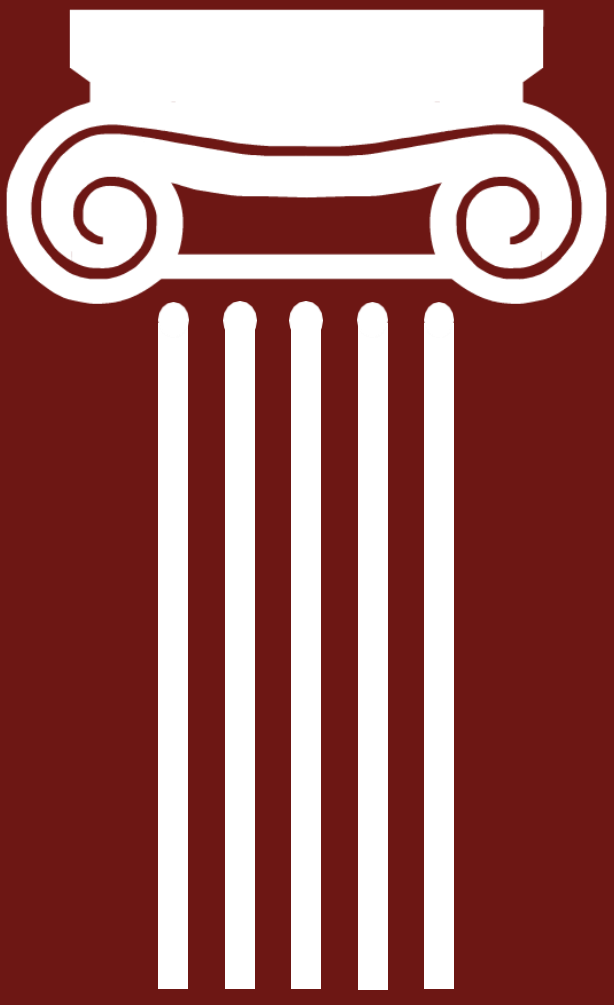
THE CLAREMONT JOURNAL OF

LAW & PUBLIC POLICY

SPRING 2022



Volume 9 • No. 2

Letter from the Editors

Dear Reader,

Welcome to Volume 9, Number 2 of the *Claremont Journal of Law and Public Policy.* We worked on this edition through the spring semester, as the Claremont Colleges faced COVID-19 case surges and a combination of in-person and remote learning. Despite the challenges, Journal members found the time to have our first 5C club dinner at Malott Dining Hall, a movie screening of *Legally Blonde*, and an end-of-the-semester pizza party!

Our writers have explored a fascinating array of pressing law and public policy issues in this edition. Veteran staff writer Jessica Zou kicks off the edition exploring the Federal Trade Commission's challenges in reigning in big tech through the case of the *FTC vs. Facebook, Inc*. Michelle Lee, another prolific staff writer, brings us a discussion of global governance by investigating the benefits and drawbacks of the global corporate tax minimum announced by 130 countries in 2021. Journal regular Bryan Thomas delves into the cycle of reinforcing addiction and homelessness as drug overdoses surge in the United States, offering policy recommendations for harm reduction incurred by homeless communities during the opioid crisis.

This edition also includes debuts from new staff writers and contributing writers. Gina Yum writes about California Proposition 12 or the Prevention of Cruelty to Farm Animals Act, exploring the history of industrialized animal agriculture and how the act provides a much-needed pathway for further animal agriculture reform. Lily Mundell steals us from state politics to a nationwide crisis — student loan debt — as she analyzes the failures of President Johnson's Higher Education Act and solutions to the racial implications of its policies. Then, Jake Ballantine takes us to another hot-button issue in American politics, exploring how and when the Supreme Court has exercised influence in policy making, including a case study of the Federalist Society. Leonora Willet closes out the edition with a narrative about how Robert Bork's confirmation hearing to the Supreme Court in 1987 shaped the rules and norms of the modern-day confirmation process.

This edition would not have been possible without all our wonderful staff writers, including those whose pieces are not in the print edition, for their commitment to the Journal. We are grateful to our print edition editors Matt Fisch, Jordan Hoogsteden, Chris Murdy, Celia Parry, Chloe Mandel, and Ethan Widlansky for supporting and inspiring writers throughout the editing process. We also want to thank our digital content editors Nick Yi and Jon Burkart and our webmaster Adeena Liang. Finally, we would like to thank our faculty sponsor, Professor Amanda Hollis-Brusky and our longtime partnering organization, the Salvatori Center at Claremont McKenna College. And of course, we want to thank you — our readers — who make this work worthwhile. Happy reading!

Best,
Calla Li and Rya Jetha
Editor-in-Chief and Managing Editor

About

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

Submissions

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

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

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

Executive Board

In This Issue

The Relevance of Antitrust Laws in the Twenty-First Century: Facebook's Monopolization of Social Media

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Staff Writer

Social media usage permeates contemporary society, and Meta Platforms Inc., previously known as Facebook, has dominated virtual space in the past decade. With billions of users across the globe, Meta's platforms dwarf the presence of other competitors in the social media world.[1] Meta encompasses Facebook, Instagram, and WhatsApp, amounting to a net worth of over $500 billion as of February 2022.[2] In 2021, the Federal Trade Commission (FTC) initiated a lawsuit against the company due to its monopolistic practices. As an administrative agency designed to protect consumers, the FTC perceives Meta's monopolization of the social media space as contributing to inferior services and products for users. When a company monopolizes an industry, the lack of competition restrains consumer options, forcing consumers to accept suboptimal prices and product/service quality. The FTC sees Meta's monopolization of the social media space as limiting consumers to using suboptimal social media platforms that harm users' mental health, spread disinformation, and exploit private data. This paper investigates the relevant antitrust laws and legal arguments in *Federal Trade Commission v. Facebook, Inc*, and discusses the case's potential outcomes. The first section of this paper will explain how the Sherman Antitrust Act, Federal Trade Commission Act, and the Clayton Antitrust Act provide foundations for FTC's lawsuit. The following section will cover the history of the case, explaining both sides' arguments in-depth. The last section will highlight the suit's ongoing proceedings and offer predictions for the final ruling.

Through examining the history and ongoing proceedings in *Federal Trade Commission v. Facebook, Inc*, this paper argues that the FTC must adjust its approach towards convicting large companies in the technology industry by narrowing down the particular market they occupy and specifying the anti-competitive behavior taken within that market. In this case, the FTC's articulate market definition and its ability to gather evidence of Meta's problematic products and services will support the agency's assertion that Meta has achieved monopoly power through anti-competitive behavior. The agency's fortified legal arguments will likely convict Meta for violating Section Two of the Sherman Antitrust Act. Challenges in this case can inform the FTC's future strategies with large tech companies, especially those occupying multiple markets and wielding substantial resources. The outcome of this case will set a precedent for how enforcement agencies can apply antitrust laws to preserve healthy competition in the twenty-first century's technology industry.

Relevant Antitrust Laws

As industrialization transformed the world economy in the latter half of the nineteenth century, the American steel, railroad, and oil industries flourished. Despite modernizing the United States, these industries engaged in anti-competitive practices, harming consumers and the economy at large. In a capitalist system, competition keeps the economy healthy since sellers must produce goods and services of sufficient quality while offering them at acceptable costs to avoid losing consumers.[3] Beginning with Standard Oil Co., corporations across major industries began using trusts to consolidate decision-making power, allowing small groups of individuals to control entire industries. Company leaders in the same sector coalesced their stock shares into a singular trust and, in exchange, received a percentage of all the companies' collective earnings. A large corporation such as Standard Oil could co-opt competitors in the industry with a trust, ensuring that previous competitors' profits bolstered the trust arrangement. Such an agreement between firms eliminated the need to compete within the industry. The board members had the power to determine prices across the entire sector, reduce product options available to consumers, and crush any emerging company that did not join the trust. These behaviors furthered the anti-trust sentiment throughout the country during the industrialization age when economic inequality became more rampant. Many ordinary Americans began seeing financial and business elites as acquiring exorbitant amounts of wealth through unfair means such as monopolizing an entire industry. As explained by Professor William Letwin at the London School of Economics and Political Science, consumers began seeing trust arrangements as a form of monopoly, which within American traditions has "always meant some sort of unjustified power, especially ones that raised obstacles to equality of opportunity."[4] The American public

[1] *E.g.,* SPANDANA SINGH, KOUSTUBH BAGCHI, HOW INTERNET PLATFORMS ARE COMBATING DISINFORMATION AND MISINFORMATION IN THE AGE OF COVID-19, 8 (2020).
[2] *See, e.g., Meta Platforms Net Worth 2010-2021 | FB,* MACROTRENDS (Feb. 27, 2022).
[3] JOHN H. SHENEFIELD, THE ANTITRUST LAWS: A PRIMER (2001).
[4] WILLIAM LETWIN, LAW AND ECON. POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965).

overwhelmingly welcomed economic reforms that could decrease the elites' powers and benefit ordinary people. Widespread social dissatisfaction at the time led to a more progressive era where political leaders saw the need for regulating economic practices in order to protect the general public's interests. As a result, Congress enacted the 1890 Sherman Antitrust Act, the first piece of federal legislation that directly limited economic activity in the United States.
The Sherman Act declared that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states, or with foreign nations, is declared to be illegal."[5] Despite attempting to terminate trust arrangements and monopolizing strategies, the Act saw limited success because its vague language made enforcement difficult. For agencies and officials to enforce legislation effectively, they require more specificity on proscribed actions and their corresponding consequences. The Sherman Act's vagueness posed substantial enforcement challenges to curbing unfair economic practices because firms engaged in monopolistic behavior not clearly enumerated in the law. Legislators failed to provide a "detailed list of prohibited activities" and instead passed a "generalized statute of constitutional breadth."[6] A broad, Constitution-like law often states principles on forbidding or mandating certain actions instead of providing instructions for how to determine a violation of the law and ways to enforce it. For example, the First Amendment allows for a wide range of interpretations on what types of speech are protected under "freedom of speech," ranging from exclusively verbally spoken speech to campaign donations as an extension of one's own political speech. Consequently, Courts lacked confidence in prosecuting corporate actors under the Sherman Act since the legislation did not specify the types of exact types of actions that warranted law enforcement. The 1894 case *United States v. E.C. Knight Company* poignantly revealed the Act's limitations. The Supreme Court found the sugar industry in compliance with the Sherman Act despite its monopolization of the sugar refining process.[7] Imprecision in the Sherman Act subverted antitrust goals prevalent among lawmakers and the public, generating calls for more stringent laws that would specify enforcement details.

Congress furthered antitrust legislation in 1914 by enacting the Clayton Antitrust Act, which described illegal behaviors and methods to enforce the law. The Clayton Act prohibited specific anti-competitive practices, including price discrimination, basing sales on exclusive dealing contracts, and acting as a board member for competing companies.[8] The Act also designated enforcement duties to the Federal Trade Commission, the Interstate Commerce Commission (ICC), and the Federal Reserve.[9] Congress passed the Federal Trade Commission Act to establish the FTC as an enforcement agency for antitrust laws. The agency strives "to prevent persons, partnerships, or corporations (...) from using unfair methods of competition in or affecting commerce" by enforcing the Sherman Antitrust Act and the Clayton Antitrust Act.[10] The Act specified the FTC's responsibility to investigate perceived violators of the Clayton and Sherman Acts and initiate lawsuits against companies violating antitrust laws. The FTC can issue cease and desist orders to stop and prevent actors from engaging in harmful behavior, which U.S. appeals courts must approve and enforce.[11] As the American economy continues to grow more complex, the FTC plays a significant role in consumer protection, especially when companies can profit from new forms of goods and services not yet existent during the era of early antitrust legislation.

The FTC's Lawsuit Against Meta

The FTC filed a Complaint for Injunctive and Other Equitable Relief in the U.S District Court for the District of Columbia against Meta, which operated under the name Facebook at the time, stating that the company violated Section Two of the Sherman Act due to its monopolization attempts in the Personal Social Networking (PSN) market. The agency seeks relief in the form of a permanent injunction that requires divestiture of Meta's assets, including Instagram and WhatsApp.[12] The Complaint states that Meta "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)" since 2011 through 'significant entry barriers'" that make it difficult for other firms to enter the PSN market.[13] According to the FTC, Meta monopolizes the market "through two different kinds of entry barriers: first, by acquiring firms that it believed were well-positioned to erode its monopoly (...) and second, by adopting policies preventing interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors."[14] To defend their first claim, the FTC cited Meta's acquisition of Instagram and WhatsApp as an attempt to eliminate growing competing firms. For the second claim, the FTC explained Meta's practice of allowing third-party

[5] 15 U.S.C. §§ 1-38.
[6] JOHN H. SHENEFIELD, *supra* note 1.
[7] United States v. E. C. Knight Co., 156 U.S. 1 (1895).
[8] 15 U.S.C. §§ 12-27
[9] *Id.*
[10] 15 U.S.C. § 45
[11] 15 U.S.C. §§ 41-58
[12] *See, e.g.*, *FTC Sues Facebook for Illegal Monopolization,* FTC (Dec. 9, 2020).
[13] Complaint for Injunctive and Other Equitable Relief, 8, FTC v, Facebook, Inc., No.1:20-cv-03590-JEB, (D.D.C.) .
[14] Fed. Trade Comm'n v. Facebook, Inc., No. CV 20-3590 (JEB), 2021 WL 2643627, at *1 (D.D.C. June 28, 2021).

access to its application program interfaces (APIs) only if third parties "refrain from providing the same core functions that Facebook offers, including through Facebook Blue and Facebook Messenger, and from connecting with or promoting other social networks."[15] The FTC argues that by refusing to share its platform interconnections unless third parties agree not to compete with the company, Meta prevents developing firms from becoming competitive in the long term.

In response, Meta motioned to dismiss the FTC's action based on the agency's insufficient legal proof of Meta monopolizing the PSN market in the United States.[16] Meta established a three-tiered argument to invalidate FTC's claims. First, Meta claimed that the FTC failed to establish a relevant market that Meta operates under. A monopoly must have control over a specific market, so to indict a firm of having monopoly power, the FTC must clearly explain the market dominated by Meta. The company argues that the FTC cannot articulate the boundaries of "personal networking services" and arbitrarily excludes firms that Meta views as competitors. Secondly, according to Meta, the FTC outlandishly claims that the company has over sixty percent market ownership but offers no substantive proof for this claim. Lastly, the FTC approved Meta's past acquisitions that it now portrays as inherently anti-competitive. In the case of Instagram, the "acquisition was reviewed and cleared by the FTC in a unanimous 5-0 vote." The WhatsApp acquisition was also "reviewed and summarily allowed to proceed by the FTC." [17] Furthermore, Meta only limited the sharing of its APIs due to third parties free riding off the company's developed resources. With these arguments, Meta successfully dismissed the FTC's initial action.

Judge Boasberg of the U.S. District Court for the District of Columbia issued a memorandum opinion, agreeing with Meta that the FTC did not establish the company's violation of the Sherman Act. Judge Boasberg cited the ruling in *United States v. Grinnell Corp*., determining that "the offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[18] Meta asserted that the FTC failed to prove either component necessary to render Meta a monopoly. In agreement that the FTC did not offer direct proof of Facebook's majority share of a relevant market, Judge Boasberg dismissed the agency's action.

