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Our Mission

The Tri-Co Law Review is an undergraduate law journal dedicated to the publication of student legal scholarship from the Tri-Co community and beyond. The Law Review seeks to provide a forum for perspectives on issues arising within various fields in and surrounding law, ranging from topics like criminal procedure to legal interpretations of religious texts. By focusing on the editing and publishing of undergraduate scholarship, the Tri-Co Law Review seeks to cultivate those perspectives and to educate the Tri-Co community and the public.

Alienable Rights: How the United States Violates and Immures Native Autonomy

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I. Introduction

Volatility breeds peril. The permanent suspension of a community's safety and rights makes attempting to accrue power a futile endeavor. The United States is no stranger to employing this calculus of power denial, as the twin systems that underlie its existence –racism and classism–confirm. The Native nations that inhabit the land the settler country has colonized face one of their most egregious manifestations of this oppression. The United States uses its selective, restrictive granting and rescinding of tribal authority, especially criminal jurisdiction, as a means of controlling and subduing Native power. This paper will review legal policies, practices, and apparatuses including *Cherokee Nation v. Georgia*, *McGirt v. Oklahoma*, the Dawes Act, the Indian Civil Rights Act, the Major Crimes Act, the Forest Service, the Office of Federal Acknowledgement, and the mass incarceration of Native women in an effort to lay clear the myriad of systemic strategies that the US employs in order to undermine the sovereignty and autonomy of Native communities.

The limits the government has imposed on Native authority, while ostensibly representing efforts to support and work with tribal administrations, stem in truth from the desire to confine and disempower Native Americans. In the landmark 1831 Supreme Court case *Cherokee Nation v. Georgia,* the United States denied the Cherokee Nation's statehood, classifying them instead as a "domestic dependent nation" whose "relations to the United States resemble that of a ward to his guardian." The Cherokee Nation was seeking "an injunction to prevent the execution of certain acts"—namely, laws designed to evict them from their homeland—"of the Legislature of the State of Georgia."[1] As a result of the Cherokee Nation's "domestic dependent nation" classification, the Court

[1] Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831).

decided it had no jurisdiction to arbitrate the dispute.[2] The Court also ordered the government to protect tribes' right to self-rule and to act in the tribes' best interests when tribal and federal concerns collided.[3] Yet Hopi Appellate Court Associate Judge Justin B. Richland offers evidence that the federal government disregarded these orders in *Cooperation Without Submission: Indigenous Jurisdictions in Native Nation–US Engagements*, his analysis of the history and meaning of federal-tribal interactions. In the "mid-1800s to early 1900s," for example, "the prevailing policies called for … Tribal land holdings" to be dissolved, the "cultural assimilation of Native Peoples through forced reeducation," and an end to the United States's recognition of tribes as valid political entities.[4] All of these programs breached Native self-determination and completely disregarded tribal interests. For the two decades following World War II, as Richland explains, policymakers sought to extend their newfound supremacy inward, leading to legislators "attempt[ing] to end the unique relationship between certain select Tribes and the US," to transfer "criminal jurisdiction over Tribal lands"—a right which largely belonged to the tribes—to state governments, and of, course, "to do both without any effort to secure Tribal consent."[5] That the US has deliberately and repeatedly robbed Native nations of their territory, culture, and sovereignty demonstrates its lack of commitment to the duties enumerated in *Cherokee Nation*. Instead of preserving tribal rights like a guardian to its wards, the US has exploited tribes' "domestic dependent" status to erode their legitimacy and threaten their existence. Boarding schools, which perpetuated cultural genocide on hundreds of thousands of Native children from 1869

[2] Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).
[3] Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).
[4] Justin Richland, *Cooperation Without Submission: Indigenous Jurisdictions in Native Nation–US Engagements* (United Kingdom: University of Chicago Press, 2021), 6.
[5] Richland, *Cooperation Without Submission*, 6.

until the late 20th century;[6] the allotment system, which, starting with the Dawes Act of 1887, splintered communally-owned reservation territory into individual holdings in such a way that caused "communities to lose vast acreage of their tribal lands";[7] and laws like the Indian Civil Rights Act of 1968, which "limited the tribal court's sentencing authority to 6 months in jail and a $5,000 fine,"[8] all point to one truth: boundaries drawn around and within Native communities work to subvert their capabilities ever further.

II. Undermining Tribal Jurisdiction

Today, the federal relationship with Native nations reflects the attitude that the US can and should undermine rather than undergird tribal authority. One such dynamic concerns the Hopi Tribe of northeastern Arizona. Given the slew of governmental organizations, from the Forest Service to the Bureau of Indian Affairs, encroaching upon Hopi sovereignty, the tribe founded a Hopi Cultural Preservation Office in 1990 to protect its heritage.[9] The HCPO is tasked with supervising research conducted by outsiders on Hopi land to ensure that it occurs "in conjunction and collaboration with the Hopi Tribe and that the researcher advocates for Hopi cultural property rights off the reservation."[10] The office has "represented the Tribe in a host of engagements with its federal counterparts" and qualifies as an official consultant under "United States regulatory regimes," requiring federal agencies to work with tribes on policies involving

[6] The National Native American Boarding School Healing Coalition, "US Indian Boarding School History," accessed November 10, 2023, https://boardingschoolhealing.org/education/us-indian-boarding-school-history/.
[7] National Archives, "Dawes Act (1887)," 2022, https://www.archives.gov/milestone-documents/dawes-act.
[8] Office for Victims of Crime, accessed November 10, 2023, "Tribal Law," https://www.ovcttac.gov/saneguide/legal-and-ethical-foundations-for-sane-practice/tribal-law/.
[9] Richland, *Cooperation Without Submission*, 15.
[10] Richland, *Cooperation Without Submission*, 15.

them.[11] In practice, no such arrangement exists. The United States Forest Service is in charge of overseeing "several historic Hopi sites," and, in 2013, USFS and HCPO agents convened to discuss "the handling … and sale" of part of this land.[12] Hopi negotiators attempted to explain "the trouble that disturbing itaakukveni," culturally significant archaeological remains, raises: "we believe that people are still there. Their spirits are still there. So… [if] we disturb that, or somehow allow for it to be disturbed, it's a form of, ah, taboo … It's something that we highly respect."[13] Yet the federal agents' disinterest in itaakukveni stewardship quickly proved to the Hopi team that the sole reason for the meeting was for the USFS to learn of "the significance of the site to aid… in justifying the expenditure of federal funds to excavate them for the archaeological record"—a plan already in the works, on which the HCPO was supposed to merely provide corroborating commentary.[14] Where the HCPO could have been a meaningful intermediary between Hopi scholars and non-Hopi anthropologists, federal agents instead treat it as a rubber stamp at best and a roadblock at worst. The USFS utilized its authority over Hopi archaeological sites not to safeguard the itaakukveni or to bolster the HCPO's limited resources, but to exploit access to a fascinating site whose symbolic significance was merely text for a plaque rather than a cornerstone of a living culture. Even while blocking the Hopi from holding full legal control over their land, the US still had the opportunity to support the tribe, but, as the 2013 meeting exemplifies, the limitations on Hopi self-rule serve only to override their voices. In the end, the USFS dug up the site, then sold off the land to a private consortium, using a so-called "Finding

[11] Richland, *Cooperation Without Submission*, 16.
[12] Richland, *Cooperation Without Submission*, 115.
[13] Richland, *Cooperation Without Submission*, 122.
[14] Richland, *Cooperation Without Submission*, 121.

of No Significant Impact" to circumvent further HCPO involvement.[15] USFS archaeologists did not even notify the office, theoretically intended to maintain communication with US authorities, when they excavated the itaakukveni.[16]

The tribal acknowledgement system offers similar lessons in federal duplicity. The Office of Federal Acknowledgment determines which tribes qualify for official federal recognition and which do not. Such status grants a Native nation a multitude of rights, including jurisdiction over most disputes concerning members of the nation and "a government-to-government relationship" with the US.[17] Consequently, obtaining recognition is imperative. Yet this procedure represents the United States "assessing the validity" of Native "norms, knowledge, and relations" through "settler colonial evidentiary criteria"[18]—it implies Native nations lack authority and sovereignty, conceptions defined in the Western, nation-state, colonial sense, unless they meet standards which non-Native lawmakers craft and a non-Native office enforces. Furthermore, that they "find themselves blamed for their own," often forced, "assimilation," and that this often disqualifies them from acknowledgement demonstrates profound dishonesty on the part of the OFA.[19] Brushing off the history of American colonialism does not nullify its effects; it perpetuates them. Instead of acting as a mechanism that strengthens the federal government's relationship with Native nations and protects their cultures and communities, the policy of acknowledgement places the onus for legal existence on the tribes and conveniently erases the centuries-old, ongoing oppression of Native Americans. More egregiously still, the

[15] Richland, *Cooperation Without Submission*, 122-123.
[16] Richland, *Cooperation Without Submission*, 122-123.
[17] Richland, Cooperation Without Submission, 140.
[18] Richland, *Cooperation Without Submission*, 31.
[19] Richland, *Cooperation Without Submission*, 145.

system of recognition helps "setter state representatives claim… evidence of [the] settler state's own reformation" into an entity disavowing its violent supposedly-past behavior in favor of supporting its Native peoples.[20] The Vernon's Ridge Tribal Nation epitomizes the injustice of recognition.[21] The tribe has "sought, and has for over forty years continuously pressed, its claim for legal recognition."[22] An OFA delegate visited an assembly of VRTN members while Richland was staying with the tribe, and, despite the petition meeting multiple of the acknowledgement criteria, only one of which is necessary for approval, the delegate turned it down before reading it. "The very people before him in their Tribal headquarters," Richland writes, highlighting the simultaneous absurdity and powerlessness intrinsic to the recognition process, "were people who, for federal purposes, did not exist as an Indian Tribe."[23]

The United States uses ambiguity as a tool to subvert tribal sovereignty, a tactic that extends to recognized tribes. The tangled, arbitrary network of constraints on Native nations' purview creates confusion and a lack of clarity regarding tribal criminal jurisdiction that inherently leans toward undermining tribal power and bolstering US influence. Legal scholar Addie C Rolnick compiles a greatly abridged version of this maze in "Tribal Criminal Jurisdiction Beyond Citizenship and Blood," her investigation of the unique and unequal limitations Native nations face when enforcing criminal law. Tribes possess criminal jurisdiction over most tribe members, "unless those powers have been explicitly taken away by Congress or held by the Supreme Court to have been implicitly divested"; the Supreme Court has invoked this ability twice, though Congress

[20] Richland, *Cooperation Without Submission*, 145-146.
[21] This is a pseudonym that Richland uses in *Cooperation Without Submission* to protect the tribe's anonymity.
[22] Richland, *Cooperation Without Submission*, 140.
[23] Richland, *Cooperation Without Submission*, 142.

has retroactively repealed parts of both of these rulings.[24] Tribes typically only wield jurisdiction over non-Native offenders when they are domestic abusers with "sufficient ties to the tribe."[25] "[C]rimes between Indians and non-Indians and certain enumerated major crimes involving only Indians" are the domain of the federal government.[26] However, certain states operate in their stead when arbitrating these crimes and cases involving only non-Native parties.[27] The exceptions to tribes' jurisdiction over intratribal crimes are ten crimes and three felonies enumerated in the Major Crimes Act of 1885 and a series of subsequent laws.[28] This convoluted set of rules utterly lacks a unifying vision or principle, existing instead as the product of a scattered array of legislation, policies, rulings, doctrines, and personal ideologies. A coherent framework might offer unambiguous definitions of key legal terms, clearly lay out the spheres in which each level of governance (tribal, state, federal) operates, and enumerate tribes' jurisdictional rights and responsibilities. What exists instead is a messy patchwork that blurs the borders between tribal, state, and federal courts' areas of oversight and forces Native leaders to somehow tread the thin line between overstepping their confines and letting the US annex yet more areas of jurisdictional power. Uncertain definitions of central concepts, like what counts as "sufficient ties to the tribe" in the clause about domestic abusers, enable federal and state courts to reinterpret tribal purview into narrower and narrower boxes, and push Native courts toward relying on the United States for definitions and demarcations. The US holds the ability—ever-looming over projects of tribal sovereignty—to further shrink the boundaries of tribal criminal jurisdiction. It

[24] Addie Rolnick, "Tribal Criminal Jurisdiction Beyond Citizenship and Blood," American Indian Law Review 39, no. 2 (2014): 348, http://www.jstor.org/stable/43857888.
[25] Rolnick, "Tribal Criminal Jurisdiction," 349.
[26] Rolnick, "Tribal Criminal Jurisdiction," 350.
[27] Rolnick, "Tribal Criminal Jurisdiction," 350.
[28] "Tribal Law."

also utilizes its power to imperil and confine to keep Native communities in check.

III. Oppression of Native Women

The violence and criminalization Native women face are manifestations of the United States' agenda of social control. As part of its colonial enterprise, the US seeks to eradicate the culture and restrict the social and geographic mobility of Native peoples. It limits the space they can occupy and traverse and immerses their lives in carcerality and criminality. This "control and denial," as Salish scholar Luana Ross frames it in her critical study *Inventing the Savage: The Social Construction of Native American Criminality*, "is clearly evidenced by the number of incarcerated Native Americans and by their experiences in prison."[29] Ross describes how, during her childhood, "[p]eople from my reservation simply appeared to vanish and magically return" with "exceedingly familiar" regularity and normalcy, illustrating the colonial status of Native reservations and communities.[30] Criminalizing their members is one of the methods by which the US robs Native nations of sovereignty, with systems of law and justice "repeatedly [being] used … to coerce racial/ethnic group deference to Euro-American power."[31] This colonial context is necessary to understanding Native incarceration, as viewing individual actions as isolated events "overlooks the social and historical origins of the behavior."[32] It would be specious to view the mass incarceration of Black Americans as a consequence of some innate Black waywardness rather than the realization of the United States's pursuit of subjugating Black bodies. The same is true for Native peoples,

[29] Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Austin: University of Texas Press, 1998), 4.
[30] Ross, *Inventing the Savage*, 1.
[31] Ross, *Inventing the Savage*, 12.
[32] Ross, *Inventing the Savage*, 12.

for whom the speciousness also lies in the reality that the notion of a singular "Native America" is a colonial taxonomy that brush-paints over a diverse continent of nations. Investigating how the United States exercises its power over Native people is key to grasping its use of confinement to repress Native individuals and communities.

Native women, in particular, face a landscape heavily populated by the prison, which usurps spaces theoretically promising socioeconomic stability and advancement, such as marriage, the workplace, and the school. Incarcerated Native women, already overrepresented in the national prison population by a factor of 3.5,[33] have typically not had the chance to complete their education or hold well-paying jobs, with "53 percent … not employed prior to their incarceration" and most of the remainder having been in "service jobs or other poorly paid positions."[34] It is essentially punishment targeting the poor, and racial and gender pay gaps ensure that Native women face exceptional difficulty in escaping this cycle of imprisonment and hardship. In systematically hindering Native women's ability to achieve prosperity and retain freedom, the United States uses its near-monopoly over the law to exert social control.

The causes of conviction reflect this phenomenon. Of the Native women in state prisons, one-third are detained for drug offenses, making it the most common charge for which they are incarcerated.[35] Nearly half "were under the influence of drugs or alcohol when they committed the crime of which they were convicted,"[36] demonstrating the United States's targeting of drug use, which for most is not a voluntary choice but the result of generational addiction or the need for a coping mechanism. By situating Native

[33] "Native incarceration in the U.S.," Prison Policy Initiative, accessed April 3, 2025, https://www.prisonpolicy.org/profiles/native.html.
[34] Ross, *Inventing the Savage*, 75.
[35] Ross, *Inventing the Savage*, 75.
[36] Ross, *Inventing the Savage*, 75.

women in a political and psychological landscape rife with structural stressors such as wage inequality and barriers to education, the US steers them toward substance abuse, then locks them away for drug offenses.

A similar pattern exists for violent crimes. Of the thirty-two percent of incarcerated Native women so convicted, nearly one in three "were at one time victims of sexual or physical abuse," the vast majority of whom "committed a violent act against a relative or intimate partner," usually a male abuser.[37] Punished for defending themselves at home and for seeking economic self-sufficiency, Native women are hemmed in from all sides. The state not only neglects to attend to their social and economic needs, but it also uses the law to actively endanger them, situating them at the perilous intersection of domestic and vocational vulnerability. Some of the other prevalent grounds for prosecution include "writing 'bad checks' to adequately care for their children"; pleading guilty to share sentencing years with their spouses, who too face disproportionate policing and sentencing; and cases involving married couples with foster children, in which "judges assumed the wives were also responsible" for their husbands' assaulting of the adoptees, even when the men "recognized their wives' innocence."[38] For Native women, escaping the risk of incarceration poses an immense challenge—if one is not imprisoned for being poor or living in a toxic household, resorting to substances to cope with unending oppression is a likely candidate for criminal conviction. This difficulty points to targeted systemic marginalization aimed at exerting social control. If no emphatic assurance exists that they can live non-criminalized lives, and if attempts to travel beyond the socioeconomic or

[37] Ross, *Inventing the Savage*, 76.
[38] Ross, *Inventing the Savage*, 90.

geographic site to which they supposedly belong are routinely met with incarceration, then Native women's chances of finding safety, amassing meaningful power, or charting a path out of the bottom tiers of the United States's socioracial hierarchy plummet.

For Native women, facing violence on a daily basis is the norm. Being women, people of color, Native, and beneath the poverty line at a higher rate than any other gender-racial demographic in the country,[39] the US's systems of power situate them at the intersection of several avenues of brutality. A study conducted at the Montana Women's Correctional Center "exposes that 90 percent of the imprisoned women are victims of prior abuse," mostly perpetrated by family.[40] One prisoner's haunting account tells of her white stepfather and mother assaulting her: "[W]hen I was seven years old, my adopted father out-and-out raped me. And my mother told me, 'That's what you deserve. You're an Indian—that's what you deserve.' I can't forgive her for that."[41] Another cannot even remember details of her youth, with the "few memories of my early childhood" being "sporadic, traumatic, laced with violence towards me"; as for the rest, she says, "I've done a pretty good job of blocking them out … I don't want to remember."[42] Abuse by police officers and prison guards is widespread, too, though considerably less testimony exists due to the magnified power disparity between the violators and those violated.[43] Trapped in a revolving door that rotates them at a dizzying rate from legal, carceral injustice to familial and economic brutality and back again, Native women seldom achieve refuge from systemic violence, obfuscating their prospects of reaching positions threatening to their persecutors. Perpetually suffusing

[39] "Poverty rate in the United States in 2022, by race and ethnicity," Statista, November 3, 2023, https://www.statista.com/statistics/200476/us-poverty-rate-by-ethnic-group/.
[40] Ross, *Inventing the Savage*, 93.
[41] Ross, *Inventing the Savage*, 96.
[42] Ross, *Inventing the Savage*, 94.
[43] Ross, *Inventing the Savage*, 98.

their lives with physical and emotional trauma robs them of the capacity to grow comfortable, safe, and prosperous, and allows the United States to dictate the confines of their existence. The unclear, disjointed nature of policies surrounding tribal criminal jurisdictional power and the lack of guarantee that Native nations will possess purview over those who victimize their members mean the United States's oppression of Native women both patrols the limits of what they are permitted to do and cripples tribal power by rendering tribes unable to safeguard their members—one of the most basic requirements of a government.

