. Lauren Rodriguez, our Interview Editor, not only helped with interviewing Professor Kersch but also with establishing a more formal process for interviews with the *CJLPP*. Our Campus Policy Editor, Alison Jue, and our Digital Content Editors, Alex Simard and Christopher Tan, have been busy ensuring our website has consistent and quality content; they have been supported by Webmaster Aden Siebel, whose work has drastically improved the readability and visual appeal of our website. Ali Kapadia, our Business Director, has led the business team in planning ambitious events: The team hosted a standing-room-only event on the Hong Kong protests, and they have even bigger events planned next semester (stay tuned!). Additionally, our writers — both digital content and staff writers — are indispensable members of the journal. And, of course, I must express my thanks to Daisy Ni, our Chief Operating Officer, who was a consistent source of support and advice throughout this last semester.

I am sad to report that Daisy, Aden, Chris, Sean, and Staff Writer Musa Kamara will be going abroad next semester. Luckily, Chief Operating Officer Bryce Wachtell and Print Edition Editor Scott Shepetin will be returning from their semesters abroad; with their help, I am confident that the *CJLPP* is well-positioned for a strong spring semester.

Finally, I thank our faculty advisor, Professor Amanda Hollis-Brusky, for her sponsorship. The *CJLPP* is also indebted to the 5C student governments, the Salvatori Center, the Athenaeum, and the 5C politics, legal studies, government, and public policy departments. For those who are interested in joining us, please see the "Hiring" section of our website or email us at info.5clpp@gmail.com. We also always welcome submissions to our blog and future print editions; for more information, see the "Submissions" section of our website.

Enjoy the holidays, and happy reading!

Best,

Isaac Cui
Editor-in-Chief

About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The *CJLPP* is also proud to spearhead the Intercollegiate Law Journal project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

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In This Issue

The Battle for Insulin Affordability 4
Sarah Wilson (SCR ’20)

“Please — don’t let me have my baby in this jail”: Inadequate Provisions of Prenatal Healthcare in the U.S. Prison System 9
Olivia Varones (PO ’22)

Deadly Inconsistencies: An Analysis of Religious Rights, the Orders Docket, and Death Row 13
Chris Murdy (PO ’22)

The Controversy of Harm Reduction: Safe Injection Sites in the United States 17
Delaney Hewitt (SCR ’20)

Towards a Just Finance Sector: The Merits of State-Owned Banks 20
Elias van Emmerick (PO ’21)

Conservative Constitutionalism: An Interview with Ken Kersch 28
Conducted by Sarah Wilson (SCR ’20), Transcribed by Nadine Khalidi (PZ ’20) and Lauren Rodriguez (PO ’22)

Money Talks: The Public Financing of Judicial Elections 33
Matthew Fisch (PO ’23)

The Battle for Insulin Affordability

Sarah Wilson (SCR '20)
Staff Writer

Insulin pricing is topic of concern in the health policy sphere. America has the highest drug prices in the developed world,[1] a direct consequence of the government's inaction on price controls. Recently, the diabetic community has brought attention to the unaffordable level of insulin prices.[2] Synthetic insulin was invented a century ago and has been on the market for decades. Still, the price of insulin in America is high and climbing.

In this essay, I assess the merits of several approaches to regulating insulin prices. First, I situate the reader in the current drug pricing environment, focusing on the structural factors that have enabled insulin prices to skyrocket. Second, I examine the consequences of high insulin prices on patients. Third, I describe new legislation in Colorado that caps out-of-pocket costs and explore its merits and reception. Finally, I conclude by discussing implications of the new law for diabetics in other states.

I. Diabetes and Drug Pricing in America

According to the Centers for Disease Control and Prevention, over one hundred million Americans have diabetes or prediabetes. There are 30.3 million Americans who live with diabetes, and seven-and-a-half million people require synthetic insulin to live.[3] In 2017, diabetes was the seventh leading cause of death in the United States.[4] There are two types of diabetics: Type 1 and Type 2. Type 2 diabetics develop the disease as a result of diet and lifestyle choices. Type 1 diabetics, however, develop an autoimmune form of the disease in which they lose the ability to produce insulin naturally. Without insulin, the body cannot control blood sugar levels. For diabetic patients, lack of insulin can result in diabetic ketoacidosis (DKA),[5] high blood pressure, nerve damage, kidney damage, skin infections, stroke, glaucoma, and death.[6] Not all Type 2 diabetics require insulin, but all Type 1 diabetics require insulin to control their diabetes.

Insulin was first synthesized in the 20th century by three researchers at the University of Toronto.[7] For centuries, diabetes was a death sentence. Children with Type 1 diabetes died young, unable to manage their disease. In 1921, Canadian scientists Frederick Banting, J.J.R. Macleod, Charles Best, and James Collip produced the first pure form of insulin.[8] The commercial production of insulin began in 1923. Since that time, countless advancements in the production of insulin have been made. In 1996, the first fast-acting insulin was produced by Eli Lilly.[9] The first long-acting insulin was produced in 2000.[10] These insulin products are widely used together by diabetics to manage blood sugar levels.

There are four players in the American insulin pricing system: pharmaceutical companies, insurance companies, Pharmacy Benefit Managers (PBMs) and the government. Pharmaceutical companies manufacture drugs. Prescription drugs (sometimes called "brand name" drugs) are under patent, meaning that the patent holder has the sole legal right to manufacture that drug for a set period of time. After the period of time expires, other manufacturers can produce generic (off-brand) versions of the drug. The availability of generic versions of the drug increases competition and lowers prices.[11]

Insurance companies pay for a percentage of the drug cost. The portion not paid by the insurance company is referred to as co-insurance. Co-insurance is the "out-of-pocket" price that patients pay at a pharmacy. Insurance companies offer a formu-

1 Patricia M. Danzon & Michael F. Furukawa, *Prices And Availability Of Biopharmaceuticals: An International Comparison*, 25 Health Aff. 1353, 1353 (2006).
2 *See, e.g., Stand Up for Affordable Insulin,* Am. Diabetes Ass'n, https://makeinsulinaffordable.org/ (last visited Nov. 16, 2019).
3 *New CDC Report: More than 100 million Americans have Diabetes or Prediabetes*, Ctrs. For Disease Control & Prevention (July 18, 2017), https://www.cdc.gov/media/releases/2017/p0718-diabetes-report.html#targetText=The%20report%20finds%20that%20as,new%20diabetes%20diagnoses%20remains%20steady (last visited Nov. 9, 2019)
4 *Leading Causes of Death*, Ctrs. For Disease Control & Prevention (last updated Mar. 17, 2017), https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm (last visited Nov. 9, 2019).
5 Diabetic ketoacidosis (DKA) is a condition that develops when one's body can't produce enough insulin. Without sufficient insulin, one's body begins to break down fat as fuel. This produces a buildup of acids in the bloodstream called ketones, which lead to DKA. Untreated DKA can be fatal. *See generally Diabetic ketoacidosis,* Mayo Clinic (June 12, 2018), https://www.mayoclinic.org/diseases-conditions/diabetic-ketoacidosis/symptoms-causes/syc-20371551 (last visited Nov. 16, 2019).
6 *Complications,* Am. Diabetes Ass'n, https://www.diabetes.org/diabetes/complications (last visited Nov. 9, 2019).
7 Ignazio Vecchio et al., *The Discovery of Insulin: An Important Milestone in the History of Medicine*, 9 Front. Endocrinol. 1, 4 (Oct. 2018).
8 *Id.*
9 Tiffany Stanley, *Life, Death and Insulin,* Wash. Post Mag. (Jan. 7, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/07/feature/insulin-is-a-lifesaving-drug-but-it-has-become-intolerably-expensive-and-the-consequences-can-be-tragic/.
10 Vecchio et al., *supra* note 7, at 6.
11 *How Insulin Pricing Works in the U.S.,* Beyond Type 1, https://beyondtype1.org/insulin-pricing/ (last visited Nov. 17, 2019).

lary of drugs tiered by cost. Drugs on the lower tier have lower out-of-pocket costs, and drugs on higher tiers have higher out-of-pocket costs. Formularies are negotiated by PBMs, which are third-party intermediaries that negotiate prices between insurance and pharmaceutical companies.[12] PBMs make money by getting discounts on drugs from pharmaceutical companies in exchange for putting the drugs in an insurer's formulary.

The insulin supply chain begins when manufacturers make a drug and sell the product to a wholesaler or directly to a pharmacy. Pharmaceutical companies offer rebates to PBMs to increase their market share,[13] and the rebate is a portion of the list price of the insulin. Therefore, the higher the list price, the bigger the rebate for PBMs and the higher the profit is for manufacturers. Manufacturers provide rebates to wholesalers in exchange for exclusivity provisions. Wholesalers are only authorized to sell one drug to pharmacies, which in turn sell them to patients. Manufacturers negotiate rebates with PBMs to have their drug placed on a lower tier.

II. The Cost of Insulin

The cost of insulin in America is high and rising. Three pharmaceutical companies — Eli Lilly, Sanofi, and Novo Nordisk — have a near-monopoly on fast-acting insulin products. These three firms control ninety percent of the insulin market.[14] As a result, the system is rife with abuse. The three pharmaceutical companies have gamed the system to extend their patents indefinitely.[15] To maximize profits, pharmaceutical companies will arbitrarily raise the list price. There is no evidence that the cost of manufacturing insulin has risen, yet prices keep climbing. Between 2002 and 2013, the price of insulin jumped, with out-of-pocket costs increasing from $40 a vial to $130.[16] According to the *Washington Post Magazine*, when Eli Lilly debuted its Humalog brand of insulin in 1996, the list price of a 10-milliliter vial was $21.[17] The price of the same vial is now $275.[18] Sanofi's popular insulin brand Lantus was $35 a vial when it was introduced in 2001; it's now $270.[19] Novo Nordisk's Novolog was priced at $40 in 2001 but was $289 in 2018.[20]

Higher list prices mean bigger rebates for PBMs and wholesalers.[21] Because PBMs and wholesalers take a percentage of the list price as their payment, manufacturers will raise list prices to give PBMs a bigger rebate. Insurers pay a portion of the cost but patients are still responsible for the remaining amount. Higher list prices mean larger profits for drug companies, PBMs, wholesalers, insurers and pharmacies and higher costs for patients. The combination of an artificially small number of manufacturers, a large number of consumers who require insulin, and a convoluted pricing scheme drives up costs for patients.

As a result, Americans pay more than patients in any other developed country for almost every drug — including insulin.[22] There are no federal price controls for insulin, even through government programs like Medicare and Medicaid.[23] Type I diabetics require fast-acting insulin every day and usually require more than one vial per month. The demanding nature of Type I diabetes further drives a lack of affordability.

Out-of-pocket costs in the United States are higher than in any other country. The after-insurance cost of one vial of Novolog is $6 dollars in Austria and $48 dollars in Singapore but costs a whopping $289 dollars in the United States.[24] Similarly, one vial of Humalog is free for patients in Portugal and $69 dollars for patients in Chile while patients in the United States sometimes pay $435 dollars.[25] In a Senate hearing in May 2019, a father from Maine told senators that a ninety-day prescription for just one of his son's insulin would cost him $1,489.46.[26]

According to researchers from the University of Michigan, the total cost of insulin for Type II diabetics more than tripled, from $231 a year in 2002 to $736 a year in 2013 for each patient.[27] According to the Health Care Cost Institute, the average annual cost was $2,864 for a Type I diabetic in 2012. By 2016, annual insulin costs per person doubled to $5,705.[28]

The situation has garnered public attention to the issue of insulin affordability. The Congressional Diabetes Caucus conducted a year-long investigation of insulin pricing and published a whitepaper with its findings.[29] The Senate Finance Committee conducted three hearings in 2019 to address drug pricing in America. The House Committee on Energy and Commerce's Oversight and Investigations Subcommittee questioned executives from Sanofi, Novo Nordisk, Eli Lilly and several PBMs

12 *Id.*
13 *Id.*
14 Stanley, *supra* note 9.
15 Andrew Dunn, *Insulin Drugmakers Under Scrutiny for Pricing, Patent Practices*, BioPharma Dive (Nov. 2, 2018), https://www.biopharmadive.com/news/insulin-drugmakers-under-scrutiny-for-pricing-patent-practices/541275/ (last visited Dec. 1, 2019).
16 Xinyang Hua et al., *Expenditures and Prices of Antihyperglycemic Medications in the United States: 2002-2013*, 315(13) JAMA 1400, 1400 (2016).
17 Stanley, *supra* note 9.
18 *Id.*
19 *Id.*
20 *Id.*
21 *How Insulin Pricing Works in the U.S., supra* note 11.
22 David J. Gross, Jonathan Ratner, James Perez, & Sarah L. Glavin, *International Pharmaceutical Spending Controls: France, Germany, Sweden, and the United Kingdom,* 15 Heath Care Fin. Rev. 127 (1994).
23 Dunn, *supra* note 15.
24 *Access to Insulin and Supplies Survey*, T1International, https://www.t1international.com/insulin-and-supply-survey/ (last visited Dec. 1, 2019).
25 *Id.*
26 *Insulin Access and Affordability: The Rising Cost of Treatment: Hearing Before the Special Comm. on Aging,* 116th Cong. (2019) (testimony of Paul Grant).
27 Hua et al., *supra* note 16, at 1401.
28 Jean Fuglesten Biniek & William Johnson, Health Care Cost Inst., Spending On Individuals with Type 1 Diabetes and the Role of Rapidly Increasing Insulin Prices 2 (2019), https://healthcostinstitute.org/images/easyblog_articles/267/HCCI-Insulin-Use-and-Spending-Trends-Brief-01.22.19.pdf.
29 Diana Degette & Tom Reed, Cong. Diabetes Caucus, *Insulin: A Lifesaving Drug Too Often Out of Reach*, Congressional Diabetes Caucus, https://diabetescaucus-degette.house.gov/sites/diabetescaucus.house.gov/files/Congressional%20Diabetes%20Caucus%20Insulin%20Inquiry%20Whitepaper%20FINAL%20VERSION.pdf.

about insulin price hikes.[30]

III. Consequences for Patients

The situation for patients is dire. According to a study from the Yale Diabetes Center, one in four diabetics rations their insulin.[31] There are countless stories describing the permanent health effects of rationing insulin, ranging from permanent kidney damage to DKA and death.[32] A group of researchers from Emory University studied patients who were hospitalized due to DKA. They found that twenty-seven percent of those patients became ill because they could not afford their insulin.[33]

For patients who want to avoid rationing insulin, there are a few alternatives. Under U.S. law, it is illegal to import drugs from foreign countries.[34] However, it is legal to buy a short-term supply of drugs for personal use. As a result, some patients have started making trips to Canada and Mexico to purchase insulin. One woman told reporters that she could get a month's supply of insulin in Canada for a tenth of what she pays at an American pharmacy.[35] At a pharmacy in Ontario, Canada, a *Los Angeles Times* columnist bought a 10-milliliter vial of Humalog for $33 in U.S. dollars. The same vial of Humalog retails for $280 in Los Angeles.[36]

In a video op-ed for the *New York Times*, several diabetes activists highlighted the emergence of an insulin black market — an underground economy of diabetics selling and buying insulin and other diabetes supplies online.[37] Diabetics who cannot afford high out-of-pocket costs have turned to Craigslist and Instagram to get the insulin they need. Traveling to Mexico or Canada is not feasible for everyone, nor should it be the only option to get lifesaving insulin. Patients should be able to access affordable insulin at a pharmacy.

IV. Approaches to Lowering Insulin Prices

Policymakers have identified several approaches to lowering patient's financial burden. In its whitepaper,[38] the Congressional Diabetes Caucus enumerated several policy recommendations.

The first recommendation centered on reducing upward pricing pressure. The Caucus endorsed the development and use of value-based contracts between insulin makers and PBMs. Under the current pricing scheme, PBMs profit off drugs in their formulary even if the drugs do not work for the patient. A value-based model incentivizes PBMs to offer effective insulin at lower costs. If the insulin does not work for the patient, the patient does not have to pay for it. The Caucus also recommended replacing rebates with standardized fees and placing more transparency in the rebate system, so patients know the value and volume of rebates taking place. They further endorsed linking out-of-pocket costs to lower negotiated prices rather than the artificially high pre-rebate list price.

To encourage competition, the Caucus advocated for lawmakers to address patent abuse and allow for generic manufacturers to produce older, off-patent insulin formulations. They recommend that Congress require manufacturers to disclose the list price of their insulin so there is more transparency in how much the drug costs before rebates drive the price up.

In order to address problems with formularies, the Caucus sought to standardize the exemption process for patients wishing to change their prescription. The lawmakers recommended standardizing patient cost-sharing information and limiting the number of changes an insurer is permitted to make to a formulary each year. Additionally, the Caucus endorsed a cap on out-of-pocket expenses for insulin, meaning that the insurance company must absorb the extra cost. The Caucus provides no recommendations for uninsured individuals.

The American Diabetes Association Insulin Access and Affordability Working Group proposed many of the same measures as the Caucus. The Working Group called on providers to prescribe the lowest-priced insulins and be aware of how pricing affects drug adherence.[39] They called on researchers to explore the effectiveness of low-cost insulins compared to newer, high costs insulins.[40] The Working Group further advised PBMs, wholesalers, and manufacturers to minimize rebates, fees, and

30 *Priced Out of A Lifesaving Drug: Getting Answers on The Rising Cost of Insulin:* Hearing Before the Comm. on Energy & Comm., 116th Cong. (2019).

31 Randi Hutter Epstein & Rachel Strodel, *Diabetes Patients at Risk From Rising Insulin Prices,* N.Y. Times (June 22 2018), https://www.nytimes.com/2018/06/22/well/diabetes-patients-at-risk-from-rising-insulin-prices.html#targetText=Between%202002%20and%202013%2C%20the,about%20a%20week%20or%20two (last visited Dec. 1, 2019).

32 *See, e.g.,* Ritu Prasad, *The Human Cost of Insulin in America,* BBC News (Mar. 14, 2019), https://www.bbc.com/news/world-us-canada-47491964 (last visited Dec. 1, 2019); Audrey Farley, *Drug Prices Are Killing Diabetics. 'Walmart Insulin' Isn't the Solution.,* Wash. Post (Feb. 19, 2019, 3:00 AM), https://www.washingtonpost.com/outlook/2019/02/19/drug-prices-are-killing-diabetics-walmart-insulin-isnt-solution/ (last visited Dec. 1, 2019); Bram Sable-Smith, *Insulin's High Cost Leads To Lethal Rationing,* NPR (Sept. 1, 2018, 8:35 AM), https://www.npr.org/sections/health-shots/2018/09/01/641615877/insulins-high-cost-leads-to-lethal-rationing (last visited Dec. 1, 2019).

33 Victoria C. Musey et al., *Diabetes in Urban African-Americans. I. Cessation of Insulin Therapy Is the Major Precipitating Cause of Diabetic Ketoacidosis,* 18(4) Diabetes Care 483 (1995).

34 Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 331 (West 2018); *See generally* Amanda K. Sarata & Agata Dabrowska, Cong. Res. Serv., IF11056, In Focus: Prescription Drug Importation *1-2 (2018), https://fas.org/sgp/crs/misc/IF11056.pdf.

35 Sydney Ember, *Bernie Sanders Heads to Canada for Affordable Insulin*, N.Y. Times (July 28, 2019), https://www.nytimes.com/2019/07/28/us/politics/bernie-sanders-prescription-drug-prices.html?searchResultPosition=5 (last visited Dec. 1 2019).

36 Doyle McManus, *Pssst ... Want to buy some insulin or other lifesaving medicine? Go to Canada*, L.A. Times (Aug. 14, 2019, 4:00 AM), https://www.latimes.com/politics/story/2019-08-13/want-to-buy-some-insulin-or-other-life-saving-medicine-go-to-canada (last visited Dec. 1, 2019).