Weaknesses in the FTC's Initial Legal Arguments

Defining Meta's Market

To establish a relevant market that a company operates within, one must discern a geographic boundary and a product boundary. In this case, both parties agree on the geographic boundary of the United States. The point of contention lies with discerning a product boundary. The FTC limits the relevant market to "personal social networking," claiming that within this PSN sphere, no other social media platform currently offers adequate substitutes to the services provided by Meta. For example, LinkedIn does not provide personal social networking services due to its professional focus, and neither does YouTube since it facilitates the passive consumption of media primarily not produced by one's family and friends.[19] Meta objects to this product boundary because the FTC portrayed Meta's withholding of APIs from other firms as anti-competitive, yet the agency designates them outside the PSN market.[20] If these companies exist outside the PSN market, then Meta's refusal to share APIs cannot be anti-competitive since the other companies would not be competing in the same market. If these companies do exist within the PSN market, then the FTC's characterization of Meta as a monopoly falls apart. The FTC also claimed that Meta only owned more than sixty percent of the market even though under the agency's narrow boundaries for the PSN market, it appears that Meta would control a far more significant market share. If barely any other firms can provide services belonging to the PSN market, then Meta's control over the market ought to be much closer to 100%. The agency fails to mention other competitors that they consider part of the PSN market, which would also help clarify their market definition.

Furthermore, Meta challenges the agency's assertion that consumers have no available substitutes to those the company offers. Judge Boarsberg reaffirms that when evaluating the substitution standard, one must look at "whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other."[21] Although the FTC explains that other online platforms offer fundamentally different products than those provided by Meta, it fails to explain why Meta consumers would not switch to alternative products given a price hike or decrease in service quality.[22]

[15] Complaint, *supra* note 11.
[16] Mem. in Supp. of Facebook, Inc.'s Mot. to Dismiss, No. 1:20-cv-03590-JEB, (D.D.C.).
[17] *Id.*
[18] United States v. Grinnell Corp., 384 U.S. 563, 570–71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966).
[19] Fed. Trade Comm'n v. Facebook, Inc., No. CV 20-3590 (JEB), 2021 WL 2643627, at *10 (D.D.C. June 28, 2021).
[20] *Id.*
[21] *Id.* at 11.
[22] *Id.*

Without a firm market definition, the FTC's argument that Meta has monopoly power lacks legal standing. In Meta's case, the company enjoys dominance across several markets, including personal networking, online advertisement, and instant messaging. Meta's control across these different markets may be most offensive to anti-trust sentiments in the U.S. since the company's presence feels overwhelming and prevents smaller firms from becoming competitive in any one of these markets. Yet due to Meta's widespread power across different markets, it is difficult to establish one market in which Meta has monopolized. If it remains unclear what market Meta operates in, it would be impossible to characterize the company as a monopoly despite its clear dominance across the technology industry.

Meta's Refusals to Deal and Exclusive Dealings

Even if the FTC successfully established legal standing for Meta's monopolizing actions, the Court would still reject the argument that Meta's refusal to share its APIs violates antitrust laws. Judge Boarsberg explained a three-part test to determine whether a company violated Section Two of the Sherman Act by refusing to trade with another company. A "preexisting voluntary and presumably profitable course of dealing between the monopolist and rival" must have existed before the defendant refused to deal.[23] Additionally, the defendant must be selling the product to other parties, which it refuses to trade with a particular firm.[24] And lastly, the reason for the defendant's refusal to deal "must suggest a willingness to forsake short-term profits to achieve an anticompetitive end."[25] The third standard requires the defendant to intentionally endure losses as a part of a predatory plan to eliminate competitors in the long term. Considering such precedents, Meta's practice of withholding APIs from other firms does not characterize an unlawful refusal to deal as argued by the FTC. Regarding the firms, it refuses to share APIs with, Meta showed that it has not previously worked with them, immediately negating the first standard for an unlawful refusal to deal. For example, the company declined to share APIs with Vine "mere hours after its launch," meaning "that decision was plainly lawful" since Meta "had not previously allowed Vine to access its APIs."[26] Judge Boarsberg mentioned that simply having a refusing-to-deal policy against competitors cannot amount to an antitrust violation, so without providing specific instances where Meta violated the previous three-part test, the FTC's argument has little merit.

Another shortcoming of the FTC complaint lies in the agency's claim against Meta for exclusive dealing. The decision in *Loraine Journal v. United States* [27] deemed a company's exclusive dealing unlawful if it aimed to disrupt a rival firm's ability to effectively compete in a shared market by not offering products to consumers who purchased from the rival firm. The FTC failed to show how Meta's conditions for other companies to use its APIs amounted to such a definition of exclusive dealing. Meta only required third parties using its APIs to refrain from promoting competitors on the company's social media platforms such as Facebook and Instagram.[28] Firms would not violate Meta's conditions when advertising other competitors on apps not owned by Meta. Moreover, Meta also allowed third-party developers to create similar products for competitors in the past. Unlike the type of exclusionary dealing that limits consumer options in an attempt to weaken competitors, Meta's policies on APIs cannot amount to an antitrust violation because they gave third parties ample space to advance the positions of its competitors. As a result of the FTC's inability to establish a relevant market in which Meta dominates and to explain the illegality of the company's API policies, the Court accepted Meta's motion to dismiss the action.

In the technology industry, competition runs rampant and a culture of stringently protecting one's programs has grown commonplace. Firms that need another company's products to provide its own products and services either operate in a completely different market than the dealing company or cannot grow capable of fairly competing with the dealing company if they operate in the same market. For example, a rideshare or food delivering app may need the instant messaging service offered by another company, so it solicits software for the messaging services to provide a completely different type of service to app users. If a competing company is seeking out products or services from another company in the same market, it is highly unlikely that an agreement to deal will emerge between the two. The FTC must recognize that unlike traditional markets, hypercompetitive dealing policies are common in the constantly developing technology-based markets. Many seemingly anti-competitive practices in the tech industry will not pass the aforementioned three-tiered test to amount to a Sherman Act violation. Firms often perceive one another as competitors without previously working alongside one another, which could be seen in Meta's evaluation of Vine, a brand-new company. The FTC must consider Meta as a company operating under multiple markets and offering different types of services and products. Although Meta evidently appears to have control over

[23] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013).
[24] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 410, 124 S. Ct. 872, 880, 157 L. Ed. 2d 823 (2004).
[25] *Id.*
[26] Fed. Trade Comm'n v. Facebook, Inc., *supra* note 17.
[27] Lorain J. Co. v. United States, 342 U.S. 143, 155, 72 S. Ct. 181, 187, 96 L. Ed. 162 (1951).
[28] Fed. Trade Comm'n v. Facebook, Inc., *supra* note 24, at 21.

cyberspace, a legal indictment of the company requires more specificity from the FTC's end. In its initial arguments, the FTC cast too wide of a net by illustrating different examples of Meta's anti-competitive behaviors that lacked strong legal backing. Instead, by articulating a clear market and a specific type of anti-competitive behavior used within that market, the FTC can show that Meta's current dominance stems from violating antitrust laws rather than from the company's superior products.

The FTC's Fortified Arguments

Given Judge Boarsberg's decision to dismiss the action, the FTC resubmitted an amended Complaint, fortifying its arguments with substantive data. Citing analysis of multiple metrics gathered by American analytics company Comscore, which include time spent on Meta's platforms, daily active users (DAUs), and monthly active users (MAUs), the FTC shows that Meta has held "durable monopoly power in personal social networking services since at least 2011."[29] Comscore concluded that Meta's share of time spent by platform users in the PSN market had exceeded 80% since 2012. Meta's share of DAUs in the market exceeded 70% in 2012, and its share of MAUs in the market exceeded 65% since 2012.[30] The FTC also names "Snapchat, MeWe, Path, Orkut, Google+, Myspace, and Friendster" as firms occupying the PSN market, proving that Meta dominates a relevant market where firms offering potential alternatives to Meta's platforms cannot effectively compete with Facebook or Instagram.[31] By providing a qualitative method for evaluating the PSN market and Meta's place in it, the FTC successfully portrays the company as having monopoly power in a specific market.

The agency also bolsters its claim that Meta's acquisitions of Instagram and WhatsApp amounted to anticompetitive behavior to protect its dominant position in the PSN market. Referring to Meta's internal correspondence, the FTC demonstrates how the company saw Instagram and WhatsApp as threatening competitors. With fearful perceptions of the two companies in their early development, Meta pursued an acquisition strategy to quell competition. In one email, Meta CEO Mark Zuckerberg explicitly stated that "it is better to buy than compete."[32] The FTC states that Meta's "continued ownership and operation of Instagram and WhatsApp both neutralizes their direct competitive threats and creates and maintains a "moat" that protects Facebook from entry into personal social networking by another firm via mobile photo-sharing and mobile messaging."[33] Citing Meta's internal correspondence, the FTC shows that the company acquired Instagram and WhatsApp with anti-competitive intentions, and this decision reinforced Meta's control over the PSN market.

Potential Outcomes of the Case

By narrowing down the market Meta operates under and the anti-competitive actions taken to monopolize that market, the FTC fortified its previous arguments and elicited a favorable response from Judge Boarsberg, who allowed the suit to proceed in January of 2022. In response to the agency's new Complaint, Judge Boarsberg stated that "although the agency may well face a tall task down the road in proving its allegations, the Court believes that it has now cleared the pleading bar and may proceed to discovery."[34] The FTC has provided adequate legal arguments to establish the possibility of Meta's violation of antitrust law. Consequently, the Court allowed the parties to proceed onto the discovery stage. During the discovery process, Meta and the FTC shall exchange information on the evidence and witnesses utilized by each side, allowing both parties to prepare for the trial.

For the FTC to successfully charge Meta with one count of monopoly under section two of the Sherman Act, the agency must show that Meta's current dominant position results from anticompetitive behavior rather than the company's superior products. Since the agency has already demonstrated Meta's monopoly power of a relevant market through qualitative data, it now must further establish the unlawful reason for Meta's dominance. Although the FTC gathered internal correspondence from Meta that revealed the company's anti-competitive intentions, the FTC's past approvals of Meta's acquisitions shall remain an issue that Meta will weaponize during the trial. The FTC will need to admit its past mistake of allowing the acquisitions to proceed and explain the agency's negligence in reviewing Meta's actions in the past. This case gives the agency an opportunity to remold itself to take on problems of the modern times and to develop more stringent review protocols for tech companies such as Meta. If the agency can produce a clear set of standards used to evaluate acquisitions, the public will have more faith in the FTC's ability to safeguard against anti-competitive behaviors that hurt consumers in the long run.

[29] First Am. Compl. for Inj. Relief and other Equitable Relief, No. 1:20-cv-03590-JEB, (D.D.C).

[30] *Id.*

[31] *Id.*

[32] Bobby Allyn, *Judge allows Federal Trade Commission's latest suit against Facebook to move forward*, NPR (Jan. 11. 2022), https://www.npr.org/2022/01/11/1072169787/judge-allows-federal-trade-commiss ions-latest-suit-against-facebook-to-move-forw#:~:text=The%20Federal%20Trade%20Commission's%20antitrust,dismissed%20for%20lack%20of%20evidence.

[33] First Am. Compl. for Inj. Relief and other Equitable Relief, *supra* note 27, at 76

[34] Cecilia Kang, *A Facebook antitrust suit can move forward, a judge says, in a win for the F.T.C.*, N.Y. TIMES (Jan. 11. 2022), https://www.nytimes.com/2022/01/11/technology/facebook-antitrust-ftc.html.

On the other end, Meta will likely gather evidence to prove its platforms' superior quality compared to its competitors. The company needs to prove that superior products and services rather than its strategy of buying out competitors allowed Meta to reach its current state in the PSN market. Due to its experienced legal team and financial resources, Meta can gather evidence to build a narrative centered around its excellent products and services that fairly outcompete other firms. In response, the FTC will argue that Meta's "willful acquisition or maintenance" of monopolistic power led to the company's position. To do so, the FTC needs evidence showing substantial flaws in Meta's services and products. Citing the company's failures in protecting user privacy and its permissiveness towards rampant misinformation will support the FTC's assertions. By presenting significant issues with Meta's products, the FTC can effectively claim that predatory and anti-competitive behavior rather than product superiority contributed to the company's monopolization of PSN services. Such monopoly power actively harms consumers by preventing them from accessing potentially better products, which violates antitrust laws.

Given the escalating frequency of problems with Meta's products and services, collecting evidence that opposes Meta's claims will not be difficult for the FTC. For example, in 2016, Meta failed to protect Facebook users' data, allowing the company Cambridge Analytica access to the information of eighty-seven million users without their consent.[35] In 2021, whistleblower Frances Haugen released internal documents showing how Meta's internal team identified steps the company could take to decrease political polarization and violent incitements on its platforms but that Meta's leadership refused to take these steps in order to keep user engagement high.[36] Deliberate disregard for improving its products may have contributed to Meta's role in spreading disinformation and violent ideology. Meta's platforms witnessed numerous calls for violence during the January 6th attacks on the U.S. capital in 2021. The company's platforms also allowed for extremist groups to aggregate and grow their influence. Despite harmful impacts to society, Meta has not shown initiative to change its platforms due to the current user engagement it elicits. Haugen's documents also showed Meta's prioritization of user activity over its users' mental and physical health, depicting the company's adamance on maintaining high engagement at the cost of consumer well-being.[37] Numerous reports show Meta's recent failures in managing its platforms, preventing the company from confidently arguing that its products are superior to those of other competitors. The FTC can likely amount enough evidence to portray Meta's products as problematic for consumers since the company sacrifices the privacy and well-being of its users to maintain high engagement and profits. Preventing Meta from arguing its product superiority allows the FTC to highlight the company's anti-competitive behaviors as contributing to Meta's success in the PSN market. By doing so, the FTC can attribute Meta's dominance of the social media world to its monopolistic behaviors, which amounts to a violation of the Sherman Antitrust Act.

As seen in Meta's case, antitrust laws created in the nineteenth century pose challenges for the FTC to ensure fair competition in the twenty-first-century landscape dominated by big tech. Companies no longer neatly fit within one market, especially firms that aim to provide a comprehensive set of services for their consumers. The culture around tech companies has evolved to embrace hyper-competitive policies, normalizing previous conceptions of monopolistic behavior. Tech companies often withhold information and refuse to deal with one another in order to gain a competitive advantage over others. The FTC must pinpoint specific monopolistic behaviors that not only violate antitrust sentiments but also antitrust laws. Meta's refusal to share its APIs obviously appears anti-competitive and contrary to the antitrust spirit in the U.S., but it does not violate antitrust laws. Due to the vagueness of early antitrust laws, decisions in past cases now act as standards for judging antitrust violations and many of these criteria often have stringent requirements for what amounts to an antitrust violation. In future lawsuits, the FTC would benefit from focusing on one type of monopolistic behavior and amounting substantial evidence to back their assertions. When companies like Meta possess such immense power, many of their actions may appear monopolistic, but a strong legal argument requires specifying a monopolistic behavior that fulfills all the standards established by precedent. To perform its purpose of enforcing antitrust laws effectively, the FTC must learn from the challenges in *FTC v. Facebook* and ensure the precision of its future legal arguments when convicting large companies in the technology industry.

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[35] *See, e.g.*, Paolo Zialcita, *Facebook Pays $643,000 Fine For Role In Cambridge Analytica Scandal,* NPR (Oct. 30, 2019), https://www.npr.org/2019/10/30/774749376/facebook-pays-643-000-fine-for-role-i n-cambridge-analytica-scandal.

[36] *See, e.g.*, Craig Timberg, *Inside Facebook, Jan. 6 violence fueled anger, regret over missed warning signs,* WASH. POST (Oct. 11, 2021), https://www.washingtonpost.com/technology/2021/10/2 2/jan-6-capitol-riot-facebook/.

[37] *See, e.g.*, Jim Waterson, *Facebook whistleblower Frances Haugen calls for urgent external regulation,* THE GUARDIAN (Oct. 25, 2021), https://www.wsj.com/livecoverage/facebook-whistle blower-frances-haugen-senate-hearing/card/eFNjPrwIH4F7BALELWrZ.