IV. Recent Federal Rulings

Although representing a major victory for tribal sovereignty, the 2020 Supreme Court ruling in *McGirt v. Oklahoma* was not indicative of systemic change in the United States' treatment of tribes and tribal purview, but rather the result of a confluence of favorable factors for the Five Tribes. As the Choctaw legal student Adam Goodrum explains in his 2022 journal article "Meeting the *McGirt* Moment: The Five Tribes, Sovereignty & Criminal Jurisdiction in Oklahoma's New Indian Country," the Court decided in a 5-4 vote "that the [Creek] Nation's reservation in eastern Oklahoma … was never disestablished by Congress," and indicated openness to similar findings concerning the other nations of the Five Tribes, whose treaties with the US resemble the Creek Nation's.[44] The first US-Creek treaty, ratified in 1832, "solemnly guarantied land" and "boundary lines which… secure a… permanent home," and a later treaty from 1856 confirmed that the reservation was "forever set apart as a home" for the Creeks, who

[44] Adam Goodrum, "Meeting the McGirt Moment: The Five Tribes, Sovereignty & Criminal Jurisdiction in Oklahoma's New Indian Country," *American Indian Law Review* 46, no. 1 (2021-2022): 201-202, https://www.jstor.org/stable/27154777.

held "the unrestricted right of self-government" free from annexation into "any Territory or State."[45] As a consequence of *McGirt*, the Creek Nation gained criminal jurisdiction over large swaths of Oklahoma home to millions of people. The Court's ruling in favor of tribal jurisdiction may appear to be a step in the right direction for Native sovereignty and the United States' treatment of Native peoples.

However, the jurisprudence of Neil Gorsuch—the case's swing vote—and the need for Supreme Court intervention prove this is not accurate. Rather than forecasting systemic change, the result of *McGirt* stemmed from Gorsuch's doctrinal inclination toward honoring treaties that proclaim tribal sovereignty. That Gorsuch's personal inclinations decided the direction in which the Court decided *McGirt* indicates that change at the roots of the United States's relationship with Native nations has yet to come. It would require real institutional progress, which one justice's unexpectedly favorable attitude toward tribal autonomy does not qualify as. Some argue Gorsuch's partiality originates in his experience on the 10th Circuit Court of Appeals, where he adjudicated numerous cases involving Native nations and supposedly built up an intimate understanding of the importance of tribal self-determination, or in his upbringing in the West, where the increased presence of reservations would have exposed him to Native marginalization.[46] In truth, his literalist principles produced the signs of sympathy in *McGirt*. While countering Oklahoma's claims that "historical practices and demographics" and the allotment system "proved disestablishment,"[47] he cited the original text of the treaties to explain why the reservations still existed, stating that, "[w]hen interpreting Congress's work in this arena, no less than any other, our

[45] Goodrum, "Meeting the McGirt Moment," 205-206.
[46] Mark Joseph Stern, "The Surprising Reason Neil Gorsuch Has Been So Good on Native Rights," Slate, June 15, 2023, https://slate.com/news-and-politics/2023/06/neil-gorsuch-so-good-native-americans-scotus.html.
[47] Goodrum, "Meeting the McGirt Moment," 206-207.

charge is usually to ascertain and follow the original meaning of the law before us."[48] That is, led by Gorsuch, the Court relied on originalism and textualism to rebut Oklahoma's arguments. This method of interpreting the law does not inherently favor tribes, as the steadfast anti-sovereignty track records of other justices with similar doctrines show. Antonin Scalia, who "embraced originalism," voted against tribal interests five-sixths of the time during his Supreme Court tenure, making him "'one of the most rabidly anti-Native justices' ever to serve on the court."[49] Current justice and notorious originalist Clarence Thomas is no less vehement in his anti-Nativism. He believes the Supreme Court ought to "clarify … the idea of a generic trust relationship"—the ward-guardian dependency established in *Cherokee Nation* nearly two centuries ago—because it does not exist in the Constitution.[50] Not only could Gorsuch certainly have been against tribal rights without his jurisprudence, but most other justices who do share his originalist, textualist lens have a far less favorable attitude toward Native Americans.

Moreover, although *McGirt* is a triumph for the Five Tribes, it perpetuates rather than rectifies the system of management with which the United States treats tribes. That, without the *McGirt* decision, its consequences would not have transpired is obvious, yet what this signifies is that Native communities seeking political power must still rely on policies and verdicts handed down from US authorities. In this case, the territory and jurisdiction of the Creek Nation were beholden to what the Supreme Court decreed—an instance of the United States's judgment determining which tribes deserve

[48] McGirt v. Oklahoma, 591 U.S. 1, 18 (2020).
[49] Adam Liptak, "Justice Neil Gorsuch Is a Committed Defender of Tribal Rights," *The New York Times*, June 15, 2023, https://www.nytimes.com/2023/06/15/us/politics/neil-gorsuch-supreme-court-opinions.html.
[50] Matt Ford, "Clarence Thomas Wants to Demolish Indian Law," *The New Republic*, June 23, 2023, https://newrepublic.com/article/173869/clarence-thomas-wants-demolish-indian-law.

certain rights and which do not, in which both Gorsuch and the liberal justices were complicit. The US still owns the rights of the Creek Nation, and just as it can give, so too can it take away. Despite transferring power from a state to a tribe, *McGirt* is not a break from the United States' techniques of control. The continuing Native dependence on legal success, combined with *McGirt*'s outcome having relied on Gorsuch's unique blend of conservative originalism and honest textualism, does not suggest systemic shifts.

V. Conclusion

The US manipulates tribal authority, both expanding and shrinking it, to maintain a steady erosion of Native power. By confining and confusing tribal influence, the federal government cuts away at Native peoples' sovereignty, denying them their rights to culture, land, and well-being. Enlarging it, although ceding jurisdiction to tribal leaders, ultimately reinforces the vector of recognition pointing from the settler toward the Native. The consequent volatility brings its own social control to bear on Native communities by denying tribal governments the basic guarantee that they can protect their people. The United States's relationship with Native nations rests upon a perniciously destructive framework that attacks Native self-determination from innumerable angles while legitimizing itself through claims of care or cooperation. Through judicial cases like *Cherokee Nation v. Georgia* and *McGirt v. Oklahoma*, as well as federal policies like the Dawes Act and the practices of agencies like the Forest Service and the Office of Federal Acknowledgement, the US actively limits and fragments Native autonomy. These legal and bureaucratic mechanisms, although internally disjointed, work in concert to destabilize tribal authority, ensuring that sovereignty and jurisdiction remain conditional, partial, and revocable. Similarly,

federal gestures toward recognition or progress camouflage, and thus help to perpetuate, the keeping of Native political capacities contingent on settler terms. By instating boundaries within and around Native communities' scopes of authority, particularly their legal jurisdiction, the United States works to erode Native power.

The Issue of "Adequate" Care for Incarcerated Diabetics Under Estelle and the ADA

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Abstract

Diabetes is one of the few chronic medical conditions that requires the individual, not a doctor, to make healthcare decisions for themselves numerous times a day. This paper will analyze the consequences of this unique phenomenon in the context of correctional facilities, where inmates are deprived of the ability to make independent treatment decisions, even by legislation that is meant to protect them. While the Eighth Amendment, the Fourteenth Amendment, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act can provide effective avenues to ensure proper treatment for many incarcerated people with disabilities, for diabetics, they currently do not. This paper will begin with a brief overview of the medical complications caused by inadequate diabetes care and what rights to medical care diabetics in prison are guaranteed. It will then explain why the court's understanding of the importance of diabetes care must be refined, as for many diabetic prisoners, their pleas for proper care are heard only after amputation, blindness, or death—all of which would have been preventable, given a more concrete definition of adequate care.

I. Introduction

While a constitutional right to healthcare is not guaranteed, people in correctional facilities are assured a minimum level of medical treatment. Throughout past litigation, prisoners suffering from inadequate medical care have taken two approaches to achieving relief. This paper will examine both of these approaches, their outcomes for prisoners with diabetes, and show where courts have made rulings that impose serious health consequences on diabetic prisoners, contrary to the intentions of protective statutes such as the Eighth Amendment, *Estelle v. Gamble*, the ADA, and Section 504 of the Rehabilitation Act. This paper will argue that the court's current understanding of what constitutes cruel and unusual punishment, as well as noncompliance with ADA and Section 504 guidelines, is inadequate in the context of diabetes management in incarceration facilities. Courts must recognize that long-term health consequences caused by insufficient diabetes care should qualify as "cruel and unusual punishment" under the Eighth Amendment. Prisons and jails must, therefore, reassess the limited treatment options they offer to diabetic inmates and change their guidelines to follow ADA/Section 504-mandated conditions. In many cases, this compliance should take the form of increased ability for self-management of diabetes and access to life-saving diabetes treatment options such as insulin pumps and CGMs. Denial of access to these technologies should be seen as causal for both short- and long-term diabetes-related complications.

II. Background

To begin analyzing the oversights of current laws when it comes to the treatment of prisoners with diabetes, it is important first to understand the disease itself. Diabetes,

as defined by the Centers for Disease Control and Prevention (CDC), is "a chronic (long-lasting) health condition that affects how your body turns food into energy" and comes in three distinct forms: type 1, type 2, and gestational diabetes.[51] Diabetes refers to a condition where the body cannot produce sufficient insulin (in the case of type 2) or any amount of insulin (in the case of type 1). Insulin is a hormone that allows for the processing and usage of glucose—the body's primary source of energy.[52] People with diabetes constantly have to manage their blood glucose levels (also referred to as "blood sugar levels" or "bg") to prevent both hyperglycemia and hypoglycemia—harmful conditions where the body has either too much or too little sugar.

When the quality of diabetes treatment is poor, it permanently damages the body and can lead to severe health consequences. One indicator of this damage is a person's hemoglobin A1C (HbA1c) levels, which show the level of glycated hemoglobin in the bloodstream. Simply put, HbA1c levels can be viewed as a measure of chronic hyperglycemia, and higher HbA1c levels mean the patient has more poorly regulated blood glucose levels.[53] When HbA1c levels are within 5% to 7%, they are considered normal. However, when they go beyond that range, they become indicative of a

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[51] Type 1 diabetes is an autoimmune disorder in which the body is no longer able to produce *any* insulin. This makes it the most severe form of diabetes, as in type 2 diabetes and gestational diabetes the body can usually still produce insulin, just not a sufficient quantity. Type 1 diabetes is not caused by a person's diet and/or lifestyle, and usually develops in children (hence its nickname, "juvenile diabetes"). Type 2 diabetes has a variety of causes, but diet and health choices can increase the risk of a diagnosis. Gestational diabetes develops only during pregnancy, and usually resolves after giving birth—although it can sometimes progress into a form of type 2 diabetes. See: Centers for Disease Control and Prevention, "Diabetes Basics," www.cdc.gov, May 15, 2024, https://www.cdc.gov/diabetes/about/index.html.

[52] Saidur Rahman, "Role of Insulin in Health and Disease: An Update," *International Journal of Molecular Sciences* 22, no. 12 (2021), https://doi.org/10.3390/ijms22126403.

[53] "The A1C Test & Diabetes," National Institute of Diabetes and Digestive and Kidney Diseases, 2018, https://www.niddk.nih.gov/health-information/diagnostic-tests/a1c-test.

progressive risk factor for cardiovascular disease, neuropathy, kidney damage, blindness, amputations of the extremities, and death.[54]

Importantly, when HbA1c levels are below 7%, diabetes is not significantly associated with these health conditions, but when HbA1c levels go above 7%, the risk is heavily elevated.[55] For example, "each 1% higher A1C is associated with 15–20% greater cardiovascular risk;"[56] HbA1c levels greater than 7% "were associated with a five-fold increased risk" of dementia;[57] and, while diabetics with HbA1c levels lower than 7% were at a very low risk for blindness, "51% of the patients with long-term mean HbA1c above 9.5% developed proliferative retinopathy."[58] While there is limited literature on the empirical HbA1c levels of incarcerated diabetics, one study in California found that diabetic prisoners had a mean A1C of 10.0% during incarceration, putting them at a high risk for many, if not all, of the aforementioned conditions.[59] Moreover, the population of diabetics in prison is significant—an estimated "9% of the incarcerated population has diagnosed diabetes."[60]

Treatment for diabetes is unique, as "diabetics are one of few, if not the only, individuals who must make day-to-day treatment decisions without the explicit

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[54] "Hyperglycemia (High Blood Sugar)," Cleveland Clinic, March 2, 2023, https://my.clevelandclinic.org/health/diseases/9815-hyperglycemia-high-blood-sugar.
[55] Alfredo Ramirez et al., "Elevated HbA1c Is Associated with Increased Risk of Incident Dementia in Primary Care Patients," *Journal of Alzheimer's Disease* 44, no. 4 (February 19, 2015): 1203–12, https://doi.org/10.3233/jad-141521.
[56] Matthew Riddle et al., "Epidemiologic Relationships between A1C and All-Cause Mortality during a Median 3.4-Year Follow-up of Glycemic Treatment in the ACCORD Trial," *Diabetes Care* 33, no. 5 (April 28, 2010): 983–90, https://doi.org/10.2337/dc09-1278.
[57] Ramirez et al., "Elevated HbA1c Is Associated with Increased Risk of Incident Dementia in Primary Care Patients."
[58] Maria Nordwall et al., "Impact of HbA1c, Followed from Onset of Type 1 Diabetes, on the Development of Severe Retinopathy and Nephropathy: The VISS Study (Vascular Diabetic Complications in Southeast Sweden)," *Diabetes Care* 38, no. 2 (December 15, 2014): 308–15, https://doi.org/10.2337/dc14-1203.
[59] Kirnvir K. Dhaliwal et al., "Diabetes in the Context of Incarceration: A Scoping Review," *EClinicalMedicine* 55 (January 2023): 101769, https://doi.org/10.1016/j.eclinm.2022.101769.
[60] Jennifer Sherman, "Diabetes Management in Detention Facilities: A Statement of the American Diabetes Association," *Diabetes Care* 47, no. 4 (March 25, 2024): 544–55, https://doi.org/10.2337/dci24-0015.

direction of their doctor."[61] Type 1 diabetics make an estimated 180 medical decisions per day to address how their body is feeling and reacting to insulin, glucose intake, and other factors.[62] This form of treatment is known as self-management insulin therapy, essentially a regimen where the diabetic tries to emulate the functions of a healthy pancreas by injecting themselves with insulin to precisely manage their blood sugar levels.

While a comprehensive analysis of the techniques of diabetes management and treatment is outside the scope of this article, it is important to define the medical issues diabetics can face. The primary concerns of diabetes management are addressing hyperglycemia ("high blood sugar") and hypoglycemia ("low blood sugar"). Hyperglycemia, in the short term, can lead to diabetic ketoacidosis, a life-threatening situation where the body has far too much sugar and not enough insulin. Prolonged hyperglycemia throughout the duration of a person's life drastically increases the risk of longer-term complications, including, but not limited to, amputation of the extremities due to vascular degeneration, blindness, and a shortened lifespan.[63] Hypoglycemia is also acutely life-threatening, as when the body lacks sufficient amounts of sugar, it can cause fainting and, if untreated, death. Hypoglycemia, in its milder form, can be treated by ingesting fast-acting carbohydrates, essentially pure sugars that will quickly raise blood sugar levels to a normal range.[64] Diabetes treatment requires constant attention to

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[61] Lauren Hubbard, "Inadequate Diabetes Care in Correctional Facilities & the Need For Relief under the ADA and Section 504," North Carolina Civil Rights Law Review 4, no. 2 (April 1, 2024): 429–54, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1032&context=nccvlrts, 439.
[62] Ibid., 439.
[63] "Hyperglycemia (High Blood Sugar)," Cleveland Clinic.
[64] "Hypoglycemia (Low Blood Sugar)," Cleveland Clinic, 2023, https://my.clevelandclinic.org/health/diseases/11647-hypoglycemia-low-blood-sugar.

prevent a potentially disastrous spike or fall in blood glucose levels, leading to severe health consequences.

To prevent hypo- and hyperglycemia, diabetics use a variety of medical tools to raise or lower their blood sugar, depending on their immediate needs. They are only able to do this with the assistance of medical devices such as blood glucose monitors (which allow people with diabetes to check their blood sugar numbers at any given moment), continuous glucose monitors or CGMs (devices implanted on the body that passively measure blood glucose levels on a regular basis), and, perhaps most importantly, insulin pumps or insulin pens/syringes. The insulin pump, widely considered to be the most effective option, is a small device that is connected to a needle inserted into fatty tissue and replaced every few days.[65] These pumps can inject insulin from a reservoir on the device that is connected to the body through a small tube or cannula. Notably, they also allow for passive, regular doses of insulin to be given (a "basal injection" or "basal rate"), which allows for much more effective control over blood glucose numbers.[66] However, in prisons and jails, diabetic inmates often find that access to treatment is heavily restricted, unavailable, or inadequate.

III. The First Approach: The Eighth Amendment and *Estelle v. Gamble*

The first argument for medical care is rooted in the Eighth Amendment's protection against "cruel and unusual punishment."[67] In the landmark case *Estelle v. Gamble* (1976), the Supreme Court held that "failure to provide adequate medical care

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[65] "4 Ways to Take Insulin," Center for Disease Control and Prevention, May 13, 2024, https://www.cdc.gov/diabetes/about/4-ways-to-take-insulin.html.
[66] Guido Freckmann et al., "Accuracy of Bolus and Basal Rate Delivery of Different Insulin Pump Systems," *Diabetes Technology & Therapeutics* 21, no. 4 (April 2019): 201–8, https://doi.org/10.1089/dia.2018.0376.
[67] "U.S. Constitution, Amendment VIII", https://constitution.congress.gov/constitution/amendment-8/.

to incarcerated people as a result of deliberate indifference violates the Eighth Amendment's prohibition against cruel and unusual punishment."[68] Importantly for diabetics who face long-term health consequences due to inadequate care, the Supreme Court's later decision in *Helling v. McKinney* (1993) expanded the *Estelle* decision to protect "against future harm to inmates."[69] Furthermore, under the equal protection clause, the Fourteenth Amendment expands the protection from deliberate indifference to people awaiting trial in jails.[70]

The court's rulings in *Estelle* and *Helling* obligate prisons to provide some level of attention to the medical needs of prisoners, including long-term medical needs. However, the rulings courts have given post *Estelle* and *Helling* are often inadequate from a healthcare perspective and unduly punish diabetic prisoners by considering even medically insufficient treatment as "adequate." Instead of their current understanding, courts must recognize that, in the context of diabetes, inadequate care is a form of punishment. Currently, when "a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second-guess medical judgments."[71] In some medical contexts, contesting "adequacy" may simply refer to comfort or ease of access, but in the context of diabetes treatment, courts must recognize that the level of care is proportionate to the risk of degenerative diseases and death.

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[68] Marcella Alsan et al., "Health Care in U.S. Correctional Facilities—a Limited and Threatened Constitutional Right," ed. Debra Malina, *New England Journal of Medicine* 388, no. 9 (March 2, 2023): 847–52, https://www.nejm.org/doi/full/10.1056/NEJMms2211252, 847.
[69] Helling v. McKinney (United States Court of Appeals for the Ninth Circuit June 18, 1993)., 33.
[70] Hubbard, "Inadequate Diabetes Care in Correctional Facilities & the Need For Relief under the ADA and Section 504," 434.
[71] Joel Thompson, "Today's Deliberate Indifference: Providing Attention without Providing Treatment to Prisoners with Serious Medical Needs," *Harvard Civil Rights Civil Liberties Law Review* 5, no. 2 (2010): 636–54, https://journals.law.harvard.edu/crcl/wp-content/uploads/sites/80/2009/06/635-6541.pdf, 638.