37 Robin Cressman, Nicole Smith-Holt, Laura Pavlakovich & Paulius Podziunas, *'We Either Buy Insulin or We Die,'* N.Y Times (June 13, 2019), https://www.nytimes.com/2019/06/13/opinion/insulin-price-costs.html?-searchResultPosition=6 (last visited Dec. 1, 2019).

38 Degette & Reed, *supra* note 29.

39 William T. Cefalu et al., *Insulin Access and Affordability Working Group: Conclusions and Recommendations,* 41 Diabetes Care 1299 (2018).

40 *Id.*

discounts and to formulate list prices as close to net prices as possible.[41] They urged health plans to consider the cost burden of insulin and to design formularies to include effective insulins in the low cost-sharing tiers.[42] The Working Group called on the American Diabetes Association to recognize the burden of high insulin prices and increase their efforts towards finding a solution.[43]

Several policy proposals to address drug pricing are circulating in Congress. In September, Speaker Pelosi announced H.R.3, the Lower Drug Costs Now Act.[44] In October, the Senate Finance Committee advanced S. 2543, the Prescription Drug Pricing Reduction Act, out of committee.[45] Both bills would allow the Centers for Medicare and Medicaid to negotiate drug prices in order to bring more transparency to the drug pricing process and lower out-of-pocket costs. However, the Pelosi bill fixes the maximum price for a drug to the average price in other industrialized countries.[46] Both plans target the issue of drug pricing broadly but could have implications for insulin pricing if passed.

V. Colorado's Legislation to Cap Out-of-pocket Costs

In the past few years, several states have acted to address high insulin prices. In 2017, the Nevada State Senate passed S.B. 539, which requires insulin manufacturers to report costs, profits and price hikes.[47] Soon thereafter, California passed S.B. 17, which placed similar requirements on manufacturers and gave insurers the authority to negotiate drug prices.[48] The following year, Vermont[49] and Oregon[50] passed legislation requiring manufacturers to justify price hikes on certain medications.

The state of Colorado has led the country in taking action on out-of-pocket costs. In May 2019, Colorado Governor Jared Polis signed House Bill 19-1216, which capped the out-of-pocket cost of insulin at $100 per month for insured patients, into law.[51] Colorado was the first state to pass legislation capping out-of-pocket costs for insulin, and the law will take effect in January, 2020.[52] The legislation directed insurance companies to absorb any cost over $100.[53] Another provision of the law directed the state's attorney general to launch an investigation into insulin pricing and deliver policy recommendations to the state's legislature.[54]

The Colorado law has received positive reception from the public but concerns over its efficacy and reach remain. In a statement from the American Diabetes Association, Spokesperson Christine Fallabel called the legislation a "first, but very important, step" and said that it represented "amazing progress for the state of Colorado."[55]

However, the new law does not apply to all patients with diabetes. The law only covers people with some types of insurance. People with Medicare and those whose insurance comes through ERISA[56] plans will not qualify for the cost cap.[57] Diabetes awareness foundation T1International wrote in public comments to the state's Division of Insurance that those not covered by the law "will still be subject to paying the unconscionable prices for the insulin they need to survive," adding that "[t]his law does not sufficiently cover all people with diabetes or using insulin in Colorado."[58] For the uninsured, access to insulin is still out of reach.

Additionally, there are concerns about enforcement. It is not yet clear how the state will compel insurance companies to cover the extra cost of insulin above the $100 cap. A spokesperson from the Colorado Association of Health Plans says insurance companies may react by raising premiums by two to three percent.[59]

Furthermore, the law only addresses one facet of insulin pricing: out-of-pocket costs. It does nothing to address any a lack of generics and biosimilars, lack of competition, or the prevalence of costly middlemen in the system. Notably, there is no provision of the law to help with diabetes care outside of the cost of insulin. In addition to high prices for insulin, diabetics require costly supplies such as blood test strips, glucose monitors, and needles.

VI. Conclusion

Over seven million diabetics in America require insulin to manage their illness. Diabetics in the United States face higher list prices and out-of-pocket costs than their counterparts in most developed countries. For America's seven million Type I diabetics, insulin accessibility can be the difference between life and death.

41 *Id.*
42 *Id.*
43 *Id.*
44 Lower Drug Costs Now Act, H.R. 3, 116th Cong. (2019).
45 Prescription Drug Pricing Reduction Act, S. 2543, 116th Cong. (2019).
46 The bill bases maximum prices on the average price in Australia, Canada, France, Germany, Japan, and the United Kingdom.
47 Nev. Rev. Stat. § 439B.630 (2017).
48 Cal. Health & Safety Code §§ 127675–127686 (2017).
49 18 V.S.A. § 4635 (2018).
50 H.B. 4005, 79th Gen. Assem. (Or. 2018).
51 H.B. 19-1216 72d Gen. Assem., 1st Reg. Sess. (Colo. 2019) (codified in C.R.S.A. 10-16-148, 24-31-110).
52 Id. § 4.
53 Id. § 2.
54 Id. § 3.
55 John Ingold, *Critics Worried Colorado's New Law Capping Insulin Costs Would Raise Insurance Rates. It hasn't.,* Colo. Sun (Sept. 11, 2019, 5:00 AM), https://coloradosun.com/2019/09/11/colorado-insulin-price-insurance/ (last visited Dec. 1, 2019).
56 Employer-sponsored Retirement and Income Security Act (ERISA) plans are large, (usually) multi-state, employer health plans. They are usually self-funded meaning the company pays for the benefits out of its own bank account. Not every commercial plan is an ERISA plan. *See generally Health Plans & Benefits: ERISA,* U.S. Dep't Of Labor, https://www.dol.gov/general/topic/health-plans/erisa (last visited Dec. 1, 2019).
57 Ingold, *supra* note 55.
58 *Id.*
59 Shaun Boyd, *Bills Could Help Coloradans Save Money On Prescription Drugs,* CBS Denver (Apr. 16, 2019, 11:59 PM) https://denver.cbslocal.com/2019/04/16/bills-could-help-coloradans-save-money-on-prescription-drugs/ (last visited Dec. 1, 2019).

The United States has very few price controls for prescription drugs as regulators have historically taken a free-market approach to drug pricing. The high price of insulin stems from a number of factors. Three pharmaceutical companies have a near-monopoly on fast-acting insulin products. The pricing and payment scheme contains incentives for manufacturers to offer rebates and drive up list prices. Wholesalers and PBMs have control over what types of insulin patients can access and profit by passing on costs towards consumers. American manufacturers have banned the importation of drugs from other countries in order to avoid foreign competition.

Increasing public outrage has sent lawmakers looking for an answer to fix perverse pricing incentives. Colorado's new insulin pricing legislation is a welcomed relief for insulin users in the state, but critics argue it does not go far enough.

Federal action on insulin pricing is unlikely, but lawmakers in states across the country are looking to Colorado to see what happens. In September, legislators in Illinois put forward similar legislation to cap out-of-pocket costs.[60] If Colorado's legislation works, other states may follow with their own version of the legislation, which would severely reduce the financial burden of insulin on diabetic patients.

60 S.B. 0667, 101st Gen. Assem. (Ill. 2019).

"Please — don't let me have my baby in this jail": *Inadequate Provisions of Prenatal Healthcare in the U.S. Prison System*

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In 1973, J.W. Gamble, a prisoner in Texas who worked in a prison-operated textile mill, injured his lower back when a large bale of cotton fell on him.[1] A doctor prescribed multiple medications to Gamble and, eventually, "took him off cell-pass, thereby certifying him to be capable of light work."[2] Although his injury was deemed not serious enough to merit more intensive care or supervision, Gamble, still in intense pain from this incident, refused to work and was sent to solitary confinement as punishment.[3] Subsequently, he sued the state, alleging that the state had inflicted "cruel and unusual punishments"[4] on him because he had been denied a specific diagnosis by prison medical staff and adequate care. He argued that his situation was exacerbated by the time he spent in solitary confinement.[5] Though his case was initially dismissed by the district court, the Fifth Circuit Court of Appeals ruled in Gamble's favor in a decision which Texas appealed to the Supreme Court.[6] Reviewing whether Gamble's treatment (or lack thereof) constituted "cruel and unusual punishment," the Court held that "deliberate indifference to serious medical needs of prisoners" is a violation of the Eighth Amendment.[7]

Estelle v. Gamble set the standard for federal legislation regarding the obligation of prisons to provide adequate medical care to the incarcerated. While the Eighth Amendment does not reference the prison system specifically, it does contain a basis for the rights of incarcerated persons. *Estelle* presented questions about what exactly constitutes negligent behavior of prison staff, medical or otherwise, and whether such situations arise because of a lack of federal legislation that protects inmates' rights.

Though *Estelle* asserted broadly that "deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment,"[8] and later decisions such as *Farmer v. Brennan*[9] solidified what constitutes appropriate access to medical care for the incarcerated, the concept of "deliberate indifference by prison personnel" is still not adequately defined. The lack of adequate healthcare standards is a far-reaching issue that affects millions of incarcerated people in the United States.[10]

I focus this analysis on inmates' access to prenatal healthcare, which is even more grossly lacking in basic legal standards than general primary medical care. Though researchers have found it difficult to measure the number of people who are incarcerated while pregnant or who give birth in jail or prison, a recent study conducted by the Johns Hopkins University Medical School found that between 2016 and 2017, 1,396 people were pregnant upon intake and 753 people gave birth while incarcerated.[11] The 231,000 women incarcerated in the United States are transitively impacted by the lack of mandatory federal standards of care for pregnant inmates, as it sets a precedent of invalidating the need for specific provisions of women's reproductive healthcare.[12] In cases in which women are not pregnant during their period of incarceration but have recently given birth, their medical needs might be different from the general prison population, and these women should be afforded access to postnatal care. Setting a basic federal standard of medical care for pregnant inmates would be a step in the right direction even as it would be an acknowledgement that the prison system failed in the realm of women's healthcare.

The lack of data on prenatal healthcare in U.S. prisons and jails, combined with a lack of federal oversight, leaves the implementation of any sort of prenatal healthcare to the discretion of prison officials. This situation allows for ambiguity in policy that, more often than not, disservices an already vulnerable population. The exploitation of pregnant incarcerated persons is a multi-faceted issue, rooted in broader inequities

1 Estelle v. Gamble, 429 U.S. 97, 99 (1976).
2 *Id.* at 99–100.
3 *Id.* at 101.
4 U.S. Const. amend VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
5 *Estelle,* 429 U.S. at 101–06.
6 *Id.* at 98.
7 *Id.* at 104.
8 *Id.* at 97.
9 511 U.S. 824 (1994).
10 The United States currently holds more than 2.3 million people in prison. *See, e.g.,* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019,* Prison Pol'y Initiative (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html (last visited Dec. 1, 2019).
11 *First of its Kind Statistics on Pregnant Women in U.S. Prisons,* Johns Hopkins Medicine Newsroom (Mar. 21, 2019), https://www.hopkinsmedicine.org/news/newsroom/news-releases/first-of-its-kind-statistics-on-pregnant-women-in-us-prisons (last visited Dec. 1, 2019) (The study used a sample of prisons which hold fifty-seven percent of incarcerated women in the United States.).
12 Sawyer & Wagner, *supra* note 10.

that already characterize the U.S. justice system and are deepened by the involvement of private-sector medical providers. The failure of the U.S. prison system in providing adequate prenatal healthcare is directly tied to systems of oppression within the prison-industrial complex which disproportionately impact poor women and women of color. This issue must be viewed through the lens of civil rights legislation, such as the Pregnancy Discrimination Act of 1978,[13] to facilitate tangible improvement in prison conditions for pregnant inmates. New legislation should extend existing legal protections to pregnant incarcerated persons and provide them with adequate medical care.

I. Tammy Jackson and Private-sector Involvement

The lack of substantive federal or state legislation regarding standards for medical care, and prenatal care in particular, in U.S. prisons and jails is closely related to the involvement of private firms. Many of the most egregious instances of negligent treatment by prison officers and medical staff toward pregnant inmates have occurred in connection with Wellpath, "the largest correctional healthcare provider in the country."[14] Annually, Wellpath generates approximately $1.5 billion of revenue by providing healthcare to inmates,[15] although it has been subject to various lawsuits which suggest negligence and minimal concern for the wellbeing of the inmate populations it serves. Over the past five years, Wellpath has been subject to six different lawsuits that "allege that pregnant women have been subjected to inhumane and dangerous conditions and treatment that in some cases have allegedly led to miscarriages and infant deaths."[16]

Though poor healthcare is a long-standing issue in the prison system, it recently garnered widespread media attention with *The New York Times* coverage of Tammy Jackson, a woman who was forced to give birth alone in a Florida jail cell in April 2019.[17] Jackson was kept in an isolation cell specifically because she was pregnant,[18] yet prison officials did nothing to support her particular medical needs as a pregnant woman. When Jackson went into labor and started to bleed profusely, her cries for medical assistance were ignored for almost seven hours before a doctor was called.[19] This example highlights why there must be federal standards for medical care, especially prenatal medical care, in jails and prisons. If left to the discretion of individual prison officers, such abuses of inmate rights are bound to occur.

Tammy Jackson's story is not an anomaly. There are a variety of examples of negligent and dehumanizing treatment endured by pregnant inmates in U.S. prisons and jails, and many of those centers of incarceration employ Wellpath as their provider of medical care.[20] Similar cases involving Wellpath have occurred in Kentucky, New Mexico, Arkansas, and Michigan,[21] and the traumatic experiences these women had to endure are strikingly violent and inhumane. Many of these involved miscarriages or stillbirths, and Wellpath has also been accused of engaging in unethical medical practices. It was recently discovered that "at least one county that hired the company found medical staff had given Librium, a powerful benzodiazepine, or tranquilizer, to multiple pregnant inmates. Librium's label recommends against the use of the drug during pregnancy because of potential risk to the fetus."[22] These examples of gross negligence and abuse are taken less seriously within the context of incarcerated persons. Furthermore, Tammy Jackson's identity as an incarcerated woman of color made her particularly vulnerable to the discrimination she experienced, especially considering that Wellpath has a history of prioritizing profits over the rights of inmates.

II. Standards of Prenatal Healthcare and Data Collection in the Prison System

The topic of prenatal healthcare in prisons presents a variety of legal conundrums as to what exactly constitutes "sufficient care" for pregnant incarcerated persons and their unborn children. Though the Office on Women's Health, a subset of the U.S. Department of Health and Human Services, has a wealth of standards and suggestions related to the sort of medical care women require throughout the stages of their pregnancy, these standards appear nowhere in prison legislation,[23] and thus there is no legislative mandate for inmates' access to prenatal health care.[24] The U.S. prison system is far too overwhelmed to provide adequate prenatal healthcare to inmates.[25] This issue is exacerbated by the fact that the U.S. prison population is racially and economically marginalized, and there is little urgency in mainstream politics to grant adequate healthcare.

Current data on the demographic makeup of those who are pregnant and incarcerated are incomplete and insufficient. The most comprehensive study is one entitled "Mothers Behind Bars" conducted by The Rebecca Project for Human Rights at the National Women's Law Center in 2010. From the outset, its authors note that "forty-three states do not require medical examinations as a component of prenatal healthcare" and "forty-nine states fail to report all incarcerated women's pregnancies and their outcomes."[26] Clearly, prison officials are not under any sort of legal pressure to provide simple medical examinations throughout an inmate's pregnancy, and they are

13 Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e (West 1978).
14 Blake Ellis & Melanie Hicken, *Dangerous Jail Births, Miscarriages, and Stillborn Babies Blamed on the Same Billion Dollar Company,* CNN (May 7, 2019, 7:14 P.M.), https://www.cnn.com/2019/05/07/health/jail-births-wellpath-ccs-invs/index.html (last visited Dec. 1, 2019).
15 *Id.*
16 *Id.*
17 Sandra E. Garcia, *Ordeal of Woman Who Gave Birth in Florida Jail Cell Prompts Internal Investigation,* N.Y. Times (May 7, 2019), https://www.nytimes.com/2019/05/07/us/woman-gives-birth-jail-cell.html (last visited Dec. 1, 2019).
18 *Id.*
19 *Id.*
20 Ellis & Hicken, *supra* note 14.
21 *Id.*
22 Garcia, *supra* note 17.
23 Malika Saada Saar, Rebecca Project for Hum. Rts. & Nat'l Women's L. Ctr., Mothers Behind Bars 8 (Oct. 2010), https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf.
24 *Id.* at 6.
25 Sawyer & Wagner, *supra* note 10.
26 Saar, *supra* note 23, at 6.

not required to report on the status of their pregnant inmates. There exists no legal incentive or requirement for officials to provide even a basic standard of care to pregnant inmates, which compounds existing issues within the prison system.

The Office of Women's Health, whose mission is to "provide national leadership and coordination to improve the health of women and girls through policy, education, and innovative programs,"[27] delineates basic guidelines for prenatal care. These include suggestions about prenatal nutrition and increased caloric intake for pregnant women, noting that women need at minimum an extra 300 calories per day to support their child's development.[28] Yet only ten states require "prenatal nutrition counseling or the provision of appropriate nutrition"[29] for pregnant inmates. The Office also outlines the necessity of prenatal checkups throughout the course of a woman's pregnancy, which it notes should occur once per month for the first seven months of pregnancy, twice a month for the eighth and ninth months, and weekly from the ninth month on.[30] These are only basic guidelines, and women with high-risk pregnancies need more frequent checkups. Despite this, the "Mothers Behind Bars" report discovered that only eight states require "medical examinations as a component of medical care," while the remaining states either do not require examinations or do not mention them in any existing legislation.[31] Seventeen states require the "screening of and treatment for high risk pregnancies," but the majority of states do not publish information on the details of such treatment.[32]

The U.S. prison system clearly ignores established medical guidelines related to the basic needs of pregnant women, and the lack of transparency only compounds the problem. Even in states where provisions of care and access to nutrition counseling and workplace safety exist, there is a lack of standardization in how those policies are enacted. Thus, their implementation is almost entirely at the discretion of prison officials. At minimum, the government should require prison officials to adhere to accepted guidelines from the medical community regarding services that pregnant women require to ensure their health and that of their child. Failing to adhere to these guidelines constitutes an act of discrimination, one that women are protected against in the workplace under the Pregnancy Discrimination Act, but that pregnant women in prisons are not due to their status as incarcerated persons.

III. Connections to the Eighth Amendment

There have been a variety of studies and legal analyses of prenatal healthcare in prisons which draw upon both constitutional law and civil rights legislation. In a piece published in the *California Law Review*, Estalyn Marquis argues that "current Eighth Amendment jurisprudence results in unequal access to justice for female prisoners following constitutionally inadequate reproductive healthcare."[33] According to Marquis, current legal standards on the provision of adequate medical care in prisons are male-centric, and the way the Eighth Amendment has been invoked in cases of medical negligence is rarely extended to the rights of pregnant incarcerated women.[34] She writes that "the gendered nature of Eighth Amendment jurisprudence allows prisons to continue to ignore women's medical needs[,]"[35] and issues related to the crisis of mass incarceration and overcrowding in prisons have only compounded this problem.[36] The idea that the general invocation of the Eighth Amendment is gendered suggests the need for a more comprehensive definition of medical negligence in prisons as it relates to healthcare provisions for female inmates specifically.

Marquis compares *Estelle* to *Farmer*, which dealt with a transgender, woman-identifying inmate named Dee Farmer who was transferred to a male prison against her will and was subsequently raped by a cellmate.[37] Farmer later filed a lawsuit, asserting that prison officials had violated her constitutional rights under the Eighth Amendment.[38] The courts ruled in favor of the prison officials,[39] and Marquis uses this decision to assert that what constitutes a violation of the Eighth Amendment looks quite different when it relates to female-identifying prisoners and, thus, is inherently gendered in its invocation. This legal background shows that the invocation of the Eighth Amendment is inequitable, as it often presents different implications for male and female incarcerated persons.