Equalizing Tax Competition:
The Global Minimum Corporate Tax Rate

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In the past few decades, economic globalization has rapidly accelerated, with the Internet and advanced transportation technologies making it easier than ever to eliminate geographical trade barriers. With increased access to international markets and resources, economies have grown rapidly through economic specialization, but are also more closely interconnected. For example, the U.S. has specialized heavily in exporting goods and services related to capital goods, with the country being the largest commercial aircraft exporter in the world.[1] At the same time, the U.S. imports almost $650 billion in consumer goods, with pharmaceuticals, cellphones, and clothing apparel composing the largest categories.[2] Since the U.S. has specialized production in certain sectors, it must now depend on trade to acquire other necessary goods and services. While globalization has brought countless benefits to both producers and consumers, multiple concerns have also been raised — namely, competition and job loss. Due to high labor costs and corporate taxes in the U.S., more and more multinational companies have offshored jobs and moved their headquarters to countries with lower corporate tax rates to keep costs low.[3] These companies' departures have not only caused job loss in the U.S. but also reduced government revenue from taxes. The revenue instead goes to the government of the country the company relocates to, creating incentives for other countries to cut taxes and draw companies to their shores.[4]

With their budgets struggling to recover from COVID pandemic-relief spending, governments want more than ever to prevent multinational companies from shifting profits and tax revenue to low-tax countries. In October 2021, more than 130 countries banded together to overhaul the global corporate tax system, instituting a global 15% tax minimum as well as rules to redistribute tax revenue from large multinational companies.[5] On top of increasing the funds needed for governments to bolster public investment, the new system ultimately aims to end the decades of "race to the bottom" tax-cutting between countries to compete for foreign investment.[6] The agreement currently calls for countries to codify the new system into law by the end of 2022 so that the tax is on track to be implemented by 2023.[7] However, focusing on the U.S. in particular, the proposal still faces significant obstacles before Congress can agree to change domestic tax laws to comply with the deal.[8]

Nevertheless, technology companies are quickly overwhelming the taxation system that is currently held in place by now outdated tax policies. In today's economic environment, the benefits of a standardized tax regime outweigh the potential pitfalls. This paper examines the benefits and drawbacks of a global corporate tax minimum, as well as potential extensions to the policy. To explore these issues, the essay will address the following topics:

I. The causes behind recent surges of corporate offshoring and the economic impact of moving companies abroad
II. The potential pros and cons of a new global corporate tax minimum
III. Extensions to the new tax system that resolve potential drawbacks
IV. Political roadblocks that could potentially block the implementation of the new tax system

[1] *See* Kimberly Amadeo, *US Exports: Top Categories, Challenges, and Opportunities*, The Balance (2022), https://www.thebalance.com/u-s-exports-top-categories-challenges-opportunities-3306282 (last visited Apr 30, 2022).
[2] *See* Kimberly Amadeo, *U.S. Imports, Including Top Categories, Challenges, and Opportunities*, The Balance (2021), https://www.thebalance.com/u-s-imports-statistics-and-issues-3306260 (last visited Apr 30, 2022).
[3] *See* Edward Alden, *Why Companies Are Leaving the United States, and How to Get Them Back*, Council on Foreign Relations (2012), https://www.cfr.org/blog/why-companies-are-leaving-united-states-and-how-get-them-back (last visited Apr 30, 2022).
[4] *See* Leigh Thomas, *Explainer: What is the global minimum tax deal and what will it mean?* REUTERS (2021, 10:01 PST), https://www.reuters.com/business/finance/what-is-global-minimum-tax-deal-what-will-it-mean-2021-10-08/.
[5] *See* Anshu Siripurapu, *Corporate Taxes in a Globalized World*, Council on Foreign Relations (2021), https://www.cfr.org/backgrounder/corporate-taxes-globalized-world (last visited Apr 30, 2022).
[6] *See id.*; RACHEL GRIFFITH & ALEXANDER KLEMM, WHAT HAS BEEN THE TAX COMPETITION EXPERIENCE FOR THE LAST 20 YEARS?, 3 (2004); *See also* Hannes Winner, *Has Tax Competition Emerged in OECD Countries? Evidence from Panel Data*, 12 INT'L TAX AND PUB. FIN. 667, 1 (2005).
[7] *See supra note* 4
[8] *See supra note* 5

I. The Global Economy in Context

Subpoint A: The Origins of Tax-Dodging and Tax Competition

Currently, international taxation is "governed by thousands of bilateral tax treaties between countries that began proliferating in the 1920s" under the League of Nations, and eventually under the United Nations.[9] The decentralization of international taxation makes it extremely difficult to determine where tax revenue is going, especially for companies with subsidiaries in many countries. The UN and the Organization for Economic Cooperation and Development (OECD) provide tax models that are used as the basis of many bilateral deals.[10] While there is some multilateral cooperation on taxation policy, there is no global entity that has the authority to tax companies, as taxation is generally viewed as a "fundamental sovereign right."[11] There are two predominant systems of corporate taxation:

1. "Worldwide" taxation: all of a corporation's profits, both domestic and foreign, are subject to tax. Firms receive tax credits for tax already paid to other governments to avoid double taxation.[12]
2. "Territorial" taxation: only corporate profits earned domestically are subject to taxation.[13]

Most wealthy countries currently use the territorial system; treaties grant a government taxation rights only if the company has a physical presence in the country, such as offices or factories, as physical establishments are traditionally considered to generate economic value.[14] As such, companies are incentivized to relocate operations to countries with low corporate tax rates to avoid the higher tax rates of their home countries. Simultaneously, advanced transportation technology and the rise of digital consumption means that these corporations can still maintain the consumer bases in their home countries without physically operating there.[15] Thus, to attract capital and foreign investments, governments are pushed to slash corporate taxes. The current fear is that countries will be locked in a "race to the bottom" tax competition, leading to "extremely low, possibly zero corporate income taxes" to attract capital.[16] The "race to the bottom" reasoning is the main motivator of initiatives to avoid harmful tax competition.[17] Most research literature also finds that "governments respond to tax changes of their neighbors, which gives support to the standard tax competition theory."[18] For example, in 1997, The European Commission launched a 'Code of Conduct for Business Taxation,' a "non-binding agreement among the member states to avoid preferential taxation."[19] Aligning with theoretical models, numerous corporate income tax reforms were undertaken in OECD countries over the past half-century. Of the 19 OECD countries examined, all except Spain had a lower tax rate in 2004 than in 1982.[20] From 1980 to 2020, "the average corporate tax rate fell from 46.5% to 25.9%, a 44% reduction."[21] In the U.S., corporate taxation as a percentage of GDP has steadily declined since the end of WWII and is now one of the lowest rates among OECD countries.[22]

Currently, the U.S. government taxes U.S. multinational firms on a residence basis for income earned domestically and abroad. Firms receive U.S. tax credits for taxes paid to foreign governments to avoid double taxation.[23] However, many firms transfer excess credits obtained on income earned in high-tax countries to reduce U.S. tax due on income earned in low-tax countries.[24] Since income is only taxed once it is repatriated or brought back into the U.S., firms benefit from reporting income in low-tax countries, because in low-tax countries, income can grow tax-free before it is repatriated.[25] Similarly, firms typically also have the incentive to avoid reporting income in high-tax countries because the tax credits received by the firm are limited to the U.S. tax liability.[26] As such, in order to take advantage of loopholes in U.S. tax policy, more and more firms are shifting operations abroad to low-tax countries, such as Ireland. Similarly, right before the 2004 election, the U.S. Congress passed the American Jobs Creation Act, creating one-year windows during which firms may deduct up to 85% of cash dividends received from foreign subsidiaries, effectively creating a substantial tax advantage to repatriating funds from low tax countries in the year of the tax break.[27] On net, these tax holidays incentivize firms to invest in low-tax countries because they now have methods to repatriate profits without incurring high tax

[9] *Id.*
[10] *See id.*; *See generally About,* OECD, https://www.oecd.org/about/ (last visited Apr 30, 2022) (the OECD is an international organization and coalition of governments that work to establish international standards and public policy targeting a range of social, environmental, and economic challenges.)
[11] *See supra note* 5.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] GRIFFITH & KLEMM, *supra note* 6 at 3.
[17] *See* Winner, *supra note* 6 at 667.
[18] *Id.* at 668.
[19] *Id.* at 667.
[20] GRIFFITH & KLEMM, *supra note* 6 at 6.
[21] *Supra note* 5.
[22] *See id.*
[23] *See* Kimberly A. Clausing and Kevin A. Hassett, *The Role of U.S. Tax Policy in Offshoring*, BROOKINGS TRADE FORUM 457, 458 (2005).
[24] *See id.* at 458.
[25] *See id.*
[26] *See id.*
[27] *See id.* at 460.

costs.[28] Because U.S. tax credits are limited and foreign income is only taxed upon repatriation, firms are especially responsive to tax rate differences across countries.[29] U.S.-based multinational firms may invert their corporate structures by moving their headquarters to low-tax countries, turning the parent into the subsidiary and the subsidiary into the parent.[30]

Beginning around the 1970s, most U.S. jobs offshored had been in manufacturing; however, these offshored manufacturing jobs were a relatively minor percentage of the industry as a whole.[31] Information technology (IT) services was the first industrial sector to move a significant number of jobs offshore due to high labor costs, which often composed 70% of the net cost of IT firms.[32] Other information-intensive sectors, such as insurance and financial services, are also aggressively offshoring. India has been the major beneficiary of white-collar offshoring from the U.S. due to its "large English-speaking educated workforce, large diaspora living in the U.S. and the U.K., and specialization in IT."[33] While Western Europe is about three to five years behind the U.S. in offshoring due to language barriers and greater protection for domestic workers, offshoring is rapidly growing in importance both economically and politically there as well.[34]

Beyond just moving physical operations abroad, firms can also lower the taxes paid on domestic income if, for instance, U.S. income is shifted abroad to low-tax countries.[35] This is especially prevalent with the rise of multinational tech giants such as Amazon, Facebook, and Google, which often earn billions of dollars in advertising and other revenue in countries where they do not have physical operations.[36] Under current regulations, which award taxing rights based on physical presence, these tech companies do not have to pay taxes on that income in those countries. Economists at the University of California Berkeley and the University of Copenhagen have estimated that as much as 40% of multinational corporate profits are relocated to tax-havens every year, reducing global corporate tax revenues by $200 billion.[37] To counter tech company tax-dodging, several European countries, along with India and Tukey, have implemented new "digital service taxes" (DSTs) and the European Union is considering them as well.[38] On the other side of the world, the U.S. has threatened to impose tariffs on countries with DSTs, arguing that they "violate long-standing tax principles and unfairly target U.S. companies."[39] However, with such large losses in government revenue due to tax-dodging along with financial pressures from the COVID-19 pandemic, the U.S. has since changed its tone, leading the push for a global minimum tax rate.

Subpoint B: The Economic Impacts of Tax-Dodging and Offshoring

Unfortunately, taxation is a zero-sum game, where losses in one segment of the tax base, namely corporations, must be made up by gains in another segment. Theoretically, "taxes on capital should vanish in a world of increasing capital mobility," as is the trend today. Therefore, to maintain the level of public expenditure on other programs such as healthcare and education, "governments have to raise taxes on immobile factors, in particular labor."[40] Immobile factors generally do not move easily between regions and sectors of the economy. Empirical evidence suggests that the tax burden has indeed been shifted from capital taxes to labor taxes, especially since the mid-1980s.[41] For the common taxpayer, this means that as corporate tax rates are slashed, income taxes, employee-side payroll taxes, and employer-side payroll taxes are increased to make up the difference.[42] Higher labor taxes are associated with lower economic growth, higher unemployment, and lower investment.[43]

Beyond just shifting tax burdens, the offshoring resulting from tax competition also wreaks havoc on domestic labor markets. Offshoring increases the relative demand for skilled labor and contributes to rising skill premiums both domestically and abroad.[44] This rise in skill premiums exacerbates income inequality.[45] While offshoring could bring "higher wages for individual workers, especially those with college education," these wage increases only apply to

[28] *See id.* at 461.
[29] *See id.* at 471.
[30] *See id.* at 464.
[31] *See Political History of Offshoring*, The Economics of Offshoring in the Software Industry, https://cs.stanford.edu/people/eroberts/cs201/projects/2003-04/offshoring/history.html (last visited Apr 30, 2022).
[32] PRB, *Offshoring U.S. Labor Increasing PRB* (2008), https://www.prb.org/resources/offshoring-u-s-labor-increasing/ (last visited Apr 30, 2022).
[33] *Id.*
[34] *See id.*
[35] *See supra note* 23 at 462.
[36] *See supra note* 5.
[37] *See id.*
[38] *See id.*
[39] *Id.*
[40] Winner *supra note* 6 at 667.
[41] *Id.* at 668
[42] *See* Garrett Watson, *The U.S. Tax Burden on Labor Tax Foundation* (2020), https://taxfoundation.org/us-tax-burden-on-labor-2020/ (last visited Apr 30, 2022).
[43] *See* ADRIANA KUGLER & MAURICE KUGLER, EFFECTS OF PAYROLL TAXES ON EMPLOYMENT AND WAGES: EVIDENCE FROM THE COLOMBIAN SOCIAL SECURITY REFORM, 7 (2001).
[44] *See* David Hummels et al., *Offshoring and Labor Markets, 56 no. 3 JOURNAL OF ECON. LITERATURE 981, 990 (2018).*
[45] *See id.* at 1022.

workers that remain employed.[46] In firms that experience offshoring shocks, displaced low-skilled workers lose 21% of their pre-displacement earnings in the year after displacement. Even five years after displacement, these workers still earn "substantially below their pre-displacement earnings."[47] In contrast, other low-skilled workers that are displaced by reasons other than offshoring only lose 15% of their pre-displacement earnings the year after displacement, and recover to almost their pre-displacement levels by the five-year mark.[48] On the other end of the spectrum, corresponding loss earnings for high-skilled workers that are displaced by offshoring and other mass layoff events are 15% and 7% respectively.[49] The higher earnings losses experienced by low-skilled workers displaced by offshoring can be partly attributed to higher incidences of unemployment and higher propensities to switch industries when reemployed, suggesting that "their labor market options are worsened."[50]

This phenomenon is consistent with the idea that "globalization leads to economy-wide reductions in demand for certain tasks." [51] For example, if competition drives a local firm out of business, other local firms may absorb displaced workers, performing very similar tasks to what they had previously done. However, when a local firm shuts down due to offshoring, this leaves workers with no opportunities to find new jobs that use similar skills as their previous ones.[52] Consequently, offshoring increases the risk of becoming unemployed for low-skilled workers, while it increases the probability of changing jobs for high-skilled workers.[53] Workers with more routine occupations suffer more from offshoring in terms of wages and employment while those with more communication-intensive and interactive occupations stand to gain from offshoring due to increased access to different markets. With respect to these different occupational characteristics, offshoring "plays an important role in income distribution and changes in income inequality."[54]

II. Introducing the New Global Corporate Tax System

With the rise of highly mobile tech conglomerates and mounting financial pressures in the wake of the COVID-19 pandemic, multiple governments are now turning to a collaborative global minimum corporate tax plan to recover lost revenue. In October 2021, nearly 126 countries signed on to a deal that would include a 15% minimum tax for companies with more than $870 million in annual revenue. President Biden unveiled a proposal for the new tax plan in the U.S. that broadly modeled the work of the OECD's "Pillar One" and "Pillar Two" blueprints for global tax reforms, which were set out in July 2021.[55]

Under Pillar One, "taxing rights would be granted to a portion of a multinational's profits based on where its customers reside, irrespective of the company's physical presence in that location."[56] For example, if a company is physically located in Ireland, but receives profits from consumers in the U.S., then the U.S. government retains the right to tax a portion of the company's U.S. profits. Originally, Pillar One cast a wide net encompassing companies that provide digital services and consumer-targeted services, as opposed to business-to-business services.[57] Past U.S. presidential administrations have opposed Pillar One, arguing that the proposal would disproportionately target U.S. corporations.[58] To support the OECD's tax reforms, President Biden has proposed a plan that shifts the scope of Pillar One by basing it on revenue and profit-margin instead of targeting specific sectors. President Biden's proposal includes an additional threshold to Pillar One, capturing the world's 100 biggest multinationals, but exempting smaller companies from this provision.[59]

Under Pillar Two, which implements the global minimum tax rate, governments would still be able to set whatever local rate they wanted to; however, if companies "paid lower rates in a particular country, their home governments could claim "top-ups" to the agreed tax floor, eliminating the advantage of shifting profits to a tax haven."[60] For example, if a German company has a subsidiary in Bermuda paying little to no tax locally, the German government would be able to collect the difference of the local tax up to 15%. With this system, there would be less incentive to shift income to low-tax

[46] *Id.* at 1009.
[47] *Id.* at 1018.
[48] *See id.*
[49] *See id.*
[50] *Id.*
[51] *Id.*
[52] *See id.*
[53] *See id.*
[54] *Id.* at 1022.