Eighth and Fourteenth Amendment claims rarely succeed not only because of courts' hesitancy to contest adequacy but also due to the high burden set by *Estelle*, as plaintiffs must prove the facility's "deliberate indifference" through both an "objective" and a "subjective" standard.[72] As explained in *Hunt v. Uphoff* (1999) citing *Farmer v. Brennan* (1994), "the medical need must be sufficiently serious to satisfy the objective component… [and,] in terms of the subjective component, i.e., the requisite deliberate indifference, a plaintiff must establish that defendant(s) knew he faced a substantial risk of harm and disregarded that risk, 'by failing to take reasonable measures to abate it.'"[73] While the consensus judicial opinion is that diabetes is objectively a "serious medical condition,"[74] satisfying the "objective" standard, it is extraordinarily difficult to prove the "subjective" component. "Federal courts have stated that to constitute deliberate indifference, 'treatment must be so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness'… for example, prison officials deliberately ignoring the express orders of an incarcerated person's physician. Negligent medical treatment and even medical malpractice would not meet the 'deliberate indifference' requirement."[75]

Yet, negligent medical treatment and medical malpractice in diabetes care are so deficient that they directly result in gruesome, torturous, and irreversible health consequences. To suggest otherwise would require proof that either the consequences of current medical treatment for incarcerated diabetics do not result in such health

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[72] Benjamin Eisenberg and Victoria Thomas, "Legal Rights of Prisoners and Detainees with Diabetes: An Introduction and Guide for Attorneys and Advocates" (American Diabetes Association, 2024), http://main.diabetes.org/dorg/living-with-diabetes/correctmats-lawyers/legal-rights-of-prisoners-detainees-with-diabetes-intro-guide.pdf#page=18.40, 10.
[73] Hunt v. Uphoff (United States Court of Appeals, Tenth Circuit 1999), 3.
[74] Eisenberg and Thomas, "Legal Rights of Prisoners and Detainees with Diabetes: An Introduction and Guide for Attorneys and Advocates," 10.
[75] Alsan et al., "Health Care in U.S. Correctional Facilities—A Limited and Threatened Constitutional Right," 848.

consequences or that the consequences themselves are not severe enough to constitute "cruel and unusual punishment." The cause and effect are not separable—if it is the inadequate treatment that results in amputation, blindness, and death, then the inadequate treatment itself should be viewed as "cruel and unusual punishment."

IV. The Second Approach: The ADA and Section 504 of the Rehabilitation Act

The ADA and Section 504 of the Rehabilitation Act offer another avenue to adequate medical care in prisons. Section 12132 of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[76] Since *Pennsylvania Dept. of Corrections v. Yeskey* in 1998, courts have held that jails and state prisons are considered "public entities" and therefore must abide by the ADA.[77] Section 504 expands this protection to "federal prisons, jails, and detention centers—as well as in state prisons, private prisons, local jails, and detention centers that receive federal funds."[78]

However, much like the *Estelle* defense, the ADA and Section 504 do not, in practice, protect diabetic prisoners from undue hardships. There is a clear discrepancy between the goals of the ADA and the outcomes of ADA-based pleas for relief and ADA-governed prison policy. The ADA was meant to promise "equal opportunity, full participation, independent living, and economic self-sufficiency" for people with

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[76] "Americans with Disabilities Act of 1990, as Amended," ADA.gov (US Department of Justice Civil Rights Division, 1990), https://www.ada.gov/law-and-regs/ada/#subchapter-ii---public-services-title-ii.
[77] Pennsylvania Dept. of Corrections v. Yeskey (United States Court of Appeals, Third Circuit 1998).
[78] Hubbard, "Inadequate Diabetes Care in Correctional Facilities & the Need For Relief under the ADA and Section 504," 443.

disabilities.[79] However, when a judge sentences someone with diabetes, there is no reasonable expectation that their punishment also includes blindness, dementia, amputations of the extremities, or an early death. Even in comparison to other prisoners, inmates with diabetes are forced to suffer unique punishments as a direct result not of their sentence but of their disability.

Furthermore, even if such medical punishment could be considered acceptable during a person's sentence, the effects of that punishment are not limited to just the time served in prison. An estimated "95% of the prison population will at some point reenter society,"[80] but for diabetic prisoners, the medical harms they suffer because of inadequate care will carry over into their life after prison. As Lauren Hubbard writes in the North Carolina Civil Rights Law Review, "Irreversible diabetic complications, such as nerve damage, amputation, and bone and joint problems, can lead to the inability of individuals to work and an increased reliance on the social safety net once released. And individuals who are able to work but also face diabetes-related complications often have decreased productivity due to more severe symptoms and consistent medical appointments. Therefore, correctional institutions' failure to provide adequate medical care to incarcerated diabetics hinders both their ability to fully participate in society and their economic self-sufficiency upon release,"[81] explicitly contrary to the promise of the ADA to protect against those exact issues.

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[79] Joseph Biden, "Proclamation 10426—Anniversary of the Americans with Disabilities Act, 2022," Authenticated US Government Information, July 25, 2022, https://www.govinfo.gov/content/pkg/DCPD-202200657/pdf/DCPD-202200657.pdf.
[80] "Reentry Trends in the United States," Bureau of Justice Statistics (US Department of Justice, 2018), http://www.bjs.gov/content/reentry/reentry.cfm.
[81] Hubbard, "Inadequate Diabetes Care in Correctional Facilities & the Need For Relief under the ADA and Section 504," 449.

To fulfill the promises made by the ADA, there must be clarity as to what qualifies as adequate care and a commitment to uphold that standard. Even within the American Diabetes Association's article on "The Legal Right to Medical Care in Detention Facilities," adequate care is defined by a list of things it "may" include.[82] Amorphous definitions of adequate care allow prisons to overlook the plight of diabetic prisoners that goes far beyond any semblance of fairness or reasonable restrictions. While the Federal Bureau of Prisons Clinical Guidance does suggest that intensive insulin therapy should be provided to prisoners with diabetes, along with access to blood glucose meters,[83] the specifics of what that care looks like are unclear, allowing prisons to neglect the medical needs of prisoners without breaking any rules. Furthermore, cost-cutting measures and the use of private contractors undermine even the limited protection that the Federal Bureau of Prison's guidelines guarantee.[84] For example, in 2019, "there were 12 diabetic ketoacidosis (DKA) related deaths in Georgia jails and prisons, most likely a result of inadequate diabetes care."[85] Numerous lawsuits have been filed against CoreCivic—the company that runs one of Tennessee's largest and newest correctional facilities—on the basis of inadequate diabetes care, and there are a litany of cases where prisoners have individually been denied diabetes care, died, and had their diabetes-related deaths covered up.

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[82] "The Legal Right to Medical Care in Detention Facilities" (The American Diabetes Association, 2025), https://diabetes.org/sites/default/files/2025-01/The-Legal-Right-to-Medical-Care-in-Detention-Facilities-Fact-Sheet-2023.pdf.

[83] "Federal Bureau of Prisons Clinical Guidance on the Management of Diabetes" (Federal Bureau of Prisons, 2017), https://www.bop.gov/resources/pdfs/diabetes_guidance_march_2017.pdf#page=20.42, 17, 21

[84] "Diabetes behind Bars: Challenging Inadequate Care in Prisons," *The Lancet Diabetes & Endocrinology* 6, no. 5 (May 2018): 347, https://doi.org/10.1016/s2213-8587(18)30103-7.

[85] Mike Hoskins, "For People with Diabetes, Arrest and Incarceration Could Be Lethal," Healthline, August 20, 2020, https://www.healthline.com/healthy/diabetes-endangered-arrest-and-incarceration?utm_source=ReadNext#Diabetes-care-behind-bars.

The ADA was extended to people in prisons to ensure they do not face an undue burden simply because they happen to have a disability and their fellow prisoners do not. As it stands today, there is no parity between the sentence of a person with diabetes and a person without it. Even if both inmates are housed in the same prison for the same sentence, the prisoner with diabetes is discriminated against by virtue of being disabled. The persistence of ambiguity in the definition of adequate care and the unwillingness of courts to uphold ADA standards in prisons violate the rights of disabled prisoners and inflict avoidable harm on diabetic prisoners.

V. Rethinking "Adequate Care"

Adequate care must be rethought in the context of diabetes to include the long-term health effects of poor diabetes management. It is well known that insulin pumps and CGMs, which allow for independent, adaptable treatment, significantly reduce HbA1c levels, rates of diabetic ketoacidosis, and hospitalizations due to diabetes,[86] and allowing for those forms of treatment would be a massive step towards reducing the unnecessary deaths and injuries of diabetic prisoners. However, at minimum, it is crucial that prisons be required to provide insulin multiple times a day, regular blood sugar checks, and access to fast-acting sugar in the event of hypoglycemia.

Courts have begun to recognize this need in certain circumstances. In *Montez v. Owens*, a court found a violation of the ADA and Section 504 when the correctional institution did not keep a diabetic medication in stock, and the plaintiff once had to wait three weeks for it. Most notably, the court in *Montez* stated that "a diabetic in prison has

[86] Kajal Gandhi et al., "Insulin Pump Utilization in 2017–2021 for More than 22,000 Children and Adults with Type 1 Diabetes: A Multicenter Observational Study," *Clinical Diabetes* 42, no. 1 (October 12, 2023): 56–64, https://doi.org/10.2337/cd23-0055.

no option to seek appropriate medication on his own or through non-prison sources. To deny a diabetic needed medication is to treat that individual differently, as the non-diabetic does not need [diabetes medication] or insulin to keep on living."[87] The court's interpretation of "adequate care" in *Montez* was based on comparing the conditions of diabetics and non-diabetics in prison. When courts recognize that insulin is necessary not three weeks in the future but on a daily basis, they are coming to terms with the real medical needs of diabetics.

VI. Conclusion

Inadequate care is not simply a matter of opinion—it's a matter of medical fact. Existing protections for prisoners with disabilities, such as the *Estelle* protection from deliberate indifference and the ADA/Section 504, must be expanded to cover not just the bare-minimum level of treatment to ensure someone remains alive but also holistic treatment that takes into account the unique nature of chronic disabilities like diabetes. Courts must critically examine the actual medical needs of prisoners and come to terms with the harms of ignoring that reality. Diabetes is unique in how drastically its side effects depend on the quality of treatment, but it is not the only chronic illness that is exacerbated by poor treatment. Courts must, more generally, adopt a critical lens when analyzing the standard of care in prisons. When the quality of care for illnesses is poor, the risks of horrific medical consequences skyrocket. It is for this reason that courts must rethink their implied separation of treatment and consequences. While courts have given relief to plaintiffs after a serious injury is sustained,[88] they must recognize

[87] Hubbard, "Inadequate Diabetes Care in Correctional Facilities & the Need For Relief under the ADA and Section 504," 446.
[88] "Georgia to Pay $550,000 to Convicted Felon for Amputation," AP News, September 23, 2017, https://apnews.com/general-news-1a49ef1f1bfb4cd0b603fdcb41817287.

that if they find the consequences of inadequate care in violation of the Eighth Amendment or the ADA, then they should also view the conditions that directly result in those consequences as illegal.

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A Review of Campaign Finance Reform on State and Local Levels in the Wake of *Citizens United v. FEC*

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Abstract

The Supreme Court's decision in *Citizens United v. FEC* represented one of the greatest fundamental shifts in campaign finance law in U.S. history. It effectively nullified Congress' long history of attempting to set limits on campaign contributions. Current academic focus on how to reform campaign finance has focused on national reform programs while neglecting experiments at the state and local levels. This paper reviews three such efforts—New York's public campaign financing program, Seattle's Democracy Voucher Program, and St. Petersburg's anti-foreign influence legislation—and their likelihood to survive legal scrutiny. I conclude that the New York and Seattle programs are likely to survive further constitutional scrutiny, but predict that St. Petersburg legislation will be struck down in part.

Campaign finance has been a sticky subject in American politics throughout history and has only become more controversial in the wake of the 2010 *Citizens United v. FEC* ruling by the Supreme Court. The court's ruling that the indirect spending of corporations and unions is constitutional speech protected by the First Amendment has led to the largest influx in campaign donations in U.S. history.[89] This has sparked outcry from Congress, members of the public, and many in the legal field who feel the power of corporate entities has grown too large. Most attention on this topic has revolved around how the ruling could be overturned or how Congress could pass new national reform. Far less attention has been given to how state legislatures and other local governments have updated or expanded their campaign finance laws in the wake of *Citizens United*. Federalism enables these governments to be the laboratories of democracy. Assembling these reform attempts would assist in condensing information on solutions to campaign finance reform to inform federal policy. In this paper, I will first provide context on the history of campaign finance reform before covering a brief overview of the debate on corporate personhood in the wake of *Citizens United*. Next, I will trace how the governments have implemented election funding reform in New York State and Seattle and attempted to directly limit the influence of foreign corporate entities in St. Petersburg, Florida. I will analyze how these efforts have navigated constitutional restrictions extending from *Citizens United v. FEC*.

I. Tracing the History

Campaign finance regulation has been an ongoing battle since the Reconstruction Era and has evolved with the changing influence of donations. The Naval

[89] Mayersohn, David Meyers and Andrew. "By the Numbers: 15 Years of Citizens United." OpenSecrets News

Appropriations Act of 1867, limiting campaign contributions from dock workers, and the Pendleton Civil Service Act, establishing a merit-based system of employee appointments, were two early such efforts. Later, Wall Street donations to campaigns from 1896–1904 caused clamor for reform against the speech of corporations, resulting in the Tillman Act. The act prohibited contributions from banks and corporations to federal elections, but lacked sufficient enforcement mechanisms. In 1971, the goals of these previous reforms were channeled into the Federal Election Campaign Act of 1971, also known as FECA. FECA placed caps on the amount of money an individual could spend on a campaign and required that campaign financing above a certain threshold must be reported.[90] The act was amended in 1974 in the wake of the Watergate scandal. It was then subsequently challenged in the case *Buckley v. Valeo,* beginning the modern battle over campaign finance. A key debate in the Buckley case was whether or not the individual campaign donation limits and campaign expenditure limits violated First Amendment free speech protections. The plaintiffs argued that the individual expenditure limits discriminated against non-incumbent candidates and that expenditure limits hampered the free speech of candidates to reach wider audiences with their messages. The court upheld the individual campaign donation limit, as well as the total donation limit to candidates, on the grounds that such restrictions did not violate freedom of speech as they enhanced the perceived integrity of the democratic process. However, the court struck down the limitations on campaign expenditures and independent expenditures by outside parties. The court asserted that money in elections was equivalent to speech—increased donations to one candidate over another indicated higher popular support among the people. Limiting the amount that could be spent on

[90] Slabach, Frederick Gilbert. *The constitution and campaign finance reform* (7-25)

the race would then fundamentally violate that freedom. Furthermore, limitations on a candidate using their own personal resources would limit their ability to advocate for themselves. Such limitations did not warrant governmental interest in regulation as there was little risk of corruption.[91]

The political winds once again demanded accountability and reform in the early 2000s. As a response to multiple corporate donation controversies such as the Enron scandal, Congress passed the Bi-Partisan Campaign Reform Act (BCRA). BCRA amended pieces of FECA by attempting to limit national political PACs from raising more money than set federal limits. Additionally, the act banned issue ads within 30 days of an election. The law was swiftly challenged in the courts on the grounds that such limitations on spending violated First Amendment protected speech.[92] These disputes rose in the Supreme Court, where the court upheld much of the act in *McConnell v. FEC.* Unlike in *Buckley v. Valeo*, the court applied closely drawn scrutiny rather than strict scrutiny. The court reasoned that spending limits were only marginally restrictive on speech, as opposed to total campaign limits. Furthermore, contribution limits were justified due to "the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."[93] This anti-appearance of corruption doctrine balanced both free speech concerns with wider societal interest, but would be overturned just a few years later in *Citizens United v. FEC.*

The case was brought to the court in 2010 by Citizens United, a nonprofit suing the SEC over fears that it could face civil and criminal penalties for releasing a movie

[91] Buckley v. Valeo, 424 U.S. 1 (1976)
[92] Briffault, Richard. "Reforming Campaign Finance Reform: The Future of Public Financing."
[93] Buckley v. Valeo, 424 U.S. 1 (1976)

about Hillary Clinton thirty days before an election. The court found that restricting corporations, unions, and nonprofits from advocating expressly for or against candidates by using their treasury funds was unconstitutional. Such a ruling meant that PACs could accept unlimited donations from individuals and corporations. As Justice Kennedy wrote, "government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity."[94] The court reasoned that under the Buckley precedent, money was speech, and speech could not be limited based on identity. The First Amendment protects speech at large, and not the identity of the speaker. The court did uphold that "the disclaimer-and-disclosure provisions of BCRA did not violate the First Amendment."[95] These, the court reasoned, were crucial for citizens to know who was speaking. With this knowledge, citizens can be better informed when it comes time to cast their ballot.

II. Literature Review

Central to any understanding of legislation in response to *Citizens United* is an understanding of the scholarly debate around the role that corporations should play in campaign finance. For simplicity, I have classified those in this debate into three categories: those in favor of corporate participation, those who straddle a mediated position advocating for some limits, and those who are against such participation. William R. Maurer, a lawyer who has successfully argued before the Supreme Court to overturn Arizona's campaign reform law, has argued against the portrayal of *Citizens United* as misguided and defended corporations' right to speech. In response to critics

[94] Citizens United v. FEC, 558 U.S. 310 (2010)
[95] Citizens United v. FEC, 558 U.S. 310 (2010)

who have pointed to the law as an extension of rights to corporations, Maurer argues that the First Amendment does not grant rights; it limits government power. The amendment protects the rights of all people, corporations, and unions to have their voices heard. It does not specify who may speak, but that speech itself is protected. Maurer continues that the assertion of free speech rights only belonging to individuals is ridiculous. Companies cannot have their intellectual property stolen or have troops quartered in their offices simply because the amendments do not specify that corporations are entitled to these rights. The spirit of these amendments is to protect everyone from governmental overreach. The speech that these corporations exercise may not be popular or well-received, but that does not mean that such speech can be limited. Maurer's points have been shared by other scholars.[96]

Kent Greenfield, a professor of law at Boston College, has argued that "the Court was correct in assuming corporations are rightful holders of constitutional rights."[97] Greenfield believes that the court could have been more careful in its decision as constitutional law must be nuanced enough to recognize the danger from unlimited funds being channeled into an election. This, however, does not mean that the solution to the problem is revoking all of the rights of corporations, as some have argued. Corporations should be treated as people sometimes and other times not. For instance, corporations should not be extended the right to lie, as has been extended to people in *United States v. Alvarez,* as market trust depends on the factuality of information. The proposed solution to these issues is for corporations to be treated more like individuals, but force them to adopt responsibilities beyond their shareholders.

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[96] Maurer, William R. "Illuminating Citizens United: What the Decision Really Did." The Federalist Society.
[97] Greenfield, Kent. Corporations are people too: (and they should act like it). New Haven: Yale University Press, 2018.

Other scholars such as Jane Anne Morris, a corporate anthropologist, have taken a much more aggressive stance against corporate power in elections. Morris has argued that the crux of the debate over corporate influence has shifted over the years. The discussion has shifted too far away from how to serve individuals and instead focuses on how to serve corporate interests. Before the 1970s, corporations were treated as fundamentally different from citizens regarding their rights to express themselves. Corporate speech used to be seen as dangerous, capable of distorting the service of the government towards corporations and crowding out the participation of citizens. Morris argues that the discourse must shift towards recognizing that money is not speech and that corporations should have their personhood revoked when it comes to speech that influences political processes.[98]

III. New York's Public Campaign Funding

New York's campaign matching program aims to spur legislators to be responsive to the needs of their constituents while staying within constitutional limits outlined by the court on public financing programs. Proposed as far back as 1907 by then–President Theodore Roosevelt, public funding for political campaigns has been one of the longest-discussed campaign finance solutions. Public funding proposals have varied over the years, but most center around a pool of public money to fund campaigns. Initially started in New York City, the program was updated and expanded to the state level in 2022. In its most recent version, the process begins when a candidate for state office opts into the program. As the candidate runs for office and raises money through small-dollar donations, every dollar donated to the candidate from a member in their

[98] Ritz, Dean. (2001) 2006. Defying Corporations, Defining Democracy. (191-196)

district will be matched with twelve dollars from the state government. The aim is for those running for office to be more responsive to the needs of their voters.[99] If a greater proportion of their funding comes from serving their constituents, they will be less likely to listen to corporate interests. So far, the program has shown great promise. A study conducted by the Brennan Center for Justice found that before 2020, small-dollar donations made up just 5% of funds contributed during election cycles. When matching funds are factored in, the 2024 cycle saw individual contributions rise from 5% to 45%. Approximately 51,000 small donors made donations this past year, a number that is nearly double what it was in 2020. At the same time, large donations from super PACs decreased from 70% of all campaign funds in 2020 to just 38% in 2024.[100] This program has not been without challenges, however, as it must be careful not to violate Supreme Court decisions that have limited the scope of public financing programs.