Marquis notes that the "*Estelle/Brennan* standard requires a prisoner to demonstrate that her injury or deprivation was objectively sufficiently serious. . . . [But] based on a review of federal case law, . . . courts cannot successfully compare a reproductive healthcare violation affecting women to a healthcare violation affecting men."[40] It is clear that invoking precedent regarding negligent treatment toward male prisoners in cases that deal with the medical rights of female prisoners is an inherently flawed approach. The needs of female prisoners, especially pregnant female prisoners, are obviously different than those of male prisoners, and thus a comparison is futile. There should exist more flexibility in the invocation of the Eighth Amendment as it relates to the medical and reproductive rights

27 *Vision, Mission, Goals, and History,* U.S. Dep't of Health & Hum. Serv. Off. on Women's Health http://www.womenshealth.gov/about-us/who-we-are/vision-mission-goals-and-history
28 *Staying Healthy and Safe,* U.S. Dep't of Health & Hum. Serv. Off. on Women's Health (January 30, 2019), https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/staying-healthy-and-safe (under "Calorie needs" tab).
29 Saar, *supra* note 23, at 16.
30 *Pregnancy: Prenatal healthcare and tests,* U.S. Dep't of Health & Hum. Serv. Off. on Women's Health (last updated Jan. 30, 2019), https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/prenatal-care-and-tests (under "Prenatal checkups" tab).
31 Saar, *supra* note 23, at 16.
32 *Id.*
33 Estalyn Marquis, *"Nothing Less Than the Dignity of Man": Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment,* 106 Calif. L. Rev. 203, 205 (2018).
34 *Id.* at 205–06.
35 *Id.* at 205.
36 *Id.* at 206–10.
37 *See generally* Farmer v. Brennan, 511 U.S. 824, 829–30 (1994).
38 *Id.* at 830–32.
39 Marquis, *supra* note 33, at 213 (noting that Dee lost in a jury trial after the Supreme Court remanded in *Farmer v. Brennan*).
40 *Id.* at 216.

of female prisoners, and courts should not make decisions that seek to situate the needs of female prisoners under the umbrella of general medical care.

IV. The Pregnancy Discrimination Act of 1978

Though there does not exist any current federal legislation securing the rights of pregnant inmates, the Pregnancy Discrimination Act of 1978 provides a legal framework to classify the current lack of healthcare access for pregnant inmates as discriminatory. This law amends the Civil Rights Act of 1964 to "prohibit sex discrimination on the basis of pregnancy."[41] It states that the "terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes."[42] This expanded definition of discrimination "because of sex" or "on the basis of sex" has not been extended to incarcerated women. Though the amendment deals specifically with workplace discrimination, its legal assertion that discrimination against pregnant women falls under the broader umbrella of sex discrimination should translate to issues of medical care for pregnant inmates.

The decision of state governments to prevent pregnant inmates from accessing care afforded to non-incarcerated women constitutes discrimination, rooted in a history of denying prisoners protections normally afforded by the Civil Rights Act. Pregnant inmates comprise an incredibly vulnerable population with limited avenues to contest inadequate healthcare provisions. If the Pregnancy Discrimination Act were extended to protect incarcerated pregnant women, it could be used to challenge inequitable prison healthcare. New legislation is needed for this expansion of rights to incarcerated pregnant women. The conditions of the workplace and the prison system are distinct, but that does not justify discrimination via medical negligence toward pregnant women merely because they are incarcerated.

In failing to classify inadequate prenatal healthcare in prisons as an example of discrimination, the federal government has created a contradiction. Why does the government provide protections for free pregnant women in the workplace but not for pregnant inmates? The solution to this inequity lies in expanding the Pregnancy Discrimination Act to encompass the rights of incarcerated women. Such a framework would also lay the groundwork for detailed, federal legislation regarding prenatal healthcare in prisons.

Furthermore, the Eighth Amendment's application has been uneven to the disservice of incarcerated women. This injustice is the result of an oversimplified approach by courts in considering the medically negligent treatment of pregnant women in prisons compared to that of male prisoners. Reproductive, prenatal, and postnatal care must be classified as medical necessities on par with other, non-gendered medical provisions.[43]

* * *

The issue of prenatal healthcare in U.S. prisons and jails is symptomatic of broader ills within the justice system, and it must be reframed within the context of civil rights legislation to develop comprehensive and impactful federal legislation. Leaving the implementation of adequate prenatal healthcare in prisons to prison officials, especially when there is no legal incentive for those prisons to report data or information about pregnant inmates, opens the door to gross negligence and insufficient standards of care. The incarcerated population is disproportionately marginalized; thus, to prevent discrimination, written legislation is necessary to improve their access to basic medical provisions necessary for a healthy pregnancy. The treatment afforded to pregnant incarcerated persons in U.S. prisons and jails is discriminatory and dehumanizing, and its realities have gone ignored at the behest of private, profit-seeking corporations. In essence, this is the U.S. justice system at its very worst — an entity that purports to seek justice for the oppressed engaged in actively depriving marginalized people of their basic right to medical care.

41 Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e (West 1978).
42 *Id.* § 2000e(k).
43 *See generally* Lauren Kuhlik, *Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare Access in Prisons,* 52 Harv. C.R.-C.L. L. Rev. 501 (2017).

Deadly Inconsistencies: *An Analysis of Religious Rights, the Orders Docket, and Death Row*

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In March 2019, the Supreme Court granted a Texas prisoner named Patrick Murphy a stay of execution after he claimed that the prison's policies amounted to discrimination on the basis of religion. As a practicing Buddhist, Murphy had requested that his priest join him within the execution chamber, yet the Texas prison only afforded that privilege to Muslim and Christian inmates. Despite the fact that the Supreme Court ruled in Murphy's favor here and temporarily halted his execution to allow for further legal action, less than two months earlier, in a five-to-four vote, the Court overturned a stay of execution for an Alabama prisoner named Dominique Ray under nearly identical circumstances. A Muslim, Ray wanted to pray with his imam during his execution, an opportunity that every Christian inmate had on death row in Alabama.

This article highlights the inconsistencies between these two decisions and discusses their broader implications. First, the differences between these two cases did not warrant different rulings. Regardless of whether or not one considers executions to be "cruel and unusual punishments,"[1] the fact that Dominique Ray's life ended without the same religious comfort afforded to Christian inmates previously executed at Holman Prison should raise great alarm. Second, these two different decisions reflect larger issues related to how the Supreme Court handles cases from the orders docket. In both of these rulings, the Court provided little explanation, and for Ray, it offered a mere sentence suggesting that it based its decision on timing. This critical lack of transparency exists for most of the Court's decisions outside of the approximately seventy high-profile cases from the merits docket that it extensively reviews each year. Furthermore, the Court's limited ruling in these cases, as is often the case with the orders docket, adds injustice to Ray's death because it leaves those outside the Court to speculate as to why only Murphy was allowed to live to fight his case.

In the subsequent sections, I first present the background behind both Ray and Murphy and then explain how the cases reached the Supreme Court. I then use these two cases to demonstrate that the current appeals process for death penalty cases, among other types, as well, is shrouded in secrecy and in desperate need of reform.

I. Murphy's Case

A. Factual Background

While serving a prison sentence in 2000, Patrick Murphy escaped the John B. Connally Unit in Texas with six other inmates. During their month on the run, the group robbed a store and killed a Dallas police officer.[2] Though he did not kill the officer himself, Ray was nevertheless convicted of murder as part of a conspiracy under Texas' "Law of Parties."[3] After recapture, Murphy was sentenced to death for his role in the murder.[4] The facts of the case are not in dispute; it is the manner of execution at question here.

Murphy began practicing Buddhism in 2011 while on death row,[5] and Rev. Hui-Yong Shih has served as his spiritual advisor for the past six years.[6] Due to a "[need] to focus on the Buddha at the time of his death in order to be reborn in the Pure Land," Murphy believes that his spiritual advisor must join him within the execution chamber so that he can "maintain the required focus by reciting an appropriate chant (akin to a prayer)."[7] Texas Department of Criminal Justice (TDCJ) policy stipulates that only TDCJ employees may be present within the execution chamber at the time of death, yet they only employ Christian chaplains.[8] Murphy first requested on February 28, 2019 that Rev. Hui-Yong Shih be allowed within the execution chamber, but his request was denied on March 5.[9]

Two facts are vitally important to understanding how Murphy's case differs from Ray's. First, Murphy made his request a month before his scheduled date of execution, whereas Ray made his request about two weeks before his execution. Second, TDCJ policy is available to the public, which would have seemingly allowed Murphy and his lawyers to mount their defense at an earlier point. As discussed later, Alabama's execution policy is unavailable to the public.[10] While TDCJ refused to allow Murphy's priest in the execution chamber, they agreed to keep the Christian chaplain out of the room. Nevertheless, Murphy claimed that the policy violated both the Free Exer-

1 U.S. Const. amend. VIII.

2 Murphy v. Davis, 737 F. Appx. 693, 695–97 (5th Cir. 2018) (per curiam).
3 *Id.* at 700.
4 *Id.* at 701.
5 David Caltabiano, *Texas Seven Death Row Inmate Fighting for Religious Freedom*, FOX San Antonio (July 8, 2019), https://foxsanantonio.com/news/local/exclusive-texas-seven-death-row-inmate-fighting-for-religious-freedom (last visited Nov. 30, 2019).
6 Adam Liptak, *Supreme Court Stays Execution of Buddhist Inmate,* N.Y. Times (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/us/politics/texas-execution-buddhist-inmate.html (last visited Nov. 30, 2019).
7 Pet. for Writ of Prohibition at 5, *In re* Murphy, No. WR-63,549-02 (Tex. Crim. App. Mar. 28, 2019).
8 *Id.*
9 Murphy v. Collier, 376 F. Supp. 3d 734, 735–36 (S.D. Tex. 2019).
10 *See infra* notes 28–32 and accompanying text.

cise and Establishment Clauses of the First Amendment to the Constitution.[11]

B. Procedural Posture

After Murphy's lawyer received an email from TDCJ General Counsel Sharon Howell informing him that only TDCJ employees could witness the execution, he responded that Murphy would be content with any Buddhist employed as a spiritual advisor attending his execution.[12] Howell did not respond to this March 7 email, leaving Murphy's lawyer to conclude "either that TDCJ does not employ a Buddhist minister, or that it intends to deprive Mr. Murphy of his right to be accompanied by an advisor of his own faith for some other reason."[13]

In his petition to the Texas Court of Criminal Appeals, Murphy claimed that the TDCJ policy exhibited a clear denominational preference for Christianity over his religion and others.[14] As such, he argued that only under strict scrutiny — meaning "only if it is narrowly tailored to a compelling interest" — could this law be upheld.[15] TDCJ's interest in this case is ensuring that the execution chamber remains secure and that non-employees do not interfere with the execution protocol. Murphy's lawyer explains the importance of timing to whether strict scrutiny can be applied:

> Had Murphy waited until the week before his execution to make this request, it is possible TDCJ's interest in security purportedly served by its policy could be sufficient to survive strict scrutiny. This would be true if TDCJ could demonstrate there was not sufficient time to perform whatever security check would be needed to pre-clear a nonemployee. However, in a case where it was given a month to screen either Murphy's spiritual advisor or another Buddhist priest, TDCJ's interest in security is not fitted closely enough to its policy for the policy to survive strict scrutiny.[16]

Murphy's lawyer intends to differentiate his client's case from Ray's, yet the difference between one month and two weeks is arbitrary. Neither Texas nor Alabama explained why it could not perform the necessary security checks on the inmates' religious advisors prior to the scheduled executions. As such, there is no reason to assume that an extra two weeks would make a significant difference. United States District Court Judge for the Southern District of Texas Sim Lake denied Murphy's request on the account that he delayed too long in his request, explaining that Murphy "knew, [or] should have known, of the policy long before he sent TDCJ general counsel an email."[17] Lake also noted that TDCJ policy is public, so Murphy should have sought relief earlier.

After appealing to the Fifth Circuit Court of Appeals, Murphy's request for a stay of execution was again denied. The three-judge panel found that although Murphy first sought his accommodation from TDCJ a month before his scheduled execution date, "he then waited until March 20 — eight days before the scheduled execution — to raise his . . . claims with the Texas Court of Criminal Appeals."[18]

C. SCOTUS Review

After hearing his appeal, the Supreme Court granted Murphy a stay of execution, asserting that the "State may not carry out Murphy's execution . . . unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution."[19] The Court offered little additional reasoning for the decision, although Justice Kavanaugh's concurring opinion includes the following statement in a footnote: "Under all the circumstances of this case, I conclude that Murphy made his request to the State in a sufficiently timely manner, one month before the scheduled execution."[20] As Justice Kavanaugh was the deciding vote, this central point in his argument is critical. More than six weeks after this decision, Justices Kavanaugh and Alito took the unusual step to offer further explanation in more detailed opinions.[21] Perhaps as a response to the questions about his contrasting votes in Murphy and Ray, Kavanaugh clarified the differences as he saw them. Kavanaugh explained that Murphy raised an equal-treatment claim in his case while, in Ray, the equal-treatment claim was applied by the Eleventh Circuit Court.[22] Nevertheless, Kavanaugh concludes this additional opinion with his original argument that timing distinguishes the two cases.[23]

II. Ray's Case

A. Factual Background

Ray converted to Islam in 2006, and, like Murphy, he requested that a spiritual advisor from his own faith accompany him within the execution chamber at Holman Prison.[24] Like in Texas, the prison denied his request and explained that only prison employees were permitted within the execution chamber. The parallels between the cases continue, as the prison did not employ a spiritual advisor of his Muslim faith.

However, the State of Alabama has employed Chris Summers as the Christian chaplain at Holman Prison since 1997. The state argues that Summers' tenure, along with his training, gives him the unique ability to be within the execution chamber and "kneel at the side of [the condemned] and pray with him if the inmate requests prayer."[25] If a prisoner were to decline such care, Summers stands off to the side but remains within the

11 U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
12 *Collier*, 376 F. Supp. at 736.
13 Pet. for Writ of Prohibition, *supra* note 7, at 6.
14 *Id.*
15 *Id.* at 7.
16 *Id.* at 8.
17 Murphy v. Collier, 376 F. Supp. 3d 734, 738 (S.D. Tex. 2019).
18 Murphy v. Collier, 919 F.3d. 913, 915 (5th Cir. 2019).
19 Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.).
20 *Id.* at 1476 n. (Kavanaugh, J., concurring).
21 *See id.* at 1476–78 (statement of Kavanaugh, J., respecting grant of application for stay); *id.* at 1478–85 (Alito, J., dissenting from grant of application for stay).
22 *Id.* at 1476–77 (Kavanaugh, J.) ("*First,* unlike Murphy, Ray did not raise an equal-treatment claim. . . . Ray did not raise an equal-treatment argument in the District Court of the Eleventh Circuit. The Eleventh Circuit came up with the equal-treatment argument on its own . . . .") .
23 *Id.* at 1477.
24 Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 692 (11th Cir. 2019).
25 *Id.*

chamber.[26] Despite Summers' past role during executions, the State of Alabama agreed to Ray's request that he not attend the execution. However, it denied Ray's request that his imam replace Summers at his execution, claiming that Alabama "will not permit a non-[Alabama Department of Corrections] employee, someone unfamiliar with the execution process and with the practices and safety concerns of the prison, to be in the chamber in the chaplain's place."[27]

Alabama criminal procedure law makes no distinction between those allowed to witness the execution from within the chamber and those who must remain in an adjacent room behind two-way glass.[28] Indeed, the statute only differentiates between the different categories of people who may "be present at an execution."[29] Alabama Department of Corrections (ADOC) policy, which is available to neither the public nor inmates prior to execution, offers the only details about where certain observers must remain during executions. As such, the only information available to Ray or his lawyers on who could attend the execution was the aforementioned section of Alabama's criminal code, which did not stipulate who could and could not witness the execution from within the chamber.

Despite the fact that Ray's execution had been scheduled on November 8, 2018 for February 7, 2019, Ray first learned about the ADOC procedures at a January 23, 2019, meeting with the prison's warden, giving him only two weeks to challenge these discriminatory procedures.[30] The warden, Cynthia Stewart, "explained to Ray the practices and policies that were followed by the ADOC during the administration of the death" at this meeting, "apparently for the first time . . . ."[31] Upon learning about the procedures, Ray asked at the same meeting that his imam join him within the execution chamber, that Chaplain Summers not attend the execution, and that his body not be subjected to an autopsy.[32] Stewart denied Ray's first two requests and told him that the third was not within her authority to grant.

B. Procedural Posture

After this meeting, in which Ray learned for the first time that his imam would not be present at his execution, he filed a civil rights complaint and an emergency motion for a stay of execution in the United States District Court for the Middle District of Alabama five days later on January 28. Despite this quick action, Judge W. Keith Watkins ruled that Ray was "guilty of inexcusable delay," arguing that he "had ample opportunity in the past twelve years to seek a religious exemption, instead of waiting until the eleventh hour to do so."[33]

The state only presented one argument as to why Ray would have already known the policies regarding who may be present within the chamber: forty-five other inmates had been executed at Holman Prison since Ray had been put on death row. Judge Watkins agreed, writing that because "Ray ha[d] been confined at Holman Prison for nineteen years, he reasonably should have learned that the State allows only members of the execution team, which previously has included a state-employed chaplain, inside the execution chamber."[34] Judge Watkins also found that Ray had not adequately argued that his case had "a substantial likelihood of success on the merits,"[35] one of the four necessary factors for granting a stay of execution.[36]

The Eleventh Circuit Court of Appeals reversed the district court ruling, granting Ray a stay of execution because he had "demonstrated a substantial likelihood of success on the Establishment Clause and because the other equitable factors tip in his favor."[37] The Establishment and Free Exercise Clauses of the First Amendment to the Constitution stipulate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[38] In staying Ray's execution, the court wanted to "promptly address and resolve [Ray's] claims,"[39] but the Supreme Court prevented that process from transpiring.

C. SCOTUS Review

The State of Alabama appealed to the Supreme Court, and the Court overturned the stay of execution in a five-to-four decision, allowing Ray to be executed on February 7, 2019, "[b]ecause Ray waited until January 28, 2019 to seek relief . . . ."[40] Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor, writing:

> Here, Ray has put forward a powerful claim that his religious rights will be violated at the moment the State puts him to death. The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process — and itself rejects the claim with little briefing and no argument — just so the State can meet its preferred execution date.[41]

The decision by Chief Justice Roberts and Justices Alito, Kavanaugh, Thomas, and Gorsuch was based not on the merits of the case but instead on Ray's supposed delay in filing his lawsuit.