[55] *See* Richard Partington, *How would a global minimum tax work and why is it needed?* THE GUARDIAN (2021, 7:28 EST), https://www.theguardian.com/world/2021/apr/09/global-minimum-tax-biden-administration-profit-shifting-big-tech-firm-multinationals.
[56] *Id.*
[57] OECD, TAX CHALLENGES ARISING FROM DIGITALISATION—REPORT ON PILLAR ONE BLUEPRINT, 12 (2020).
[58] *See supra note* 55.
[59] *See id.*
[60] *Id.*

jurisdictions since the difference would be taxed somewhere else.[61] The OECD estimates that this will shift taxing rights for about $150 billion in profits each year. In exchange, countries that have imposed DSTs are expected to eliminate them. The EU has announced that it will delay its digital tax while the global agreement is finalized; similarly, French officials stated they would drop France's DSTs once the new rules are implemented.[62] Contrary to expectations, many U.S. tech giants welcomed the deal, stating it would "bring stability by replacing the patchwork of DSTs with a single regime."[63]

A higher global minimum tax rate might also encourage nations to increase their domestic rates across the board. The U.K. and the U.S. are the first countries to announce corporate tax rate increases, which could be a detrimental decision in isolation but could also encourage other larger economies to do the same.[64] There is broad international acceptance that taxation must be reformed to account for the increasing digitization of businesses. While it may be difficult to implement a global minimum tax plan, international consensus appears to be that the tax plan will come to pass, simply because inaction would be more disastrous.[65] Without international action, there would be a plethora of unilateral measures that could potentially lead to double taxation and international disputes, resulting in more damaging political and economic ramifications.[66]

Subpoint A: Benefits of the New Tax Plan

The competitive downward pressure on corporate tax rates also undermines the progressiveness of personal income taxes, since corporate taxes serve as a "backstop" for personal income taxes.[67] If the nominal corporate tax rate is lower than the personal rate, which is the case in the U.S. for all but the lowest two tax brackets, then "private individuals have an incentive to hide their income behind a corporate veil—incorporating themselves and recategorizing their income as corporate" to avoid taxes.[68] For example, if an individual's income is within the 37% tax bracket, which is higher than the corporate tax rate of 21%, then it is advantageous for the individual to hide their income as corporate income to avoid paying the extra tax. The gap between corporate capital taxes rates and top personal income tax rates undermines the redistributive objective of taxes, increasing wealth inequality. Redistribution occurs only among individuals who earn their incomes on the labor market; in contrast, capital owners, which often compose the top 1% of individuals, are proportionally taxed at a much lower rate.[69] Implementing a global minimum corporate tax would largely eliminate the competitive pressures that widen the gap between corporate tax rates and top personal income tax rates, strengthening the ability of taxes to redistribute wealth.

Mitigating tax competition would also decrease international inequality. While industrialized countries experience relatively few adverse effects in terms of government revenue, this is not the case for developing countries.[70] Similar to developed countries, corporate tax rates in developing countries have lowered, but unlike developed countries, developing countries have not been able to stabilize their corporate tax revenues.[71] From the early 1990s to 2001, "African countries experienced a 20% decline in corporate tax revenues," a significant portion of this loss being directly attributed to enterprise profit shifting.[72] Because of profit shifting, developing countries are estimated to lose around $160 billion in annual revenue.[73] Unlike in developed countries, developing countries could not refinance their corporate tax losses by broadening the tax base and shifting the tax burden onto other immobile factors of the economy. Instead, the tax base has actually shrunk in many developing countries. In the poorest countries, especially those in sub-Saharan Africa, tax bases have eroded due to the marked increase of "tax incentives targeted at foreign direct investment," for example, tax holidays and allowances.[74] In Ghana, foreign companies do not have to pay any tax for the first 10 years and only 8% on profits afterward. Kenya also grants foreign companies 10 year tax holidays, after which a flat tax of 25% is paid.[75] A major reason why tax competition is more severe in developing countries is that their political and administrative structures are more susceptible to the demand of particular interests, such as those of foreign multinationals.[76] With lessened competitive pressure from a minimum global tax, developing countries are able to better reclaim their lost revenue and increase investment in public services and development.

[61] *See supra note* 5.
[62] *See id.*
[63] *Id.*
[64] *See* Melissa Geiger & Sharon Baynham, *Global minimum tax: An easy fix?* KPMG, https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html (last visited Apr 30, 2022).
[65] *See id.*
[66] *See id.*
[67] *See* Thomas Rixen, *Tax Competition and Inequality: The Case for Global Tax Governance*, 17 no. 4 GLOBAL GOVERNANCE 447, 452 (2011).
[68] *Id.*
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *Id.*
[73] *See id.*
[74] *Id.* at 453.
[75] *See id.*
[76] *See id.*

On the other hand, tax haven countries, some developed and some developing, profit from tax competition. In these countries, little real economic activity takes place but their economics prosper because they operate as tax shelters, "commercializing their tax sovereignty."[77] Most tax havens, mainly small countries or dependent territories, offer "low or zero tax rates, bank secrecy, or statutes of incorporation that enable foreign taxpayers to set up shell companies."[78] They poach the tax bases of other countries by providing important infrastructure to facilitate paper profit shifting.[79] If tax havens are largely eliminated by a global minimum tax, the economies of these countries may suffer in the short run, but will ultimately face greater incentives to promote more stable methods of growth that do not depend on foreign interests and influence from large multinationals.

Subpoint B: Disadvantages of the New Tax Plan

The main concern of implementing a global minimum corporate tax is that it might disincentivize foreign investment, especially in countries that rely on investments from multinationals. For example, around 74% of Luxembourg's economy depends on foreign markets, the highest of OECD countries, due to its advantageous tax policies.[80] Negatively impacting Luxembourg's ability to offer tax incentives could be severely damaging to its economy. Tax incentives are an important factor in the financial decisions of large multinationals. If these firms have to pay a top-up tax no matter where they relocate, then the tax incentive to invest in a low-tax country has disappeared, increasing the chances of an investment not happening at all.[81] Smaller countries may need some elements of appropriate tax competition to "enable them to compete with larger countries that have inherent economic advantages."[82] For countries that are "heavily reliant on the inward investment encouraged by tax incentives" like Luxembourg, a global minimum tax could cause economic recovery to stutter in the wake of the pandemic and beyond.[83] If foreign multinationals start investing due to the lack of tax benefits, these changes could result in "both foreign and domestic reductions in operations and employment with spillover effects to the local communities where they are located."[84] A study of German multinational companies found that "FDI fell by 2.5% if a policy to limit interest deductibility is adopted by a country with an above-average corporate tax rate," demonstrating that policies that reduce tax benefits "lead to negative employment and investment effects."[85] If a foreign multinational chooses not to invest, the jobs and economic opportunities that are created locally disappear as well to the detriment of the local economy. Furthermore, if new tax costs are sufficiently high, smaller businesses may be deterred from future cross-border investments and may sell off current foreign operations to other companies. In that situation, it may also shrink domestic operations that previously supported foreign sales.[86]

A case study of reduced investment due to taxes can be observed in U.S. tax policy in Puerto Rico. In 1996, the U.S. began a ten-year phase-out plan of a tax benefit for U.S. companies with profits and activities in Puerto Rico. The policy provided U.S. companies with operations or assets in Puerto Rico the opportunity to essentially eliminate federal taxes on profits in Puerto Rico, making it an attractive place to place intangible assets or factories while maintaining complementary activities in the continental U.S.[87] The low-tax activities in Puerto Rico lowered the cost of investing those profits back into activities in places like New York.[88] Recent research by Duke University economist Juan Carlos Suárez Serrato highlights that after the phase out, U.S. companies were hit with the full U.S. federal corporate tax rate of 35%, directly impacting investing and hiring decisions.[89] Companies benefiting from tax policy account for "about 2.3 million jobs in the U.S. and that the 682 firms with Puerto Rican affiliates employed close to 11 million workers in the U.S."[90] Firms essentially viewed the repeal of the policy as an "increase in the effective cost of investing in the U.S."[91] Suárez Serrato estimates that the repeal of the policy reduced global investment by 10% and reduced U.S. employment by 6.7%.[92]

Other than direct investments, a global minimum tax rate may also result in "tax revenues effectively being exported to other jurisdictions."[93] For example, suppose a multinational is going to invest in a country regardless of whether there is a tax incentive or not. If the country offers a tax incentive, it reduces the tax paid in the country, but there would still be a

[77] *Id.*
[78] *Id.*
[79] *See id.* at 454
[80] *See* OECD, LUXEMBOURG TRADE AND INVESTMENT STATISTICAL NOTE, 1 (2017).
[81] *See supra note* 64.
[82] *Id.*
[83] *Id.*
[84] Daniel Bunn, *A Global Minimum Tax and Cross-Border Investment: Risks & Solutions Tax Foundation* (2021), Tax Foundation, https://taxfoundation.org/global-minimum-tax (last visited Apr 30, 2022).
[85] *Id.*
[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *See* JUAN CARLOS SUÁREZ SERRATO, UNINTENDED CONSEQUENCES OF REMOVING TAX HAVENS, 1 (2019).
[90] *Id.* at 8.
[91] *Id.* at 2.
[92] *See id.* at 1.
[93] *Supra note* 64.

"top-up tax" paid to the parent country. If the investment were to happen anyway, the country would be worse off by offering the incentive compared to if it had offered no incentives as it is effectively subsidizing another country's tax revenues.[94] Furthermore, since taxes are often used to encourage certain behaviors, a global minimum tax would also impact noble incentives in areas such as environmental taxes.[95] Currently, most environmental policies act along "carrot and stick lines," where "bad behavior is penalized through taxes and good behavior is incentivized through tax reliefs."[96] Governments might have to turn to subsidies, grants, or other methods to encourage good behavior from companies. Over time, there could be a shift to competition on non-tax platforms or non-profit based taxes.[97] When implementing the new tax plan, governments must carefully consider how they can preserve the effectiveness of tax benefits in discouraging harmful corporate behaviors.

When focusing on the technicalities of the new tax, the deal also includes provisions that would exempt some companies from paying the full minimum tax. A so-called substance carve-out is included, exempting "companies that have employees and physical assets in low-tax countries from paying the full minimum tax."[98] Another carve-out would also exempt financial services, oil and gas, and mining companies from the rules regarding physical presence in taxation.[99] Some experts warn that these carve-outs, particularly the substance carve-out, could incentivize "different patterns of profit shifting" and create a "tax haven reshuffle." [100] While the global minimum tax would crack down on the classic 0% tax havens such as Bermuda and the Cayman Islands, it could shift activity to other types of tax havens such as Ireland, Luxembourg, and the Netherlands, which often have relatively high nominal tax rates but provide a host of other benefits to lower the effective rate.[101] The "tax haven reshuffle" could potentially invite new forms of tax planning that will allow tax competition to continue far below 15% because it has not removed the basic incentive for shifting profits.[102]

III. Advantageous Extensions to the New Global Minimum Tax Plan

Given that negatively impacting investment is a major concern with implementing a global minimum tax, the new tax plan should be designed with investment decisions in mind. One approach is to design the tax such that it "exempts business costs including start-up costs, ongoing employment costs, and the costs of expansion and new hiring."[103] Countries like Latvia, Estonia, and Georgia have adopted this type of corporate tax policy because it is simple from both an administrative and compliance standpoint, and also because it is neutral to investment choices.[104] If a company pursues a profitable investment opportunity, there is no tax wedge to distort its decision-making. However, taxes would be due if investors require dividends or owners want to take cash out of the business.[105]

Other features of the tax plan could include loss carryforwards and carryovers for foreign tax credits. With a limited amount of mobility for foreign tax credits, it is less likely that one good year for the company would trigger the minimum tax liability; instead, "tax liability would be smoothed out over time."[106] Taken together, these policy approaches would ensure that the global minimum tax applies to profits that are "above and beyond normal economic returns on investment and cyclical fluctuations in foreign income."[107] It would also minimize distortion on cross-border investment decisions while also collecting taxes on high value activities in jurisdictions where there is no corporate tax, or where rates fall below certain rates.[108] As such governments can bolster their revenues from corporate taxes, while smaller countries can still attract the foreign investment they need to grow.

It will also be necessary to address how national tax systems and existing networks of double tax treaties will fit into a new, multilateral agreement. Careful planning and review of existing treaties will need to be conducted in order to avoid double taxation. The new plan will also have to define the tax base that the minimum tax rate will apply to very specifically. Because there is no standard international tax regime as of year, varying tax laws in individual countries result in differing tax vases and rules. To be recognized as fair and acceptable, a global minimum tax will require a standard

[94] *See id.*
[95] *See id.*
[96] *Id.*
[97] *See id.*
[98] *Supra note* 5.
[99] *See id.*
[100] *Id.*
[101] Sam Meredith, *G-20's global crackdown could create a new kind of tax haven,* CNBC (2021, 11:03 EST), https://www.cnbc.com/2021/07/16/oecd-tax-reform-g-20s-crackdown-may-create-a-new-kind-of-tax-haven.html.
[102] *See id.*
[103] *Supra note* 84.
[104] *See id.*
[105] *See id.*
[106] *Id.*
[107] *Id.*
[108] *See id.*

definition of the tax base as well as how the plan can be implemented, amended, and enforced.[109] Many of the pitfalls in the current reforms can be avoided through careful adjusting of certain provisions within the proposal. Given that the OECD reforms would, for the most part, resolve decades of international tax evasion and competition, it is clear that there is much to gain from implementing a standardized tax regime.