A similar public campaign finance program was struck down in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* for unfairly punishing those who rely on private campaign donations. Arizona's campaign finance system allowed candidates to opt in to receive public grants for campaign spending. If an opposing candidate funded by PAC donations received more money than the state-financed candidate's initial allotment, it would automatically trigger another grant to the state-financed candidate. Petitioners argued that this program unfairly penalized speech by encouraging privately funded campaigns to spend less. The court found that “Arizona's matching funds scheme substantially burdens political speech and is not sufficiently

[99] “New York Campaign Finance Program Overview.” New York State Public Campaign Finance Board. Accessed March 11, 2025. https://pcfb.ny.gov/program-overview.
[100] Pino, Marina, Grady Short, and Celina Jaramillo. “New York State's Public Campaign Financing Program Empowers Constituent Small Donors.”

justified by a compelling interest to survive First Amendment scrutiny."[101] The court agreed that such lump sum payments to candidates imposed burdens on what private individuals could spend, as every dollar they spent would be matched with a donation to their opponent. Furthermore, the court held that the state's interest in preventing corruption was not sufficiently justified to merit the restriction on speech.

New York's program is so new that it has not yet been legally challenged, but it has made several key changes to avoid Arizona's mistakes. New York bases its matching on what individual small donors spend, not on how much money another candidate receives. This crucially avoids the charge that the financing burdens private donations, as it only encourages private donations from small donors, making it harder to argue that the program discourages speech. If it is challenged, it is likely to be evaluated under strict scrutiny because the last several major campaign finance cases (*Citizens United v. FEC* and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*) have been considered through this lens as they deal with sensitive restrictions placed on speech. Since New York's program avoids the major pitfalls of Arizona's program, it appears far less likely to be stricken down. New York's program, if implemented nationally, could spur more individual donors to take part in elections and uplift candidates who cater to the needs of their constituents. Such an effort would help repair public trust in the legitimacy of elections and the government at large.

For decades, Americans' trust in institutions has been eroding. In 1960, around 73% of Americans trusted the government to do the right thing almost all of the time. In 2022, that number sat at 20%.[102] The reasons for this decline are varied, but a major

[101] Arizona Free Enterprise Club's Freedom Club PAC, et al. v. Bennett, et al; McComish, et al. v. Bennett, et al., 564 U.S. 721 (2011).
[102] Nadeem, Reem. "Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role." Pew Research Center.

contributor has been the fact that Americans see their representatives as disconnected from their constituents' interests. Voters see many in Congress as power-hungry or beholden to corporations and lobbying interest groups. Institutional distrust has already been building over many years, and with constant new headlines about record-breaking election spending, people do not feel that their interests are being represented. New York's program helps to address many of the issues contributing to this culture of distrust. Its goals of increasing donor participation and decreasing super PAC spending lead to voters being more active in elections and more important to candidates. If voters begin to see that their donations actually result in responsive representatives and legislative change, it could help to repair much of the broken trust in government.

IV. Seattle's Democracy Vouchers

New York's program is not the only successful campaign finance funding scheme. Democracy voucher programs have also seen great success in encouraging small-dollar donations. Seattle's campaign voucher program has encouraged many new candidates to run for office, generating small-dollar donations in local races to unseat incumbent candidates. The program works by distributing four $25 vouchers to registered voters that can be sent to candidates' campaigns. These vouchers can then be redeemed by candidates so they can draw upon these public funds in their race. Seattle's program is novel in that it allows voters to direct funds in a manner of their choosing and does not rely on private donations. A recent study on Seattle's voucher system found that the program increased total contributions in the 2020 election cycle by 53%, with a 350%

increase in funds coming from small-dollar donors. The program has also led to an 86% increase in the number of individuals choosing to run for public office and a significant decrease in incumbent electoral success. It is worth noting that these results were statistically significant when taken into consideration with other local and national races. The study did not comment on the reasons for the success, but there are a few possible explanations. The distribution of the public vouchers made it easier for new individuals seeking office to attempt to run. With newly available public funds, they could now source much of the needed cash for local races. As more voices were able to emerge in races, incumbents faced a more difficult time running for reelection. More competition in races is healthy for a democracy and encourages representatives to be more attuned to the needs of the people. Additionally, the emergence of the voucher program seemingly encouraged individuals to make small-dollar donations on top of the vouchers to candidates they supported. Finally, the study found that in the wake of the voucher program, the amount of corporate donations declined, but that such a decline was not statistically significant.

Even with such positive effects on election outcomes, Seattle's program faced legal challenges. The vouchers were challenged as unconstitutional in late 2018 on the grounds that they forced taxpayers to contribute to speech that they may not politically endorse. Plaintiff Mark Elster alleged that the voucher program unconstitutionally compelled speech and led to uneven distribution of funds along majoritarian preferences. He also asked the court to apply strict scrutiny to the case. *Elster v. City of Seattle* made its way up to the Washington Supreme Court, where the court upheld the constitutionality of the program. Justice Gonzalez, writing for the majority, declined to apply strict scrutiny, ruling "[t]hat some candidates will receive more vouchers reflects

the inherently majoritarian nature of democracy and elections, not the city's intent to subvert minority views."[103] In other words, the state was not endorsing particular candidates but simply providing voters with such means to do so. Crucially, the court distinguished the merits of the case from *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* on the grounds that "[t]he Arizona system operated in a way that burdened the speech of both privately financed candidates and groups independently advocating for those candidates,"[104] Seattle's voucher program simply makes available funds to all parties that can be directed democratically. I believe that this distinction towards not favoring certain speech, and instead enabling it, makes Seattle's program likely to survive a challenge in the Supreme Court. Elster could even serve as an important precedent if other similar campaign finance programs like New York's are ever challenged.

Seattle's program, like New York's, has the potential to increase trust in government and elections since the distribution of vouchers directly to candidates helps to connect voters more personally with local representatives whom they believe in. Yet, according to research data, approximately 71% of voters polled distrusted the Seattle City Council in 2023.[105] In 2018, that proportion was 61%.[106] In 2023, anxiety rose over city budgets, business development, and the city's drug policy. However, concerns over corruption or the influence of corporations were not highlighted in the survey. In the future, there is a pressing need to closely monitor levels of public trust in the wake of

[103] Elster v. City of Seattle. 2019. 444 P. 3d 590.
[104] Elster v. City of Seattle. 2019. 444 P. 3d 590.
[105] Clarridge, Christine. "Poll Finds Seattle Residents Don't Trust the City Council as Much as Businesses - Axios Seattle." Axios Seattle.
[106] Porter, Essex. "Seattle Ballot Issues Face Trust Deficit." KIRO 7 News Seattle

public policy experiments, such as democracy vouchers, to measure their effect on the perception of corruption.

V. The Problem of Foreign Corporate Donations

The *Citizens United* case has partially created a loophole in campaign financing that allows foreign corporations to donate to U.S. companies. In his dissent in *Citizens United*, Justice John Paul Stevens lambasted the court's decision to ignore the identity of the speaker when considering speech, stating, "If taken seriously, our colleagues' assumption…would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans."[107] Justice Stevens believed that if the court ignored the identity of the speaker, it could allow foreign actors to channel money into corporations and, by proxy, into American elections. Indeed, his concerns that such speech could be used by foreign corporations were warranted. In 2018, American Ethane Company, a firm that is 88% owned by Russian nationals, used its funds to donate to candidates during the midterm election cycle.[108] The laws barring foreign corporations from political speech are complicated. Foreign citizens (any individual who is not a citizen or permanent resident) are barred from "spending any money to speak about any election in the United States, whether through contributions to candidates or political parties, [or] independent expenditures to advocate for candidates."[109] The Supreme Court affirmed through summary judgment in *Bluman v. Federal Election Commission* that there is a compelling state interest in limiting the

[107] "CITIZENS UNITED v. FEDERAL ELECTION COMM'N." 2010. Cornell Law School
[108] Ghosh, Saurav. 2022. "The FEC Is Allowing Foreign Money to Influence Our Elections."
[109] 2001 U.S. Code Title 2 - THE CONGRESS CHAPTER 14 - FEDERAL ELECTION CAMPAIGN SUBCHAPTER I - DISCLOSURE OF FEDERAL CAMPAIGN FUNDSSec. 441e - Contributions by foreign nationals

contributions of foreigners when it upheld a law banning foreign nationals from making political contributions. Judge Kavanaugh, in his D.C Circuit opinion, extended that "Our holding means, of course, that foreign corporations are likewise barred from making contributions and expenditures prohibited by 2 U.S.C. § 441e." [110]These statutes and case history seem to clearly indicate that foreign corporations are not allowed to donate to U.S. elections. However, the law is ambiguous as to what features define a foreign corporation. Returning to the example of the American Ethane Company, the firm is majority Russian-controlled but run by a U.S. citizen. Despite company ownership being aligned with the Russian government, it is currently unclear under U.S. law whether this company has free speech rights. Recently, there has been a push at the local level in the city of St. Petersburg, Florida to limit the contributions of major companies that are owned in part by foreigners. Such efforts could even pave the way for legislation that could broadly eclipse corporate power in politics by forbidding companies with partial foreign ownership from contributing to campaigns.

VI. St. Petersburg Program

In 2017, St. Petersburg passed the Defend Democracy Ordinance to regulate political spending in its local elections. The proposition was widely viewed as a rebuke of the *Citizens United* decision as it sought to limit the influence of PAC funds while also laying out the first framework for defining 'foreign corporations' to regulate their speech.[111] The city's ordinance was designed in three parts so that the law would survive if partially struck down in the courts: (1) Disclosure Requirements, (2) Contribution

[110] Bluman v. Fed. Election Commision 800 F. Supp.2d281, 292 n.4 (D.D.C. 2011)
[111] Weintraub, Ellen L. 2020. "St. Pete Is Doing What the Feds Won't—Keeping Dark Money out of Local Elections | Column."

Limits, and (3) Foreign Spending Regulation.[112] The disclosure requirements mandated supplemental elements of Florida's current election code and made city contractors and foreign-influenced business entities disclose their donations. Of the three provisions, the disclosure requirements are very likely to pass constitutional scrutiny. The Supreme Court held in *Citizens United* that the ruling protected political speech and that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[113] The second provision on contribution limits effectively poses a $5,000 limit on PAC donations per year. These PACs are allowed to receive donations exceeding $5,000, but they are forbidden from spending more than that amount per individual, per year. Only PACs that are covered under the city's definition of an outside spending group, are required to adhere to this limit. Donors are notified ahead of time of this spending limit. Though this provision avoids directly confronting the *Citizens United* decision, it does violate the spirit of the decision. The ability to spend the funds donated to a campaign is implicit in the unrestricted ability to donate. Though a loophole to limit the influence of corporations in the short term, it is likely to face further scrutiny later. The final provision on foreign spending begins by adding to the current federal definition of 'foreign national' by adding the statement "any entity for which a foreign national [...] has direct or indirect beneficial ownership of 50 percent or more of the equity [...] of the entity."[114] Next, the ordinance defines Foreign Influenced Business Entities (FIBE) as a company that has

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[112] Remler, Brian. 2020. "Foreign Threats, Local Solutions: Assessing St. Petersburg, Florida's 'Defend Our Democracy' Ordinance as Potential Model Legislation to Curb Foreign Influence in U.S. Elections ."
[113] Citizens United v. FEC, 558 U.S. 310 (2010)
[114] Remler, Brian. 2020. "Foreign Threats, Local Solutions: Assessing St. Petersburg, Florida's 'Defend Our Democracy' Ordinance as Potential Model Legislation to Curb Foreign Influence in U.S. Elections ." (660)

"5% or more beneficial ownership, two or more foreign nationals collectively [who] own 20% or more, or [a] foreign national [that] participates directly or indirectly in the entity's decision-making process with respect to the entity's political activities within the United States."[115] The provision is enforced by a disclosure statement that all businesses must file, which states that they lawfully attest they are not a FIBE under penalty of perjury. PACs are then required not to use any funds that come from businesses that fail to follow these rules. Though *Bluman v. FEC did* rule that such restrictions on foreign speech can be conducted within a governmental interest, the exact nature of the degree of foreign influence in a firm has not been tested yet. When this issue does arise, the decision may well hang on the court's use of a rational basis or strict scrutiny standard. Judge Kavanaugh, in his decision, chose to apply strict scrutiny for *Bluman v. FEC* but did not rule whether this could be the consistent standard for foreign speech cases. As Kavanaugh now sits on the Supreme Court, the justices would be likely to again apply strict scrutiny to St. Petersburg's law. The government would have to argue a difficult case as to why exactly the set thresholds were justified in preventing corruption. The court's recent ruling in *TikTok v. Garland* indicates that the court recognizes the importance of the government's interest in limiting foreign influence even when weighed against free speech issues. In summary, St. Petersburg's disclosure requirements and foreign spending regulations are most likely to pass constitutional scrutiny as they align clearly with recent Supreme Court precedent. However, the contribution limits are likely to be stricken down on the basis that they impose maximum limits to the expression of speech.

[115] Remler, Brian. 2020 (660)

The implications of St. Petersburg's law are far-reaching. Not only does it provide a potential model for eliminating foreign corporate interference in American elections, but it can also broadly limit the influence of corporations in general. Today's corporations are inherently multinational, with their stock held by various investors all over the world. Ellen L. Weintraub, a former commissioner with the FEC, has suggested that this could be used to eliminate corporate influence more broadly.[116] If the standard for banning corporate speech were set at a lower percentage, perhaps 10% of the company's stock in general, then most large corporations would be effectively banned from engaging in political donations. This could, in effect, decrease the amount of money in elections and reduce government corruption.

VII. Conclusion

The debate surrounding *Citizens United v. FEC* will inevitably continue for decades, but so too will the effort to reform American democracy. New York's public financing law, Seattle's Democracy Vouchers, and St. Petersburg's foreign influence restrictions all represent electoral experiments in the laboratory of democracy to improve the responsiveness of the electoral system. I believe that the New York and Seattle programs are likely to survive legal challenges as they explicitly enable speech, rather than prohibiting it. St. Petersburg's program, on the other hand, is likely to have its disclosure requirements and ban on foreign contributions upheld while its PAC contribution limits are stricken down. In a time of uncertainty shrouding the future of democracy, these programs represent hope for reform. Currently, corporate spending

[116] Weintraub, Ellen. 2016. "Taking on Citizens United." The New York Times, March 30, 2016. https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html

massively eclipses the impact of individual donors. Americans, regardless of political stripe, feel this disparity, contributing to the erosion of trust in our institutions. For voters to see the impact of their donations magnified, voucher programs or limits on corporate spending will help to restore trust in a fractured political system. Although thus far relegated to local politics, these efforts deserve far more media attention to raise support for campaign finance reform nationwide. Furthermore, these programs deserve more academic attention, concrete studies into programmatic effects for the future, and scholarly analysis on their ability to hold up under constitutional scrutiny from the court.

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Exploring the Impact of the SUPPORT act and New CMS Guidelines on Medicaid and Children's Healthcare Insurance Program Coverage on Reentering Justice-Involved Black Girls and Recidivism Rates in Washington D.C.

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I. Introduction

In Washington D.C., the Department of Youth Rehabilitation Services (DYRS) committed 153 youths in the fiscal year of 2024, a population that has decreased 75% over the last 24 years (FY24). DYRS runs two facilities in which justice-involved youth (JIY) can be residentially placed: the New Beginnings Youth Development Center (New Beginnings) or the Youth Services Center (YSC). These two facilities house on average 138 youths in total daily, who are in various stages of placement.[117]

Almost half of JIY in DYRS facilities report that their primary form of healthcare prior to incarceration was Medicaid and Children's Health Insurance Program (CHIP).[118] However, only recently have new policies taken effect to ensure that incarcerated juveniles are able to maintain Medicaid and CHIP coverage when they are released. According to the Federal Inmate Exclusion Act, Medicaid and CHIP are automatically suspended for juveniles who are involuntarily held by the state.[119] Until recently, the guidelines provided by the Center for Medicaid Services (CMS) left it up to the Medicaid agencies and states on whether they could terminate or only suspend Medicaid and CHIP services to incarcerated youth. In 2018, the Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities (SUPPORT) act established that states may only *suspend* incarcerated juveniles' Medicaid and CHIP services during incarceration and must guarantee re-enrollment upon their release, effective January 2025.[120] Prior to the implementation of the SUPPORT Act, 37.8% of JIY in carceral or correctional residential facilities were released without the guarantee of healthcare upon release.[121]

[117] "Data | Dyrs."
[118] "CMS Releases Guidance on New Required Services for Incarcerated Young People."
[119] Barnert et al., "Physical Health, Medical Care Access, and Medical Insurance Coverage of Youth Returning Home After Incarceration."
[120] "CMS Releases Guidance on New Required Services for Incarcerated Young People."
[121] "CMS Releases Guidance on New Required Services for Incarcerated Young People."

The guidelines of implementing the SUPPORT Act were outlined in the Center for Medicaid Services' Consolidated Appropriations Act (CAA) of 2023.[122] Pre-release eligible incarcerated juveniles are entitled to targeted case management (TCM) and diagnostic and screening services for all 30 days prior to their release as well as 30 days post-release. The purpose of TCM is to connect JIY with health care providers in their local communities pre-release.[123] Medicaid-enrolled youth receive additional comprehensive needs assessments of behavioral and health needs, a person-centered care plan, and referrals and related activities to social services in the community. Unfortunately, CHIP enrollees do not have guaranteed access to case management services. CMS states in the CAA guidelines that states who provide CHIP services are encouraged to align with Medicaid standards but are not required to.[124]

The new CAA guidelines aim to address a population that has been suffering from a lack of systemic support and follow-up care. JIY present higher rates of chronic mental and physical illnesses and addiction, which are exacerbated due to a lack of healthcare access upon reentry. A survey conducted by Ravindra Gupta sponsored by the MacArthur Foundation found that 62% of JIY nationwide lacked a primary care provider and healthcare insurance after incarceration, even though twice that amount had coverage before they were incarcerated. Additionally, more than 60% reported having a physical health condition, 28% reported an acute illness, and 40-60% reported high substance abuse or mental challenges.[125]

These health issues are much worse for minority populations of JIY. A nationwide study by the University of California Los Angeles Pediatrics Department

[122] "CAA 2023 Sections 5121 & 5122 - Juvenile Justice | Medicaid."
[123] "New CMS Guidance on the Provision of Medicaid and CHIP Services to Incarcerated Children and Youth."
[124] "CMS Releases Guidance on New Required Services for Incarcerated Young People."
[125]Gupta et al., "Delinquent Youth in Corrections.", Jones, "Providing Health Care and Mental Health Services to Juveniles.", Mcfalls, "Juvenile Justice-Involved Youth and the Mental Health Care System.",

found that 47% of female just-involved-youth reported needing mental health services, 62% of whom were repeat offenders.[126] According to the Department of Youth Rehabilitation Services, Black and brown JIY are overrepresented in the population that relies on Medicaid and upon reentry face larger barriers to healthcare access.[127] Hence, justice-involved Black girls face "higher rates of substance abuse, acute illnesses, sexually transmitted diseases, unplanned pregnancies, and psychiatric disorders" than any other demographic.

The recent implementation of the SUPPORT Act and CMS guidelines in January 2025 makes it imperative to examine their effects on the continuum of care for Justice-Involved Black Girls and recidivism rates for Medicaid and CHIP eligible youth in Washington D.C. Washington D.C. youth recidivism rates have climbed to 92.7%, making D.C. an ideal case study for understanding the impact of the new healthcare guidelines on recidivism.[128]

II. Literature Review

Previous literature on the reentering youth and Medicaid access has focused on identifying the barriers faced with re-enrolling into health insurance policies and accessing healthcare.

Alberton, E.M. (2018) evaluated the access to behavioral health services during reentry for youth in Washington State based on their health diagnosis, race and geographic location. This established a correlation between lack of access to care and likelihood for recidivism within the youth population. Research by Mcfalls, C. (2021)

[126]Barnert et al., "Physical Health, Medical Care Access, and Medical Insurance Coverage of Youth Returning Home After Incarceration.", Gupta et al., "Delinquent Youth in Corrections."
[127]"Data | Dyrs."
[128]Partin, "Juvenile Recidivism: A 2018 Cohort Analysis."

studied the consequences of a 'continuum of care' for JIY and found that the more access to treatment JIY have, the less likely they are to recidivate.