This raises deeper concerns about how the Supreme Court often handles death penalty cases. The Court hears two main categories of cases — the merits docket and the orders docket. While the former involves cases selected "for extensive briefing, oral argument and a substantial written opinion, sometimes with dissents,"[42] the orders docket often involves decisions re-

26 *Id.* at 692–93.
27 *Id.* at 694.
28 *See* Ala. Code 1975 §15-18-83(a) (West 2019).
29 *Id.* (The statute includes "[t]he spiritual advisor of the condemned" and [t]he chaplain of Holman Prison" as two of the nine categories of people permitted to be present at an execution.).
30 *Ray,* 915 F.3d at 702–03.
31 *Id.* at 692.
32 *Id.* at 693.
33 Ray v. Dunn, No. 2:19-cv-00088-WKW-CSC, 2019 WL 418105, at *4 (M.D. Ala. Feb. 1, 2019).
34 *Id.*
35 *See id.* at *4–5.
36 *Id.* at *4.
37 Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 695 (11th Cir. 2019).
38 U.S. Const. amend. I.
39 *Ray,* 915 F.3d at 695.
40 Dunn v. Ray, 139 S. Ct. 661, 661 (2019) (mem.).
41 *Id.* at 662 (Kagan, J., dissenting from grant of application to vacate stay).
42 William Baude, *The Supreme Court's Secret Decisions,* N.Y. Times

garding procedural matters made without oral arguments and often without any detailed explanation.[43] In Ray's case, the Court offered a mere sentence with timing as the reason for its decision.[44] The justices are not even required to formally record how they voted on cases from the orders docket, and Chief Justice Robert and Justice Alito initially failed to do so in *Murphy v. Collier*. In some instances, orders docket cases are decided without votes being recording from any of the justices. This often leaves both the justices' reasonings and votes unrecorded.[45]

III. Implications of Orders Docket Rulings

Rulings on cases from the orders docket have important implications for future precedent. Lower courts lack the ability to make consistent decisions without explanations and context. Lawyers also have difficulty framing their arguments in future cases when they lack the details of how the Supreme Court came to its previous decisions. Legal scholars have pushed for greater transparency from the Court on this matter.[46] While it would be unreasonable to expect the Court to provide detailed opinions on the thousands of orders docket cases it considers each year, some explanation for the most influential decisions is clearly needed. University of Chicago Law Professor William Blaude explains that even just a few paragraphs that "briefly explain [the Court's] decision when it either reversed a lower court decision, or when it proceeded in the face of a written dissent . . . would be a big improvement over our current, murky practices."[47]

Ray's case highlights the need for greater transparency on orders docket cases, as the lack of a detailed explanation has left people to wonder how it differed from Murphy's. Some have claimed that Islamophobia prejudiced the Court's decision, while others have claimed that the Court upheld Murphy's stay of execution after enduring criticism of its decision in Ray's case. Both of these scenarios are highly unlikely — the truth is that we simply do not know why the Supreme Court issued seemingly inconsistent rulings in these cases. What is certain is that Ray died alone without his imam while Murphy received a stay of execution.

As Justice Kavanaugh had suggested that timing was a critical differentiator, he would then presumably claim that Ray's request for a stay of execution came too late, regardless of the fact that Ray apparently first learned about the prison's policies only two weeks prior to his execution. Fundamental constitutional rights are at stake at the time of these inmates' greatest vulnerability. New procedures are necessary for the Supreme Court's handling of death penalty appeals, and Professor Blaude suggests

> promulgating a new Supreme Court rule setting out some deadlines or timeliness rules; adopting a general presumption of deference to the lower court in last-minute filings; adopting a general presumption of deference to the district court in last-minute filings; granting certiorari and oral argument in one of these shadow-docket cases so that some specific timeliness principles could be discussed, adjudicated, and adhered to; keeping all of the Justices in the building on execution night so that they can discuss controversial orders in the conference room.[48]

* * *

No two cases are ever identical, and the difference in outcomes between the cases of Ray and Murphy appears to have come down to timing. While Ray made his request to the ADOC fifteen days before his scheduled execution date, Murphy did so to the TDCJ a month in advance. For Justice Kavanaugh, that appears to have made the difference. Nevertheless, these contrasting and unclear rulings point to a larger question of how the Supreme Court presents its decisions on cases from orders docket. For the sake of transparency and proper application of justice, the Court must reevaluate its current practices.

(Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions (last visited Nov. 30, 2019) [hereinafter Baude, *Secret Decisions*].

43 *Id.*

44 *Ray,* 139 S. Ct. at 661 (majority op.) ("Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit.").

45 William Baude, *Death and the Shadow Docket,* Reason (Apr. 12, 2019) https://reason.com/2019/04/12/death-and-the-shadow-docket/ (last visited Nov. 30, 2019) [hereinafter Baude, *Shadow Docket*].

46 *E.g., id.*

47 Baude, *Secret Decisions, supra* note 42.

48 Baude, *Shadow Docket, supra* note 45.

The Controversy of Harm Reduction: *Safe Injection Sites in the United States*

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The opioid crisis is a profound public health crisis that has killed hundreds of thousands of Americans throughout the past decade and a half. In the early 1990s, pharmaceutical companies began to encourage the use of opioids as painkillers, resulting in the loss of many lives to addiction. Since 2010, more than 400,000 people in the United States have died from opioid overdoses.[1] Overwhelmingly, drug users become addicted to opioids from using prescribed medication for chronic pain.[2] The opioid crisis was sparked by large pharmaceutical companies like Purdue Pharma, the manufacturer of Oxycontin, spending hundreds of millions of dollsars promoting their opioid drugs as effective pain relievers.[3] With a marketing strategy of all-expenses-paid conferences for health care providers and education programs on pain management, drugs like Oxycontin soared in popularity.[4] More and more frequently, large pharmaceutical companies were encouraging doctors to prescribe highly addictive opioids to patients, and the patients were developing deadly addictions. Patients then fueled their addiction with more prescribed medication, medication not prescribed to them, heroin, or other opioids like fentanyl, an extremely lethal drug. In 2018 alone, 50,000 Americans died of opioid overdose.[5] In comparison, over four years of the Vietnam War, 58,000 Americans lost their lives. While it will take a long time to combat the opioid crisis, there are steps that can be made to reduce overdoses and help those living with addiction.

In this paper, I argue that while there are significant political and legal challenges to implementing safe injection sites, they are an effective method that will play a critical role in alleviating the opioid crisis. Part I provides background on safe injection sites, including what they are and how they have been successful; Part II discusses where safe injection sites have been implemented outside of the United States; and Part III addresses concerns about bringing safe injection sites to the United States.

I. Safe Injection Sites

One proposed strategy for combatting deaths related to opioid use is safe injection sites. Safe injection sites, often referred to as safe injection facilities, overdose prevention centers, or drug consumption rooms, are spaces where it is legal to inject illicit drugs. The best safe injection sites have food, showers, clothing, healthcare, counseling, and drug addiction treatment.[6] The key three components of safe injection sites are sterile supplies, an environment free from criminal prosecution, and lifesaving support.[7] The lifesaving support entails trained medical professionals onsite who have Naloxone, also known as Narcan, and are ready to use it in case of an overdose. Naloxone works within minutes to reverse respiratory depression, sedation, and hypotension caused by opioid use,[8] essentially reversing an overdose. The sterile supplies offered at safe injection sites include clean needles, which can prevent the spread of bloodborne diseases. According to the Centers for Disease Control and Prevention (CDC), of all of the people diagnosed with HIV in the United States, one in ten are people who inject drugs,[9] making clean needle use extremely important. An environment free from criminal prosecution is necessary so that users feel comfortable injecting drugs in the safe injection site. This means that more people who are using drugs will be using clean needles and protected from a deadly overdose. It also means that instead of doing drugs alone in a hidden place, people with opioid addictions will have positive human interaction, be more comfortable, and be offered resources on how to get help. Moreover, safe injection sites can offer much more beyond lifesaving treatment and clean needles to protect the drug user's health. Often, sites will have drug testing kits to test drugs before users inject them. This is helpful because opioids are often cut with fentanyl, a highly lethal synthetic opioid that is fifty times more potent than heroin.[10]

1 *Supervised Injection Sites Are Coming to the United States. Here's What You Should Know.,* USC Dep't of Nursing Blog (May 2, 2019), https://nursing.usc.edu/blog/supervised-injection-sites/ (last visited Nov. 30, 2019).
2 Nalini Vadivelu et al., *The Opioid Crisis: A Comprehensive Overview,* 22(16) Current Pain & Headache Rep., Mar. 2018, at 1.
3 *Id.* at 2.
4 *Id.* (noting that Purdue Pharma "aggressively mobilized" marketing strategies, "organizing 20,000 pain 'education' programs and 40 all-expenses-paid conferences for 5000 health care providers").
5 *Do Safe-Injection Sites Work?*, Economist (Oct. 10, 2019), https://www.economist.com/graphic-detail/2019/10/10/do-safe-injection-sites-work (last visited Nov. 20, 2019).
6 *Id.*
7 *Supervised Injection Sites Are Coming to the United States, supra* note 1.
8 *Narcan (Naloxone Hydrochloride Injection): Clinical Pharmacology,* RxList (last updated Jan. 17, 2019), https://www.rxlist.com/narcan-drug.htm#clinpharm (last visited Nov. 30, 2019).
9 *HIV Among People Who Inject Drugs,* Ctrs. for Disease Control & Prevention (last updated Nov. 12, 2019), https://www.cdc.gov/hiv/group/hiv-idu.html (last visited Nov. 30, 2019).
10 Mattie Quinn, *A Safe Space: Is the U.S. Ready for its First Supervised Injection Site for Drug Users?*, Governing (May 2019), https://www.governing.com/topics/health-human-services/gov-supervised-injection-site.html (last visited Nov. 30, 2019).

The largest challenge to implementing safe injection sites is their contested legality. Having the sites be free from criminal prosecution while individuals are using drugs that are illegal under federal law has been challenged by the United States Deputy Attorney General, lawmakers, judges, and law enforcement officials.[11] While drugs are federally illegal, the legality of these sites have been determined on an individual state basis. In 1986, a law was enacted by Congress under the Controlled Substances Act that is referred to as the "Crack House" statute, which states that it is unlawful to "manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."[12] Opponents argue that this statute would make safe injection sites illegal. However, district court judge Gerald McHugh ruled that safe injection sites do not violate federal law, and that the Crack House Statute does not apply because "the ultimate goal of Safehouse's proposed operation is to reduce drug use, not facilitate it . . . ."[13] So far, Philadelphia, New York City, Seattle, and San Francisco have all considered safe injection sites.[14] California legislators recently approved a bill to start a three-year pilot program for a safe injection site in San Francisco.[15] San Francisco and these other three cities have all suffered the impacts of the opioid crisis and are attempting to combat it through the implementation of safe injection sites.

Vancouver community activist Sarah Blyth states that safe consumption sites are "the first step into recovery" and mentions the importance of the drug purity testing they offer.[16] However, ultimately the reason Blythe is involved with safe injection sites is because "no one dies at these sites."[17] There has never been a deadly opioid overdose at a safe injection site. In fact, a study from the U.S. National Library of Medicine reported that safe injection sites are associated with eighty-eight fewer deaths from overdoses per 100,000 person years.[18] The opioid crisis in the United States has taken hundreds of thousands of lives. While some measures are being taken to stop the use of opioids, there needs to be policy in place for harm reduction, and safe injection sites are a great option.

II. Implementation of Safe Injection Sites Abroad

The United States is not the first to consider this tactic, as many major European cities and areas throughout Canada have already instituted safe injection sites in order to combat opioid overdose and use in public spaces.[19] Most of the sites in Europe were initially implemented to prevent the spread of AIDS during the AIDS crisis.[20] The first safe injection site was implemented for this reason in Bern, Switzerland.[21] Today, the Netherlands has thirty-one sites in twenty-five cities.[22] The sites that have been open in both Europe and Canada have been quite successful in mitigating overdoses; since the opening of a safe injection site in Vancouver, Canada, over 3.6 million people have injected drugs without fatal overdoses;[23] in Barcelona, stray syringes in the street are estimated to have dipped from thirteen thousand a month to three thousand a month after a site opened.[24] Most impressively, safe injection sites have led to an increase in people seeking help for their addiction and are associated with less injecting-risk behavior, like sharing needles.[25] With the success of the sites abroad and the horrific opioid crisis in the United States, a handful of American cities have been considering the implementation of safe injection sites, but have been met with much opposition.

III. Concerns About Safe Injection Sites in the United States

While safe injection sites can seem like an optimal option for harm reduction, there is concern around them, including an increase of drug use, an increase of crime, and danger to communities. Politicians and voters struggle with the idea of having a site that essentially exists to help people take drugs. Some see it as an opportunity to "feed [a drug users'] addiction."[26] Opponents argue that safe injection sites encourage drug use and bring more crime to the community.[27] Former Deputy Attorney General Rod Rosenstein, in opposition to the ruling by Judge McHugh, stated that "[i]t is a federal felony to maintain any location for the purpose of facilitating illicit drug use. Violations are punishable by up to 20 years in prison, hefty fines and forfeiture of the property used in criminal activity."[28] Rosenstein continued, "When drug users flock to a site, drug dealers follow, bringing with them violence and despair, posing a danger to neighbors and law-abiding visitors."[29] A member of the Redmond City Council in Washington state described a visit to the area around Vancouver's safe injection site as "a war zone" with "drug-addled, glassy-eyed people strewn about" and "active drug dealing going on in plain sight."[30] U.S. Attorney William M. McSwain also said at a press conference that "normalizing the use of deadly drugs like heroin and fentanyl is not the answer to solving the opioid epidemic."[31]

11 *See also infra* Part III.
12 Anti-Drug Abuse Act of 1986 § 1841, 21 U.S.C.A. § 856 (West 2003).
13 United States v. Safehouse, No. 2:19-cv-00519-GAM, slip op. at 56 (E.D. Pa. Oct. 2, 2019); *see also* Quinn, *supra* note 10.
14 Quinn, *supra* note 10.
15 *Supervised Injection Sites Are Coming to the United States, supra* note 1.
16 Quinn, *supra* note 10.
17 *Id.*
18 Jennifer Ng et al., *Does Evidence Support Supervised Injection Sites?*, 63 Can. Fam. Physician 866, 866 (2017).
19 Quinn, *supra* note 10.
20 *Do Safe-Injection Sites Work?*, *supra* note 5.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Drug Consumption Rooms: An Overview of Provision and Evidence,* EMCDDA (June 7, 2018), http://www.emcdda.europa.eu/topics/pods/drug-consumption-rooms_en (last visited Dec. 2, 2019).
26 *Id.*
27 Elana Gordon, *What's The Evidence That Supervised Drug Injection Sites Save Lives?*, NPR (Sept. 7, 2018), https://www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives (last visited Nov. 30, 2019).
28 Rod J. Rosenstein, Opinion, *Fight Drug Abuse, Don't Subsidize It,* N.Y. Times (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html (last visited Nov. 30, 2019).
29 *Id.*
30 *Id.*
31 Quinn, *supra* note 10.

However, introducing safe injection sites in the United States has never been a plan to solve the opioid epidemic; instead, it is only a means for harm reduction. Opponents such as McSwain are concerned with the idea of normalizing drug use, but safe injection sites simply move drug use that is already happening off the streets to a safer space. The goal is not to encourage drug use, but to limit the number of fatal overdoses and let addicts know they have the option to seek help if they want it.

Opponents of safe injection sites argue that implementing them is not worthwhile because, in some cases, only about ten percent of injection site users actually go to treatment.[32] While this may be the case, that ten percent of opioid users represents people that may have never found help without a safe injection site. It is also important to recognize that no one has suffered a fatal overdose in any safe injection site. Safe injection sites not only help with harm reduction through the provision of a safe space and clean injection supplies, but they also offer care and compassion. They help those struggling with addiction — many of whom are homeless, like in Seattle, where eighty percent of the homeless population struggles with substance abuse[33] — connect with members of society in a positive way.

While some political leaders and constituents have expressed concern for increased crime, increased drug use, and the formation of dangerous areas surrounding the sites, those worries have not been become realities in cities with sites. In fact, safe injection sites play a critical role in mitigating harm from opioid use. Although opponents of safe injection sites argue that these sites make neighborhoods more dangerous, in reality, unmonitored drug use in public spaces, like restrooms, parks, and sidewalks present a far greater threat to neighborhood safety. After implementing a safe injection site, Barcelona saw a drastic reduction in needles found on the street.[34] The use of needles in a confined facility where they can be properly disposed of is more beneficial to the community because it keeps needles off the streets where they can endanger the public. Loose, used needles can spread diseases like HIV/AIDS, hepatitis, tetanus, and syphilis. These contaminated needles can even be found on playgrounds and spaces occupied by young kids who do not know to avoid the needles. In a 2014 review, seventy-five studies revealed that safe injection sites "reduce overdoses and increase access to health services. Supervised injection sites were associated with less outdoor drug use, and they did not appear to have any negative impacts on crime or drug use."[35] Studies therefore demonstrate that one of the main concerns of opponents to safe injection sites have not come to fruition at many of the already implemented sites. Safe injection sites should not impact the areas around them, except to limit the drug paraphernalia left over from public injection. While there is limited research regarding changes in the presence of drug dealers in the area surrounding safe injection sites, one study reported that introducing safe injection sites did not lead to any increase in arrests related to drug trafficking, assaults, or robberies,[36] suggesting that safe injection sites do not increase crime.

The other concern of safe injection site opponents is the financial cost to the city that implements them. One organization did a peer-reviewed simulation of Vancouver's safe injection site to perform a cost-benefit analysis. While the cost of safe injection sites has been a concern for opponents, the research revealed that because of supervised injection facilities' ability to limit the spread of disease, the sites were actually associated with decreased cost.[37] The main benefit is the decrease in HIV infection, which, even with the model's conservative estimates, would outweigh the cost of the safe injection site. In addition, safe injection sites are not typically paid for by the government, as they are most often run and funded by non-profits. Therefore, it is unlikely that the city or state would be footing the bill for these establishments; instead, they just have to approve the sites' existence.

Currently, the proposals to implement safe injection sites are met with uncertainty because their legality depends on how local, state, and federal officials will interpret state and federal laws.[38] There are complex federalism issues that complicate the legality of local safe injection sites. These legal problems are independent of their policy desirability, however, and suggest that statutory changes to federal and state law should occur to authorize the creation of safe injection sites.

* * *

Ultimately, safe injection sites appear to offer far more benefits than drawbacks. The concerns people have with promoting drug use and increasing crime have not proved true in the nearly one hundred safe injection sites worldwide. Safe injection sites can limit deaths from overdose, decrease disease spread from the use of dirty needles, and offer people who feel isolated because of their addiction a comfortable space to interact with others. The empirical evidence suggests that safe injections sites are effective and can help not only those who use opioids but also society as a whole.

32 *See* Rosenstein, *supra* note 28.
33 Christopher F. Rufo, *An Addiction Crisis Disguised as a Housing Crisis*, City J. (June 14, 2019), https://www.city-journal.org/opiods-homelessness-west-coast (last visited Dec. 2, 2019)
34 *See supra* note 24 and accompanying text.
35 Gordon, *supra* note 27.
36 Ng, *supra* note 18, at 866.
37 Ahmed M. Bayoumi & Gregory S. Zaric, *The Cost-Effectiveness of Vancouver's Supervised Injection Facility*, 179 CMAJ 1143, 1143 (2008).
38 Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States,* 98 Am. J. Pub. Health 231, 234 (2008).

Towards a Just Finance Sector: *The Merits of State-Owned Banks*

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The finance sector[1] increasingly takes up space in the American economy. What originated as a means to an end (a middleman to collect and distribute funds) has for many become an end unto itself. Top students from prestigious universities across the globe desperately pursue jobs at investment banks, hedge funds, and private equity firms.[2] In fact, the finance, insurance, and real estate industries make up one-fifth of domestic GDP, more than any other sector.[3] At the same time, history is rife with examples of financial crises driven by these same industries. Nobel Prize-winning economist Joseph Stiglitz describes the financial sector's work as being at least partly "rent-seeking": an economic activity that redistributes wealth (often from the poor to the rich), but does not actually generate meaningful increases in overall economic growth.[4] In other words, financiers do not grow the pie — they simply take a larger slice of it.

This paper aims to investigate to what extent state-owned commercial banks could alleviate some of the major issues related to the financial sector. Section I discusses contemporary pitfalls in the commercial banking sector and relates these to a rationale for creating state-owned banks. Section II details the requirements for establishing a state-owned bank. Section III evaluates the German *Sparkassen*, an example of an existing state-owned banking system. Finally, Section IV summarizes contemporary efforts to establish government-owned commercial banks in the United States.

Throughout this paper, I make frequent use of the terms "liquidity," "public," and "bank." I define "liquidity" as the M2 money supply[5]: the amount of cash, checking and savings deposits, and time deposits[6] in the economy at a given time. "Public" will refer to ownership of an entity by the government, rather than an entity being publicly traded on the stock market. Finally, "bank" will refer to the commercial kind unless otherwise noted. A commercial bank is one that services consumers and small businesses — it provides loans, facilitates checking and savings accounts, and offers very basic financial services.[7] This last distinction is important to draw, as many of the conclusions reached in this paper would not transfer to investment or merchant banks.