IV. Political Roadblocks

To implement the new tax plan worldwide, participating countries first have to change their domestic tax policies to reflect the plan. For the Biden administration, this global tax deal is "central to the push to raise the U.S. corporate tax rate" since "such an increase will be more palatable politically if other countries adopt the new minimum tax."[110] Top republicans who oppose both foreign DSTs and higher U.S. taxes have signaled their opposition to the plan, claiming that it will disproportionately harm U.S. companies.[111] With such slim Democratic margins in Congress and the 2022 midterm elections coming up, it will be extremely difficult to pass any changes to domestic tax policy through Congress. However, Secretary of the Treasury Janet Yellen has said that the minimum tax can be implemented via a legislative process known as reconciliation, which only requires a simple-majority vote in the Democratic-controlled Senate.[112] Reconciliation is only reserved for budget resolutions; only bills that change spending or revenues can be included.[113] Tax policy affects government revenues and can therefore be passed through reconciliation. However, Republicans are pushing back, arguing that the tax agreement should be considered a treaty due to its international reach. Treaties require a two-thirds majority in the Senate, which would be much more difficult to achieve.[114]

Outside the U.S., reactions to the new tax plan are also mixed. Kenya, Nigeria, Pakistan, and Sri Lanka, countries that stand to lose more revenue from removing DSTs than they would gain from the new taxing rights, have refused to sign on to the deal.[115] In Ireland, which has attracted many large U.S. tech conglomerates with its 12.5% corporate tax rate, Finance Minister Paschal Donohoe has stated he was "not in a position to join the consensus," but is looking for an outcome he can support.[116] Donohoe has also warned that Ireland could lose between $2.37 billion to $2.64 billion, around a fifth of the country's annual corporate tax revenue, under the proposal. Several EU member states have also expressed strong opposition to any global minimum tax that impinges on their sovereignty to establish corporate tax rates, especially if the agreed rate is set as 15% or above.[117] To implement the deal in the EU, a bloc-wide law will need to be passed, requiring unanimous backing from all 27 member states.[118] France is currently the president of the bloc until the end of the first half of 2022 and French Finance Minister Bruno Le Marie has said that he would try to win over those holding out on the deal, adding that all large digital corporations would be covered by the agreement.[119] In Estonia, another tax haven, the corporate income tax rate is 20%, but taxes are only levied when profit is distributed to shareholders, so there can be very low or practically no corporate tax for a few years.[120] The global minimum tax may tax profits earned in Estonia even though local laws do not tax them.[121] Estonian President Kersti Kaljulaid commented that the government would be willing to negotiate and find a way to show that its tax system would work with the new global system once regulations and technicalities are ironed out.[122]

The outlook in some other countries regarding the new tax system is slightly more positive. India is likely to benefit from the 15% minimum tax rate since domestic rates applicable to corporations in India are higher than the 15% threshold.[123] The new tax plan's proposal of granting taxing rights based on market jurisdiction could also allow India to tax tech giants like Facebook and Google.[124] As such, India will likely work toward a consensus with the new tax plan as long as it gives "meaningful and sustainable revenues to market jurisdiction."[125] China, which has a nominal corporate tax rate of 25% and grants a 15% rate to some high-tech companies, has reiterated its commitment to the global minimum tax plan. Chinese analysts say that the initiative has few potential risks for the country because "it is already a magnet for global investors."[126] The minimum tax has more risks for Hong Kong, which is the seventh-largest tax haven in the world and

[109] *See* Anshu Khanna, *Global Minimum Tax Rate: A Strategy in the Tax Collection Battle Bloomberg Tax* (2021, 0:00), https://news.bloombergtax.com/daily-tax-report-international/global-minimum-tax-rate-a-strategy-in-the-tax-collection-battle.
[110] *Supra note* 5.
[111] *See id.*
[112] *See id.*
[113] *Budget Reconciliation: The Basics*, House Committee on the Budget (2021), https://budget.house.gov/publications/fact-sheet/budget-reconciliation-basics (last visited Apr 30, 2022).
[114] *See supra note* 5.
[115] *See id.*
[116] *Supra note* 109.
[117] *See id.*
[118] *See id.*
[119] *See id.*
[120] *See id.*
[121] *See id.*
[122] *See id.*
[123] *See id.*
[124] *See id.*
[125] *Id.*
[126] *Id.*

the largest in Asia.[127] Around 70% of foreign investment from the Chinese mainland is currently channeled through Hong Kong.[128] Paul Chan, Hong Kong's financial secretary, has stated that the proposed changes to the global tax regime might affect some of the tax concessions offered by the government to various industries.[129] The main obstacle blocking the global minimum tax plan is getting the agreement of countries whose main competitive advantage is that they are tax havens. The Biden administration is proposing to raise taxes for companies based in countries that do not join, but with such middling response from the rest of the world, the new tax plan faces a rocky path forward.[130]

V. Conclusions

If implemented, the impact of a minimum tax may continue to shape tax policy in the future.[131] There could also be increasing homogeneity of tax bases and types of taxes implemented in different countries as governments work to ensure that their tax systems are not disadvantaged by the minimum tax calculation methodology.[132] With regards to tax incentives, non-profit based taxes may prove to be an attractive policy moving forward, as they represent a more stable revenue stream that is less susceptible to economic fluctuations.[133] Regardless, with the increasing mobility of capital and digitization of businesses, a standardized international tax regime is necessary to ensure governments can collect the taxes they are due, and also avoid disruptive economic disputes over conflicting tax policies. With 136 countries representing more than 90% of the global GDP signing on to the global minimum tax deal, it is likely that we see some sweeping changes in tax policy in the near future.

[127] *See id.*
[128] *See id.*
[129] *See id.*
[130] *See id.*
[131] *See supra note* 64.
[132] *See id.*
[133] *See id.*

Proposition 12: Plowing the Way for More Humane Farming Practices

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California Proposition 12, otherwise known as the "Prevention of Cruelty to Farm Animals Act," has caused intense controversy from its inception to implementation. Approved on November 6, 2018, this proposition aimed to "prevent animal cruelty by phasing out extreme methods of farm animal confinement."[1] Proposition 12 enforces minimum space requirements for particular farm animals and bans the sale of specific animal products to promote animal welfare in a time of highly industrialized animal agriculture. Many individuals in the animal agriculture industry view this ballot measure as highly restrictive because California Proposition 12 affects animal welfare within California and outside of it. The Proposition requires all animal products sold within the state to conform to its regulations. Since California is such a large animal product consumer and contributes to animal product producers' profit margins, out-of-state producers must conform to Prop 12 restrictions to continue selling in California. This proposition has also stirred up controversy because it is one of the first animal welfare initiatives in recent history. Before the 2008 introduction of Proposition 2, the ballot measure which set the foundations for Proposition 12, the last animal welfare initiative on the ballot was in 1988.

Overall, this paper contends that California Proposition 12 is a crucial ballot measure initiative because of the foundations it creates for future animal welfare legislation. Section I of this paper examines the history of industrialized animal agriculture and provides background on the largely unregulated factory farming that overtook the animal agriculture industry. Section II presents the textual strengths of the proposition and further contextualizes the reforms included in the ballot measure. Section III refutes the criticisms of the proposition from both sides — animal welfare organizations who believe the proposition's restrictions are too lenient and animal agricultural producers who think they are too strict, arguing that Proposition 12 paves a pathway for further animal agriculture reform while providing grace for producers to adapt to the restrictions in Proposition 12.

I. Background and History

Around the early nineteenth century, mass numbers of slaughterhouses emerged to accommodate the food production needs of the United States as the country shifted from an agrarian to an industrialized system.[2] Public and private slaughterhouses were located outside city centers and designed to look like factories to decrease visibility from both workers and consumers.[3] This design ensures that individuals at all stages of meat processing become disconnected from the actual processes of animal agriculture. Architects still design slaughterhouses to look like nondescript factories and place them outside the public's view, separating people from the "industrialization of animal slaughter."[4] Due to improvements in refrigeration and other technologies, slaughterhouses have continued to industrialize further, becoming larger in size and fewer in number.

Large livestock populations are raised in closed conditions to maximize production and profit. Between 1974 and 1997, the number of slaughterhouses employing more than 1,000 workers doubled, and that trend has continued to incline.[5] In the U.S., about 50 large slaughter plants are currently responsible for almost 98 percent of slaughtering and processing in the beef industry.[6] An overreliance on large slaughter plants is concerning because larger plants are more likely to use mass industrialized practices.[7] When a few corporate plants process all beef, almost all animal products in the United States inevitably derive from inhumane practices.

This overreliance came to be through consolidated markets. A small number of highly concentrated cooperatives and corporations essentially manage the animal agriculture industry. For almost every commodity in the agricultural sector, four firms or fewer own 40% of the market share, which increases the likelihood of market abuses.[8] Various laws like the Capper-Volstead Act allow market consolidation to happen. The Capper-Volstead Act, which provides exemptions from antitrust laws for farmer-owned agricultural cooperatives, provides the foundations for four of

[1] Secretary of State of California, *Text of Proposed Laws - Voter Information Guide November 6, 2018* 87-90 (2022).
[2] Amy J. Fitzgerald, *A Social History of the Slaughterhouse: From Inception to Contemporary Implications*, 17 HUM. ECOLOGY REV. 58, 59 (2010).
[3] *Id.* at 60.
[4] *Id.*
[5] Michael J. Broadway & Donald D. Stull, *Meat processing and Garden City, KS: Boom and bust*, 22 J. OF RURAL STUD. 55, 56 (2010).
[6] Michael Corkery & David Yaffe-Bellany, *The Food Chain's Weakest Link: Slaughterhouses*, NEW YORK TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html
[7] *Id.*
[8] Corporate Control in Agriculture, Farm Aid, https://www.farmaid.org/issues/corporate-power/corporate-power-in-ag/ (last visited Apr. 28, 2022).

the largest dairy cooperatives in America to control over half of the market. Congress initially passed the Capper-Volstead Act to allow small, independent farmers to protect themselves from large corporations by providing them the right to collectively bargain prices for their goods through farming cooperatives. However, since then, large cooperatives have begun to resemble corporations where profits made by small farmers directly go towards the cooperatives they are a part of, which hurts the livelihood of independent farmers. For example, the Dairy Farmers of America, a large agricultural cooperative, only pays a quarter of its profits directly to its farmers.[9] Additionally, market control of the beef industry is greater than 85%, and only four corporations, Tyson, JBS, Cargill, and National Beef, control most meatpacking plants in America.[10] The current structure of the industrialized animal agriculture industry allows these corporate interests more power to subvert animal welfare regulations.

The analysis of prices for necessary farm supplies further emphasizes the influence of corporate interests. Sellers with high market power can inflate prices for farm supplies knowing that farmers must buy them to sustain their livelihoods, which shrinks profit margins for independent farmers. The median farm income in 2018 was negative $1,840, and this statistic has remained relatively low since then. These types of efforts in the animal agriculture industry have forced independent farmers to contract with mega-corporations that have well-established relationships with farm supply sellers and can avoid the effects of inflated prices. More prominent figures in the animal agriculture world can enforce their unbridled power through political influence over the rules that govern our food system and manipulate the marketplace, which lets them avoid animal welfare legislation.[11]

Because industrialized farms seek to maximize profits and production in all ways possible, environmental justice and animal welfare are regularly sacrificed. Proposition 12 aims to provide some reform to the injustices carried out by industrialized farms by enforcing land requirements for confinement for particular farm animals, specifically hens, pigs, and cows. Confinement abuses infringe on animal welfare and create environmental and social concerns. Having animals together in close confinement induces high-stress levels and inhibits their immune systems, which increases their susceptibility to infection. Because factory farms house animals in suffocating proximity without proper ventilation and sunlight, viral transmission is readily facilitated between different species of animals.[12] These poor conditions also create a public health risk for humans, especially for populations closest to these factory farms. These populations, usually marginalized people, often work at these large plants. Because of the immense size of these factory farms, even those who do not directly work at these factory farms are reliant on these farms through the local economy and suffer public health risks, like increased risk of disease transmission.[13] Thus, industrialized farms hurt the well-being of people and animals alike.

Understanding that slaughterhouses establish the perfect environment for disease outbreaks, meat producers often introduce high levels of antibiotics to all of their healthy animals. Animal producers buy more than 70% of "medically important" antibiotics in the U.S., creating substantial breeding grounds for bacteria to evolve and develop antibiotic resistance.[14] This practice weakens public health. There is evidence that rates of human antibiotic resistance are rising due to the widespread use of non-therapeutic antibiotics in animals, which means that humans might not be able to treat bacterial infections they once could.

Public health risks from animal agriculture are more likely to impact marginalized people. The American Public Health Association (APHA) recently called for a moratorium on new animal confinement operations because of the air and groundwater pollution that this form of confinement perpetuates. The APHA moratorium is critical because there is a significant overlap between areas with larger amounts of pollution and those with more low-income people of color.[15] Proposition 12 would require producers to create more space for their livestock, which targets these public health issues. It is important to note that this impacts the health of nearby homeowners who usually happen to be slaughtering and processing workers and others who rely on the industry for their livelihood. Because the overwhelming majority of slaughtering and processing workers are people of color, and a large portion is foreign-born, this further perpetuates environmental injustices.[16]

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[9] Dan Kaufman, *Is It Time to Break Up Big Ag?*, ECON. HARDSHIP REPORTING PROJECT (Aug. 17, 2021), https://economichardship.org/2021/08/is-it-time-to-break-up-big-ag/.

[10] *Id.*

[11] *California Proposition 12, Farm Animal Confinement Initiative (2018), Ballotpedia, https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018) (last visited Apr. 28, 2022).*

[12] Jonathan Anomaly, *What's Wrong With Factory Farming?*, 8 PUB. HEALTH REV. 246, 247 (2015).

[13] Sacoby M. Wilson et al, *Environmental injustice and the Mississippi hog industry.*, 110 ENVTL. HEALTH PESP. 195, 196 (2002).

[14] U.S. Gen. Accountability Office, GAO-11-801, *Antibiotic Resistance: Agencies Have Made Limited Progress Addressing Antibiotic Use in Animals* 7 (2011).

[15] Wendee Nicole, CAFOs and Environmental Justice: The Case of North Carolina, 121 ENVTL. HEALTH PESP. 182, 184-185 (2013).

[16] Angela Stuesse & Nathan T. Dollar, *Who are America's meat and poultry workers?*, ECON. POLICY INSTIT. (Sept. 24, 2020, 10:00 PM), https://www.epi.org/blog/meat-and-poultry-worker-demographics/.

The animal agriculture industry has perpetuated many harmful practices through market consolidation and legislative loopholes. Their actions have harmed independent farmers, animal welfare, and public health measures. Proposition 12 aims to remedy some of these issues posed by industrialized animal agriculture by restricting animal producers from executing modern animal confinement practices.

II. The Contents of Proposition 12

Proposition 12 builds off the 2008 California Proposition 2, a previous ballot initiative introduced by The Humane Society. Proposition 2 also worked towards the prohibition of animal confinement. However, Prop 2, which went into effect in 2015, was criticized for being vague in its restrictions because it did not disclose specific confinement dimensions, making implementing the measure difficult. Additionally, Proposition 2 did not authorize specific enforcement agencies within its contents. Proposition 12 aims to close the loopholes left by Prop 2 by describing specific confinement standards for eggs and pork sold in California and enforcing standards for all forms of animal products. For example, the proposition includes both shell eggs and liquid eggs.

These are the specific abuses that Proposition 12 aims to reform:

Abuses Against Hens
Battery cages are intensive confinement wire cage systems for hens (chickens, turkeys, ducks, geese, and guinea fowl) to maximize the number of egg-laying hens on a farm. When hens live in these cages, they cannot spread their wings and move freely, which physically debilitates them.[17]

Abuses Against Pigs
Gestation crates similarly confine pregnant pigs. These crates prevent sows from turning around, which leads to pressure sores, ulcers, and abrasions. Producers aim to maximize potential offspring, so they confine breeding pigs for most of their lives.[18] According to a 2012 USDA pig producer survey, 75.8% of all gestating pigs lived in cages, with almost 2,000 housed in a single shed, which indicates how these crates are a normalized industry practice.[19]

Abuses Against Cows
Calves raised for veal are generally sent to slaughter by 20 weeks old and spend most of their lives in "veal crates," which are wooden stalls so small the calf cannot turn around. The calves are often kept anemic through an iron-deficient diet to maintain the whiteness of the flesh of the calves for marketability.[20]

Proposition 12 states specific restrictions to protect against the abuses listed above by introducing two waves of restrictions to make it easier for producers to adhere to the Proposition. The California government enforced the first wave starting from the beginning of 2020. Under the proposition, California agencies were supposed to introduce the second wave at the beginning of 2022. Under Prop 12, new minimum space requirements affect egg-laying hens, sows, and calves raised for veal. The 2020 wave banned producers from confining calves and hens to "inhumane areas."[21] The 2022 wave was supposed to finish the listed goals of Prop 12 by prohibiting the confinement of breeding pigs and their immediate offspring to "inhumane areas" and requiring egg-laying hens to be raised in a cage-free environment. Unfortunately, judicial matters, which this paper will analyze in the next section, temporarily halted the 2022 wave of restrictions from being enforced.