Barnert E. S., Lopez, N., (2020) was a foundational study conducted to demonstrate the impact of cultural, socioeconomic, and citizenship barriers to accessing health care faced by re-entering latino youth. The findings of the study showed that the latino youth population were outliers in the set of barriers regarding language, religion and political issues such as immigration compared to other populations, but that they had the same rates of likely recidivism as their black counterparts.

While past research has explored separately the connection between race, gender and recidivism as well as healthcare access and recidivism there is a gap in research considering the impact of the intersection between race and gender.

III. Theory

Black girls are overrepresented in the population for relying on Medicaid and CHIP services within DYRS[129] and confront higher rates of chronic illness during reentry due to a lack of health care, leading to a high recidivism rate.[130]

A continuum of care is crucial when JIY are confronted with stress-inducing challenges such as a lack of housing or employment or a struggle to comply with court-ordered programs. The stress as a result of these factors may lead to mental or physical illness that requires medical or psychiatric attention. However, without Medicaid or CHIP, many JIY, predominantly Black JIY, cannot afford the care they need. The historical structural barriers in accessing to health care upon reentry are

[129] "Data | Dyrs."
[130] Wen et al., "Racial Disparities in Youth Pretrial Detention.", Barnert et al., "Physical Health, Medical Care Access, and Medical Insurance Coverage of Youth Returning Home After Incarceration.", Alvidrez et al., "Intersectionality in Public Health Research."

evidence of the compounding social and physical barriers that place justice-involved Black girls into a "limbo" status as a reentering individual, an already critical phase for JIY.[131] Without structural facilitation, reentering JIY turn to informal manners of acquiring health care such as emergency rooms, home care, substance abuse, or even criminal activity (Jones et al., 2023, Contance-Huggins et al., 2022, *Black Women's Health Insurance*, 2024).

Formerly incarcerated Black youth have a disproportionately high rate of morbidity and mortality compared to their nonincarcerated peers and formerly incarcerated White peers.[132] Considering gender differences, female JIY are found to have higher rates of mental and physical health issues while also having higher rates of misdiagnosis, a lack of diagnosis or inability to access care.[133] Therefore, the intersection of race, sex, and criminal justice involvement in the context of the healthcare system deeply impacts the ability to access adequate health care services for Black justice-involved girls.[134]

The longer the length of a health coverage gap and the higher the risk of the JIY's health status, the higher the negative impacts.[135] These challenges and barriers to care can be exacerbated due to parental involvement, socioeconomic status, race, gender and the cultural context of the family. Without a continuum of care, there are significant

[131] Barnert et al., "Physical Health, Medical Care Access, and Medical Insurance Coverage of Youth Returning Home After Incarceration.", Lopez-Williams et al., "Predictors of Mental Health Service Enrollment Among Juvenile Offenders.", Mcfalls, "Juvenile Justice-Involved Youth and the Mental Health Care System."
[132] Wen et al., "Racial Disparities in Youth Pretrial Detention.", Barnert et al., "Physical Health, Medical Care Access, and Medical Insurance Coverage of Youth Returning Home After Incarceration.", "The Mortality Gap Has Existed since the 1970s, but It Widened during the Pandemic."
[133] Fields and Abrams, "Gender Differences in the Perceived Needs and Barriers of Youth Offenders Preparing for Community Reentry.", Jones, Pierce, and Hoffmann, "Gender Differences in Adverse Childhood Experiences, Self-Control, and Delinquency."
[134] Hancock, "Wellness and Delinquency at the Intersection of Gender and Race."
[135] Jones, Pierce, and Hoffmann, "Gender Differences in Adverse Childhood Experiences, Self-Control, and Delinquency."

increases in the high-risk of morbidity and mortality, the high-risk of relapse, and the lack of services in the communities they are released to.[136]

IV. Methods

Data Collection

The population of the study will focus on Justice-Involved Youth in Washington D.C. eligible for Medicaid and CHIP services between the ages of 14 and 19 who are being released on, or currently on, a 12 month probation from one of the two DYRS residential facilities. This population was chosen due to their high prevalence in the DYRS system and their increased agency in ability to access healthcare from the recent policies. Separating the population into groups based on race and gender, the justice-involved Black girls' scores will be compared to the responses of the JIY reentering in the following groups: white male youth, black male youth, and white female youth. The population of the study will be of JIY 10 of which are white males, 10 of which are black males, 10 of which are white females, 10 of which are black females.

The study will aim to complete a total of 40 series of longitudinal interviews to further understand the impact of the SUPPORT Act and CAA guidelines on the experience of justice-involved Black girls ease of access to healthcare in comparison to their peers.

The JIY will be interviewed four times during their probation. The interviews will be conducted at 3 months, 6 months, 9 months and 12 months after release and will be done blindly, over phone with a different researcher each time. A phone will be provided to the JIY for the interview. The interview will be conducted in a closed door room with

[136] Gupta et al., "Delinquent Youth in Corrections.", Parrish et al., "A National Survey of Probation Staff of the Needs, Services and Barriers of Female Youth in Juvenile Justice Settings."

only the supervision of a research assistant outside of the room while the JIY is on the phone with the researcher.

The risk of recidivism will be evaluated in collaboration with the probation officer of the youth, who will be given a longitudinal survey that measures the likelihood that the JIY will recidivate at 3, 6, 9, and 12 months. The longitudinal study scores will then be coded and graphed with the risk recidivism of the youth as they go through their programming.

The goal of the research is to understand the impact of intersectionality with the healthcare and correctional system through a multilevel modeling approach that demonstrates the impact of macro level forms of oppression and disadvantage as well as individual-level experiences. The macro-level experiences of oppression are characterized by the recidivism, access to health care, interactions with the criminal justice system. The individual-level experiences include health-status, coping mechanisms, mental and physical symptoms experienced within the reentry process.

Survey Design

The longitudinal surveys will have a total of twenty questions. The JIY's names will not be recorded. Five of the questions will be demographic questions to collect the age, race, sex, health insurance status, medical history, and history of involvement in the criminal justice system. The next ten will be scaled questions that aim to understand the impact of having or not having health insurance, ease of transportation to healthcare, frequency of attendance to providers, perceived attitude towards providers, perceived ease of access to medication, and perceived affordability of medication and appointments.

The last five questions will be open ended questions to further understand the various impacts of healthcare access and insurance access. The answers will be coded using an evaluative rating system for the first fifteen questions and an independent coding system for the last five qualitative questions in order to score the impact and prevalence of the gap in health care. These questions aim to understand the individual-level experiences will be informed by questions asked the JIY that explore the emotional and physical toll of navigating the healthcare system and Medicaid enrollment, experiences with past providers meetings, experience with support from the correctional system of enrolling and accessing health care, experience with stigma surrounding accessing health care, experience post-detention with diagnoses, continuum of medication and therapy, experience surrounding recidivism and re-arrest

V. Feasibility

The study would be conducted in collaboration with the DYRS, which would require extensive work for clearance of classified information of the youth in accordance with the institution, as well as an outside IRB approval which can be obtained from American University due to the involvement of a vulnerable population. In total, the timeline of the project would be two and a half years, half a year dedicated to going through the IRB process, beginning the collaboration with DYRS and proposing the study to the various funding opportunities. The next year would consist of data collection, and the last year would be dedicated to coding, interpreting and publishing the results along with publishing a prefacing explanatory paper detailing the actual gap of healthcare insurance in Washington D.C.. Lastly, the project would require

substantial funding in order to hire research assistants, use data collection and analysis programs and fund travel for conferences to present the findings.

The opportunities for funding the study can come from a variety of public and private institutions. The Public Welfare Foundation provides funding every fall that comes from individuals and organizations with proposals for projects that focus on structural and systemic changes to the justice system. The proposals must be creating youth or adult criminal justice reform in Washington D.C., which is where I plan to conduct my research. The grant's amount would depend on the approximate budget and the requested amount submitted and then accepted by the foundation. The alignment of the goals as well as the focus on storytelling and qualitative research fits with my proposal. The Exploratory/Developmental Grants (R21) by the National Institute of Health assists new research projects that aim at exploring topics that do not have a lot of data connected with them or are in categorical program areas of various institutions. The amount of support is restricted in level of support and time which is ranked upon acceptance. At least one of the participating funding organization's missions align with the funding opportunity in order for it to comply with the opportunity-specific requirements. The National Institute on Minority Health and Health Disparities' goals and mission to understand and counter the disparities that BIPOC and minority communities experience aligns closely with my research proposal. The funding would allow for collection of data, research assistants and publication opportunities. The Health Equity Data Access Program (HEDAP) provides a research opportunity by the Department of Health and Human Services and the Centers for Medicare and Medicaid Services for projects conducted by individuals in higher education or nonprofit organizations. This program allows for participants to access CMS restricted data for

minority health research that can be used to conduct research on health care topics such as social determinants of health focused on racial and ethnic minority groups and different genders. The seat of the researchers will be available for 36 months, allowing for access to that data. There is a rolling application process that closes at the end of the year. While there is no direct funding for the research project, this is an opportunity to be able to engage with data that is extremely difficult to access and would reduce the costs substantially of finding and collecting data for this project. The American University Undergraduate Research Support is a resource to help cover the cost of equipment needed for research activity including travel to conferences and research related activities. In addition other types of funding requests are reviewed on a case-by-case basis. In order to apply, it is required to have a current transcript, proof of presentation acceptance to a conference, if that is applicable, and a letter of support form a faculty sponsor. This application and acceptance is a rolling process, meaning that there are no set deadlines. The funding provided by American University is logical due to the fact that I attend the university and that it is specifically for undergraduate researchers.

VI. Significance

Within the academic sphere, this study is an important addition to the conversation surrounding public health and safety as well as criminology pertaining to Black girls, a population that has long been ignored or overlooked within this sphere. The impact of this study will not only have policy effects but help researchers to understand how recidivism, juvenile rehabilitation and reentry into communities specifically affects Black girls in comparison to their peers. This study will also lend

itself to the expansion of critical theories such as intersectionality in the field of criminology and of legal studies. The continued examination of the interaction of the systems of power in the juvenile criminal justice system and the healthcare system as both a public health crisis and criminological issue will further be informed by the results of this study.

In addition to expanding the knowledge surrounding justice-involved Black girls, this study is relevant to the current implementation of the SUPPORT Act and the CAA guidelines put forth by the CMS. Examining whether the SUPPORT Act and CAA 2023 guidelines serve the communities in reducing recidivism and facilitating the continuum of care for JIY will influence policy changes and improvement that can be made by the Mayor's Office of Washington D.C., the Medicaid agencies of D.C. and other state program's surrounding Medicaid and CHIP services.

Currently in Washington D.C. the topic of Medicaid is extremely relevant as the Mayor's Office recently cut services under the guise of saving Medicaid due to the current threats by the federal government to make Washington D.C. pay more to provide Medicaid to its citizens. Both D.C. Healthcare Alliance Programs and Immigrant Children's Healthcare Program which provide healthcare for non-eligible Medicaid and CHIP eligible youth and families were cut from funding. Due to this shift in tone from the Mayor's Office after years of support for vulnerable populations that leaned on Medicaid adjacent services, the implementation of the SUPPORT Act and the enforcement of the CAA must be closely monitored in order to ensure positive results for JIY.

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Punishment and Parenthood: Coerced Sterilization in the Criminal Legal System

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I. Introduction

When Kelli Dillon was 24, doctors at a women's correctional facility in California sterilized her without her consent. During what she thought was a biopsy to check for ovarian cancer, Kelli's physicians took it upon themselves to decide she would never have children.[137] The surgical team did not tell her she had been sterilized, so it was years before Kelli discovered the truth. This horrific case of malpractice seems unthinkable in the era of modern medicine and consent laws, but it occurred in 2001, nearly 75 years after the Supreme Court upheld the constitutionality of involuntary sterilization in *Buck v. Bell*. Far from being a relic of the past, forced sterilization persists today in various forms, even rebranded as a way for incarcerated individuals to reduce their prison time. Proponents of these practices suggest that voluntary sterilization is a humane alternative to prison for certain offenders. However, this view is based on several flawed assumptions about consent and voluntariness. I argue that the "option" of sterilization for incarcerated individuals is both unethical and unconstitutional. Its inherently coercive nature violates the principles of informed consent, disproportionately impacts marginalized groups historically targeted by eugenics, and infringes on fundamental rights to bodily autonomy and procreation.

II. Reproductive Injustice in the Past and Present

The specter of forced sterilization has haunted American history for over a century, and investigations have shown that the practice has persisted even in recent years. The Court's 1927 decision in *Buck v. Bell* determined that the sterilization of

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[137] Ray Levy Uyeda, "How Organizers Are Fighting an American Legacy of Forced Sterilization," YES! Magazine, 2021, https://www.yesmagazine.org/social-justice/2021/02/08/united-states-forced-sterilization-women.

people with mental disabilities was permissible to "prevent those who are manifestly unfit from continuing their kind."[138] This ruling epitomized the nation's growing eugenics movement, which advocated sterilization and genetic modification to "breed out" undesirable traits in the human race. Later decisions, such as *Skinner v. Oklahoma*, changed course by prohibiting states from forcibly sterilizing individuals convicted of certain crimes, and *Griswold v. Connecticut* protected the use of contraceptives by married couples. These cases set important precedents for broader reproductive autonomy but failed to eliminate forced sterilization. The state of California alone has involuntarily sterilized more than 20,000 people over the past century, and a 2013 investigation revealed that approximately 150 incarcerated women in California were sterilized without consent between 2006 and 2010.[139] Moreover, as recently as 2020, at least five women received involuntary hysterectomies at immigration detention centers in Georgia.[140] Estimating the total number of people who have been forcibly sterilized in the United States is challenging, as many victims remain silent and physicians often choose not to record the procedures. Still, some estimates indicate that as many as 70,000 Americans were forcibly sterilized during the 20th century, while others suggest that the true number is between 100,000 and 150,000.[141] Despite progress in legal protections, forced sterilization—and the ideologies fueling it—exist well into the twenty-first century.

Although forced sterilization is widely regarded as unethical, no such consensus exists about the sterilization of incarcerated people in exchange for reduced sentences or

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[138] *Buck v. Bell*, 274 U.S. 200 (1927).
[139] Corey G. Johnson, "Female Inmates Sterilized in California Prisons without Approval," Reveal, July 7, 2013, http://revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/.
[140] Jose Olivares and John Washington, "Whistleblower: ICE Prison Does Hysterectomies at High Rates," September 15, 2020, https://theintercept.com/2020/09/15/hysterectomies-ice-irwin-whistleblower/.
[141] Uyeda, "How Organizers Are Fighting an American Legacy of Forced Sterilization."

parole. As of 2024, 11 states have approved laws allowing for the castration of certain sex offenders.[142] In these states, sterilization is either offered as a way to shorten prison time, mandated as a condition of release, or imposed as a standalone punishment. This paper focuses specifically on cases where incarcerated individuals can "opt" for sterilization as a means of avoiding further incarceration. For example, Texas law requires incarcerated people to provide total informed consent for castration under all circumstances, and in Georgia, offenders must provide written consent to treatment.[143] As I will argue later, the legitimacy of such consent processes is questionable at best. Still, they are upheld by state laws as a valid option for those facing prison time. While these agreements are often framed as targeted responses to sex crimes, that is not always the reality. In 2017, a Tennessee judge issued a standing order offering incarcerated individuals who had used drugs a 30-day sentence reduction for undergoing a sterilization procedure.[144] There are numerous other examples, such as prosecutors requiring sterilizations for women in plea deal negotiations in 2015, and a Virginia man opting for a vasectomy in exchange for a lighter sentence in a child endangerment case.[145] Sterilization "options" for incarcerated people extend beyond crimes of sexual violence, touching on broader issues of parenthood, childcare, and personal responsibility.

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[142] Jesus Mesa, "Here Are the States That Allow Chemical Castration as Punishment," Newsweek, June 4, 2024, https://www.newsweek.com/louisiana-chemical-castration-surgical-law-child-sex-offenders-1908158.
[143] Charles L. Scott and Trent Holmberg, "Castration of Sex Offenders: Prisoners' Rights versus Public Safety," *The Journal of the American Academy of Psychiatry and the Law* 31, no. 4 (2003): 504–5.
[144] Elise B Adams, "Voluntary Sterilization of Inmates for Reduced Prison Sentences," *Duke Journal of Gender Law and Policy* 26, no. 23 (2018): 23.
[145] Sheila Burke, "Attorneys: Sterilizations Were Part of Plea Deal Talks," AP News, March 28, 2015, https://apnews.com/general-news-824ffb7d2ed84849b5d87c41cdf8c0f7.

III. Coerced consent and constitutional rights violations

As sterilization is a medical intervention, federal and state laws require physicians to obtain informed consent from patients before performing the procedure. The doctrine of informed consent is meant to protect patients and prevent malpractice, typically requiring that patients receive sufficient information about a procedure, are competent to make medical decisions, and are not subject to coercion.[146] Many states have codified medical informed consent into statutory law, and physicians' lack of adherence to the statute can lead to negligence charges. Federally funded programs such as Medicare are mandated to obtain informed consent from patients prior to sterilization, specifying that consent must be "knowingly and voluntarily" given.[147] Informed consent is widely recognized as both a legal requirement and a cornerstone of medical ethics. Unfortunately, violations of the doctrine, particularly regarding sterilization, are prevalent, both historically and in current medical practices. Merely signing a consent form does not constitute true informed consent, but many victims of coerced sterilization believe that they have no claim to medical malpractice or reparations because they "signed a piece of paper."[148] In order for consent to be valid, physicians must adhere to specific guidelines, ensuring that patients are fully informed about their decisions and not subjected to external pressure.

Due to its inherently coercive nature, the "option" of sterilization for incarcerated individuals can never satisfy the requirements of informed consent. Coercion is

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[146] J. L. Bernat, "Informed Consent," *Muscle & Nerve* 24, no. 5 (May 2001): 614–21, https://doi.org/10.1002/mus.1046.
[147] "42 CFR Part 50 Subpart B -- Sterilization of Persons in Federally Assisted Family Planning Projects," https://www.ecfr.gov/current/title-42/part-50/subpart-B.
[148] Shefali Luthra, "California Promised Reparations to Survivors of Forced Sterilization. Few People Have Gotten Them.," The 19th, 2023, https://19thnews.org/2023/09/california-forced-sterilization-incarceration-reparations/.

commonly defined as compelling or inducing an individual to engage in certain conduct, as well as threats of serious harm or physical restraint.[149] Under this definition, "voluntary" sterilizations in prison are explicitly coercive—prisoners know that declining the procedure could result in years of confinement. Defendants are unlikely to question sterilization conditions out of fear of serving a longer jail sentence, which means that these court orders and decisions are rarely appealed.[150] The "voluntariness" standard of informed consent is clearly violated when incarcerated people are afraid to refuse the procedure. Referencing Judge Benningfield, the Tennessee judge who had offered a 30-day sentence reduction in exchange for sterilization, one scholar commented that the order "effectively gives inmates an ultimatum: either stay incarcerated, a restraint on personal freedom or become sterilized, a restraint on personal autonomy."[151] Simply put, when someone faces a choice between sterilization and prison time, that choice is not made freely. Even in the absence of explicit offers or threats, prisons remain highly coercive environments. Christina Cordero, one of the women forcibly sterilized by doctors in California, explained that the OB-GYN at her facility repeatedly pressured her to agree to a tubal ligation. "As soon as he found out I had five kids, he suggested that I look into getting it done," Cordero recalled. "He made me feel like a bad mother if I didn't do it."[152] Weaponizing motherhood against incarcerated women is a common tactic to shame them into agreeing to sterilization. The power imbalance between prisoners and prison officials makes incarcerated people uniquely vulnerable to coercion. In all of these situations, obtaining informed consent is impossible.

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[149] "Definition: Coercion from 18 USC § 1591(e)(2)," Legal Information Institute, n.d.
[150] Adams, "Voluntary Sterilization of Inmates for Reduced Prison Sentences," 31.
[151] Adams, 33.
[152] Johnson, "Female Inmates Sterilized in California Prisons without Approval."