I. The Rationale Behind a Public Bank

The U.S. commercial banking sector has a number of glaring issues, many of which became apparent during the 2008 financial crisis. The incentive structure of these banks encourages excessive risk-taking and predatory lending practices, and it has proven itself remarkably resistant to legislation.[8] A public bank could offer a solution to four distinct problems present in the banking sector: private control over the public money supply, problematic lending and financing practices, unfair savings rates, and risk-seeking behavior.

A. The Money Supply

America has historically had a tumultuous relationship with private financial institutions. Andrew Jackson wrote that "if [Congress has] the power to regulate . . . currency, it was conferred to be exercised by themselves, and not to be transferred to a corporation."[9] Jackson referred

1 Taken to include the insurance, financial services, and real estate (when specified) sectors.

2 *See, e.g.,* Chris Hopson, *The Draw of Consulting and Finance*, Harv. Pol. Rev. (July 15, 2018), https://harvardpolitics.com/harvard/the-draw-of-consulting-and-finance/.

3 *Gross Domestic Product by Industry: Second Quarter 2019*, U.S. Bureau of Econ. Analysis (Oct. 29, 2019), https://www.bea.gov/data/gdp/gdp-industry (last visited Dec. 1, 2019).

4 *See generally* Joseph E. Stiflitz, The Price of Inequality: How Today's Divided Society Endangers Our Future (W.W. Norton & Company 1st ed. 2012).

5 *See, e.g.*, *M2 Money Stock*, Fed. Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/M2 (last visited Nov. 30, 2019).

6 Time deposits refer to deposits in a bank account that cannot be withdrawn before a set date.

7 In contrast, an investment bank advises businesses and other organizations on mergers and acquisitions and capital raising, and a merchant bank specializes in loan services and fundraising services for corporations and high net worth individuals. *See generally* Sean Ross, *Investment Banking vs Commercial Banking: What's the Difference?*, Investopedia (last updated Apr. 18, 2019), https://www.investopedia.com/articles/professionals/091615/career-advice-investment-banking-vscommercial-banking.asp (last visited Dec. 1, 2019).

8 *See, e.g.*, Alan Rappeport & Emily Flitter, *Congress Approves First Big Dodd-Frank Rollback*, N.Y. Times (May 22, 2018), https://www.nytimes.com/2018/05/22/business/congress-passes-dodd-frank-rollback-for-smaller-banks.html (last visited Dec. 1, 2019).

9 Andrew Jackson, Veto Message (July 10, 1832), *reprinted in President Jackson's Veto Message Regarding the Bank of the United States*, Avalon Project, https://avalon.law.yale.edu/19th_century/ajveto01.asp.

to what many contemporary economists consider to be a major flaw of the private banking system: control over the money supply.[10] Traditionally, it is assumed that the federal government has the ability to influence the money supply.[11] The Federal Reserve can control the money supply by trading Treasury notes with commercial banks,[12] or by more unorthodox techniques such as quantitative easing.[13] It is inherently desirable to have the government perform this function because without government oversight unchecked increases in the money supply would lead to devastating inflation and a loss of faith in currency.[14] Furthermore, the government is able to prevent liquidity from drying up in an economic crisis to some extent. Control over the money supply is a useful policy tool that should be wielded by the state with the interest of its constituents in mind.

In reality, the money supply is heavily influenced by the decisions of commercial banks. Economists have reached a consensus on something called the "fractional reserve" theory of money creation.[15] This theory states that banks lend out a percentage of each deposit they receive, equal to the total deposit minus the reserve requirement — an amount set by the Federal Reserve that banks are required to retain of each deposit as an insurance against bank runs. After the bank lends out this percentage of a deposit, the person who receives the loan theoretically deposits that money in another account, where a part of it is loaned out, *ad infinitum*. Every person in this chain now has additional money in their account; their spending decisions will be made accordingly. The original deposit was multiplied; money was "created." Conversely, banks may also decide to call back their loans or refuse to issue new ones. In effect, this equates to a removal of money from the money supply.

The unfortunate truth is that this method of money creation exacerbates any swings in the wider economic environment. When the economy is heating up (and thus is experiencing inflationary pressures), banks will be more eager to lend money, which in turn will increase the money supply, thereby further increasing inflation. When the economy is in a rut, fewer loans will be extended, contracting the money supply and further pushing down spending and aggravating potential deflation. When banks follow "rational incentives," the economy does not always benefit. A valid counterpoint is that the Fed is tasked with preventing these swings. During economic booms they raise interest rates, which curb lending, and during busts they lower them, which in turn boost spending.[16] The problem is that the government is forced to resort to indirect and imprecise manipulations of currency, instead of maintaining direct control over its creation.

B. Lending and Financing

Commercial banks' role as distributor of liquidity has other downsides as well. Because commercial banks are asked to maximize shareholder value, they are incentivized to extend capital only to those who are likely to repay it. Individuals or businesses that are deemed high-risk are penalized by high interest rates and other unfavorable loan terms. This aligns with prevailing economic theory. The bank is assuming the risk, and for taking on higher risk it should be eligible to receive a larger reward.

However, a closer examination reveals the perversity behind this idea. Access to capital is essential for a number of activities that can lead to prosperity. Home ownership, starting a business, or going to college all typically require some form of lending. Low-income individuals are thus required to pay a higher price, both in absolute and relative terms,[17] for these opportunities. It is morally bankrupt, as well as socially undesirable, to make loans more expensive for those who already have very little. Studies have shown that low-income individuals on average pay more for every kind of loan.[18] The Federal Reserve found a positive correlation between income and credit scores,[19] and a number of other studies have shown that minorities typically have lower credit scores, even when the data is controlled for disparities in income.[20] There is a strong negative correlation between credit scores and interest rates payable on loans — the lower your score, the more you are asked to pay. It is understandable that banks employ this system, but that does not mean that it is beneficial to society as a whole. In essence, the credit score system is a regressive tax. There is substantial evidence that this system contributes to the so-called "poverty trap;"[21]

10 *See, e.g.*, Philipp Bagus & David Howden, *Fractional Reserve Banking: Some Quibbles*, 4 Q. J. Austrian Econ. 29 (2010).

11 *See, e.g.*, N. Gregory Mankiw, Macroeconomics 86 (Worth Publishers 8th ed. 2012) (1991).

12 The Federal Reserve is henceforth also referred to as "The Fed."

13 Quantitative easing refers to a central bank directly providing liquidity to the economy by purchasing large quantities of financial assets. *See, e.g.*, Kimberly Amadeo, *How Central Banks Create Massive Amounts of Money With Quantitative Easing*, The Balance , https://www.thebalance.com/what-is-quantitative-easing-definition-and-explanation-3305881 (last visited Dec 4, 2019).

14 *See, e.g.*, Mankiw, *supra* note 11, at 82.

15 *See* Joseph Huber, *Modern Money Theory and New Currency Theory*, 66 Real-World Econ. Rev. 38, 38 (2014).

16 *See, e.g.*, Mankiw, *supra* note 11, at 84.

17 The interest they are asked to pay is higher in absolute terms, but it also makes up a larger share of income than a similar loan would for high-income individuals.

18 Diana Elliott & Ricki Granetz Lowitz, *What Is the Cost of Poor Credit?*, Urban Inst. (Sept. 18, 2018), https://www.urban.org/research/publication/what-cost-poor-credit.

19 Rachael Beer, Felicia Ionescu & Geng Li, *Are Income and Credit Scores Highly Correlated?*, Bd. of Governors of the Fed. Reserve Sys. (Aug. 13, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/are-income-and-credit-scores-highly-correlated-20180813.htm.

20 Caroline Ratcliffe & Steven Brown, *Credit Scores Perpetuate Racial Disparities, Even in America's Most Prosperous Cities*, Urban Inst. (Nov. 20, 2017), https://www.urban.org/urban-wire/credit-scores-perpetuate-racial-disparities-even-americas-most-prosperous-cities.

21 Bruce Katz & Margery A. Turner, Brookings Inst., Rethinking U.S. Rental Housing Policy: Building on State and Local Innovations 2 (Feb. 28, 2007), https://www.brookings.edu/wp-content/uploads/2016/06/PB_Housing_Katz.pdf.

the poorer you are, the more you pay.[22]

A public bank could step in and resolve this issue. It could extend loans not with the intent of making a profit but rather of stimulating the economy. This might mean providing loans to low-income communities at break-even interest rates, as they are likely to spend that money in a way that benefits the wider economy.[23] A public bank could also act as a tool for policymakers. If politicians want to stimulate homeownership and reduce carbon emissions, mortgages could become cheaper and car financing more expensive. A public bank would provide a direct way of injecting money into desirable areas of the economy.

The focus of commercial banks on generating returns for their shareholders is costly to society in other ways as well. A significant share of Americans have their checking and saving accounts with one of the major banks — 37.6% of all deposits are placed with one of the five largest banks, and 30.82% are placed with one of the three largest.[24] Today's financial sector can accurately be described as an oligopoly — a few key players control such a significant share of the market that they are able to work together and set rates in a way that is favorable to them.[25] In the American financial system, savings rates are artificially held down. As mentioned before, banks make money off each dollar they receive in deposits. Unfortunately, almost none of that money returns to their clients. Savings accounts at most commercial banks generate negligible interest, and checking accounts frequently cost money for those who deposit under a certain amount.[26] Interest rates offered on savings accounts remain low, even as the Fed has increased its discount rate.[27,28] Many banks further exacerbate inequality by providing a higher rate of return on savings accounts with greater deposits.[29]

C. Savings

A public bank whose primary aim is to further the public interest rather than make a profit would be more likely to offer a savings rate that closely mirrors the discount rate. Not only would this provide customers with a better alternative to the rates offered by commercial banks, it might also force banks to match that rate if they want to retain their clients. In effect, this would constitute a redistribution of wealth from the banks and their shareholders to average account holders. Although online banks already offer higher interest rates on savings accounts,[30] they are rather niche and lack visibility to threaten the larger banks. A public bank would be backed by a state or city and have physical branches, allowing for increased visibility. Further, a public bank wold have the benefit of targeting a specific, rather than a diffuse, audience. An accessible, well-known public bank could succeed where these online banks have failed and significantly drive up the average interest rate on savings accounts.

D. Risk-seeking Behavior

A lack of profit incentive would also reduce a public bank's exposure to risk. In the years leading up to the Great Recession, nearly every bank filled its balance sheet with subprime mortgages and risky derivatives even though the industry was aware of the risks associated with these products.[31] Banks simply could not explain to their shareholders that they were going to hold off on products that were generating sizeable returns for their competitors — doing so would have constituted economic suicide.[32] The profit incentive of commercial banks has at times generated genuine financial innovation, but more often it has caused them to cut corners and harm communities. Wells Fargo, for example, was recently convicted of engaging in predatory lending throughout the United States in the years leading up to 2008.[33] The bank knowingly extended credit to those who were unlikely to pay it back, charging high upfront fees and then passing on the actual debt to other firms. Wells Fargo knew the risks involved but ultimately decided short-term profits were more important. Unlike traditional banks, a public bank would not answer to shareholders, but rather to elected officials who are held accountable by their constituents. Research has already shown that banks who are responsible to a large number of shareholders are more risk-averse than those who answer only to a select group of the corporate elite.[34] These findings could be extrapolated to infer that a bank that answers to the general population would be significantly more risk-averse than current financial institutions.

22 Jill Cornfield, *Low-income Americans Get Double Squeeze from Poor Credit And High Fees*, CNBC (Sept. 19, 2018), https://www.cnbc.com/2018/09/19/poor-credit-keeps-low-income-people-paying-higher-fees-and-stiff-interest-rates.html (last visited Nov. 9, 2019).

23 Christopher Carroll et al., *The Distribution of Wealth and the Marginal Propensity to Consume*, 8 Quant. Econ. 977 (2017).

24 *Total Assets, All Commercial Banks*, Fed. Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/TLAACBW027SBOG (last visited July 31, 2019).

25 *See, e.g.*, Mei Dong et al., A Macroeconomic Theory of Banking Oligopoly (May 2017) (unpublished manuscript) (available at https://www.rse.anu.edu.au/media/1944983/Mei-Dong-Paper.pdf).

26 *Weekly National Rates and Rate Caps - Weekly Update*, FDIC (2019), https://www.fdic.gov/regulations/resources/rates/ (last visited Nov. 9, 2019).

27 This refers to the interest charged by the Federal Reserve to institutional lenders, which is closely correlated with interest rates on commercial loans. *See generally The Discount Rate*, Bd. of Governors of the Fed. Reserve Sys. (last updated Nov. 26, 2019), https://www.federalreserve.gov/monetarypolicy/discountrate.htm (last visited Dec. 1, 2019).

28 Bd. of Governors of the Fed. Reserve Sys. (US), *Effective Federal Funds Rate*, Fed. Reserve Bank of St. Louis (1954), https://fred.stlouisfed.org/series/FEDFUNDS (last visited Nov. 9, 2019).

29 *See, e.g.*, *Savings Account - Open an Advantage Savings Account Online*, Bank of America (2019), https://www.bankofamerica.com/deposits/savings/savings-accounts/ (last visited Nov. 9, 2019).

30 *See Best Online Savings Accounts of November 2019*, Bankrate (Nov. 2019), https://www.bankrate.com/banking/savings/rates/ (last visited Nov. 9, 2019).

31 *See generally* Matthias Hanauske et al., *Doves and Hawks in Economics Revisited: An Evolutionary Quantum Game Theory Based Analysis of Financial Crises*, 389 Physica A 5084 (2010).

32 John Cassidy, How Markets Fail: The Logic of Economic Calamities 296 (2009).

33 County of Cook v. Wells Fargo, 115 F. Supp. 3d 909 (N.D. Ill. 2015).

34 Simon H. Kwan, *Risk and Return of Publicly Held Versus Privately Owned Banks,* 10 FRBNY Econ. Pol'y Rev. 97, 102–05 (2004).

It is important to note that a lack of profit incentive cannot be assumed for any public bank. Governments may want to create a bank that generates money to be used for other public policy projects or simply a state's rainy-day fund. The fundamental difference remains that even if consumers do not directly benefit from higher interest rates on savings accounts or cheaper loans, the profits that a public bank generates will eventually benefit them. This is not the case for larger commercial banks, whose profits flow to shareholders.

E. Concluding Remarks

Public banks offer a solution to many of the issues our financial system struggles with today. A wholly different incentive structure would allow a public bank to deploy capital where it would stimulate the economy, rather than just where it would generate profits. The absence of responsibility to shareholders would lead to higher interest rates on savings accounts and the adoption of a more sustainable risk profile. As a competitor to commercial banks, a public bank would realign the industry to be more concerned with the needs of its customers.

That said, the United States is home to just one public bank, whose assets total seven billion dollars — about 0.004% of total commercial bank assets.[35] The next section will investigate the steps required to create a public bank and discuss potential hurdles.

II. Creating a Public Bank

A number of states and cities — including Vermont, New Jersey, Massachusetts, Los Angeles, and San Francisco — have conducted or are in the process of conducting feasibility studies for the creation of regional public banks.[36] As such, there is a substantial range of literature available with detailed descriptions of the steps required to start such a bank. Although many studies focus on public banks providing capital for infrastructure investment and state financing needs rather than functioning as consumer-serving institutions,[37] the basic principle behind their construction remains the same.

The technicalities of a bank's creation are rather simple. The bank needs to have sufficient assets to begin lending, employees, and possibly a few physical branches. Feasibility studies generally assume the city or state responsible for creating the bank would move its current cash reserves to the new bank, thereby providing capital without the need for loans or other costly financing techniques. The only existing American public bank — the Bank of North Dakota — was initially financed by a two-million-dollar bond offering in 1919, which would amount to about twenty-nine million dollars today.[38] Research suggests that due to the increased complexity of the contemporary economy, the required capitalization to form a state bank would be closer to $325 million.[39] Since most states hold a multiple of that amount in commercial banks currently, it is unlikely that a bond offering would be necessary today. California, for example, holds nearly $15 billion in its rainy-day fund.

A public bank would have either a state or a city as its sole shareholder, and any returns it made would be returned to its home state or city.[40] As such, public banks would prevent capital drain to out-of-state bondholders and keep profits within the local economy.

The creation of a public bank would thus be relatively uncomplicated, and a variety of feasibility studies have cited high potential upsides. For example, a public bank in New Jersey would generate about sixteen to twenty-one million dollars in additional state output and raise state income by about four to five million dollars for every ten million dollars lent out. Furthermore, for every ten million lent out, the bank would add roughly sixty to ninety-three new jobs.[41] Yet strong opposition to public banks exists. In Maine, a bill to commission a study on the effects of a public bank failed to pass the state legislature, even though seventy-two percent of small businesses and farmers in the state supported the creation of a state-owned bank.[42] Opponents argue that public banks could pose increased risk to state assets and that there is currently adequate credit available through commercial channels.[43] Internationally, the idea has also fallen out of favor with economists, who claim that public banks are often inefficient and influenced by political pressures.[44] The next section of this paper will investigate a current example of a state-owned banking system to determine the merits of these arguments.

III. Germany's Public Banks: Sparkassen

Germany's commercial financial sector consists of three pillars: commercial banks, cooperative banks (owned by their customers), and public banks. The last consists of

35 *Total Assets, All Commercial Banks*, *supra* note 24.

36 *See, e.g.*, *Studies & Reports*, Pub. Banking Inst., https://www.publicbankinginstitute.org/studies-reports/ (last visited Dec. 1, 2019).

37 *See, e.g.*, Deborah M. Figart, Stockton Univ., Exploring a Public Bank for New Jersey: Economic Impact and Implementation Issues (2018), https://stockton.edu/hughes-center/documents/2018-0326-exploring-a-public-bank-for-new-jersey-economic-impact-and-implementation.pdf.

38 *Overview of BLS Statistics on Inflation and Prices*, Bureau Lab. Stat., https://www.bls.gov/bls/inflation.htm (last visited Nov. 9, 2019).

39 Yolanda K. Kodrzycki & Tal Elmatad, New England Pub. Pol'y Ctr., The Bank of North Dakota: A Model for Massachusetts and Other States? 19 (2011), https://www.bostonfed.org/publications/new-england-public-policy-center-research-report/2011/the-bank-of-north-dakota-a-model-for-massachusetts-and-other-states.aspx.

40 *See, e.g.*, Vermonters for a New Economy, Gund Inst., Exploring a Public Bank for Vermont (Dec. 2013), https://publicbanking.files.wordpress.com/2014/01/public-banking-1-13-2014.pdf.

41 Figart, *supra* note 37, at 10.

42 *Id.*

43 *See, e.g.*, Anjelica Tan, *A Public Bank Is Risky Business*, The Hill (Oct. 19, 2018, 4:00 PM), https://thehill.com/opinion/finance/412278-a-public-bank-is-risky-business (last visited Jul. 31, 2019).