The Proposition authorized the California Department of Food and Agriculture and the California Department of Public Health with the power to enforce regulations previously listed above. Defining responsible enforcement agencies within the proposition closed other loopholes left by Proposition 2, which did not contain any state agency-related enforcement procedures. The California Secretary of State estimated that enforcing the measure could cost the state upwards of 10 million dollars annually.[22] Violating the restrictions set by Proposition 12 is considered a misdemeanor and can lead to fines up to a thousand dollars. The large budget reserved for legislative enforcement and the regulatory authorization detailed in the proposition emphasizes how seriously the California government regards this state measure. Prop 12 includes many safeguards against potential infringements against the animal welfare issues listed in its contents. Various methods in the legislation preserve the legislative strength of this piece of legislation.
Additionally, Prop 12 included protections for retailers and business owners. Section 7 of the proposition asserts that

[17] M.R. Baxter, *The welfare problems of laying hens in battery cages*, 134 VETERINARY REC. 614, 615 (1994).
[18] *Welfare Implications of Gestation Sow Housing*, AM. VETERINARY MED. ASS'N. 1, 1 (2015).
[19] *Swine 2012*, Agric. Dec. 24 (U.S.D.A. 2015) (Jan. 2015).
[20] *Foxes in the Hen House Animals, Agribusiness, and the Law: A Modern American Fable*, 22 J. OF RURAL STUD. 205, 206 (2005).
[21] INITIATIVES AND REFERENDA CLEARED FOR CIRCULATION: CALIFORNIA SECRETARY OF STATE https://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-referenda-cleared-circulation (last visited Apr. 28, 2022).
[22] *Id.*

California agencies will not prosecute business owners if their suppliers provide them with a written certification that their animal products follow the guidelines described in the statute. This section ensures that meat producers have time to meet the requirements listed in the proposition and highlights the California government's dedication to business owners. This portion of the legislation paints Proposition 12 as reforming, not radical, legislation.

Proposition 12 includes many details that promote an accessible transition to more humane animal agriculture practices without significantly stressing animal producers and suppliers. The many safeguards had within this proposition, which previous legislation did not possess, highlight the importance of regulatory enforcement. Proposition 12 included many specificities that pave a detailed roadmap, from which future animal welfare legislation can build.

III. Criticisms and Opposition

This proposition impacts the wider animal agriculture industry by enforcing a sales ban against noncompliant animal products sold within California. California is one of the largest consumers of pork, poultry, and beef, so out-of-state producers must work to accommodate this California law if they want to continue business in the state. Doing so requires producers to build new facilities or change their existing facilities to ensure that they can continue to sell products in California.

Because out-of-state producers do not want to comply with California law, Proposition 12 has received a large amount of criticism and judicial opposition on a national level. The National Pork Producers Council and the American Farm Bureau Federation challenged Proposition 12 for violating the Constitution's Commerce Clause in *National Pork Producers Council v. Ross*.[23] The Commerce Clause, Article 1, Section 8 of the Constitution, protects free trade among the states by implicitly preventing states from passing legislation that burdens interstate commerce.[24] Essentially, the NPPC and AFBF argued that Proposition 12 violated the clause by imposing burdensome restrictions on farmers all across the United States to the point where all farmers who want to sell products in California are subject to the restrictions of Proposition 12. In April 2020, a California court dismissed this case by ruling that Proposition 12 was not explicitly directed at interstate commerce and did not call for uniform practices throughout the U.S.

However, in March of 2022, the Supreme Court agreed to hear out the National Pork Producers Council's challenge to Proposition 12 within the following year.[25] If the Supreme Court ruled in favor of the NPPC and AFBF, who represent the pork industry, this could end the short-lived life of Prop 12. Because the animal agriculture industry has wielded tremendous political power for many decades, an end to Prop 12 is not an unlikely possibility. This future Supreme Court case could hold much weight for the future of animal welfare-related legislation, not just animal confinement restrictions.
In addition to this ruling, the animal agriculture industry temporarily stopped Proposition 12 regulations in early 2022 when the California Superior Court for Sacramento County ruled to halt enforcement of Proposition 12 restrictions on whole pork meat sales for retailers and grocers. This delay will remain until six months after California enacts final regulations. Because the California Department of Food and Agriculture failed to release its Prop 12 regulations on time, they created a delay in implementation.[26] The ruling for this case stated that implementation failure resulted in the CDFA not providing farmers and producers with clear instructions on regulations. This ruling allows the pork supply chain to adjust to the new regulations after the CDFA releases its final restrictions. Coupled with the aforementioned future Supreme Court status for Prop 12, this temporary delay has made it very difficult for Prop 12 to roll out.

Opposition against Prop 12 has also come from animal welfare organizations, like Representatives from the People for the Ethical Treatment of Animals (PETA) and Friends of Animals. PETA executive vice president Tracy Reiman pointed out that Proposition 12 is regressive because the confinement regulations set by the statute will still force birds in very close proximity.[27] She pointed out that this proposition will allow egg suppliers to label their products as "cage-free" because it gives hens more floor space.

Although PETA and Friends of Animals are correct in saying that there must be stricter regulations for factory farms to create more humane living conditions for animals, the confinement regulation reform set by Proposition 12 is still necessary to create the foundation of animal welfare legislation to further advocate for more animal welfare rights.

[23] National Pork Producers Council v. Ross, (21-468) U.S. (2022) .
[24] Commerce Clause, Cornell Law Institute, https://www.law.cornell.edu/wex/commerce_clause (last visited Apr. 28, 2022).
[25] National Pork Producers Council v. Ross, SCOTUSblog, https://www.scotusblog.com/case-files/cases/national-pork-producers-council-v-ross/ (last visited Apr. 28, 2022).
[26] The Associated Press, *Judge delays enforcement of part of California's new bacon law*, KRON4 (Jan 27, 2022, 07:45 AM), https://www.kron4.com/news/california/judge-delays-enforcement-of-part-of-californias-new-bacon-law/.
[27] Tracy Reiman, *Why PETA can't support Proposition 12,* PETA PRIME (Nov. 16 2018), https://www.kron4.com/news/california/judge-delays-enforcement-of-part-of-californias-new-bacon-law/.

Proposition 12 has already inspired several states to pass similar legislation to support stricter animal welfare practices in industrialized agriculture. Currently, nine states have banned gestation crates for sows.[28] Other states have followed suit by banning gestation crates for sows and battery cages for hens, and over 100 major food retailers have pledged to stop their use of gestation crates.[29][30][31] After some original debate, Tyson Foods and Hormel, two of the nation's largest poultry and pork producers, have even proactively agreed to comply with the regulations of Proposition 12.[32] Proposition 12 will pave the way for future animal welfare legislation. With so much criticism against Prop 12 from animal producers, opposition from animal welfare organizations only damages public support of Prop 12 when animal welfare legislation is already absent. It is important to note that Proposition 12 has been endorsed by groups like the Center for Biological Diversity and the Animal Legal Defense Fund because they believe that new animal confinement legislation, like Prop 12, is crucial for forming similar legislation in the future.[33]

IV. Conclusion

Intense outside opposition has made the future of this California initiative very volatile. Both sides of the animal welfare debate have released criticisms against Prop 12, which has led to delays in the initiative's implementation. Because the Supreme Court has agreed to hear the case made by the pork industry in the upcoming term based on the Interstate Commerce Clause, the existence of Proposition 12 is not guaranteed. The current lack of animal welfare-related legislation has led to largely unregulated factory farm abuses, desperately calling for regulation reform. Issues perpetuated by the animal agriculture industry have persisted without regulation for far too long. Although Proposition 12 does not fully address all factory farm-related issues, this state statute is still a necessary law that lays out foundational restrictions to decrease inhumane practices in the animal agriculture industry.

[28] *Hog Welfare 2012*, Agric. (U.S.D.A. 2022) (Mar. 2022).
[29] Fla. Const. Sec. 21
[30] Me. Stat. tit. 7, § 4020.
[31] The Humane Society of the United States, *The Economics of Adopting Alternatives to Gestation Crate Confinement of Sows* 1 (2011), https://www.wellbeingintlstudiesrepository.org/hsus_reps_impacts_on_animals/29).
[32] *California law bans eggs that are not from cage-free hens*, POULTRY WORLD, Apr. 15, 2022, ttps://www.poultryworld.net/the-industrymarkets/market-trends-analysis-the-industrymarkets-2/implementation-has-started-of-proposition-12-in-california/
[33] *California Proposition 12, Farm Animal Confinement Initiative (2018), Ballotpedia, https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018) (last visited Apr. 28, 2022).*

Breaking the Cycle:
A Path Toward Addressing the Homeless Opioid Crisis

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Since the turn of the century, the severity of the opioid epidemic in the United States has risen to a level of national crisis. Between 2000 and 2014, the number of opioid-related overdose deaths tripled.[1] Amid the myriad of troubles caused by the coronavirus pandemic, all fifty states reported an increase in overdose deaths.[2] In the twelve-month period that ended in April 2021, national overdose deaths rose above 100,000.[3]

This opioid epidemic has disproportionately impacted the growing number of homeless Americans.[4] Opioids are now responsible for one-in-ten homeless hospital admissions[5] and are considered the primary cause of a recent increase in homeless deaths around the country.[6] Homeless individuals are especially concentrated in cities, which means that the crisis has had an exceptional effect on the nation's urban centers.[7] Drug overdose is the leading cause of death among homeless individuals in New York City,[8] Boston,[9] and Los Angeles,[10] while San Francisco[11] and Philadelphia[12] have both received growing media attention for the increasing visibility of opioid use among their homeless populations. Adding to these issues, the opioid rates among homeless youth have increased exponentially in American cities,[13] which attests to the enduring nature of the issue. Americans who become addicted in youth are likely to remain addicted through adulthood, due to their vulnerability to long-term substance abuse and untreated psychiatric disorders.[14]

There is ample evidence that opioid addiction leads to homelessness, and, conversely, homelessness leads to opioid addiction.[15] This cycle of reinforcing addiction and homelessness makes both adverse conditions particularly difficult for homeless individuals to escape. In this paper, I first describe the connection between opioid addiction and homelessness in urban centers. In the second section, I describe the factors that make opioid addiction exceptionally difficult for homeless individuals to escape, such as a lack of support resources, vulnerability to psychological trauma, challenges imposed by co-occurring psychiatric disorders, and a social culture of drug use among homeless communities. I identify areas for improvement, such as insufficient mental health and rehabilitation resources, disproportionally high access to addictive substances on the streets relative to lifesaving resources, and decreased

[1] Noah Aleshire, Increases in Drug and Opioid Overdose Deaths — United States, 2000–2014, https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm (last visited Feb 28, 2022).
[2] Bobby Mukkamala, 2022 a critical year to address worsening drug-overdose crisis, American Medical Association, https://www.ama-assn.org/about/leadership/2022-critical-year-address-worsening-drug-overdose-crisis (last visited Feb 23, 2022).
[3] Jeffery C. Mays & Andy Newman, Nation's First Supervised Drug-Injection Sites Open in New York, The New York Times, November 30, 2021, https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html (last visited Feb 23, 2022).
[4] Opioid Abuse and Homelessness, National Alliance to End Homelessness, https://endhomelessness.org/resource/opioid-abuse-and-homelessness/ (last visited Feb 16, 2022).
[5] Ayae Yamamoto et al., Association between Homelessness and Opioid Overdose and Opioid-related Hospital Admissions/Emergency Department Visits, 242 Soc Sci Med 112585 (2019).
[6] Josh Kruger, Data shows America's opioid crisis fueling increase in homeless deaths | Department of Public Health, City of Philadelphia, https://www.phila.gov/2019-12-18-data-shows-americas-opioid-crisis-fueling-increase-in-homeless-deaths/ (last visited Feb 16, 2022).
[7] State of Homelessness: 2021 Edition, National Alliance to End Homelessness , https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/ (last visited Feb 17, 2022).
[8] Tim Craig, Surge in homeless deaths linked to opioids, extreme weather, soaring housing cost, Washington Post (2018), https://www.washingtonpost.com/news/national/wp/2018/04/13/feature/surge-in-homeless-deaths-linked-to-opioids-extreme-weather-soaring-housing-cost/ (last visited Feb 16, 2022).
[9] Boston Health Care for the Homeless Program, Selling Hope: A Creative Journey into Opioid Addiction, Boston Health Care for the Homeless Program (2018), https://www.bhchp.org/news/selling-hope-creative-journey-opioid-addiction (last visited Feb 16, 2022).
[10] Jason McGahan, Homeless Opioid Deaths Force Change in L.A. Jails, Venice Family Clinic (2019), https://venicefamilyclinic.org/news/in-the-news/homeless-opioid-deaths-force-change-in-l-a-jails/ (last visited Feb 16, 2022).
[11] The Impact of Homelessness & Opioid Crisis on SF Streets, , Chronic Homelessness Initiative (2018), https://chi.tippingpoint.org/in-the-news/the-impact-homelessness-and-the-opioid-crisis-are-having-on-san-francisco-streets/ (last visited Feb 16, 2022).
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[13] Anamika Barman-Adhikari et al., Social Network Correlates of Methamphetamine, Heroin, and Cocaine Use in a Sociometric Network of Homeless Youth, 6 Journal of the Society for Social Work and Research 433–457 (2015).
[14] Krystina Murray, Homelessness And Addiction, Addiction Center (2021), https://www.addictioncenter.com/addiction/homelessness/ (last visited Feb 18, 2022).
[15] Krystina Murray, Homelessness And Addiction, Addiction Center (2021), https://www.addictioncenter.com/addiction/homelessness/ (last visited Feb 18, 2022).

motivation to quit drugs. In the final section, I conclude by describing policies that can reduce the harm incurred by the opioid crisis among homeless communities. I advocate for decreased opioid prescriptions and increased Narcan distribution, increased funding for public drug rehabilitation programs, and the establishment of supervised injection sites in high-risk areas. I also contribute to the movement to protect vulnerable homeless individuals with supportive, subsidized housing. Doing so will save countless lives from overdose in the face of a growing homeless addiction crisis and provide vulnerable homeless individuals with the resources to break the harmful cycle of homelessness and addiction.