Performing sterilizations on incarcerated individuals without informed consent infringes on their fundamental rights to bodily autonomy and procreation. The landmark 1942 case *Skinner v. Oklahoma* established procreation as a fundamental right, specifically emphasizing protections against involuntary sterilization for those convicted of a crime.[153] Similarly, the Supreme Court's decision in *Eisenstadt v. Baird* identified the right against government intrusion "into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[154] These cases outlined individuals' rights to bodily autonomy and further established that the Court must apply strict scrutiny "when the state curtails the exercise of a fundamental right, such as the right to have children."[155] Strict scrutiny requires the state to demonstrate that its actions were narrowly tailored to further a compelling government interest and were the "least restrictive means" to further that interest.[156] Sterilization as an alternative to incarceration fails to meet this standard. First, it is not always narrowly tailored. For example, in the case of the Virginia man convicted of child endangerment, sterilization does not address the specific circumstances of his crime—after being sterilized, he could have very well continued to endanger one of his existing children. Second, his crime was unrelated to sexual violence, so the state cannot claim a compelling interest in preventing sex crimes. The only relevant state interest in this case would be preventing convicted criminals from reproducing, which ventures into the field of eugenics. Third, sterilization is in no way the "least restrictive means" to prevent various crimes from occurring. Judge Benningfield in Tennessee, for instance, justified

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[153] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).
[154] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[155] *Skinner v. Oklahoma.*
[156] "Definition: Strict Scrutiny," Legal Information Institute, n.d., https://www.law.cornell.edu/wex/strict_scrutiny.

reducing births among drug users by referencing the number of children born with symptoms of addiction or neglected due to a parent's drug use.[157] Other possible solutions, such as drug treatment facilities or harm reduction programs, would have been much less restrictive and more narrowly tailored to the state's interest. Moreover, even if courts were to apply a lesser standard of review, such as the "Turner test" established in *Turner v. Safley*, these sterilizations would still be unconstitutional. *Turner* required that prisoners retain "those [constitutional] rights that are not inconsistent with his status as a prisoner or with … legitimate penological objectives."[158] The right to procreation—or at the very least, the right against involuntary sterilization—does not conflict with one's status as a prisoner. There is no appropriate justification for allowing coerced sterilizations to occur. As the Court warned in *Turner*, "prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[159]

IV. Sterilization as a form of eugenics

Furthermore, sterilization policies disproportionately affect racial minorities, immigrants, and low-income populations—groups that have been historically targeted by eugenics practices. In the mid-twentieth century, activist Fannie Lou Hamer coined the term "Mississippi Appendectomy" to describe the egregiously large number of forced hysterectomies occurring in the deep South.[160] Thousands of poor Black women seeking medical treatment at hospitals were sterilized, causing profound physical, mental, and community-level harm. In California, the *Madrigal v. Quilligan* lawsuit exposed one

[157] Adams, "Voluntary Sterilization of Inmates for Reduced Prison Sentences," 25.
[158] *Turner v. Safley*, 482 U.S. 78, 84 (1987).
[159] *Turner v. Safley*.
[160] Uyeda, "How Organizers Are Fighting an American Legacy of Forced Sterilization."

Los Angeles hospital's systematic coerced sterilization of Mexican-American women throughout the 1960s and 70s. The logic behind these sterilizations, and the broader eugenics movement, was that certain populations should be prevented from having children in order to avoid passing on "undesirable" genetic traits to their offspring. This same logic endures today, as courts and medical professionals rationalize coerced sterilizations as cutting costs that the state would have wasted on welfare, "paying for these unwanted children."[161] Assuming certain people are incapable of raising and caring for their children, and that those children would only be a drain on government resources, is precisely the sentiment employed by eugenics enthusiasts a hundred years ago. Marginalized groups, especially those targeted by over-policing, harsh sentencing laws, and racial discrimination, have consistently borne the brunt of the harm inflicted by eugenics policies. The forced hysterectomies at Georgia detention centers in 2020 were all performed on poor immigrant women, and the majority of the women sterilized during California's 2006-2010 investigation were Black and Latina. Vulnerable populations are more likely to be seen as sexually deviant and incapable of personal responsibility, and they have fewer safeguards against medical malpractice and systemic legal abuse. Due to racial and class bias in the criminal legal system, these sterilization "options" are likely to be directed to communities of color and low-income defendants, while wealthy, white Americans are spared from ever facing such choices.

Allowing the sterilization of incarcerated individuals creates a dangerous precedent, as ambiguous consent can easily devolve into forced sterilization and even eugenics. In such cases, those in power make broad decisions about who should reproduce based on their own flawed judgment. Judge Benningfield reported

[161] Johnson, "Female Inmates Sterilized in California Prisons without Approval."

attempting to "fix" his county's drug crisis by stopping drug users from procreating, just as courts have historically attempted to "fix" poverty by preventing poor people from having children. Some supporters of prison sterilization procedures admit that informed consent in these situations is unattainable, but argue that the procedures are justified anyway because people who commit crimes lose claim to their bodily autonomy.[162] Beyond the medical, ethical, and legal flaws in this argument, it assumes that the criminal legal system will appropriately identify and punish "criminals" one hundred percent of the time. Being convicted of a crime should not erase a person's constitutional protections, particularly given the fundamental flaws in the criminal legal system. Additionally, sterilization is weaponized as a tool of eugenics even outside of the prison-industrial complex. Organizations like Project Prevention offer current and former drug users $300 to get sterilized or use long-acting birth control.[163] Their mission depends on the portrayal of minority and poor women as irresponsible sexual deviants. "I'm not saying they are dogs, but they are not acting any more responsibly than a dog in heat," Project Prevention's founder remarked in a promotional video.[164] The implication of this statement is that these women, like dangerous animals, cannot continue to breed—motherhood must be reserved for those who will contribute to a productive society. The moralistic rhetoric of eugenics advocates has remained remarkably consistent over time: vilifying poor mothers and framing incarcerated

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[162] Thomas Douglas et al., "Coercion, Incarceration, and Chemical Castration: An Argument From Autonomy," *Journal of Bioethical Inquiry* 10, no. 3 (2013): 393–405, https://doi.org/10.1007/s11673-013-9465-4.
[163] "Project Prevention: Mothers and Children Speak Out," https://www.opensocietyfoundations.org/voices/project-prevention-mothers-and-children-speak-out.
[164] Erika Derkas, "The Organization Formerly Known as Crack: Project Prevention and the Privatized Assault on Reproductive Wellbeing," *Race, Gender & Class* 19, no. 3/4 (2012): 184.

people as unwilling to stay out of jail is a narrative that has been echoed throughout history.

V. Conclusion

In the decades following the Supreme Court's decision in *Buck v. Bell*, forced sterilization became socially reprehensible and legally impermissible, to a certain extent. Policies allowing incarcerated people to opt for sterilization in exchange for reduced sentences fundamentally contradict the key principles of informed and voluntary consent, presenting ethical and legal issues. Moral judgments about what some individuals "deserve" do not outweigh violating informed consent rules and infringing on protected constitutional rights. Twenty years after Kelli Dillon was forcibly sterilized, she explained that the government's actions were essentially about control.[165] "This is not just about the control of one's body," she cautioned. "This is about people who are trying to control and determine the worth of a human life, and that is dangerous."

[165] Uyeda, "How Organizers Are Fighting an American Legacy of Forced Sterilization."

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frame=true&def_id=18-USC-826895778-1007944208&term_occur=999&term_src=.

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Standardized Testing, Discrimination, and Affirmative Action in New York City Public High Schools

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Abstract

Over the past ten years, race has become a higher predictor of standardized test scores than parent education or household income. Historically, access to high quality education has been out of the hands of people of color, reflected in the upholding of segregation until 1954 in the Brown v. Board of Education Supreme Court case that ruled segregation unconstitutional. Although segregation is illegal, several practices remain that create similar outcomes to when segregation was legal. The use of standardized testing as the sole determiner of admittance into high performing schools, such as the New York City Specialized High Schools, inaccurately selects the highest-achieving students and perpetuates a seemingly race-neutral barrier that excludes Black and brown students from the best educational opportunities.

The psychological effects of segregation have been found in American children as young as three years old when they start to associate negative traits with some racial groups.[166] Explicit discrimination can stimulate responses similar to post-traumatic stress disorder, and children who have discriminatory teachers have a higher chance of dropping out of school as a result of lower academic motivation and performance in combination with worse feelings towards school.[167] Outside the context of education, significant research has demonstrated that segregation contributes to lower self-esteem and self-image. As the co-director of the UCLA Civil Rights Project Gary Orfield stated, "Racial segregation denies equal opportunity and creates a false path of inferior educational preparation that perpetuates inequality across generations."[168]

Testing as an informal means to perpetuate segregation stems from voting tests that Black citizens had to take in order to be allowed to vote. These tests were over-complicated and wholly unrelated to the ability to vote. The discriminatory outcomes of the New York Specialized High School Admissions Test (SHSAT) are just one part of a large system of standardized testing that leading historian of race and discrimination Dr. Ibram X. Kendi describes as "the most effective racist weapon ever

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[166] "Children Notice Race Several Years Before Adults Want to Talk About It," American Psychological Association, last modified August 27, 2020, accessed May 6, 2022, https://www.apa.org/news/press/releases/2020/08/children-notice-race.

[167] Christia Brown, "The Educational, Psychological, and Social Impact of Discrimination on the Immigrant Child," Migration Policy Institute, last modified September 2015, accessed May 6, 2022, https://www.migrationpolicy.org/research/educational-psychological-and-social-impact-discrimination-immigrant-child#:~:text=Experiencing%20discrimination%20can%20provoke%20stress,dropping%20out%20of%20high%20school.

[168] [4] The Civil Rights Project, "Report Shows School Segregation in New York Remains Worst in Nation," The Civil Rights Project, last modified June 10, 2021, accessed May 6, 2022, https://www.civilrightsproject.ucla.edu/news/press-releases/2021-press-releases/report-shows-school-segregation-in-new-york-remains-worst-in-nation#:~:text=Amid%20these%20changes%2C%20the%20city%27s,2010%20to%2070%25%20in%202018.

devised to objectively degrade Black and Brown minds and legally exclude their bodies from prestigious schools."[169] Standardized testing arose in America as part of the eugenics movement, with psychologist and eugenicist Carl Brigham claiming that testing demonstrated the superiority of White people and that "intermingling" with people of color was dangerous for the American gene pool. Brigham was commissioned to assist in developing aptitude tests for the US Army and was instrumental in the creation of the Scholastic Aptitude Test (SAT), which was considered an innovative psychological test, but was originally created to exclude Jewish people from the Ivy League.[170] These deeply biased tests were used throughout World War I to place over a million soldiers into units determined by race and test scores. This Army testing paved the way for the expansion of school testing, which was increasingly relied upon to group students. The Army testing was adapted to suit college admissions needs and in 1934 Harvard University began using the SAT to determine scholarship awards. From there, universities were quick to adopt the test. Black students, especially males, are disproportionately placed or misplaced in special education due to test results, which are not an accurate measure of someone's educational needs. Perhaps more concerningly, experimental questions that Black students outperform White students on have regularly been eliminated due to concerns that inclusion of these questions would disrupt the SAT's bell curve. Black students perform much better on tests that are not

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[169] John Rosales, "The Racist Beginnings of Standardized Testing," National Education Association, last modified March 20, 2021, accessed May 6, 2022, https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing

[170] Soares, "Dismantling White," Teachers College Press.

bell-curved, further implicating the SAT as the source of racially disparate outcomes.[171] Despite expanding free test prep for underrepresented students and offering the SHSAT during the school day, the number of Black and Hispanic students admitted remains egregiously low. As former Mayor de Blasio said, "These numbers are even more proof that dramatic reform is necessary to open the doors of opportunity at specialized high schools." [172]

In the growing debate now on critical race theory teaching in schools, many have argued that racism should not be discussed because it makes students uncomfortable. Given that young children of color are able to identify the ways they are treated and viewed differently to their race, though, many educational and child development experts say it is an unreasonable demand to remove race discussions from curricula. In short, if children of color have to experience racism every day, White children should be able to understand it and be consciously educated in age-appropriate ways even at early stages of schooling. This can be done early-on through simple explanations of the unfair treatment people experience as a result of their race and progress into more complex ideas and history as children mature.

Intergenerational trauma also shapes outcomes, impacting both mental and physical health. For instance, Black mothers in the U.S. are disproportionately more

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[171] Ibid.

[172] Eliza Shapiro, "Only 7 Black Students Got Into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots," *The New York Times*, March 18, 2019, accessed May 6, 2022, https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html?action=click&contentCollection=The%20Upshot®ion=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&moduleDetail=undefined&pgtype=Multimedia.

likely to have birthing complications than White mothers, even when adjusting for income. The complications are more likely to cause health issues for the child, for instance, with prematurity and mental health disorders, which can be passed on. Compounded with the violent way Black people have been historically treated by the medical system, there are higher levels of distrust in the medical system, making Black people less likely to seek medical help, thus generally worsening health outcomes that may affect their education.[173] This cycle is just one example of the long-term effects of racist structures that contribute to differing levels of academic achievement across races, but is not easily pinpointed as a direct cause of educational gaps.

New York City provides a striking example of the way racist systems massively shape the lives of people who reside just steps away from each other. The city that never sleeps is frequently described as a melting pot for its extraordinary diversity in its population of eight and a half million. In 2010 New York City was reported for the first time to be majority non-White, becoming the first city in the Northeast where White people are the minority.[174] The shifting demographics are due to the rapidly expanding Asian and Hispanic populations that offset the slowly decreasing White and Black populations. Despite the growth of non-White populations, many specific areas of the city fail to reflect the changing demographics. This can be attributed to a variety of factors including the locations of public housing, historical racial covenants, and labor

[173] Claudia Lugo-Candelas, "Intergenerational Effects of Racism Can Psychiatry and Psychology Make a Difference for Future Generations?," JAMA Network, last modified July 28, 2021, accessed May 6, 2022, https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2782451.
[174] Sam Roberts, "Non-Hispanic Whites Are Now a Minority in the 23-County New York Region," *The New York Times*, March 27, 2011,accessed May 6, 2022, https://www.nytimes.com/2011/03/28/nyregion/28nycensus.html.

markets that have traditionally been highly structured by race and ethnicity. Even when holding factors like income and education constant, the differences are still disparate.[175] The evolving neighborhoods also mean that demographics in local schools are changing, with a growing Latine population and a shrinking Black population.[176] Even with the demographic shifts, the inequities across individual schools and school districts remain intact.

The New York City Department of Education was founded in 1842, and the contemporary districting system was started in the 1960s. Although *Brown v. Board of Educatio*n officially made de jure segregation illegal in 1954, de facto segregation persisted across all of America. On February 3, 1964 over 450,000 New York City students, nearly half of the school-age population, boycotted schools to protest segregation and inequity in the education system.[177] The legacy of school segregation in New York is still evident, as a 2021 report from the UCLA Civil Rights Project found that since its initial 2014 research, New York remains the most segregated state in the country for Black students and the second most segregated for Latino students, behind only California.[178] Since 1990 the portion of schools with intense segregation, categorized as being 90 percent or more non-White, has decreased only slightly from 72 percent to 70 percent, while extremely segregated schools, categorized as schools with a 99 percent non-White student population, decreased from 31 percent to 17 percent.

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[175] Ibid.
[176] The Civil Rights Project, "Report Shows," The Civil Rights Project.
[177] Zinn Education Project, "Feb. 3, 1964: New York City School Children Boycott School," Zinn Education Project, accessed May 6, 2022, https://www.zinnedproject.org/news/tdih/nyc-school-children-boycott-school/.
[178] The Civil Rights Project, "Report Shows," The Civil Rights Project.

While these statistics suggest some improvement in desegregation, of the 934,000 student population 94 percent still attend predominantly non-White schools.[179] The report explicitly cites the Specialized High Schools as particular contributors to segregation. There are nine Specialized High Schools in New York City: Fiorello H. LaGuardia High School of Music & Art and Performing Arts, which does not use testing as the sole measure of admission; The Bronx High School of Science; The Brooklyn Latin School; Brooklyn Technical High School; High School for Mathematics; Science and Engineering at City College of New York; High School of American Studies at Lehman College; Queens High School for the Sciences at York College; Staten Island Technical High School; and Stuyvesant High School. Stuyvesant and Bronx Science are of particular note for consistently being the two most high-achieving and difficult schools to enter. Entrance to these schools is determined by one three-hour multiple choice test, the Specialized High School Admissions Test. Student scores are ranked from highest to lowest, with students earning the highest scores being given priority in their school preference. A student from any part of the city may be admitted to any of the specialized schools, eschewing the usual requirement of living in-district for public schools.

In the educational arms race, families who hold traditional privileges across, race, wealth, and other social identifiers, are able to leverage their advantages to better their children's prospects. Stuyvesant and Staten Island Technical have 92 percent enrollment of Asian and White students with only one percent Black and two to three

[179] Ibid.

percent Latino students. In a city with a population distribution that stands in such stark contrast to enrollment at its top schools, very strong forces are at play to create this phenomenon. While the specialized schools have always skewed heavily towards Asian and White enrollment, the portion of Black and Hispanic students has declined significantly over the past 40 years.[180] A leading cause of this is that for a long time students were not preparing for the SHSAT, but recently there has been a lucrative industry of test preparation that disproportionately favors students with access to such preparatory services. Tutoring and practice exams can cost hundreds of dollars and demand significant time on both the student and their family's part, as some devote months or even years to studying for the test.

Additionally, those with more time to navigate the complex bureaucracy mean that important information regarding high school options can be miscommunicated or even not communicated at all.[181] Many people in the city also do not speak fluent English, which is greatly disadvantageous, as such households have an even larger barrier to understanding the school system. Standardized testing additionally disadvantages English language learners, whose educational level is often poorly

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[180] Eliza Shapiro, "How New York's Elite Public Schools Lost Their Black and Hispanic Students," *The New York Times*, June 3, 2019, accessed May 6, 2022, https://www.nytimes.com/interactive/2019/06/03/nyregion/nyc-public-schools-black-hispanic-students.ht
ml?action=click&contentCollection=The%20Upshot®ion=Footer&module=WhatsNext&version=What s Next&contentID=WhatsNext&moduleDetail=undefined&pgtype=Multimedia.

[181] Reema Amin, "11th-hour changes may be coming to NYC's high school admissions," Chalkbeat New York, last modified March 4, 2022, accessed May 6, 2022, https://ny.chalkbeat.org/2022/3/4/22961972/nyc-high-school-admissions-changes-david-banks
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reflected in test scores.[182] Access to professionals for disability diagnoses to receive exam accommodations such as extra time also skews heavily for White people. 42 percent of students with a designation for double time on the SHSAT were White in comparison to the 18 percent of White students who took the test under normal conditions, and White students were ten times more likely to have extra time than Asian students. Students with extra time are about twice as likely to receive an offer for a Specialized High School regardless of race. Importantly, there is no evidence suggesting exaggeration or lying about disabilities, but because it is often the prerogative of a parent to request disability accommodations for their child, families with better access to healthcare and expensive health consultations are more likely to have the appropriate test-taking conditions.

This issue is further reflected in the severely segregated middle school system. From the start, students are set on a track that provides them with severely different educational outcomes. Although the public school system is meant to provide education for all students, there is a significantly higher quality of education for people in certain districts in a city which has practiced both formal and informal redlining. The middle school a student attends, determined by housing district, highly correlated with income and race, is a major indicator of the likelihood of attending a Specialized High School, with some middle schools even being known as feeder schools for these high schools. In addition, there is significant overlap between extra

[182] Rosales, "The Racist," National Education Association.

time designations and prestigious public middle schools. While only 323 out of over 27,000 students in 2018 had extra time, a high concentration of those students came from wealthier districts. This inequity demonstrates how the SHSAT advantages people with more resources.