44 *See, e.g.*, Marcia Millon Cornett et al., *The Impact of State Ownership on Performance Differences in Privately-owned Versus State-owned Banks: An International Comparison*, 19 J. Fin. Intermediation 74 (2010).

the aforementioned *Sparkassen*, as well as *Landesbanken*, which engage in wholesale banking,[45] and the *LBS Bayerische Landesbausparkasse*, a public sector building and loan association. *Sparkassen* are a unique example of state-owned, easily accessible banks that offer basic commercial banking services to consumers and small- to medium-sized enterprises (SMEs). They have been operating since 1778 and were originally founded by merchants with the intent of supporting local communities.[46] Today, there are over fifteen thousand *Sparkasse* branches collectively controlling over two trillion euros in assets. They operate in a decentralized manner with strong geographic boundaries; each city or region has its own *Sparkassen* branches that serve local clients and provide loans for local investments. In addition to local government being their main shareholder, *Sparkassen* are backed by a national organization that maintains a "rainy-day fund." When a region of Germany is experiencing financial distress, it can tap into this fund to obtain support from *Sparkassen* in prospering regions.[47]

Germany's *Sparkassen* are mandated by law to serve the public interest and promote regional development. Their success is measured not by returns generated for shareholders or profit, but by their impact on the communities they serve.[48] Stakeholder value rather than *shareholder* value is the key metric by which these banks are judged. The banks are highly popular, with about seventy percent of all SMEs obtaining their financing from a *Sparkasse*. About sixty percent of all Germans deal with the banks in some way, and low-income families specifically make up the largest part of *Sparkasse* customers. This broad reach is partly because of the system's indiscriminate approach to banking — *Sparkassen* are mandated not to deny anyone a savings account, and they provide the same rate of return for each customer. This stands in stark contrast to the practices of many commercial banks, who stratify customers based on wealth and offer a return rate proportional to the size of a customer's deposits. Furthermore, the German legislature explicitly states that *Sparkassen* are supposed to "satisfy the credit demands of local businesses,"[49] meaning that they must fulfill the loan requests of small and medium-sized local businesses, and theoretically, should not deny any local business a loan.
Besides serving customers and enterprises, *Sparkassen* fund socially desirable projects with the express intent of promoting the public interest. The banks together provided €488 million (about $550 million) to social projects[50] in 2018 alone,[51] and a 2015 report estimated that the banks added about twenty billion euros in value to local communities that year,[52] equal to about 0.66% of Germany's GDP in 2015.[53] They also provide significant funding for start-ups, infrastructure repairs, and other socially desirable activities.

Notwithstanding the several benefits associated with the *Sparkassen* system, the banks have been regularly criticized by European and American economists alike.[54] Many find fault with the idea of a state-owned bank rather than with a specific issue present in the system,[55] but others have identified some salient flaws in the way the *Sparkassen* are run, specifically relating to their entanglement with local politics.

Political involvement in the day-to-day operations of the banks has been and remains one of the key points of concern. A study by the Brussels-based think tank Bruegel notes that in eight states surveyed,[56] eighty-three percent of the *Sparkassen*'s board chairs were current county heads or municipality heads. In five out of eight states, every single board chair was a current politician. More broadly, eighteen percent of board members were politicians. Moreover, in the only state where politicians publicly declare their income, board chair fees made up an average of twelve percent of a politician's income.[57] The mayor of Regensburg, the fourth-largest city of Bavaria, is currently standing trial for accepting significant campaign donations from a real estate developer, allegedly in exchange for a favorable loan from the *Sparkasse* where the mayor held a board seat.[58] Such cases are admittedly rare,

45 Wholesale banking refers to merchant banking services provided by the wholesale banker for large clients such as insurance providers or commercial banks.

46 Céline Choulet, BNP Paribas, German Sparkassen: A Model to Follow? 4 (Apr. 2016), https://economic-research.bnpparibas.com/html/en-US/German-Sparkassen-model-follow-4/29/2016,28761.

47 Claudia Irigoyen, *Sparkassen Savings Banks in Germany*, Ctr. Pub. Impact (Mar. 27, 2017), https://www.centreforpublicimpact.org/case-study/sparkassen-savings-banks-germany/.

48 *Id.*

49 Stephen L. Clarke, Civitas, German Savings Banks and Sqiss Cantonal Banks, Lessons for the UK 11 (2010), http://www.civitas.org.uk/reports_articles/german-savings-banks-and-swiss-cantonal-banks-lessons-for-the-uk/ (last visited Nov. 9, 2019).

50 These include educational programs, museums, sports clubs, and other local initiatives deemed beneficial to the community.

51 *Financial Report 2018 of the Savings Banks Finance Group*, Finanzgruppe Deutcher Sparkassen-und Giroverband, https://financialreport.dsgv.de/ (last visited Dec. 1, 2019).

52 Finanzgruppe Deutcher Sparkassen-und Giroverband, Report to Society 2015: Our Country-Out Contribution 16 (2015), http://archiv.im-auftrag-der-gesellschaft.de/_Downloads/Downloads_2016/DSGV_Report_Society_2015.pdf?m=1467731001.

53 *Germany*, OECD, http://data.oecd.org/germany.htm (last visited Sept. 11, 2019).

54 *See, e.g.*, Kahl, et al., *How Germany's Little Savings Banks Threaten Big Financial Woes*, Bloomberg (Oct. 5, 2018), https://www.bloomberg.com/news/articles/2018-10-05/germany-s-sparkassen-little-banks-big-worries (last visited Dec. 1, 2019).

55 *See* Todd Buell, *Germany's Banking Problem Is Bigger Than Deutsche Bank*, Wall St. J. (Oct. 12, 2016), https://www.wsj.com/articles/germanys-banking-problem-is-bigger-than-deutsche-bank-1476264606 (last visited Nov. 9, 2019).

56 Germany has a total of sixteen federal states.

57 Jonas Markgraf & Nicolas Véron, *Germany's Savings Banks: Uniquely Intertwined with Local Politics*, Bruegel (July 18, 2018), https://bruegel.org/2018/07/germanys-savings-banks-uniquely-intertwined-with-local-politics/ (last visited Nov. 9, 2019).

58 Jan Friedmann, *Spendenaffäre um Oberbürgermeister: Der Fast-Freispruch von Regensburg*, Spiegel Online (July 3, 2019), https://www.spiegel.de/politik/deutschland/regensburg-joachim-wolbergs-bleibt-in-spendenaffaere-straffrei-a-1275607.html.

but the degree of entwinement between politicians and public banks is certainly cause for concern. Little research has been done on inefficiencies in the *Sparkassen* system caused by political entanglement, so the severity of these findings remains unclear. An American public bank could certainly model itself after the *Sparkassen*, but it might benefit from an explicit separation between currently serving politicians and the bank itself, if only to maintain public trust in the system.

Critics have further claimed that the *Sparkassen* "distort competition" and limit the business volume available to commercial banks by absorbing market share.[59] The reasoning behind this claim is that *Sparkassen* benefit from a supposedly implicit government guarantee, and consumers therefore feel confident placing their deposits there. There is some validity to this claim. During the 2008 financial crisis, Germany's *Landesbanken* faced serious balance sheet issues, and the *Sparkassen* were expected to provide liquidity in order to stabilize them. However, the government stepped in and used public funds to bail out the *Landesbanken*, thereby absolving the *Sparkassen* of the financial costs associated with a bailout.[60] Although the *Sparkassen* never required a government bailout, they were indirect beneficiaries of one. Bailouts like this do create moral hazard,[61] and were they to be unique to public banks, one could credibly claim that bailouts create unfair competition. In reality, however, multiple commercial German banks received government funds during the last financial crisis,[62] suggesting that this "implicit government guarantee" applies to all banks equally.

Aside from the merits and demerits of the *Sparkassen*, there is an issue of transferability associated with them. The *Sparkassen* both enable and are enabled by the financial context in which they operate. At 9.9% in 2017, Germany has a far higher household savings rate than the European and American average (3.25% and 6.9%, respectively).[63] Furthermore, Germans place a larger percentage of their savings in savings accounts (as opposed to investing) than residents of many other countries.[64] The *Sparkassen* are able to provide high returns, transfer liquidity between regions, and remain financially stable due to their sizeable deposit base.[65] A similar system in the United States may suffer from the relatively low percentage of household savings placed into savings accounts. The *Sparkassen* form a successful example of a state-owned banking system in their local context, and they provide a number of lessons that could be useful to an American public bank. The banks provide financing for individuals and SMEs at low rates, do not discriminate in the provision of financial services, and reinvest proceeds in their local communities. Their decentralized structure partly insulates them from economic shocks and reduces their reliance on continuous revenue streams. Political entanglement and moral hazard are issues of which to be wary, but they do not present sufficient reason to simply write off the *Sparkassen*.

IV. Looking Forward: Public Banking Initiatives in the United States

The public banking movement has seen a resurgence of sorts in the last decade, and a number of states and cities have introduced legislation to either establish a public bank or conduct feasibility studies. Most notably, current New Jersey Governor Phil Murphy ran his campaign partly on the promise of establishing a public bank,[66] and he sponsored a bill on his first day in office to achieve that goal.[67] Maine,[68] Vermont,[69] and New York[70] have also voted on bills to establish state banks.

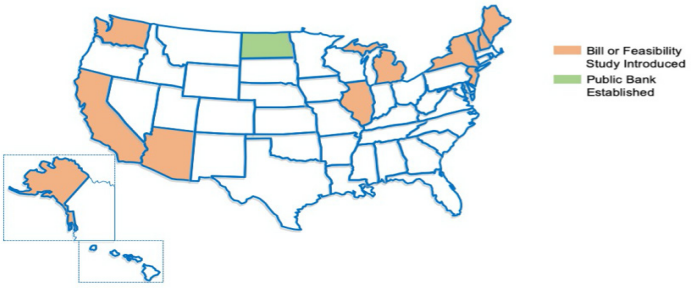


Figure 1: Public Banking Efforts by State

Feasibility studies have generally predicted positive results. For example, a 2011 feasibility study predicted that a public bank would generate 3,500 new jobs in Maine;[71] a 2013 study found that a public bank would create about

59 Choulet, *supra* note 46.
60 Laura Noonan, *The Landesbanken: Inside Germany's Trillion Euro Banking Blind Spot*, Reuters (Sept. 17, 2013), https://www.reuters.com/article/banking-germany-landesbanken-idUSL6N0H211D20130917 (last visited Nov. 23, 2019).
61 *See* Lammertjan Dam & Michael Koetter, *Bank Bailouts, Interventions, and Moral Hazard* (Deutsche Bundesbank Discussion Paper, Series 2, No. 10, 2011), https://www.econstor.eu/bitstream/10419/50000/1/667625526.pdf.
62 *See, e.g.*, Matthias Sobolewski & Paul Carrel, *Germany Adopts 500 Billion Euro Bank Rescue Package*, Reuters (Oct. 13, 2008), https://www.reuters.com/article/us-financial-germany-idUSTRE49C5PX20081013.
63 *Household Savings*, OECD (2019), http://data.oecd.org/hha/household-savings.htm (last visited Dec. 1, 2019).
64 *Id.*
65 Irigoyen, *supra* note 47.
66 *A Public Bank – Investing in New Jersey Not Wall Street*, Murphy for Governor https://www.murphy4nj.com/issue/a-public-bank-investing-in-new-jersey-not-wall-street/ (last visited Nov. 10, 2019).
67 State Bank of New Jersey Act, S. 885, 218th Leg. (N.J. 2018).
68 An Act to Establish a State Bank, S.P. 83, 128th Leg. (Me. 2017).
69 An act relating to creating the Commission on the State Bank of Vermont, S. 48, 2017-2018 Legis. (Vt. 2018).
70 S. 1778, 2019-20 Leg (N.Y. 2019).
71 Heather C. McGee & Jason Judd, *Putting Maine Money to Work for Maine*, Demos (May 3, 2011), https://www.demos.org/research/putting-maine-money-work-maine.

2,500 new jobs and $200 million in added value to the economy in Vermont;[72] and a study for the city of Santa Fe found that every one million dollars in lending from a public bank would generate an additional ten jobs in the local economy.[73] Exceptions are the feasibility studies for California and the District of Columbia. Both studies found that establishing a public bank would be legally difficult and capital-intensive. The D.C. study heavily relied on advice from the Federal Reserve, which stated that the income a city or state can gain by having a public bank is "relatively minor" and that the risk of losses is "real."[74] It is important to note that the Federal Reserve might have an inherent aversion to public banks, as these are not placed under the Fed's supervision., in turn giving them less control Aside from this criticism, the D.C. study also found that public banks would spur local economic development and infrastructure investment, as well as reduce risk exposure of the financial system.[75] The final version of the D.C. report is still being edited and is due to be released sometime later this year.

California's study was born out of rather unique circumstances, and as such it may not be representative of the actual feasibility of a public bank in the state. California's public bank was designed to accommodate the cannabis industry, which is unable to make use of federally overseen banks as long as cannabis remains a Schedule 1 drug under federal law.[76] The study found that there were less complex ways of providing financing to dispensaries and growers, such as "improving access to banking services by the California legal cannabis industry . . . through facilitation, communication, and coordination."[77] The report did not consider other merits of a public bank, and it determined that the main drawback was potential litigation associated with having a bank that would explicitly provide financing for a federally illegal industry.[78]

Feasibility studies have produced mixed results, but there has been nothing mixed about the legislative response to the idea of public banks. Maine's bill was sent back from committee with a majority saying it should not pass.[79] Vermont's bill to establish a public bank did not pass either (although the legislature did approve $350 million in local investment instead),[80] and New Jersey seems to have put its plans for a public bank on hold. New York is the sole exception — its bill has passed the state Senate and is now awaiting assembly approval.[81] As of today, North Dakota remains the only state with a public bank. The idea is seen as socialist by many[82] and as overly complex and costly by others.[83] The D.C. feasibility study claimed that direct government spending towards socially beneficial programs would be far less complex and costly than establishing a public bank[84] — an argument to which many lawmakers subscribe.

Legal challenges also cause many legislators to view public banks unfavorably. Specifically, many state constitutions have provisions against lending state credit.[85] However, the Supreme Court's ruling in *Craig v. Missouri* holds that such provisions "[do] not interfere with the power of a state to authorize banks to issue bank notes in the form of due-bills or of similar character, intended to pass as currency on the faith and credit of the bank itself, and not of the state which authorizes their issuance."[86] As such, banks, public or commercial, are able to provide credit that passes as currency as long as they are not printing currency themselves. In *Briscoe v. Bank of Commonwealth of Kentucky*, the Court held that Kentucky's state bank did not violate the Constitution, as its loans contained "no pledge of the faith *of the state* for the notes issued by the institution."[87] The issue at hand here is whether activities that are at the core of the bank's operations (lending, investing, etc.) are explicitly backed by a government guarantee. If so, public banks would have an unfair advantage over private banks. So far, no proposal for a state bank has indicated that the bank would rely on such a state-sanctioned "pledge of faith." Consequently, it is unlikely that the constitutionality of a public bank could be challenged on these grounds. Furthermore, the Bank of North Dakota is evidence that it is constitutionally possible to operate a public bank.

V. Conclusion: An Uncertain Future

There is a strong case to be made for the establishment of regional public banks throughout the United States. Pub-

72 Vermonters for a New Economy, *supra* note 40.
73 City of Santa Fe, Public Bank Task Force Final Report (2018), https://www.santafenm.gov/public_bank_task_force.
74 D.C. Dep't of Ins., Sec. & Banking, Public Bank Feasibility Study 6 (June 27, 2019), https://disb.dc.gov/node/1332801.
75 *Id.*
76 *See, e.g.*, *Why Marijuana Retailers Can't Use Banks*, Economist (Jan. 22, 2018), https://www.economist.com/the-economist-explains/2018/01/22/why-marijuana-retailers-cant-use-banks.
77 Level 4 Ventures et al., California State Backed Bank Feasibility Study Report 6 (Dec. 24, 2018), https://www.treasurer.ca.gov/comm-external-urls/cannabis-feasibility-full-report.pdf.
78 *Id*. at 10.
79 *See* An Act to Establish a State Bank, *supra* note 68.
80 Alexis Goldstein, *Vermonters Lobby for Public Bank — And Win Millions for Local Investment Instead*, Yes! (Jan. 7, 2015), https://www.yesmagazine.org/commonomics/vermonters-lobby-public-bank-win-millions-for-local-investment (last visited Nov. 10, 2019).
81 S. 1778, *supra* note 70.
82 *See, e.g.*, Mark Calabria, *Public Banking Hurts Economic Growth*, N.Y. Times (Oct. 1, 2013), https://www.nytimes.com/roomfordebate/2013/10/01/should-states-operate-public-banks/public-banking-hurts-economic.
83 *See, e.g.*, Mark Hallerberg & Jonas Markgraf, *The Corporate Governance of Public Banks before and after the Global Financial Crisis*, 9 Global Policy 43 (2018).
84 Dep't of Ins., Sec. & Banking, *supra* note 74.
85 Ellen Brown, *Are Public Banks Unconstitutional? No. Are Private Banks? Maybe*., Web of Debt Blog (May 18, 2014), https://ellenbrown.com/2014/05/18/are-public-banks-unconstitutional-no-are-private-banks-maybe/.
86 Craig v. Missouri, 29 U.S. (4 Pet.) 410, 410 (1830).
87 Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. (11 Pet.) 257, 320 (1837) (emphasis added).

lic banks would allow for increased control over the money supply, greater access to affordable loans for low-income families and small businesses, higher returns on savings accounts, and a lower risk profile of the financial sector. As it stands, commercial banks largely engage in rent-seeking behavior. Predatory lending practices, low interest on savings accounts, and high credit card rates serve to generate profits for large banks by taking money from the economically vulnerable. The International Monetary Fund has found that as the financial sector grows relative to the size of the economy, inequality increases.[88] Recent research by economists at Columbia University confirms this relationship, and further finds that this effect is not significantly offset by the easier access to credit which financial markets supposedly provide.[89]

Encouraging progress is currently being made in many places. Feasibility studies are an important first step in moving the idea of public banking into the mainstream, and we might soon see a bill to establish a state bank pass in New Jersey. However, the unfortunate truth remains that lawmakers view public banks unfavorably. Beyond the practical hurdles associated with establishing one, there seems to be a general sentiment that a public bank would not fit with the capitalist ideals of the United States.

I would argue that a public bank is fundamentally American. It is a state apparatus that enables the government to more efficiently support entrepreneurship, local communities, and infrastructure. A public bank, if given proper direction, could better facilitate the achievement of the elusive American Dream. The Founders vocally opposed monopolies, championed a stable currency, and believed that all should be able to acquire property and benefit from public infrastructure.[90] According to Stiglitz, "[r]ather than justice for all, we are evolving into a system of justice for those who can afford it. We have banks that are not only too big to fail, but too big to be held accountable. . . The only true and sustainable prosperity is shared prosperity."[91]

Commercial banks today are hurdles keeping us from innovation, wealth creation, and achieving equality. A bank should facilitate the dreams of entrepreneurs from all backgrounds, not just those backed by venture capital. It should not charge the poor more than the rich. In many ways, by contributing to immense inequality commercial banks violate some of this country's supposed core values. In short, there is nothing un-American about a state bank.

88 Era Dabla-Norris et al., International Monetary Fund, Causes and Consequences of Income Inequality: A Global Perspective 20 (June 2015), http://www.deslibris.ca/ID/247027.
89 Alberto Botta et al., *Inequality and Finance in a Rent Economy*, J. Econ. Behav. & Organ. 30 (2019).
90 *See, e.g.*, Thomas G. West, *The Economic Principles of America's Founders: Property Rights, Free Markets, and Sound Money*, Heritage Found. (Aug. 30, 2010), https://www.heritage.org/political-process/report/the-economic-principles-americas-founders-property-rights-free-markets-and.
91 Joseph E. Stiglitz, *The People Who Break the Rules Have Raked in Huge Profits and Wealth and It's Sickening Our Politics*, AlterNet (Sept. 11, 2013), https://www.alternet.org/2013/09/joe-stiglitz-pople-who-break-rules-have-raked-huge-profits-and-wealth-and-its-sickening-our/ (last visited Nov. 10, 2019).

Conservative Constitutionalism: *An Interview with Ken Kersch*

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Ken Kersch is a Professor of Political Science at Boston College whose primary areas of expertise are American political thought and constitutional development. Recently, he was at the Claremont Colleges for a panel discussion for his new book, Conservatives and the Constitution,[1] *hosted by Claremont McKenna College's Salvatori Center for Individual Freedom and the* Claremont Journal of Law and Public Policy. *While in Claremont, he graciously agreed to sit down for an interview with the* CJLPP, *in which he shared his thoughts on the current role of the three branches of government, discussed the divergence in liberals' and conservatives' interpretation of the Constitution, and contextualized many of the recent developments occurring within American politics.*

This interview has been lightly edited for length and clarity. It has also been excerpted; the full version will be on the CJLPP*'s website at* 5clpp.com.