I. Addiction and Homelessness

The nation's growing opioid crisis is tied to the growing homelessness crisis. For the fourth consecutive year, homelessness in the US has increased nationwide, particularly among younger ages.[16] Moreover, officials recently reported over 580,000 individuals experiencing homeless around the country – a statistic that is likely well below the true number due to the difficulties of counting individuals without addresses or stable jobs.[17] Experts project that the pandemic recession could cause chronic homelessness to increase by 49 percent by 2025.[18]

Several factors contribute to this crisis and force people into homelessness. Medical debt, job loss, domestic violence, parental disapproval of one's sexual orientation, under-supported prison release, and the rising cost of living are some of the most common causes.[19] Members of the LGBTQ+ community have a 120% higher risk of homelessness than individuals who self-identify as 'straight.'[20] Many urban areas with the highest costs of living, such as San Francisco, also have some of the highest rates of homelessness.[21] And elevated unemployment rates and widespread evictions throughout the coronavirus pandemic have only made homelessness more prevalent across the nation.[22] But more than all these conventional causes, addictive substances are the leading cause of homelessness. A 2016 survey by the United States Conference of Mayors found that substance abuse was the largest cause of homelessness for single adults in 68 percent of American cities.[23] Opioid addiction makes people more likely to become homeless due to addicted individuals' limited ability to work, strained relationships with family and friends, money lost on the illicit drug market, and challenges in accessing proper treatment, especially once they become homeless.[24]

Adding to the problem, homelessness is also a leading cause of drug addiction. The difficult conditions associated with life on the streets, such as poor access to food, ill health, social isolation, threats, and lack of shelter all create a highly stressful mental state.[25] These traumatic experiences commonly cause psychiatric disorders such as bipolar disorder, schizophrenia, depression, anxiety, and PTSD.[26] Homeless individuals generally seek temporary comfort and suppression of these stresses through self-medication with available harmful substances, which, on the streets, are commonly addictive opioids.[27]

But once opioid use starts among homeless individuals, it rarely stops and often leads to life-threatening overdoses. Researchers at the UCLA Fielding School of Public Health found that homeless individuals have a significantly higher risk of opioid overdose than comparable low-income housed individuals[28] and homeless individuals are "nine times more likely to die from an overdose than those who were stably housed."[29] These findings attest to the importance of protecting vulnerable individuals with supportive, subsidized housing. There are many more factors that may contribute to the relationship between homelessness and overdose vulnerability, but the magnitude of these statistics makes a

[16] John Oliver, Homelessness: Last Week Tonight with John Oliver | Transcript - Scraps from the loft (2021), https://scrapsfromtheloft.com/tv-series/homelessness-last-week-tonight-with-john-oliver-transcript/ (last visited Feb 17, 2022).
[17] *Id.*
[18] *Id.*
[19] John Oliver, Homelessness: Last Week Tonight with John Oliver | Transcript - Scraps from the loft (2021), https://scrapsfromtheloft.com/tv-series/homelessness-last-week-tonight-with-john-oliver-transcript/ (last visited Feb 17, 2022).
[20] Krystina Murray, Homelessness And Addiction, Addiction Center (2021), https://www.addictioncenter.com/addiction/homelessness/ (last visited Feb 18, 2022).
[21] State of Homelessness: 2021 Edition, National Alliance to End Homelessness, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/ (last visited Feb 17, 2022).
[22] *Id.*
[23] Opioid Abuse and Homelessness, National Alliance to End Homelessness, https://endhomelessness.org/resource/opioid-abuse-and-homelessness/ (last visited Feb 16, 2022).
[24] Ayae Yamamoto et al., Association between Homelessness and Opioid Overdose and Opioid-related Hospital Admissions/Emergency Department Visits, 242 Soc Sci Med 112585 (2019).
[25] Krystina Murray, Homelessness And Addiction, Addiction Center (2021), https://www.addictioncenter.com/addiction/homelessness/ (last visited Feb 18, 2022).
[26] *Id.*
[27] *Id.*
[28] Ayae Yamamoto et al., Association between Homelessness and Opioid Overdose and Opioid-related Hospital Admissions/Emergency Department Visits, 242 Soc Sci Med 112585 (2019).
[29] Brett Poe, Addressing the Opioid Epidemic: How the opioid crisis affects homeless populations (2017), https://nhchc.org/wp-content/uploads/2019/08/nhchc-opioid-fact-sheet-august-2017.pdf (last visited Mar 2, 2022).

case for housing resources for vulnerable homeless individuals.

Within the homeless population, non-Hispanic, white homeless females experience the highest rate of opioid overdose[30] – a finding that contradicts the conventional stereotypes of drug abusers.[31] These differences in risks based on sex, race, and ethnicity may be partially explained by differences in cultural perspectives on pain, access to pain treatment, and/or provider bias, which may make non-Hispanic white females the most likely to receive prescription opioids. These findings speak to the danger of more frequent opioid prescriptions and provide evidence for a movement to reduce the number of national opioid prescriptions, regardless of the backgrounds of the people for whom the drugs are being prescribed.

II. The Cycle of Addiction for Homeless Individuals

In addition to homeless communities being the most vulnerable to drug addiction and overdose, they also face the most barriers to receiving the health support and rehabilitation resources they need to escape their vulnerable conditions. Homeless individuals face many obstacles to accessing addiction and mental health support, especially in light of recent funding cuts to government addiction treatment programs.

Even after individuals fall victim to drug addiction prior to or during homelessness, the lack of sufficient mental health resources homeless individuals face makes escaping their adverse and life-threatening situations particularly difficult. Because of this phenomenon, many homeless Americans attribute their homelessness to a cycle of addiction that they "cannot break."[32] Homeless individuals face several barriers to rehabilitation support, such as high rates of comorbidity, social isolation, fear of authority, and a lack of transportation means to treatment centers.[33]

Even if homeless individuals can obtain proper treatment, they later confront additional barriers in transitioning to life without opioids. For example, on urban streets, addictive substances are more accessible to many homeless individuals than medical care.[34] Even for those who complete treatment programs, overdose risks may remain high when they leave treatment and relapse to opioid use on the streets amid a lack of support resources.[35] To make matters worse, amid the restrictions imposed during the coronavirus pandemic, services traditionally available to homeless people, such as bathrooms, shelters, treatment centers, and foot traffic from which to solicit money, ended.[36] Without these critical resources, urban homelessness, and the lack of resources it entails, became even harder to survive or escape.

Adding to the difficulties of finding addiction treatment, homeless individuals who are addicted to drugs often also suffer from co-occurring psychiatric disorders, in which they suffer from both substance abuse and mental health disorders.[37] These conditions can further complicate their living situations and make proper support more difficult to obtain. It can make the pursuit of mental health support more difficult, as they must choose which of their co-occurring disorders to treat, and it makes obtaining such support more difficult as well. Psychiatric disorders can further isolate them from society and the support system it provides.

Furthermore, homeless individuals often have smaller social support networks, may have decreased motivation to quit drugs, and may have other, higher priorities, such as finding housing or food, even though addiction is a major barrier to these other priorities.[38] These factors may be partially explained by the findings that substance abuse is more widely accepted among the homeless community than in the housed community.[39] Rather than finding support in the form of

[30] Ayae Yamamoto et al., Association between Homelessness and Opioid Overdose and Opioid-related Hospital Admissions/Emergency Department Visits, 242 Soc Sci Med 112585 (2019).
[31] Does Race Gender or Ethnicity Determine Drug Use, Narconon - Addiction and Recovery (2014), https://www.narconon.org/blog/drug-use/does-race-gender-or-ethnicity-determine-drug-use/ (last visited Mar 2, 2022).
[32] Sam Quinones, 'I Don't Know That I Would Even Call It Meth Anymore', The Atlantic (2021), https://www.theatlantic.com/magazine/archive/2021/11/the-new-meth/620174/ (last visited Feb 17, 2022).
[33] Addiction in California | Understanding California's Homeless Population, Pathways Recovery (2020), https://pathwaysrecovery.com/blog/addiction-in-californias-homeless-population/ (last visited Feb 23, 2022).
[34] Kristen Fuller, MD Last Updated: January 28, & 2022, Substance Abuse & Homelessness: Statistics & Rehab Treatment, American Addiction Centers , https://americanaddictioncenters.org/rehab-guide/homeless (last visited Feb 21, 2022).
[35] Ayae Yamamoto et al., Association between Homelessness and Opioid Overdose and Opioid-related Hospital Admissions/Emergency Department Visits, 242 Soc Sci Med 112585 (2019).
[36] Kristen Fuller, MD Last Updated: January 28, & 2022, Substance Abuse & Homelessness: Statistics & Rehab Treatment, American Addiction Centers , https://americanaddictioncenters.org/rehab-guide/homeless (last visited Feb 21, 2022).
[37] *Id.*
[38] Kristen Fuller, MD Last Updated: January 28, & 2022, Substance Abuse & Homelessness: Statistics & Rehab Treatment, American Addiction Centers , https://americanaddictioncenters.org/rehab-guide/homeless (last visited Feb 21, 2022).
[39] *Id.*

traditional drug rehabilitation resources, homeless individuals may instead find a sense of community among the widespread drug users using and distributing substances on the street and fail to recognize addiction as their greatest problem. But this lack of support and sufficient treatment can have serious consequences. Researchers with the Society for Academic Emergency Medicine found that, without proper treatment, a large proportion of opioid overdose patients will have a repeat overdose emergency.[40] However, during the coronavirus pandemic of 2020, multiple states cut addiction treatment programs from their annual budgets in response to budgetary restraints [41]– amid a period of growing homelessness and addiction. If the opioid crisis among homeless communities is ever to be resolved, states must make the reestablishment of addiction treatment programs a top priority, or the cycles of homelessness, addiction, and repeated overdoses will continue.

III. Policy Recommendations

As difficult as this cycle of addiction and homeless may be, there are several policy steps the government can take to prevent the cycle, intervene in it, and ultimately work to break it. One of the most apparent solutions would be to reduce the number of opioid prescriptions around the country. The status of non-white, non-Hispanic females as the demographic both most affected by opioid overdose and likely most prescribed opioids poses reduced opioid prescriptions as a natural solution.

However, the issue is far more complex. Between 2011 and 2020, national opioid prescriptions decreased by over 44 percent, including a 6.9 percent decrease from 2019 to 2020.[42] But drug-related overdoses and deaths have continued to increase around the nation, mainly due to other illicit drugs but also methadone. Methadone is a long-acting synthetic opioid that is often prescribed to wean individuals off an addiction to heroin or other prescription painkillers. But since methadone is an opioid, it, too, can be addictive. Given its lower potency compared to other opioids, doctors have been prescribing methadone for years as a substitute.[43] Over the past several years, opiate prescriptions have dropped, but methadone prescriptions have increased.[44] This popularity has caused a rise in methadone addiction, as well as easier access to methadone as a recreationally abused substance on urban streets.[45] Methadone is now increasingly available to individuals on the streets, and it has become the namesake for Boston's 'methadone mile,' an area characterized as the epicenter of New England's ongoing drug addiction crisis, where methadone is used by some to get sober and by others to get high.[46]

For decades, lawmakers have tried to limit addiction numbers by limiting the supply of prescription opioids.[47] But they have failed to account for the illicit drug supply on urban streets that continues to increase overdose numbers even as opioid prescriptions decline.[48] Instead, policies should work to increase the supply of antidotes to these drugs. Naloxone, commonly known by its brand name, Narcan, is an opioid antagonist medicine that rapidly reverses an overdose and can save the life of someone experiencing an overdose. In the future, the government should seek to decrease the cost of Naloxone and increase access to it. Doing so would help save lives from overdose and give people who suffer drug overdoses another chance to improve their conditions. In 2019, researchers at the University of Pennsylvania found that naloxone distribution programs were "effective and cost-effective in reducing opioid overdose deaths" on a national and local basis.[49]

One method for increasing naloxone access for the people who need it most focuses on the clinicians prescribing the antidote. Given that homelessness is a major predictor of overdose, doctors should account for this risk when treating

[40] Janus Kaczorowski et al., Emergency Department–initiated Interventions for Patients With Opioid Use Disorder: A Systematic Review, 27 Academic Emergency Medicine 1173–1182 (2020).
[41] Bobby Mukkamala, 2022 a critical year to address worsening drug-overdose crisis, American Medical Association , https://www.ama-assn.org/about/leadership/2022-critical-year-address-worsening-drug-overdose-crisis (last visited Feb 23, 2022).
[42] Report shows decreases in opioid prescribing, increase in overdoses, American Medical Association, https://www.ama-assn.org/press-center/press-releases/report-shows-decreases-opioid-prescribing-increase-overdoses (last visited Mar 3, 2022).
[43] Methadone Addiction: Signs, Side Effects & Treatment Near Me, American Addiction Centers (2022), https://americanaddictioncenters.org/methadone-addiction (last visited Feb 23, 2022).
[44] *Id.*
[45] *Id.*
[46] Keith Bedford, Boston's Methadone Mile - The Boston Globe, BostonGlobe.com, https://www.bostonglobe.com/news/bigpicture/2016/07/16/boston-methadone-mile/cLqxOAY7X9tHiooOGuATAI/story.html (last visited Mar 3, 2022).
[47] Prescribing Policies: States Confront Opioid Overdose Epidemic, National Conference of State Legislatures (2019), https://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx (last visited Mar 30, 2022).
[48] Report shows decreases in opioid prescribing, increase in overdoses, American Medical Association, https://www.ama-assn.org/press-center/press-releases/report-shows-decreases-opioid-prescribing-increase-overdoses (last visited Mar 3, 2022).
[49] Janet Weiner, Expanding Access to Naloxone: A Review of Distribution Strategies, Penn LDI (2019), https://ldi.upenn.edu/our-work/research-updates/expanding-access-to-naloxone-a-review-of-distribution-strategies/ (last visited Mar 30, 2022).

homeless patients. Doing so would allow them to refer homeless patients to appropriate drug-related care and precautions, and to prescribe naloxone more readily to homeless patients. Additionally, states should distribute naloxone to individuals who experience a first overdose in light of the high rates of repeat overdose, especially among homeless individuals who lack adequate rehabilitation resources. Mathematical modeling at the San Francisco Department of Public Health suggests that increased naloxone distribution alone would prevent 6–7% of overdose deaths and "may actually increase the number of non-fatal overdoses," as the high-risk people who have already overdosed are saved from repeated overdoses by Narcan.[50]

But beyond these prescribing policies, possibly the easiest way to increase Narcan access would be to remove the need for naloxone prescriptions. The FDA should reclassify Narcan as an over-the-counter medication rather than prescription-only. Prescriptions and access to prescribers have proven to be a major barrier to Narcan access – especially among the most under-resourced populations, making the medication "largely unreachable to those who need it the most."[51] Naloxone meets all FDA criteria for becoming an over-the-counter product: its benefits outweigh its risks, it treats a condition that can be identified without a medical professional's guidance, it has a low misuse potential, and the instructions are understandable by a layperson.[52] After Pennsylvania helped increase naloxone availability at pharmacies in 2015, the FDA observed a "dramatic increase"[53] in naloxone availability. The FDA has even publicly supported this change and created a drug facts label for naloxone,[54] but it cannot force the change without a pharmaceutical sponsor requesting that the drug be switched from prescription to nonprescription.[55]

Another step that could help curtail this problem, prevent overdoses, and increase resources for homeless individuals would be the establishment of supervised injection sites. Supervised injection sites are medically supervised facilities that provide a hygienic, safe environment in which individuals can inject opioids or other illicit recreational drugs. Specifically, they can provide clean needles, administer naloxone to reverse overdoses, and provide users with options for addiction treatment[56] – many of the greatest support resources that homeless individuals lack and that contribute to their high rates of overdose deaths. Supervised injection sites have been successful for decades in cities across Europe and Canada.[57] Between 2003 and 2018, one Canadian supervised injection site, which was the object of a study, supervised over 3.6 million injections and assisted more than six thousand overdoses.[58] No one has ever died there, and the study found "no signs" of the so-called 'honey-pot effect' that worries policymakers, meaning that it did not significantly increase or encourage drug use.[59]

But despite the extensive success of supervised injection sites, their implementation has faced resistance in the US due to the stigma associated with facilitating illicit drug injections. The Biden administration has embraced new methods of reducing the harm of the opioid crisis, but it has not explicitly endorsed supervised injection sites.[60] Philadelphia, San Francisco, Boston, and Seattle have all taken steps toward establishing new supervised injection sites but have yet to open sites amid debates over the legal and moral implications.[61] In October 2019, a US district judge denied a petition to open the sites, arguing that they violate a 2003 provision in the federal Controlled Substances Act known as the 'crack house' statute, which bans the operation of a facility for the purpose of using illegal drugs.[62] Moving forward, the Controlled Substances Act could become the greatest legal barrier to