Determining placement in the specialized schools solely by a standardized test score severely restricts access to some of the highest quality education in the city. Former Mayor de Blasio had proposed a plan that would have mirrored the way systems like the University of Texas allocate seats so that top-performing students in every school are guaranteed a spot in the highest performing institutions. Under the mayor's 2018 plan, the top seven percent of middle schoolers and 25 percent of students citywide, as determined by grades and state English language arts and mathematics scores, would receive admission to a specialized school. This system would have provided more equity and diversity to the school by providing opportunities for high performing students from all different backgrounds.

This plan did not receive the required State Legislature approval, and it faced strong backlash from the fact that if enacted, Asian students would lose approximately half of the usual seats they fill in a year, leading to accusations of discrimination against the largely poor and immigrant Asian-Americans in the specialized schools. While the number of offers to Asian students would decrease dramatically, they would still constitute approximately 31 percent of offers, which is still significantly higher

than the 11.8 percent of the population that Asians make up in New York City. The number of White students in the schools would remain about the same, according to the Independent Budget Office's 2019 report, while Hispanic students would receive 27 percent of offers, in comparison to about the six percent they usually receive, and Black students would receive about 19 percent of offers instead of four percent, equivalent to almost a fivefold increase.[183] Socioeconomically, the percent of students living in poverty receiving admission would rise to 63 percent from the usual 50 percent. Grades would be slightly higher for the students offered admission under the proposal as well, indicating that acceptances would be granted for students who are even more equipped to succeed than the usual admitted students.

Proponents of the proposal contend that using multiple factors for admission allows for a more accurate selection process of students who will succeed in high school and college, and that high grades relative to the school of attendance as well as high scores on state tests are easier to access without significant financial resources. Such a system would allow students who are disproportionately less likely to take the SHSAT, namely girls, Hispanic students, and students in poverty, to compete for admission to the specialized schools. Opponents say that the students who are admitted may be less prepared for the extremely rigorous curriculum and workload the schools have and that the top student at an underperforming middle school may struggle significantly.

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[183] Independent Budget Office, *Admissions Overhaul: Simulating the Outcome Under the Mayor's Plan For Admissions to the City's Specialized High Schools*, February 2019, accessed May 6, 2022, https://ibo.nyc.ny.us/iboreports/admissions-overhaul-simulating-the-outcome-under-the-mayors-plan-for admissions-to-the-citys-specialized-high-schools-jan-2019.pdf.

Additionally, a high-performing student in a high-performing school may not make the cutoff. The first objection reflects a valid concern that students from less rigorous schools may find themselves discouraged and unsuccessful at a specialized high school; however, this may be remedied by programs in the specialized schools that provide specific support for students who have not traditionally had access to the specialized school system. The second objection is less salient, as a high-performing student at a high-performing school is likely to attend a high-performing non-specialized high school, and any school may have a high-performing student that just misses the cutoff.

An admissions policy that draws students exclusively with the highest GPAs, while still not necessarily the best way to determine a student's academic potential, would diversify the specialized high schools and admit students who are more likely to succeed. Because the motivation for this policy change would be largely driven by the desire to create racial equity, there are opponents to the policy that conflate it with affirmative action. While this policy change would act affirmatively to create racial diversity, the policy does not fall under the normal purview of affirmative action because it would not take a student's race into account when determining admissions. Further, while many are upset that there would be fewer Asian-American students attending the specialized high schools, the system, if truly just, would never have had such a high number of Asian students at the top high schools in the first place. Rather, the demographic of the specialized high schools would more closely reflect the racial makeup of the city.

One argument SHSAT supporters make is that many of the students that attend the specialized high schools are low-income, supporting the claim that standardized testing is financially neutral. This is patently false, and perpetuates the dangerous Asian model-minority myth. As demonstrated with the expensive test preparation centers and the prevalence of students from wealthy school districts and feeder schools, a student's financial background greatly contributes to their likelihood to do well on tests. There are much more nuanced explanations for why outcomes are so different for some low-income Asian students and some low-income students of other races.

The model-minority myth was created as a way to divide non-White people by highlighting the achievements of some Asian-Americans in comparison to the supposed non-achievements of other Americans, particularly Black Americans. Many who do not grasp the complexities of American society will cite for instance that Asian-Americans are the highest earning racial group in the U.S. This overlooks, however, the enormous income inequality within the broad category of Asian-Americans. Indian-Americans and Filipino-Americans, for instance, have a median household income above $90,000, while the median Burmese and Nepalese-American household incomes are below $60,000. This gap can be attributed in large part to America's immigration policies, which have prioritized immigration for people with bachelor's degrees. Understandably, then, immigrants in America with high education levels will be overrepresented in higher income brackets. The model-minority myth perpetuates the idea that if you work hard enough, you can succeed in America, which shifts the causes

of poverty away from systemic factors to individuals' motivation. In essence, if some people can do it, anyone can. The idea of readily accessible social mobility perpetuated by the model-minority myth ignores the centuries of violence and oppression that, while faced by all people of color, has been particularly cruel for Black Americans. Thus, the argument that Asian-American students' success on the SHSAT is indicative of the test being purely merit-based is inaccurate.

In a ruling that was delivered on April 25, 2022, the Supreme Court decided in *Coalition for TJ v. Fairfax County School Board, et al* that the elite Virginia magnet Thomas Jefferson High School for Science and Technology (TJHSST), which uses an entrance exam modeled after the SHSAT, may continue to use their new admissions criteria which eliminated the use of standardized tests. This change was implemented for the entering class in 2021 following the demands for solutions to racial inequity after the murder of George Floyd. TJHSST has a similar racial makeup to the New York City Specialized High Schools with a disproportionately high number of Asian-American students and disproportionately low number of Black and Hispanic students. The new admissions criteria mirror that of the college admissions process, taking into account factors such as if a student is from a historically underrepresented middle school or is an English language learner. The school additionally accepts the top 1.5 percent of students from public schools in the area, similar to Mayor de Blasio's failed proposal. The basis of the challenge to this change was that it constitutes racial discrimination against Asian-American students as they are disproportionately hurt.

The initial ruling in the Federal District Court in Alexandria was in favor of the challengers, citing that the discussions of the planned changes were, according to Judge Claude Hilton, "infected with talk of racial balancing from its inception."[184] Setting aside the concerning use of the word "infecting" in relation to integration efforts, this justification against admissions changes is flawed since the purpose of the changes was to create the positive result of racial diversity. It would be unusual if these discussions did not have rhetoric surrounding race and equity. While the number of Asian-American students did fall the most of all racial groups, the incoming class was still 54 percent Asian-American in an area where only 20 percent are Asian-American. Just because one marginalized group benefited from a certain policy does not mean that changing the policy is discrimination against that group– to have maintained the admissions criteria would have upheld marginalization for other groups.

The TJHSST ruling is in line with 2016 Supreme Court case *Fisher v. University of Texas* which ruled the policy of accepting the top students across a certain district or state to be constitutional. The school board's lawyers warned that a ruling in favor of the challengers would challenge the precedent set by the Texas case that schools may use race-neutral methods to achieve diversity. While these cases involve race-neutral admissions criteria, the two Supreme Court cases against Harvard and the University of North Carolina admissions, which previously took race explicitly into account, officially

[184] Adam Liptak, "Supreme Court Allows Elite High School's New Admissions Rules," *The New York Times*, April 25, 2022, accessed May 6, 2022, https://www.nytimes.com/2022/04/25/us/politics/supreme-court-admissions-race.html.

overturned the legality of race-based affirmative action. In doing so, the court opened the precedent set by cases like *Regents of University of California v. Bakke*, which found affirmative action constitutional so long as quotas were not used.

Because the specialized high school admissions process is managed by each state, it is largely out of the control of any individual city official what can be implemented. New York City, an exception to the rule, does have control over five of the New York specialized schools, excluding Bronx Science and Stuyvesant, although Mayor de Blasio was reluctant to make changes separate from the state by creating a two-tier system that would not solve the racial disparity in the two most imbalanced schools and would further complicate an already complex application process. Current efforts by mayor Eric Adams include a proposal to create a new specialized high school in each of the five boroughs with admissions criteria beyond the SHSAT. He agreed with the logic against using standardized testing as the sole factor of admissions saying, "Being gifted and talented … is more than your ability to take an exam."[185]

The benefits of diversity are well-documented in education. As education transcends pure academics, exposure to people of different cultures is undoubtedly helpful for all parties. Teachers who teach a more diverse group of students are more motivated to provide an inclusive education that will advance students' potential to succeed. Students who learn alongside students of different backgrounds have been

[185] Conor Skelding, "Eric Adams floats building a new specialized school in each NYC borough," *The New York Post*, April 9, 2022, accessed May 6, 2022, https://nypost.com/2022/04/09/eric-adams-eyes-building-specialized-schools-in-each-nyc-borough/.

found to have better critical thinking and problem solving skills.[186] New York City's expanding population of people of color is in line with the national trend of an increasingly diverse student population, and the conversation of testing in the city's public schools is reflective of the national conversation surrounding testing, as schools increasingly recognize the limitations of testing. In May of 2020 the University of California's Board of Regents voted unanimously to stop using the SAT and ACT as a factor in testing. They said "that research had convinced them that performance on the SAT and ACT was so strongly influenced by family income, parents' education and race that using them for high-stakes admissions decisions was simply wrong."[187] In the wake of the COVID-19 pandemic, universities are continuing test-optional policies even as availability opens up for testing facilities. This aligns with the growing recognition of testing being less effective than high school GPA at predicting a student's success in college, indicating that as admissions practices become more equitable, the pool of candidates being chosen are the most likely to thrive in highly rigorous academic environments. Standardized tests offer only a very slim purview into a student's capabilities. They do not take into account creativity or critical thinking, which is crucial in today's world for professional and academic achievement. Removing the barriers to high quality high school education will help New York City reach its true potential as a melting pot, where people learn from everyone and their experiences.

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[186] Amy Stuart Wells, "How Racially Diverse Schools and Classrooms Can Benefit All Students," The Century Foundation, last modified February 6, 2016, accessed May 6, 2022, https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/.
[187] Soares, "Dismantling White," Teachers College Press.

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The Constitutionality and Scope of the Hate Crimes Prevention Act:

An Analysis of *United States v. Hill*

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The Matthew Shepard and James Byrd, Jr., Hate Crime Prevention Act of 2009, 18 U.S.C. § 249, was signed into law by President Barack Obama in October 2009, which officially federally criminalized hate crimes.[188] Hate crimes were defined by the Act as causing willful bodily harm to another on the basis of religion, gender, sexual orientation, nationality, gender identity, or disability.[189] After the Act was signed into law, offenses classified as hate crimes could be placed under federal jurisdiction, as opposed to state jurisdiction, like the vast majority of assault cases.

The federal government justifies the enforcement of the Act through the Commerce Clause of the US Constitution, which grants the federal government jurisdiction over cases that affect interstate commerce.[190] However, even though the Commerce Clause has been the justification for the Constitutionality of the Act, does the Act's ability to federally criminalize hate crimes fall under the scope of the Commerce Clause, and if so, to what extent? This paper analyzes *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019), supplemented by past US Supreme Court cases, to help answer this question.

In *Hill*, the defendant, James Hill, admitted to physically assaulting his coworker, Curtis Tibbs, on the basis of his sexual orientation. Tibbs, a gay man, was repeatedly

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[188] "The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009," Civil Rights Division, May 30, 2023, https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention -act-2009-0.

[189] 18 U.S.C. § 249 can be broken down into three main subsections. Subsection one criminalizes violent acts based on race, color, religion, or national origin. Crimes that fall under subsection one do not need to prove any other jurisdictional element for a federal conviction. Subsection two includes more protected classes, criminalizing acts of violence based on gender, gender identity, sexual orientation, or disability. In order to obtain a federal conviction, the government must show a link to interstate or foreign commerce. Subsection three applies the protected classes to crimes committed in US Special Maritime and Territorial Jurisdiction.

[190] US Constitution Article 1, Section 8, Clause 3: "[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

punched in the face by Hill and sustained significant bruising and injuries to his face.[191] The passing of the Hate Crimes Prevention Act in 2009 makes this act of violence motivated by prejudice against Tibbs's sexual identity a hate crime under federal law. The assault took place in an Amazon fulfillment center which deals with packages that travel in interstate commerce, and took place during both of the men's shifts. The facility was forced to temporarily close down the area of the assault in order to clean blood from the floor. However, the performance of the fulfillment center was generally unaffected by the assault as the two men's work was reassigned to different employees.[192] Despite this, the defendant assaulted Tibbs while fully knowing he was potentially impacting interstate commerce due to the nature of his job (and does not deny this), so the 4th Circuit Court ruled that the Commerce Clause of the US Constitution applies and this case should fall under federal jurisdiction instead of state jurisdiction. Under state law in Virginia, where the assault in *Hill* took place, the defendant's actions would not qualify as a hate crime.[193] The dissenting opinion argues that there is not a significant enough connection between interstate commerce and the assault, but the Court ruled that this argument does not hold with the specific details of the case.

From the majority opinion of *Hill*, when Congress enacted the Hate Crimes Prevention Act, Congress discussed how hate crimes are different from other violent crimes in terms of interstate commerce. "Violent hate crimes 'substantially affect interstate commerce in many ways'," including "members of targeted groups are

[191] *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)
[192] *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)
[193] State law in the Commonwealth of Virginia provides stricter penalties for crimes motivated by the victim's race, color, national origin, or religion. The Commonwealth of Virginia does not have stricter penalties for crimes motivated by sexual orientation, like the assault in *Hill*. In order for Hill to be convicted of committing a hate crime, Hill would need to be federally convicted.

prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity," and "Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence."[194] These two ideas apply to this case very well: after being assaulted in the workplace, it would be very difficult for Tibbs to retain their job under the hostile conditions at the fulfillment center. Similarly, the fulfillment center is a facility of interstate commerce, so the employment of both men at the fulfillment center during the same shift means that the facility was used to facilitate the hate crime.

Past US Supreme Court case decisions can also be used to support the federal conviction of Hill. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), Ollie's Barbecue, a restaurant in Alabama, was ruled subject to federal regulation and anti-discrimination laws due to its role in interstate commerce. The restaurant had been refusing to serve people of color in its dining room, and when the federal government attempted to regulate the restaurant's behavior under the premise that it impacted interstate commerce, the restaurant argued that it did not have a direct enough impact on interstate commerce to be regulated.[195] The decision came just months after the passing of the Civil Rights Act of 1964, which disallowed private businesses from turning away customers on the basis of race or identity.[196]

Katzenbach is a similar case to *Hill* in the sense that both are cases regarding discrimination and interstate commerce. In both cases, the discrimination at hand was of high public interest, so federal intervention in each case is important for there to be

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[194] *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)
[195] *Katzenbach v. McClung*, 379 U.S. 294 (1964)
[196] From Title II of The Civil Rights Act of 1964, 42 U.S.C. §2000a: "(a)All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin."

sufficient justice. Even though Constitutionally this is not a sufficient argument, in both cases, arguments regarding the Commerce Clause aid this high public interest. In *Katzenbach*, the restaurant's main argument was that its role in interstate commerce was too minute – but this was overruled by the Court.[197] In *Hill*, this argument is also weak. The Amazon facility directly handles goods that travel through interstate commerce and is a major contributor to interstate commerce. Thus, the connection between the facility and interstate commerce is unquestionably strong enough to apply to the Commerce Clause.

Part of the dissent's argument in *Hill* is that the jurisdictional element[198] in *Hill* referred to all commercial or economic activity, which is too broad to fall under the scope of the Commerce Clause. At his job, Tibbs handles Amazon packages that are traveling both interstate and intrastate, so not every package Tibbs handles will ultimately affect interstate commerce. The dissent used this to argue that Tibbs's actions that were affected as a result of the assault were not necessarily interstate in nature, so the commerce clause should not apply. However, the nature of Tibbs's actions at the specific time of the assault should not matter in a facility that participates in interstate commerce daily.

This principle can be corroborated by the holding of *Perez v. United States*, 402 U.S. 146 (1971). In *Perez*, the Court ruled that Perez, a "loan shark," could be federally convicted even though his specific actions did not play a major role in interstate

[197] From the decision of *Katzenbach v. McClung*, 379 U.S. 294 (1964): "the impact of an activity on interstate commerce should be measured not by the individual enterprise but by all such enterprises in the aggregate. Restaurants in general would have a significant impact on interstate commerce if they all discriminated against African-Americans, according to factual findings made by Congress that the Court took at face value."

[198] "Jurisdictional element" refers to the specific element in a law that establishes which judicial entity has jurisdiction over applications of the law. Under the Hate Crimes Prevention Act, the jurisdictional element for any hate crime that was motivated by sexual orientation is whether or not the crime affected interstate commerce.

commerce.[199] Loan sharking as a whole greatly impacts interstate commerce, as loan sharks can threaten businesses that participate in interstate commerce and hence affect interstate commerce. Even though Perez himself was loan sharking a small local butcher shop, loan sharks as a group had been impacting other interstate businesses, so Perez's illegal extortionate practices had a direct impact on interstate commerce.[200] This argument can be applied to *Hill* – even if Tibbs was dealing with intrastate packages on the day of the assault, Tibbs's job requires the handling of packages that travel in interstate commerce, so the assault on Tibbs has a direct impact on interstate commerce and the Commerce Clause should still apply. In both *Katzenbach* and *Perez*, the Court ruled that the crimes at hand should be treated in aggregate. Just because one individual crime does not deeply affect interstate commerce does not mean that the kind of crime as a whole does not. In *Katzenbach*, racial discrimination in restaurants was a national problem, not solely in the one individual restaurant, so the Court enabling federal regulation over racial discrimination in places of public accommodation as a result of the case has a national impact. Similarly, in *Hill*, even if the specific assault of Tibbs did not have a large impact on interstate commerce, assaults of the kind in the aggregate may have a much larger impact, so the ability for the Court to federally criminalize assaults of the nature has a national impact.

The dissenting opinion based most of its argument on *United States v. Morrison*, 529 U.S. 598 (2000). *Morrison* was based on the rape of a student at Virginia Tech University, and through the Violence Against Women Act, the perpetrator, Morrison,

[199] *Perez v. United States*, 402 U.S. 146 (1971)
[200] This interpretation of *Perez* is consistent with the Court's holding of *Katzenbach*, where it was held that the discrimination in the restaurant should be treated as discrimination by restaurants in the aggregate, not just the specific restaurant at hand. While one specific crime may not have a large impact on interstate commerce, crimes of similar nature in aggregate may have a much more significant impact on interstate or foreign commerce.

was legally responsible for paying a civil remedy to the victim. In *Morrison*, the application of the Violence Against Women Act to the crime at hand was challenged under the premise that it was beyond the scope of the Commerce Clause and the 14th Amendment. The Court ruled that interstate commerce was not substantially affected by the sexual assault. Hence, the Act and the federal government did not have jurisdiction over this case.[201] Instead, deferring to the federalist system of the US government, jurisdiction was given to the Commonwealth of Virginia.

The dissent uses *Morrison* to claim that *Hill* does not have a sufficient connection between interstate commerce and the targeted violence in the case, similar to how the targeted violence in *Morrison* (against women in this instance) did not have a sufficient enough impact on interstate commerce for the Supreme Court to convict Morrison. The Court in *Morrison* rejected the argument for how the targeted violence affected interstate commerce, which mainly focused on the idea that targeted violence deters potential victims from traveling interstate and by diminishing national productivity because potential victims will be avoiding potentially dangerous confrontations.

However, the dissent offers no comment on the other justifications Congress generated for how hate crimes differ from other violent crimes regarding interstate commerce – only mentioning the deterring of interstate travel. In *Hill*, Tibbs would be virtually unable to continue to hold his job in the Amazon fulfillment center, knowing that he was at high risk of future harm from hate crimes. Similarly, as aforementioned, the Amazon facility was used to facilitate a violent hate crime, and the facility is directly involved in interstate commerce. These key differences override the dissent's

[201] *United States v. Morrison*, 529 U.S. 598 (2000)

comparison to *Morrison* and the argument that there is not a sufficient connection between interstate commerce and the hate crime in *Hill*.