CJLPP: *How did you get interested in constitutional law and what was going on when you entered into that world?*

KK: I came to constitutional law relatively late, in the sense that I did not major in political science; in fact, I took very few political science courses. Look, I've been interested in politics going way back; I volunteered on campaigns in high school, I was good in social studies, I was really interested in American history, but it was only incidentally law. I majored in economics, I didn't major in political science, and I was always interested in history.

Without going through the whole meandering liberal arts college trajectory, I went to law school and I took some courses in law school that were in constitutional law. One of them I was required to take, which was constitutional law — one which I found pretty interesting. But I really thought it was a course in constitutional theory that I had with the leading constitutional theorist named Michael Perry and that incidentally was a seminar, although it had a lot of students in it but it was still called a seminar. He had us read the conservative judge Robert Bork's book on originalism. He was trying at the time to write a response to Bork that he hoped would help him refute Bork's arguments about originalism, so we got to hear him thinking aloud about how he would do that. I also took a course on legal realism, which was a course on legal thought which considered new ways of thinking about the Constitution and about law generally in the early 20th century, and I thought that was really interesting. And then I took a course in legal jurisprudence, which is legal philosophy, and I thought that was very interesting. So, it was a confluence of the number of courses I took in law school. Then when I went to graduate school eventually, I spent a lot of time studying American political development and American political thought generally, and I was really interested in integrating the law with the history and the political thought generally and so it was a lot of different tributaries that brought me to where I am, which is someone who thinks and studies the constitution as part of a broader project of understanding American politics.

[. . .]

CJLPP: *So, I want to dig deeper into your recent article in The Atlantic.[2] Do you view the Claremont Institute's brand of conservatism and its argument for, I think you call it "moral foundationalism," as a really legally, constitutionally robust argument? Because I read it and thought: this is very cultural. This is a cultural phenomenon that co-opted parts of the Constitution, and I just wanted to get your ideas on that.*

KK: I think you got that exactly right. First of all, it is not a legal argument. The interesting thing about the Claremont Institute in this regard is that it emerges from a political philosophy background. These are people who have PhDs; they do not have law degrees. These are political philosophers. There's a school of political philosophers called Straussians who study political philosophy. Obviously, law is part of political philosophy, but it is not law in the way that law professors study and think about it. Among Straussians there are roughly two schools, to be crude about it. But they themselves talk about it this way as the East Coast school and the West Coast school.

1 Ken Kersch, Conservatives and the Constitution: Imaging Consitutional Restoration in the Heyday of American Liberalism (2019).

2 Ken Kersch, *The Overlooked Conservative Tradition that Embraces an Executive Like Donald Trump*, Atlantic (Oct. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/10/some-conservative-traditions-embrace-donald-trump/600535/ (last visited Dec. 7, 2019).

I teach at Boston College, the center of East Coast Straussians (at least amongst our political theorists). We have all the usual people who teach comparative politics and international relations. But, amongst our political theorists, most of my colleagues who are East Coast Straussians talk about law in the sense that they'll read John Locke and they'll talk about Montesquieu and Plato's laws; but, most of what they teach and write about is about Plato and Thucydides and Maimonides and Leibnitz and Spinoza and Hobbes and Locke and political theorists.

What's different about the West Coast and one of the distinctive marks about it, is that while they see themselves as grounded in the principles of political philosophy, they much more emphasize its present implications on American politics. They are much more likely to write about Abraham Lincoln, Frederick Douglass, Woodrow Wilson, Theodore Roosevelt in a way that my colleagues would not do. So the Claremont Institute — first of all, it's changing over time and I'm not sure where they are today, but historically speaking — was a place where they saw themselves as taking the teachings of these ancient and modern political philosophers and drawing upon them to think about the United States of America, its political leaders, and how the country should be ordered, including constitutionally and legally. And so, they are very self-consciously focused on the link between political philosophy and the Constitution in a way that other types of thinkers might not be. That's why it does have this moralistic tinge. They tend to have a particular view of the ancient thought that they believe is best and most relevant, and it tends to emphasize issues of moral virtue, civic virtue in the populace and also in the leaders through statesmanship. They're very willing to talk about American history and the American president by touching base on what they see is the best of ancient thought through the modern world. So, I think that's consistent with how you read the article.

CJLPP: *What you think Trump has done to conservatism? Do you think conservatism will recover after Trump? Does it just bounce back? Whenever the Trump era ends, will it be forever impacted by this or, once he's out of the political picture, do people just go back to the kind of conservatism that we see before him?*

KK: The short answer is, I don't know. But I'll say something more than that. I really don't know. From my perspective, it has discredited almost the entire modern conservative movement as I see it because these people have signed onto this in the Republican Party, which is the party of the conservative movement. So, I think they've been sullied and soiled by this. I think it is in opposition to every principle they have purported to uphold.

So, I mean, that's a judgment. That's my opinion. I can't say that other people share that opinion. Certainly a lot of people do, but it's not the only opinion out there. My firm opinion is that it's discredited it and it's been indulged. I think it's a tragedy. I think certain elements of modern conservatism have been more passionate in supporting Trump, as opposed to just voting for him, and those forms of thought are even more discredited to me. Other people are just being hypocrites, but these people, there's something in Trump that they like and believe that it affirms the views that they've been pushing for a while. Those people to me seem to be the Christian Right and the West Coast Straussians.

I mean, look, West Coast Straussians are like thirteen people. It's a small group of intellectual conduct. The Christian Right is a much broader, popular group, so I don't mean to make this all about archaic arguments. I just mean that one is an intellectual coterie and the other is a broad-based movement. But on the other hand, it's also true that, look, I don't like Mike Pence, but on the other hand, I don't think he would have the same issues if Trump just disappeared and Mike Pence were to be in power. I would disagree with a lot of it, but even I would say he's a very different person than Trump. I don't believe he would be self-dealing and I don't believe he would know nothing about the Constitution. Could it be that it would just snap back and go to that? It's quite possible. Obviously, it doesn't discredit any particular conservative public policy. Whether you are for or against charter schools or vouchers or your attitude towards how broadly or narrowly we should think about the separation of church and state or whether you should be required to work for food stamps, I assume there are conservative positions on those and I think it is very hard to say that Donald Trump discredits the idea of vouchers for private schools. That's going to continue.

[. . .]

CJLPP: *After Scalia's death, Elena Kagan was on a panel and she was talking about Scalia. She said that he had won the battle over constitutional interpretation.*[3] *Is that something you agree with? Did he change the standard for how the court views the Constitution?*

KK: Yes. So, let me say something now on the pro-conservative side. I think one of the problems with having total power — and I just mean as a fact, being in control of an institution where you feel very dominant and don't have to worry about challengers to your authority — is that you can get very lazy and sloppy and also just push things to extremes in ways that are not good.

I think especially in legal thought and academia, the liberals have been in charge of the Supreme Court from the 1930s forward, for a very long period of time. I think they got very complacent in their thinking and particularly in academia, where they were also completely dominant. In fact, they had total control and, come the 1970s and early 1980s, they started pushing a theory called non-interpretivism, which was very much linked to deconstructivism and literary theory. This had its edges for people teaching at Stanford Law School — it was not like in some swamp somewhere. But they would push theories that said things like words have infinite meanings, and

3 Note that there was a little confusion with this question; the relevant quote from Justice Kagan was about a method of statutory interpretation (textualism) and not constitutional interpretation. See Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes,* YouTube (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFTOTg (at 8:28).

what's the constitution but words, and that's why it was called non-interpretivism. You couldn't really interpret it to give a precise meaning. I think that is exactly what Scalia targeted. However that works for literary theory (I don't think it actually works for literary theory), I think it's not the type of thing that is going to be very appealing in the public sphere when you're talking about the fundamental law that sets the limits and powers of government. I think Scalia recognized that and he was right.

Scalia advanced theories of originalism and also textualism. I mean, textualism is a direct response to that; essentially, the text means something — it has a fixed, at least a fixed framework of meaning, parameters of meaning — and the job of a judge is to interpret that text. And then originalism was, how do we constrain the discretion of the judge in reading that text in a way that we can claim, rightly or wrongly, that the judge is passive and applying the law that already exists to the case, as opposed to active and political and making it up?

So, to the extent that Scalia pushed the discussion to say, as Kagan said it, we're all textualists now, we're all originalists now, I think that she's absolutely right and that Scalia was very important in that. I think she would also recognize that she doesn't arrive: her reading of the text and of the original principles yields different results than Scalia. Liberals have then taken the next step beyond this and they've decided to play that game. They say, "yeah, I'm a textualist, I'm an originalist, you're wrong. You're wrong about the text. You're wrong about the original meaning of it." And that's where we are now.

So, he has shifted the discourse in a lot of the analysis, but I don't think that necessarily, as she would be the first to say, leads to the same results or interpretations that Scalia would have. And he was not a very good follower of some of these things either. His reading of free speech in the First Amendment, in terms of modern understandings of it, was not very closely linked to the 18th century understandings of it. So, there's still a lot of scope for interpretation even if the parameters are not unbounded as some of the more radical left or more political thinkers would argue in the 1970s.

[. . .]

CJLPP: *How have your views on constitutional interpretation changed over time? Was there ever a time when you were more liberal, or can you think back to an event that was impactful on how you thought about the Constitution?*

[. . .]

KK: Well, look, I could say that I was more sympathetic to originalism in the recent past than I have been in the last couple years.

[. . .]

I was a proponent of judicial restraint. I mean, I never personally liked Bork, but Scalia, in law school, at least very early on in his career, wrote very stimulating opinions. He punctured a lot of weak arguments and pieties in a way that I found very attractive. I also was never very sympathetic to non-interpretivism, which I thought was silly and just smug, so I found it very exciting that he was willing to challenge a lot of the conventional wisdom and shoot down a lot of very weak arguments. I also thought he put the [Supreme] Court in its place more. However, as time went on, he got older and also got lazier, and he started making a lot of moral denouncements in his opinions. I didn't like that too much.

The conservative Court moved away from judicial deference and got much more aggressive in exercising its judicial review powers. I just think also that to the extent that the religious right started having a greater influence in American politics and then I saw these [conservative justices] allied with them — I've never been a fan of the Religious Right. So that made me uneasy as well. I will also say that, as we just discussed, the liberals moderated their approaches. I didn't like the earlier versions, but I was more comfortable with their more moderate versions. So there were a lot of moving parts. Conservatives changed, liberals changed. Different parts of the political coalition on the Right became more salient. I've been reading more things. So I would say that today I'm not very sympathetic to the originalists.

And also, I see right now the way that the Federalist Society has just gone wrong with Trump. Even though there were plenty of people who initially were not supporters, I just don't have a lot of respect for them anymore. So I don't feel comfortable with originalism as it currently exists, and I don't trust originalists or their implications. So in that sense, I guess I've changed my views. That's kind of the way I am — I'm not a loyal member of any team. I don't really join organizations. I was never in the Federalist Society. I've spoken at a few Federalist Society things, but I'm not trustworthy, you know what I mean? I'm not sticking with the team.

CJLPP: *You make an argument in that 2015 Bowdoin lecture about the Living Constitution about how liberals have ceded the argument for popular constitutionalism.[4] How do they take that back, in your opinion?*

KK: As I remember, during that lecture, which was in 2015, I talked a lot about Reinhold Neibuhr. I had been spending a lot of time, as I have throughout my career, reading the pragmatist philosophers and also reading people on the liberal side, the liberal anticommunist side — Niebuhr's an example — in which the earlier progressive version, or at least some of the more prominent versions, could tend toward denying foundations as a matter of principle. I think obviously as a Christian theologian, Neibuhr did not do that. What Neibuhr did was essentially say, there are moral foundations, including politically (to the republic and to free liberal democracies), but that the implications of how we've applied those foundations have become clearer over time. I don't mean that they've become clearer like we're moving toward perfection. I'm just saying that

4 Ken Kersch, *Tallman Lecture: Who's Afraid of the Living Constitution*, YouTube (Nov. 6, 2015), https://www.youtube.com/watch?v=0QoM3IM-HOvo&feature=emb_title.

people suddenly realize that stuff they're doing is not consistent with the principles because of things that have changed in the world.

The classic example, which he wasn't talking about but which I talk about in my classes is: why did the Civil Rights Movement happen when it did, and why was it somewhat successful? Well, a lot of things happened: the Great Migration from the South, where African-Americans couldn't vote, to the North, where they could; I think Hitler made racism seem like an enemy ideology rather than all-American, and a lot of these things came together. I think instead of saying that we didn't believe in morality and truth before but now we do, which is how conservatives might tell the story, is very facile. Because obviously the Southerners, if you go back and look at it, were Christians and said that slavery was based on God's law, God made the "coloreds" different, and used all sorts of [justifications]. The Confederate constitutions proclaimed their foundations in God's law, and I don't think that's what happened. I think what Neibuhr captured is that people look at what's happening, they rethink things, they rethink morals based on what they see now, and they change. Not because they've suddenly acquired foundations, but because they see the implications for what equality means, or what justice means.

To get back to the Bowdoin talk, I think there's a way in which liberals conceded too much. They can talk about morality and they can talk about foundations and they can talk about justice and equality and they can talk about the Constitution — and living constitutionalism! Right? Living constitutionalism does not mean you don't have moral foundations. It just means that history exists. You can't deny it. History is part of the world, and I think that's what I found attractive. I think that in contending with conservatives in the future, [liberals] shouldn't cede the ground of morality and they shouldn't just proclaim everything on endless change. And by the way, I think there are good liberals who don't anymore.

CJLPP: *Like who?*

KK: There are a bunch of so-called liberal originalists at Yale: Jack Balkin, Akhil Amar, Bruce Ackerman. Now, I'm not saying they've been successful in how they've done it, but the way that they've framed it, what Bruce Ackerman does — it's not anti-originalism, I would call it multiple-origins originalism. Again, I'm not subscribing to his particular theory, but it makes sense. It's like, well, we have the 18th century founding which emphasized these principles. Then we have the Civil War-era amendments, which emphasized equality. Then he puts Franklin Roosevelt's New Deal — obviously there are problems with that— but it's equalizing power for freedom and equality. But, it's not an anti-moral theory; it's that different principles of morality have been integrated into the Constitution over the course of American history.

So regardless of whether I agree with his particular constitutional moments thesis — and it's obviously got its problems — Jack Balkin has a thing called living originalism which is essentially: the principles were there at the founding but the applications were determined over time. And Akhil Amar does the same thing. I'm much more sympathetic to that. They're law professors, so they tend to have theories that emphasize a particular moment when a principle is constitutionalized, because they're focused on its status as law. As someone who's not a law professor, I find some of those theories a little tendentious, but I think the project is the right project.

Again, I think that's very different from the earlier non-interpretivism. It is based in principle, it's based in some vision of morality, but it also embraces the Constitution as a developing and changing — rooted, but changing — [document] over time. For a common law tradition, which is basically a legal system that changes overtime, which is the basis of Anglo-American common law, that's the system we've had from the beginning in some sense. It's not an alien understanding, it's harmonious with the country's history and its traditions.

CJLPP: *Do you think Congress has ceded too much policymaking power to the courts?*

KK: I think Congress has ceded too much power to everybody.

[. . .]

You know, the problem with Congress — I mean, there are a lot of problems with Congress — is that Congress isn't any one thing. Congress changes over time. So very often, Congress will enact some program or some framework for governing an area and then they will never get the coalition back. There are intervening elections, and people have come and left, and they cannot get it together because it's different people. When there seem to be flaws or gaps, in theory, they're supposed to go back and fix them. But since it's different people and a different politics, they can never go back and do that. In certain contexts, I mean when there's political polarization and stuff like that, they're not actually able to act in a routine manner. Especially when the parties are polarized rather than as they used to be, where they had liberals and conservatives in both parties and therefore they could actually get enough people to tweak programs to fix problems. Now they can't do that. So the Voting Rights Act might be an example, right? And immigration policy is another example. I'm happy to blame Congress, but it just seems like they're not able to perform the role that ideally the Congress would perform.

Let's say, for example, that there's a statute that leaves out some critical area — let's say it's an area that needs fixing — and the Court essentially rules in a way that people are unsatisfied with. The Court will often say, especially if it's interpreting a statute, "We have to guess at what Congress would do. Ideally, if they don't like what we say about it, then they should fix it." Unlike interpreting the Constitution, when the Supreme Court interprets a statute, all they're trying to do is guess what Congress meant. And if Congress thinks the Court was wrong about that, they can just pass a law, and say, "No, what we actually meant was this." You can't do that with the Constitution. But for a statute, [the Supreme Court] just tries to say, "This is what we think Congress meant by the statute."

But very often when the Court does that now, Congress doesn't

follow up. Again, I just think the politics of it is that they're in no position to do it. That means, as you put it in the beginning of the question, that they're ceding power to the Court. I'm sure that's true. I'm not sure what the solution is to it. The solution has to be found in the parties and the electoral districts, and a system that's less red and blue. For political scientists, that's such a tall order. The incentives aren't there for the people holding the office.

So, yes, I think the courts and the executive branch have loomed ever-larger in relation to the Congress, and I do think that's a problem constitutionally. I do think that Congress was intended to be the most powerful branch — I mean, they make the laws. Technically, especially if you're a separation of power formalist, they make the laws, and the executive is supposed to enforce them, and the judiciary is supposed to apply them, and that makes Congress preeminent.

CJLPP: *Thank you. It was really great talking to you.*

Money Talks: *The Public Financing of Judicial Elections*

Matthew Fisch (PO '23)
Staff Writer

In the United States, over eighty percent of all legal cases are heard by judges who are either elected by popular vote or subject to recall elections.[1] While many Americans consider judges to be impartial actors,[2] contemporary elections may threaten this public faith. Because they must run for their positions, judges must solicit campaign contributions — just like any other politician. Consequently, their impartiality may be compromised by the special interests that finance their campaigns. The challenges to judicial independence and public trust have been exacerbated in recent years by the proliferation of campaign finance. This paper examines the negative implications of campaign finance in judicial races and the possibility of public financing as a legislative solution to these problems. Section I provides background on recent developments in campaign finance law; Section II discusses the current challenges of electing judges as a result of the aforementioned developments; Section III and Section IV discuss two of the most notable ways to publicly finance elections: vouchers and direct financing; and Section V offers a case study of recent legislative developments in North Carolina. Section VI concludes by arguing that individual states should adopt a system of complete subsidization for electing state judges.

I. Current Federal Campaign Finance Law

Over the course of the last decade, the courts have eroded federal campaign finance regulation.

In 2002 Congress passed the Bipartisan Campaign Reform Act (BCRA), more commonly known as McCain-Feingold.[3] The BCRA aimed to curb the influence of special interests in politics by placing legal limits on previously-uncapped contributions to political parties, known as soft money,[4] and on money spent on advertisements by corporations and unions for particular issues, known as "electioneering communications."[5]

The Supreme Court heard a challenge to the BCRA in a 2003 case, *McConnell v. Federal Election Commission*.[6] The plaintiffs challenged the law arguing, among other reasons, that the restrictions undermined their First Amendment rights to freedom of political expression[7] and exceeded Congress' constitutional authority to regulate elections.[8]

In a splintered five-to-four opinion, the Court largely upheld the BCRA.[9] In 2009, the Court heard arguments in C*itizens United v. Federal Election Commission*. There, the plaintiffs once again challenged the BCRA's limits on advertisements by corporations and unions on similar constitutional grounds as *McConnell*.[10] However, this time, in a five-to-four decision the Court partially overturned the law.[11] The Court held that limits on corporations' and unions' spending on advertisements for particular issues, known as independent expenditures, violated their rights to freedom of speech.[12]

In the same year, the U.S. Court of Appeals ruled in *SpeechNow.org v. Federal Election Commission* that restrictions on contributions to Political Action Committees (PACs) are an unconstitutional violation of freedom of speech.[13] The result was the creation of "Super PACs," which use fundraising prowess to exert political influence by, for example, running television advertisements in contested elections.[14] Since then, Congress has considered the DISCLOSE Act, which would require PACs to disclose donor rolls, but the current Congress has yet to consider the issue formally.[15]

While the Court's decisions had ramifications across federal, state, and local levels, its impact is especially acute in state judicial elections.