Ultimately, the Hate Crimes Prevention act is fully dependent on a sufficient link to interstate commerce in order to be enforced by the federal government. In *Hill*, *Katzenbach*, and *Perez*, the Court ruled that the Commerce Clause does apply, as the impact the cases have on interstate commerce was interpreted to be rather sufficient. On the other hand, in *Morrison*, the impact on interstate commerce was deemed to be less significant, so the Court could not rule that the Commerce Clause applies. This highlights that there are potentially inconsistencies in Commerce Clause holdings.

Similar to *Morrison*, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court also held that the Commerce Clause does not apply to the act at hand. In *Lopez*, a high school student was federally charged with possessing a concealed firearm on school premises as a violation of the Gun-Free School Zones Act of 1990. The Court's interpretation of the case led to the holding that gun possession is not an economic activity and does not have any impact on interstate commerce. Therefore, the federal government cannot enforce the Act based on the Commerce Clause.[202] The holdings of *Lopez* and *Morrison*, amongst other past Commerce Clause cases, are intriguing because they are not fully consistent with holdings of similar cases, like *Katzenbach*, *Perez*, and *Hill*. While these cases all revolve around similar legal principles, Court holdings have gone both ways, leading to necessary analysis of why the Court does not rule in the same direction in each specific case.

This inconsistency in holdings regarding the Commerce Clause highlights how the criteria for determining sufficient linkage to interstate commerce is not fixed but

[202] *United States v. Lopez*, 514 U.S. 549 (1995)

instead is completely arbitrary. This characteristic of the Court's interpretation of the Commerce Clause is entirely subjective and up to interpretation by the Court, yet the Court is intended to rule with consistency and impartiality. In order to minimize unintentional bias from Commerce Clause holdings and similar loosely written laws, there are measures that need to be taken to regulate the Court's interpretations.

Lawrence Lessig wrote in his article "Translating Federalism: United States v Lopez" that "a rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application."[203] Lessig coined this the "Frankfurter constraint." Lessig, in his article, continued to argue that the federal government should speak specifically and with clarity about intent when regulating areas traditionally regulated by the states. This measure accomplishes two things. First, it ensures that some power remains in the hands of the states, as intended by the Constitution. It also accomplishes the goal of removing politicization from many Commerce Clause principles. When utilizing this measure, the Courts can turn to the specific statutory language in federal laws and past regulations instead of only basing Commerce Clause principles on opinion.

Many past federal laws have not utilized the specific style of writing that Lessig recommends in "Translating Federalism." When laws are written with language that is subject to interpretation, inconsistencies in Court holdings are more likely to occur. For example, the Violence Against Women Act in *Morrison* does not provide a line where the Commerce Clause does and does not apply, and instead states, "such violence has a devastating impact on women's physical and emotional health, financial security, and ability to maintain their jobs, and thus impacts interstate commerce and economic

[203] Lawrence Lessig, "Translating Federalism: United States v Lopez," *The Supreme Court Review*, 1995, 125–215.

security."[204] If the Act provided a more specific definition of to what extent violence impacts interstate commerce and how directly interstate commerce needs to be affected in order for the law to apply, then inconsistencies in Court holdings can be minimized.

Under the context of specific legal writing, the Hate Crimes Prevention Act is a well-written law. The Act specifically states its definition of a hate crime, what specific protected classes classify violence needs to be targeted against to be considered a hate crime, and in what ways a hate crime can affect interstate commerce. This specific writing of the law can eliminate much bias in court rulings like the ruling of *Hill* and also legitimizes the enforcement of the law in past and future hate crime cases. Ultimately, the consistency of Commerce Clause interpretations depends on the clarity of congressional intent and statutory language in written laws. Given the specific writing of the Hate Crimes Prevention Act, the Act is Constitutionally justifiable and can properly enforce federal hate crime convictions compared to prior federal hate crime laws.

[204] H.R.1620 - Violence Against Women Act Reauthorization Act of 2021

Immigration Reform: The Benefits of Increasing Legal Pathways to Immigration for Undocumented Immigrants and Economic Migrants

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I. Introduction

In 2022, 11.0 million undocumented immigrants (UIs) lived in the United States (Passel & Krogstad, 2024). Two thirds of this population have lived in the US for more than 10 years, and on average UIs have lived in the country for 16 years (Peri, 2021). These individuals have children who are American citizens, and established lives in the US. However, in spite of the fact that UIs are productive and contributing members of society, they suffer unjustly because of their legal status. They are afforded few constitutional rights - which, in practice, are still applied restrictively (Frazee, 2018 - and UIs experience higher rights of poverty, low high school graduation rates, and limited access to healthcare driven in part by their insecure legal status ("What you should know", 2021).

Currently, there are limited paths to citizenship. For example, for unskilled workers there is no permanent and legal path to citizenship except through family reunification (Bier, 2018). These difficulties in obtaining legal citizenship come in contradiction to public opinion and economic growth ("Pathways", 2021; Peri, 2021). Public opinion polls conducted in key battleground states and nationwide indicate strong support, 79% and 70% respectively, for creating pathways to citizenship for UIs if certain conditions are met ("Pathways", 2021; Gallup, 2025). Economic analysis suggests that providing UIs with the legal right to work would increase US GDP by trillions of dollars and generate hundreds of thousands of new jobs (Peri, 2021; Appleby, 2024). The public's willingness and the economic benefit of providing legal status to UIs is clear.

I argue that amending the Immigration and Naturalization Act of 1965 (INA) - to expand citizenship pathways to essential workers and those with familial ties to the

US will 1) help ease the burdens faced by long-standing residents of the US and 2) stimulate the US economy. Further, expanding citizenship pathways to low-income, economic migrants (EMs) - who might otherwise immigrate to the US illegally - can address key labor gaps and decrease influx of undocumented migration.

II. Undocumented Immigrants in the US

Undocumented immigrants are deeply embedded in the fabric of American society and the US economy. Yet their contributions are overshadowed by the legal, economic, and societal hardships they endure because of their lack of status.

From 1990 to 2007, the United States experienced a stark increase in the number of UI residents. However, since then, the population has steadily declined until 2019. 37% of the overall population comes from Mexico, and other significant countries of origin include El Salvador, Guatemala, Honduras, and India (Passel & Krogstad, 2024). More than 3 million have children who are US citizens, and more than 1 million are married to an individual who is a US citizen. This means that more than 4 million, out of roughly 11 million UIs, have permanent ties to the US ("Pathways", 2021), but these long-standing residents still live under the constant threat of deportation. In addition to having permanent ties to the US, many UIs are meaningful contributors to US society and economy. 2 million UIs are considered "Dreamers", who came to the United States as minors and have either graduated high school or are currently still enrolled in school. 5.2 million UIs, half of the UI population, work in essential industries and make up 5% of the U.S. essential worker population ("Pathways", 2021). Per person, UIs contribute nearly $9,000 in tax revenue, contributing nearly $100 billion in federal, state, and local taxes (Davis et al, 2024). Economists predict that

legalizing the UI population would increase US GDP by $1.2 - $1.7 trillion and generate more than 430,000 new jobs (Peri, 2021; Appleby, 2024).

However, fear of deportation and a lack of resources limit the ability of UIs to lead fruitful lives - for many, the deprivation experienced as a result of their legal status facilitates economic, physical, and mental harm (Broder, 2023). 20% of UIs live below the poverty line because of limited legal employment opportunities ("What you should know", 2021), and a bleak employment future coupled with the need to financially support their families has contributed to a low high school graduation rate amongst UIs ("What you should know", 2021; Kreisberg & Hsin, 2020; Zong & Batalova, 2019). Limited financial resources, a lack of access to public support, and fear of immigration enforcement have also led to inadequate access to health insurance and services (*Key Facts*, 2025; "What you should know", 2021). Additionally, the constitutional rights of UIs are infringed upon. For example, while the fifth and sixth amendment right to due process and legal counsel are afforded to all people in the U.S., UIs are regularly not provided with hearings. Even when they are provided with a hearing, the additional right to counsel does not apply since deportation hearings are considered civil and not criminal cases; paradoxical to the fact that an illegal crossing of the border is considered a crime (Frazee, 2018). These infringements and unfounded laws come as a result of limited pathways to citizenship.

III. A Brief History of Immigration Law

Understanding how US Immigration Policy has evolved reveals the root causes of the high number of undocumented immigrants in the country, and explains the limitations to current pathways to citizenship. Modern immigration pathways in the US

were established by the Immigration and Naturalization Act of 1965 (INA) and the Immigration Reform and Control Act of 1986 (IRCA). Before 1965, immigration to the US was restricted by a quota system that allowed, restricted, or barred immigration from specific countries. Generally, immigrants from Western Europe could easily migrate; those from Southern and Eastern Europe and non-white immigrants faced more restrictive quotas, limiting migration from these regions. (History.com Editors, 2010). The quota system received significant backlash in the 60s during the civil rights movement due to its racist origins. Inspired by Kennedy and signed into law by President Johnson, politicians were more than willing to support the law because of the widespread belief that the law wouldn't significantly change the then-present immigration trends (History.com Editors, 2010).

In the 1960s, the INA established familial sponsorship pathways, skills-based and employment pathways, and pathways for refugees. However, quotas were still used for each country and for different immigrant categories (History.com Editors, 2010), and the IRCA that followed would restrict the historic precedent of legalized, circular migration - the regular back-and-forth movement of migrants engaged in between the US-Mexico border for economic reasons (Shashkevich, 2018). For instance, before the IRCA's effect took hold, 86% of Mexican migrants, after entering the US for work, would return back to their home countries (Shashkevich, 2018). The law's new restrictions subsequently increased the number of UIs remaining in the country. In 1990, the population of UIs in the US was at 3.5 million people, and by 2007 the population had reached 12.2 million (Passel & Cohn, 2019). The INA and IRCA had led to a revolutionary shift in immigration and helped form the "nation of immigrants" that the US is today (History.com Editors, 2010).

IV. Current Pathways to Legal Immigration

Currently, there are five official pathways for legal immigration: the refugee program, the diversity lottery, family sponsorship (for relationships other than spouses, minor children, and parents for whom there is no cap for), employment-based self-sponsorship, and employer sponsorship. However, the only pathway for permanent citizenship that exists for UIs is through their children or citizen spouses. Children or spouses who are US citizens and older than the age of 21 can submit an application for citizenship for their UI parent or partner (Bier, 2023). However, depending on how the UI entered the US, they may be required to travel back to their country of origin in order to process their residency application and may incur travel restrictions because of their status ("How US Citizens", 2023).

The other non-citizenship pathways for legal immigration are also restrictive, limiting the number of low-income EMs, and facilitating the continuation of illegal migration. The refugee pathway is not viable for EMs because 1) the U.S. legal definition of a refugee is incredibly narrow and does not include those who flee homelands due to abject poverty or gang violence, and 2), even those who do meet the definition have a 1/1000 chance of being resettled in the US (Bier, 2023). The diversity lottery is not viable for prospective immigrants because the only individuals who are eligible are those whose countries of origin are underrepresented in the US. Moreover, applicants to the diversity lottery only have a 2/1000 chance of obtaining a green card (Bier, 2023). In regard to family sponsorships, outside of marrying a US citizen or having an adult child who is a citizen, there are quotas on the number of visas that can be apportioned by type of relationship and by country. Depending on the relationship between

permanent resident or citizen (e.g. not a child below 18 or a spouse) and the applicant and the country of origin (e.g. particularly relevant if many immigrants in the US are from the nation of origin - such as Mexico or India), this process can take decades or even hundreds of years (Bier, 2023). In regard to employment-based self-sponsorship pathway, this avenue is inaccessible to impoverished migrants since it only applies to those who are “extraordinary”, are of “national importance” or can afford to make a $800,000 investment into the US economy, a feat unattainable to everyone except a select few (Bier, 2023). The last pathway is that of employer sponsorship, which may sound like a promising pathway for EMs, but it, like the other pathways, is inaccessible to many. For one, only .067% of all new hires in the US come through this program. Furthermore, of the six employment categories established - religious workers, executives and managers, outstanding professors and researchers, national interest physicians, shortage workers (e.g. nurses and physical therapists), and workers with labor certifications - only the last is available to EMs (Bier, 2023). Also, migrants must have secured a job before arriving in the US. Additionally, if there is a US worker who meets minimum qualifications for the position and willing to work, an immigrant worker will be denied (Bier, 2023).

There are specific visas allocated for less-educated workers such as the H-2A or H-2B visas for both agricultural and non-agricultural workers, however, these visas are temporary. Not to mention, the process for employers to actually sponsor an immigrant is incredibly expensive and further incentivizes employers to hire workers illegally, jeopardizing UI’s labor rights (Bier, 2023). To further restrict low-skilled immigration, subsequent laws established that only 5,000 green cards can be afforded to individuals without college degrees, making it practically impossible for non-college

educated and low-skilled individuals to legally secure a permanent immigration pathway (Bier, 2018).

V. Policy Proposal

To address the needs of undocumented migrants currently in the United States and increase immigration pathways for prospective EMs who would otherwise immigrate to the US illegally, I propose a two-pronged reform to the Immigration and Naturalization Act of 1965.

Part 1: Improving Legalization Pathways for UIs already in the US

1) Offering a pathway to immigrate with no repercussions to immigrants who have lived here for 10+ years and have a job, and those with children or spouses who are US citizens.

Currently, ⅔ of all UIs have lived in the US for more than 10 years and more than ⅓ have spouses and/or children who are US citizens (Peri, 2021; "Pathways", 2021). There are no pathways to become a legal resident based on time in the US, contrary to popular support (Bier, 2023; "Pathways, 2021"). UIs with children who are US citizens must wait until their children reach 21 before a visa application can even begin. Even then, as is also the case with a UI who has a spouse who is a US citizen, if the individual immigrated to the United States without permission (e.g. crossing the border without a visa), then they must process their visa application in their country of origin and may be barred from returning to the US for a period of 3 or 10 years depending on how long they stayed in the United States without permission ("How US Citizens", 2023; Bier, 2018). The general principle of family reunification that drives US immigration is not

upheld for UIs and millions of individuals are at risk of being torn apart from their families. This proposal has the potential to change that.

2) Offering immigrants who are essential workers a specific pathway to citizenship.

5.2 million UI are essential workers, making up 5% of all essential workers ("Pathways", 2021) in the United States. These include workers in industries such as healthcare, education, emergency response, agriculture, energy, transportation, water and waste management, and many other vital sectors (Wales, 2020). The labor forces of these critical sectors depend on UI's, and it is estimated that they comprise 34% of farm workers, 13% of construction workers, and 7% of those in the manufacturing and production sectors. Many essential workers have strong ties to the US as well - 1,000,000 essential workers are Dreamers and have lived in the US since childhood, 4.2 million have lived in the US for at least a decade, and 2.3 million have a spouse or child who is a US citizen ("Pathways", 2021). UI essential workers are deeply ingrained in the fabric of US society and are integral to the economy.

Part 2: Expanding Legal Pathways for Future Economic Migrants

1) *Removing the requirement that an immigrant can only be provided an employment-based visa in the event there are no U.S. citizens who are also qualified.*

The current law inhibits economic growth. The most recent data indicates there are currently 8 million open job positions, but only 6.8 million individuals who are unemployed (Ferguson, 2025). While these openings span multiple sectors, a significant number pertain to low-skilled workers. These occupations don't require a college degree, and are becoming undesirable as US citizens are acquiring college degrees at higher rates than ever. The food service, hospitality sectors, and other

low-wage industries have the highest turnover rates and the most difficulty retaining employees. For example, there are hundreds of thousands of positions within manufacturing and the leisure and hospitality sectors that are currently unfilled (Ferguson & Hoover, 2025). The number of available positions is projected to increase as trends indicate that America's labor force participation rate will continue to decline, especially as the disparity between older Americans leaving and younger generations entering the workforce continues to expand (Ferguson, 2025). By adopting the proposed amendment, EMs can access a legal visa pathway and acquire unfilled and undesirable roles, helping to boost the US economy.

2) *Abolishing the requirement that employment must be secured for employer-sponsored visas before arrival to the US.*

It is incredibly unrealistic to expect low-skilled workers to obtain a position in the US while still in their country of origin. There is a lack of accessible resources and information on low-skill U.S. jobs, and language barriers are a significant obstacle. Instead, I suggest allowing a certain number of unskilled workers to immigrate within certain parameters. After immigrating, an individual or member of a family has a 6 month to 1 year period to secure a position in an area that is experiencing a labor shortage as a viable pathway to securing a visa; if they are unable to, then will need to return to their country of origin. This will provide an avenue to legal residency for those recently arrived and will simultaneously ensure that the employment being sought out by EMs is not detracting from a position that a US citizen would have otherwise obtained, thus, addressing that objection and fulfilling a need in the economy.

3) *Removing the cap that does not allow for more than 5000 visas to be apportioned to those without college degrees.*

The aforementioned changes cannot be effectively implemented without the removal of the quota only allowing for 5,000 visas to be apportioned to those without college degrees (Bier, 2018). There are 1.2 million vacant job positions, many of which with no higher education requirements (Van Hook, 2023; Ferguson, 2025). Thus, in order for any immigration amendment regarding low-skilled workers to be effective, this cap must be lifted.

VI. Potential Responses to the Proposed Legislation

Democratic politicians have historically supported immigration pathways to citizenship for UIs, and would be expected to support this policy. Additional potential support might come from Republican politicians due to the influential segment of their constituency that are strong proponents of growing the labor force to stimulate the economy, as providing citizenship pathways for current UIs is expected to increase US GDP by trillions, generate billions and tax revenue, create hundreds of thousands of jobs (“Pathway”, 2021; Peri, 2021), and address labor shortages in key industries (Van Hook, 2023; Ferguson & Hoover, 2025). However, it is to be expected that many Republican voters and politicians will be strong opponents of the bill, especially considering the strong anti-immigrant sentiment that exists in the current political climate, fueled by Trump’s rhetoric supporting mass deportation (Williams, 2024).

Additionally, this proposed bill may have unintended consequences. For one, increasing the legal avenues for migration and citizenship may lead to an immediate migrant surge as individuals learn that there are more job opportunities and pathways to citizenship (Clemens, 2024). However, if historical precedent is any indication, less restrictive migration flows may allow for increased circular migratory patterns and

decrease the number of individuals permanently residing in the US (Shashkevich, 2018). Further, a study completed by the Pierson Institute for International Economics shows that increasing lawful entries by 10% decreases unlawful crossings by 3% after a period of 10 months, with greater deterrence seen over time (Clemens, 2024). Opponents may argue that while providing citizenship based on labor shortages might help the economy, in the long term, these same individuals or their children will gain education and professional skills that are suited to better paying jobs. This means that these same individuals, or their children, will eventually be competing with generational Americans for opportunities (Penn, 2016), and they would oppose the bill in order to safeguard "American" interests. I counter that increasing legal avenues of immigration and naturalization will not necessarily threaten the financial stability of Americans. Our economy already depends on millions of UIs and immigrants, and considering the declining rate of labor-force participation amongst Americans, this dependency will only grow (Ferguson, 2025), and providing UIs and future immigrants citizenship is economically beneficial for the US economy ("Pathway", 2021; Peri, 2021).

VII. Conclusion

Millions of UIs and their families are positively contributing to the US, yet they experience intense hardship, limited legal freedoms, and are at constant threat of deportation, a threat which will only grow under Trump's presidency. Providing pathways to citizenship for these individuals stands to not only have a significant positive impact on millions of lives but also on the US economy.

To address the root causes of undocumented immigration, reforming pathways

targeted to prospective EMs is necessary. Through removing restrictions on visas apportioned to low-skilled workers to address unmet labor force needs and encouraging work in underserved and essential sectors, employment and revenue generation in key industries stand to benefit significantly. My proposed two-pronged legal and policy approach addresses UIs currently in the nation and prospective EMs, and is the kind of action needed in order to develop a sustainable immigration system in the US. While in a pre-Trump era, I was confident that although some individuals might oppose these amendments because of its unintended short and long term consequences, these policies might have had broad popular support. My optimism that any such immigration reform will happen during a Trump presidency is slim, although there remain viable methods to address the consequences of restrictive immigration laws.

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