1 Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. . 1965, 1979 (2011).
2 Kermit Roosevelt, *Ways a Judge Should, and Should Not, Be Impartial*, N.Y. Times (last updated May 17, 2016, 9:45 PM), https://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/ways-a-judge-should-and-should-not-be-impartial (last visited Dec. 7, 2019).
3 Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).
4 *See* BCRA § 101, 52 U.S.C.A. § 30125(a)(1) (West 2002).
5 *See* BCRA § 203, 52 U.S.C.A. § 30118 (West 2002).
6 540 U.S. 93 (2003).
7 *Id.* at 134–85 (Stevens and O'Connor, JJ.).
8 *Id*. at 186–87.
9 Justices Stevens and O'Connor wrote one opinion in which they upheld the BCRA's two primary tenets; closing soft money loopholes and limiting the amount of electioneering communication. *See id*. at 161 (rejecting challenge to soft money provisions), 208 (rejecting challenge to electioneering communications limits for unions and corporations). In a separate majority opinion, Chief Justice Rehnquist struck down the provision of the BCRA that banned donations by minors. *See id*. at 231–32 (Rehnquist, C.J.).
10 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
11 *Id.* at 362–66.
12 *Id.*
13 599 F.3d 686, 695 (D.C. Cir 2010).
14 *See, e.g.*, R. Sam Garrett, Cong. Res. Serv., R41542, The State of Campaign Finance Policy: Recent Developments and Issues for Congress 6 (2018), https://fas.org/sgp/crs/misc/R41542.pdf.
15 *Id*. at 5–6.

II. The Problem of Judicial Elections

State courts oversee criminal and civil proceedings and, as analogous to the federal courts, they have the authority to review the constitutionality of state laws. State judges hear cases ranging from worker compensation to insurance claims to business liability, and ninety-eight percent of all cases are filed in state courts.[16] As a result, state court decisions have enormous influence on the everyday lives of Americans. Currently, eighty-five percent of all state judges are popularly elected[17] and thirty-nine states use partisan elections to select trial judges,[18] while thirty-eight states use elections for their highest court judges as well.[19]

Despite their importance, state judicial races tend to receive minimal public scrutiny, giving candidates with a fundraising edge an enormous advantage because they are able to buy more publicity.[20] Although *Citizens United* has not caused a direct increase in the amount of money spent in state judicial elections, the decision has shaped the dynamics of these elections.[21] Candidates previously relied on individual contributions from wealthy donors. However, *Citizens United* enabled a shift to independent expenditures by corporations, which can air television advertisements that advocate for certain issues, nudging voters toward a particular judicial candidate.[22] Moreover, Congress does not mandate that most outside groups — that is, organizations not directly affiliated with a campaign — disclose their donor rolls because the groups are typically not defined as political organizations.[23] As a result, this covert spending from outside groups like Super PACs, known as "dark money," has increased. In an analysis of six states, fully transparent spending decreased from seventy-six percent in 2006 to twenty-nine percent in 2014.[24] In both corporate and individual contributions to dark money groups, donors' identities remain cloaked. This veil of secrecy has the potential to exacerbate the already deleterious issue of distorted judicial decision-making because of the electoral pressure to raise money.

State judges are often forced to rule in cases that may impact future campaign contributions. In sixty percent of all Nevada state Supreme Court decisions concerning civil cases, at least one justice had received contributions from an attorney, plaintiff, or defendant appearing before the court.[25] Forty-six percent of 2028 state judges surveyed agreed that campaign contributions affect their fellow judges' decision making.[26] An analysis of the Ohio State Supreme Court concluded that judges rule in favor of donors when they appear before the court a staggering seventy percent of the time.[27]

The specter of campaign finance materializes in more subtle ways, too. Even when donors do not appear before the court, their money may still influence legal rulings. Judges may rule more harshly in criminal proceedings out of fear that a lenient ruling could be used against them in future elections. Outside groups may highlight a judge's more lenient rulings in negative campaign advertisements in order to persuade voters that the judge is soft on crime — an unpopular position.[28] Money in judicial elections thus creates perverse incentives for judges, whose fundamental responsibility requires impartiality.

The very appearance of corruption has harmful implications because public trust forms the teeth of judicial rulings. The courts' primary source of legitimacy is that they are seen as impartial arbiters who stay above the fray of everyday politics. Unfortunately, seventy percent of the public believes that judges allow the status of campaign contributors to inform their rulings.[29] Alexander Hamilton argued in Federalist 78 that "the complete independence of the courts of justice is peculiarly essential in a limited Constitution."[30] That is, the judiciary has sweeping constitutional powers, and perceptions of bias threaten to undermine its ability to realize its duties.

To undo the declining legitimacy of state judiciaries and restore public confidence in the judicial process, the answer is not to eliminate judicial elections, but rather to reform campaign finance. Judicial elections were introduced in the nineteenth century as a reform to prevent executive overreach in the judiciary branch.[31] Given the rancor of the current judicial appointment processes, electing judges may indeed prevent drawn out, politically charged confirmations. Judicial elections serve an important purpose and should not be eliminated completely. Rather, state governments should seek solutions in the form of curbing perverse campaign finance incentives. States

16 Bert Brandenburg, *Justice for Sale*, Politico Mag. (Sept. 1, 2014), www.politico.com/magazine/story/2014/09/elected-judges-110397 (last visited Nov. 30, 2019).
17 *Id*.
18 *Methods of Judicial Selection*, Nat'l Ctr. for State Cts., http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Dec. 7, 2019).
19 Alicia Bannon, *Judicial Elections After* Citizens United, 67 DePaul L. Rev. 169, 169 (2018) [hereinafter Bannon, *Judicial Elections*].
20 Alicia Bannon, Brennan Ctr. for Justice, Rethinking Judicial Selection in State Courts 8 (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf.
21 *See generally* Bannon, *Judicial Elections*, *supra* note 19.
22 *Id*. at 176–77.
23 Dave Levinthal & Kenneth P. Vogel, *Super PACs Go Stealth*, Politico (Dec. 30, 2011), www.politico.com/story/2011/12/super-pacs-go-stealth-070957 (last visited Nov. 30, 2019).
24 Bannon, *Judicial Elections*, *supra* note 19, at 178.
25 *Id*. at 172–73.
26 Justice at Stake, State Judges Frequently Questionnaire 5 (2002), http://www.justice atstake.org/media/cms/JASJudgesSurveyResults_EA-8838C0504A5.pdf (Q.12 findings showing that four percent believe campaign contributions make a "great deal of influence" on judges' decisions; twenty-two percent believe they had "[s]ome influence"; and twenty percent believing they had "[j]ust a little influence").
27 Adam Liptak, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times (Oct. 1, 2006), www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all (last visited Nov. 30, 2019).
28 Joana Shepherd & Michael S. Kang, *Skewed Justice:* Citizens United, *Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases*, Am. Const. Soc'y, https://www.acslaw.org/analysis/reports/skewed-justice/ (last visited Nov. 30, 2019).
29 Justice at Stake, March 2004 Survey Highlights (2004), http://www.gavelgrab.org/wp-content/resources/polls/ZogbyPollFactSheet.pdf.
30 The Federalist No. 78 (Alexander Hamilton).
31 *See generally* Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges*, 1850-1920, 9 Am. Bar Found. Res. J. 345 (1984).

must undertake the responsibility of adopting systems of public financing judicial elections. Previously, this has taken the form of both direct public financing and democracy vouchers.

III. Democracy Vouchers

In a voucher system, citizens receive vouchers of a certain value that they can spend on the campaigns of candidates running for public office. It is important to note that this policy has only rarely been implemented in the real world due to its high cost and relative novelty. Consequently, evidence is limited and almost entirely from Seattle, the only major U.S. city to adopt this approach. In Seattle, residents received four twenty-five dollar vouchers ten months before city elections took place in 2016, and only the first 47,000 vouchers sent back counted towards campaign contributions for their chosen candidate.[32]

Because vouchers have only been adopted locally and recently, little is known about how other state or federal courts would interpret their constitutionality. Nonetheless, the Washington state Supreme Court heard a challenge to the law and upheld it, arguing that citizens' free speech rights are not undermined because they are not required to support any particular candidate.[33]

Results from Seattle contain several promising signs. More citizens than ever before participated in the democratic process in terms of the number of total donors to local races.[34] Moreover, more donors of color and donors from low-income families used the voucher system relative to the traditional cash system.[35] Thus, it is possible — though not proven — that giving voters vouchers made them feel like they had a stake in the process.

Democracy vouchers may also have negative consequences, although there is a lack of research on the topic. One empirical repercussion in Seattle was that, although more minority voters donated to campaigns than in previous elections, most voucher-users were still white, higher-income, and already likely to participate in the electoral process.[36] One potential consequence of this trend is that candidates will make even more appeals to voters whose interests are already overrepresented in government, entrenching existing power structures.

Another potential repercussion is the insulation of incumbents. Donors may be inclined to give to candidates with the highest name recognition, thereby entrenching incumbents at the expense of challengers. Seattle's first-come-first-served system thereby may incentivize a race for candidates to campaign even earlier and for voters to make decisions before they are fully informed. Consequently, the program may benefit incumbent candidates and political organizations who have the infrastructure to recruit donors at the expense of challengers.[37]

This sense of urgency may incentivize candidates to raise money from large donors in the infancy of their campaigns, which would allow them to finance advertising efforts targeted at collecting vouchers. This shift might have the unintended consequence of increasing the solicitation of wealthy donors in elections.

On the whole, the voucher program remains too untested to be implemented more broadly in judicial elections, and what evidence does exist serves to undermine many of the purported benefits of democracy vouchers.

IV. Direct Public Financing

The other prominent method of public financing is direct public financing, which can take the form of both matching funds and complete subsidization. In a system of matching funds, the state government would magnify donations from the public under a certain set of conditions, usually that candidates would reject large individual contributions and do not self-fund their campaigns. With complete subsidization, qualifying candidates can finance their campaigns entirely through public funds once they prove viability, usually by garnering a certain number of small donors.[38] While many states and even the United States federal government have adopted various forms of the former proposal, only Arizona and Maine have attempted the latter, more ambitious one.[39]

While specific provisions of certain direct public financing laws have been struck down, the practice itself has been largely upheld by the courts against constitutional challenges. For example, under the Arizona Citizens Clean Elections Act, publicly funded candidates who received strong opposition from a privately funded candidate would receive extra funding.[40] This "trigger funds" provision was struck down by the Supreme Court in *Arizona Free Enterprise Club v. Bennett* as an unconstitutional burden on the First Amendment rights of privately funded candidates.[41] On the whole, however, the Court did not hold the system itself to be unconstitutional and tailored its decision narrowly, which suggests that such a proposal in other states would be upheld as well.[42]

32 *Democracy Voucher Program: About the Program*, Seattle.gov, www.seattle.gov/democracyvoucher/about-the-program (last visited Nov. 30, 2019).
33 Elster v. City of Seattle, 444 P.3d 590, 594 (Wa. 2019).
34 Jennifer Heerwig & Brian J. McCabe, Univ. of Washington Ctr. for Stud. in Demography & Ecology, Expansing Participation in Municipal Elections: Assessing the Impact of Seattle's Democracy Voucher Program *1–2 (2019), https://csde.washington.edu/wp-content/uploads/2018/04/Seattle-Voucher-4.03.pdf.
35 *Id*. at *4.
36 *Id*. at *1.
37 Russell Berman, *Seattle's Experiment with Campaign Funding*, Atlantic (Nov. 10, 2015), www.theatlantic.com/politics/archive/2015/11/seattle-experiments-with-campaign-funding/415026/ (last visited Nov. 30, 2019).
38 Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 State Pol. & Pol'y Q. 263, 264 (2008) (detailing Maine and Arizona's system of complete public financing for state legislative campaigns).
39 *Id*.
40 Ariz. Rev. Stat. Ann. § 16-952 (West 2006).
41 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 753 (2011).
42 *Id*. at 754–55 ("We have said that governments 'may engage in public financing of election campaigns' and that doing so can further 'significant governmental interest[s],' such as the state interest in preventing corruption. . . . Arizona's program give money to a candidate in direct response to

Direct public financing has significant benefits, but mostly in systems of complete subsidization, which take an important step in eliminating donor influence over judges. Publicly funded candidates may be less reliant on special interest groups and thus more responsive to the needs of voters. Candidates not only have more time to hear from voters instead of fundraising, but the voters become their biggest donors.[43] Public financing has been shown to significantly decrease the "money chase" of elections, measured by how much time candidates spend fundraising versus the time they spend interacting with voters.[44]

Public financing also reduces incumbency advantage and increases the competitiveness of elections. The practice helps to weaken one of the largest structural barriers to insurgent candidates: a lack of available funds to jumpstart a campaign against a well-funded incumbent.[45] This dynamic is most pronounced in states with complete subsidization. Indeed, Maine saw a forty percent increase in the number of contested primaries while Arizona saw a sixty percent increase.[46] The impact of complete subsidization would be especially salient for elected state judges, as they overwhelmingly run unopposed. For example, in Los Angeles County, 150 of the 151 incumbent elected judges did not draw a challenger in 2014.[47]

Not only were there more challengers with complete subsidization, but these races were more competitive, closing the statistical gap between incumbent and challenger.[48] Moreover, women, people of color, and other candidates from politically underrepresented backgrounds are significantly more likely to utilize direct financing, thereby boosting their representation in government and bringing oft-overlooked issues to the forefront on the campaign trail.[49]

While many effects of public financing are positive, some scholars warn of potential unintended consequences. For example, one study found that direct public financing increases political polarization of candidates by reducing the moderating influence of certain corporate interest groups, who tend to support more moderate candidates.[50] However, a study in Maine and Arizona found no impact on polarization in an analysis of roll call votes, which suggests that complete subsidization may ameliorate some of the negative consequences previously noted.[51] Notably, both studies acknowledge the positive implications, such as reducing incumbency advantage and the money chase, articulated previously.[52] Regardless, further research is required to gain a more complete picture of direct public financing.

As such, there is some evidence to suggest that adopting a system of complete public subsidization of judicial elections would help ease the distortion of decision making and take steps in the direction of restoring faith in the judiciary.

V. North Carolina as a Case Study for Broader Action

The direct public financing of elections has the potential to foster a truly independent judiciary. Consider North Carolina, which passed legislation for judicial public financing. It allowed candidates who raised thirty-five-thousand dollars from at least three-hundred-fifty individual donors with no individual contribution over five-hundred dollars to access matching public funds; if these conditions were met and a candidate were outspent in the general election by a privately-funded candidate, he or she could access public funds worth up to "twice the spending limit they would otherwise face."[53] Although this law was repealed in 2013 when Republicans achieved a majority in the state legislature, its nearly decade-long period of implementation allows for the best analysis of this system's impact elsewhere.[54] Participation in the direct financing program was high, with seventy-seven percent of judicial candidates in contested elections — both Republicans and Democrats — using public financing.[55]

By making judges less beholden to the interests of donors, they became more independent. A study of North Carolina judges who were partially publicly financed found a sixty percent decrease in the probability that they would rule in favor of a

the campaign speech of an opposing candidate or an independent group. It does this when the opposing candidate has chosen not to accept public financing, and has engaged in political speech above a level set by the State. The professed purpose of the state law is to cause a sufficient number of candidates to sign up for public financing, . . . which subjects them to the various restrictions on speech that go along with that program. This goes too far; Arizona's matching funds provision substantially burdens the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest." (quoting Buckley v. Valeo, 424 U.S. 1, 57 n.65, 92–93, 96 (1976) (per curiam)).

43 Malhotra, *supra* note 38, at 263 (laying out theory that public financing allows candidates and elected officials to focus on the public interest rather than fund raising).

44 Peter L. Francia & Paul S. Herrnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 Am. Pol. Res. 520, 520 (2003).

45 Malhotra, *supra* note 38, at 263–64.

46 Francia & Herrnson, *supra* note 44, at 521.

47 Jessica A. Levinson, *Op-Ed: Why Voters Shouldn't Be Electing Judges*, L.A. Times (May 9, 2014), www.latimes.com/opinion/op-ed/la-oe-levinson-end-judicial-elections-20140509-story.html (last visited Nov. 30, 2019).

48 *Id*.

49 Mimi Marziani et al., Brennan Ctr. for Justice, More Than Combating Corruption: The Other Benefits of Public Financing 4–5 (2010), https://www.brennancenter.org/sites/default/files/legacy/The%20Other%20Benefits%20of%20Public%20Financing%2010%207%20-%20%20FINAL.pdf.

50 *See generally* Andrew B. Hall, How the Public Funding of Elections Increases Candidate Polarization (Aug. 13, 2014) (unpublished manuscript) (available at http://www.andrewbenjaminhall.com/Hall_publicfunding.pdf).

51 Seth E. Masket & Michael G. Miller, *Does Public Election Funding Create More Extreme Legislators? Evidence from Arizona and Maine*, 15 State Pol. & Pol'y Q. 24 (2015).

52 *Id*. at 35; *see also* Hall, *supra* note 50, at 1.

53 *See, e.g.*, Morgan L.W. Hazelton et al., *Does Public Financing Affect Judicial Behavior? Evidence From the North Carolina Supreme Court*, 44 Am. Pol. Res. 587, S-A at *1 (2015).

54 *See e.g.* Lee Drutman, *Public Financing of Judicial Elections Worked. Too Bad North Carolina Ditched It.*, Vox (Sept. 16, 2015), www.vox.com/polyarchy/2015/9/16/9337637/public-funding-judicial-elections (explaining that studying North Carolina avoids the "endogeneity problem" that allows for more meaningful causal analysis than other analyses).

55 *Id*.

donor compared to when they were privately funded.[56] Given that this result only comes from partial public financing, it is possible that the probability would be even lower if the elections were completely subsidized, like in Maine and Arizona.

Moreover, the North Carolina law helped restore public faith in the judiciary. Sixty-eight percent of North Carolinians indicated approval for their financing system, public support which might indicate the amelioration of perceptions of corruption.[57] Thus, complete subsidization has significant potential for creating an independent judiciary.

VI. Conclusion

Public financing of elections may have a significant effect on the judiciary. First, its track record of restoring public trust is paramount, because the courts only have legitimacy when people believe in their objectivity and ability to stay above the fray of politics. Second, decisions are clearly distorted to benefit reelection prospects, and taking donors out of the equation would restore state courts back to a state of impartiality.

The interests of wealthy donors and corporations have developed an outsized influence on U.S. democratic institutions. This paradigm is perhaps most salient in the state judiciaries. Elected judges are far too beholden to donor interests — a problem that only increased in the wake of *Citizens United* — concealing the donor rolls of elected judges. Judges contort their decisions to benefit their own chances of reelections. And people take notice, undermining public trust.

To reverse this decay, individual states should adopt systems of complete subsidizations of judicial elections. Direct financing is a better tested and less potentially harmful tactic than voucher programs, and complete subsidization would virtually eliminate judges' incentives to rule in favor of moneyed interests. Instead, judges' rulings would be unbiased as the Founders intended. State judiciaries hold enormous influence over everyday life, and in order to ensure that this vital democratic role is carried out competently, it is the states' responsibilities to act.

56 *Id.*

57 N.C. Ctr. for Voter Educ., Results of SurveyUSA Mkt Research Study #20465, at 1 (2013), http://ncvotered.com/downloads/polling/2013/SurveyUSA_judicial.pdf.

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