[50] Phillip Oliver Coffin et al., Behavioral intervention to reduce opioid overdose among high-risk persons with opioid use disorder: A pilot randomized controlled trial, 12 PLOS One e0183354 (2017).
[51] Kendra Walsh, Plan N: The Case For Over-The-Counter Naloxone | Health Affairs Forefront, https://www.healthaffairs.org/do/10.1377/forefront.20210630.42921/full/ (last visited Apr 7, 2022).
[52] *Id.*
[53] Zachary Brennan, OTC Opioid Overdose Antidote: Why is it not FDA Approved?, https://www.raps.org/regulatory-focus™/news-articles/2016/2/otc-opioid-overdose-antidote-why-is-it-not-fda-approved (last visited Apr 7, 2022).
[54] Scott Gottlieb, Statement from FDA Commissioner Scott Gottlieb, M.D., on unprecedented new efforts to support development of over-the-counter naloxone to help reduce opioid overdose deaths, FDA (2020), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-unprecedented-new-efforts-support-development-over (last visited Apr 7, 2022).
[55] Zachary Brennan, OTC Opioid Overdose Antidote: Why is it not FDA Approved?, https://www.raps.org/regulatory-focus™/news-articles/2016/2/otc-opioid-overdose-antidote-why-is-it-not-fda-approved (last visited Apr 7, 2022).
[56] Jeffery C. Mays & Andy Newman, Nation's First Supervised Drug-Injection Sites Open in New York, The New York Times, November 30, 2021, https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html (last visited Feb 23, 2022).
[57] Elana Gordon, What's The Evidence That Supervised Drug Injection Sites Save Lives?, NPR, September 7, 2018, https://www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives (last visited Mar 3, 2022).
[58] *Id.*
[59] *Id.*
[60] Jeffery C. Mays & Andy Newman, Nation's First Supervised Drug-Injection Sites Open in New York, The New York Times, November 30, 2021, https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html (last visited Feb 23, 2022).
[61] *Id.*
[62] Christine Vestal, With Safe Injection Sites, 'Somebody Has to Go First.' It Could Be Philadelphia., https://pew.org/2q4NqXw (last visited Apr 1, 2022).

supervised injection sites. But in November 2021, New York City became the first US city to open supervised injection sites. Within the sites' first four days of operation, they reversed nine overdoses.[63]

Finally, one of the most effective measures to reduce overdose among homeless populations as well as the greater issue of homelessness may be the establishment of supportive housing resources for vulnerable homeless individuals. Homeless individuals are at higher risks of overdose than comparable, low-income individuals with housing.[64] But throughout 2021, in the largest US metro areas, median rent rose 19.3 percent, making housing increasingly inaccessible for the vulnerable, homeless individuals who need it.[65] Supportive housing could also protect homeless individuals from many of the traumatic experiences that drive them toward addictive substances in the first place.

Investing in housing and the other policy implementations that could help curtail the issue of a growing American homeless population and a growing opioid crisis within it may be expensive. But doing so will help some of the nation's most vulnerable and under-resourced citizens and improve the conditions of American cities. In the long run, these changes will even pay off financially. A study in Florida that tracked a decade of government spending on 107 chronically homeless individuals found that, between incarceration and emergency medical treatment, their communities and local governments spent an average of over $31,000 per person per year.[66] Permanent supportive housing is estimated to only cost $10,000 per person per year. Increased Narcan distribution, increased public rehabilitative resources, and new supervised injection sites will hardly cost much more, especially considering the troubles it could save our most vulnerable individuals, our most popular cities, and our national public health.

[63] Jeffery C. Mays & Andy Newman, Nation's First Supervised Drug-Injection Sites Open in New York, The New York Times, November 30, 2021, https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html (last visited Feb 23, 2022).

[64] Ayae Yamamoto et al., Association between Homelessness and Opioid Overdose and Opioid-related Hospital Admissions/Emergency Department Visits, 242 Soc Sci Med 112585 (2019).

[65] RJ Rico, Across the U.S., rents at "insane" levels with no relief in sight, PBS NewsHour (2022), https://www.pbs.org/newshour/nation/across-the-u-s-rents-at-insane-levels-with-no-relief-in-sight (last visited Feb 21, 2022).

[66] John Oliver, Homelessness: Last Week Tonight with John Oliver | Transcript - Scraps from the loft (2021), https://scrapsfromtheloft.com/tv-series/homelessness-last-week-tonight-with-john-oliver-transcript/ (last visited Feb 17, 2022).

The Higher Education Act: Promising Access, Delivering Debt

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Newspapers are littered with headlines such as "The Student Loan Crisis Is Worse Than You Think,"[1] and "How Student Debt Became a $1.6 trillion Crisis."[2] The reality of the situation is this: as of September 2021, student loan debt in the United States totals $1.73 trillion and grows 6 times faster than the economy.[3] Since 2000, average student loan debt at graduation has increased 76%, which is a growth rate that outpaces the rate of inflation by 41%.[4] Since 1970, student loan debt at graduation has increased 326%, after adjusting for inflation.[5] While these numbers are striking on their own, disaggregating them by race demonstrates an even more intense burden on traditionally underserved communities. Black college graduates hold an average of $25,000 more in student loan debt than White college graduates, and while 40.2% of White undergraduate students use student loans to pay for school, that figure is 50.8% for Black students.[6] Four years after graduation, 48% of Black students owe an average of 12.5% more than they borrowed. After that same period, 83% of White students owe 12% less than they borrowed. These figures indicate that student loans contribute to the wealth gap between Black and White borrowers.

Theoretically, educational debt should diminish with each passing year as graduates pay it off. Among students of all races from the class of 1996, the average debt at graduation was $21,509. Ten years later, graduates with debt remaining owed a nearly equal amount: $21,233 (both figures adjusted for inflation). That debt remained so consistent over the course of ten years indicates that graduates are able to make payments toward interest but not toward their loan's principal. In the long run, students end up paying more over the term of their loan and remain in debt.[7] When borrowers cannot even make payments toward their loans' interest they go into default. Statistics regarding default also differ by race: Black/African American student borrowers default at a rate of 17.7% compared to Hispanic/Latino student borrowers at 13% and White/Caucasian students at 9%. Defaulting on student loans has consequences that can drastically affect borrower's livelihood, including: a transition to lump sum payments that collect interest instead of monthly payments, loss of eligibility for future student aid and tax benefits, damage to credit scores impacting eligibility for other loans, wage garnishing, withholding tax refunds, and lawsuits.[8] Overall, the quantity and consistency of student loan debt and its disproportionate impacts on Black students indicate that the newspaper headlines calling student lending a "crisis" are not unfounded.

How did we get here? In 1965 President Lyndon B. Johnson signed the Higher Education Act into law. This legislation was meant to strengthen the educational resources of colleges and universities and to provide financial assistance for students. The student financial assistance provided through the Higher Education Act were grants and loans available to students and parents of dependent undergraduate students and a federal work study program. This aid regime has persisted with a few revisions until this day. When President Johnson signed the Higher Education Act into law, he spoke of the opportunities it would provide: "a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor."[9] Johnson referenced his political motivation to maintain supremacy within Cold War tensions in his remarks, asserting that the Act planted seeds "from which grew my firm conviction that for the individual, education is the path to achievement and fulfillment; for the

[1] Zack Friedman, THE STUDENT LOAN CRISIS IS WORSE THAN YOU THINK FORBES (2021), https://www.forbes.com/sites/zackfriedman/2021/11/13/the-student-loan-crisis-is-worse-than-you-think/ (last visited Nov 14, 2021).
[2] Abigail J Hess, HOW STUDENT DEBT BECAME A $1.6 TRILLION CRISIS CNBC (2020), https://www.cnbc.com/2020/06/12/how-student-debt-became-a-1point6-trillion-crisis.html (last visited Nov 14, 2021).
[3] Melanie Hanson, STUDENT LOAN DEBT STATISTICS EDUCATION DATA INITIATIVE, https://educationdata.org/student-loan-debt-statistics (last visited Nov 1, 2021).
[4] *Id.*
[5] *Id.*
[6] Melanie Hanson, STUDENT LOAN DEBT BY RACE EDUCATION DATA INITIATIVE, https://educationdata.org/student-loan-debt-by-race (last visited Nov 1, 2021).
[7] Melanie Hanson, STUDENT LOAN DEBT BY GRADUATION YEAR EDUCATION DATA INITIATIVE, https://educationdata.org/average-student-loan-debt-by-year (last visited Nov 1, 2021).
[8] Melanie Hanson, NATIONAL STUDENT LOAN DEFAULT RATE EDUCATION DATA INITIATIVE, https://educationdata.org/student-loan-default-rate (last visited Nov 1, 2021).
[9] Lyndon B Johnson, REMARKS AT SOUTHWEST TEXAS STATE COLLEGE UPON SIGNING THE HIGHER EDUCATION ACT OF 1965 THE AMERICAN PRESIDENCY PROJECT (1965), https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965 (last visited Nov 14, 2021).

Nation, it is a path to a society that is not only free but civilized; and for the world, it is the path to peace--for it is education that places reason over force."[10] Clearly, Johnson had high hopes for the Higher Education Act, but half a century later, the aims of the Act have been diminished as students in the United States face mounting educational debt. The current state of student debt demonstrates that while the Higher Education Act did increase access to postsecondary education, that access has not conferred the intended economic benefits of higher education. For President Johnson, access to education was "the path to achievement and fulfillment," yet 55 years later the method of financing education intended to help students realize achievement and fulfillment have instead created oppressive debt burdens for many, especially non-White students. What went wrong? Why did the HEA not fulfill the promise of helping students to accumulate wealth, and instead lead to over-indebtedness for so many, especially students of color? I argue that the federal policy's dependency on private institutions like for-profit schools and banks, debt financing methodology vis-a-vis harsh bankruptcy codes, and the presumed "colorblindness" of the policy are key reasons why the HEA has failed to deliver the hoped-for benefits of higher education to all students.

First, I will provide an overview of the provisions of the Higher Education Act. Then, I will explore the three primary factors identified above that prevented the HEA from achieving its goals. Part 1 examines the Higher Education Act's dependence on the private sector and how it led to over-indebtedness. Part 2 investigates the contradictions in policy goals between the Higher Education Act and strict bankruptcy codes. Part 3 points out the racial implications of policy and demonstrates that financing access through debt has disproportionate impacts on Black students. Finally, Part 4 discusses income driven repayment plans, a proposed solution to indebtedness in the context of the racial wealth gap.

Higher Education Act

The Higher Education Act solidified the role of the federal government in higher education and established loans as the primary method of financing. Rapid economic, political, and societal shifts that occurred in the early 20th century were the catalysts for increasing government role in higher education. The shifts that set the stage for higher college enrollment and more funds for lending to students include the rapid technological change of the industrial revolution, increasing urbanization, increasing high school graduation rates, and mass consumerism resulting from the economic boom of the 1920s. But before comprehensive legislation to provide grants and loans to students, the student loan market was exclusive, requiring students to put up collateral like stocks, bonds, and real estate in order to get loans.[11] Facing a lack of workers with new, highly technical skills and geopolitical concerns over the Soviet launch of Sputnik satellites, the government first entered the student loan business in 1958 with the passing of the National Defense Student Loan Program. In the process of passing the National Defense Student Loan Program, the country faced the question of whether to provide access through taxpayer funded scholarships or whether students should bear some of the cost through loans. Their ultimate decision to have students pay a substantial portion of the cost of attendance set up a system of financing that persists to this day. President Johnson decided to make poverty reduction and thus access to education a priority in his administration. In order to appease both Republicans and Democrats, Johnson developed a compromise of grants for the poor and loans for the middle class, but in order to address concerns about the federal deficit, he turned to banks to originate the loans rather than the Treasury. The rationale was that this model would be "'a more effective, fairer and far less costly way of providing assistance than the various tax credit devices which have been proposed.'"[12]

The first part of Johnson's compromise of scholarships for the poor and loans for the middle class were the grant programs, sums of financial assistance that don't require repayment, established in Title IV. These programs were conceived in 1965, but are still functioning to this day, having survived eight reauthorizations in which changes to certain language and provisions were made. Part A authorizes numerous grant programs, such as Pell Grants, TRIO programs and Federal Supplemental Educational Opportunity Grants (FSEOG).[13] Federal Pell Grants are the single largest source of federal grant aid supporting students of postsecondary education.[14] Pell Grants provide assistance to students demonstrating financial need as long as the student is enrolled in an eligible institution. Federal TRIO programs consist of six grant programs designed specifically for students from disadvantaged backgrounds such as those who are low-income, first-generation college students, students with disabilities, students at-risk of academic failure, veterans, homeless youth, foster youth, and individuals

[10] *Id.*
[11] JOSH MITCHELL, THE DEBT TRAP: HOW STUDENT LOANS BECAME A NATIONAL CATASTROPHE (2021).
[12] *Id. at 25.*
[13] CONGRESSIONAL RESEARCH SERVICE & ALEXANDRA HEGJI, THE HIGHER EDUCATION ACT (HEA): A PRIMER 9–12 (2016).
[14] CONGRESSIONAL RESEARCH SERVICE & CASSANDRIA DORTCH, FEDERAL PELL GRANT PROGRAM OF THE HIGHER EDUCATION ACT: HOW THE PROGRAM WORKS AND RECENT LEGISLATIVE CHANGES 1 (2016).

underrepresented in graduate education.[15] Finally, the Department of Education allocates funds to IHEs for the purpose of awarding need-based grant aid to undergraduate students with exceptional financial need under the Federal Supplemental Educational Opportunity Grants (FSEOG).[16]

In the late 70s, the maximum Pell Grant of $1,600 per year covered 80% of the cost of a public four-year college. In 1991, the maximum Pell Grant of $2,300 covered only half of the annual average cost of public college and less than one fifth the annual cost of private college.[17] In 2021, Pell Grants covered 29 percent of public college and 13 percent of private college average expenses.[18] Even though Congress has increased the maximum Pell Grant, tuition has increased at a higher rate. In order to maintain the goal of providing access to higher education while reducing the budget deficit, the 1992 reauthorization of the Higher Education Act cut funding for Pell Grants while expanding eligibility for them, thus helping more people but giving less to each individual.[19] This reauthorization also increased loan limits with the ultimate effect of shifting aid from the poor to the middle class and expanding the government's reliance on student loans for financing access to higher education.

The provisions for lending in Title IV are extensive. Part B created the Federal Family Education Loan (FFEL) Program which offered several types of federal student loans including Subsidized and Unsubsidized Stafford Loans, PLUS loans for graduate and professional students and parents of dependent undergraduates, and consolidation loans. In 2010, The Student Aid and Fiscal Responsibility Act (SAFRA) Act terminated the FFEL program, but essentially the same loans are now available under the William D. Ford Federal Direct Loan program. Under FFEL, loans were originated by private sector and state-based lenders and were funded with non-federal capital, yet the federal government guaranteed lenders against loss due to borrower default and other reasons.[20]

Part D authorizes the Direct Loan program, which is now the primary source of federal student loans, in which the federal government lends directly to students using federal capital but originating from and serviced by federal contractors. Within the direct loan program there are a variety of loans, the first of which is direct subsidized loans. These are only available to students who demonstrate financial need, and the federal government pays the interest that accrues while the borrower is enrolled in school. Direct unsubsidized loans are available to all students regardless of financial need, but the government does not pay the interest that accrues while the borrower is in school. Direct PLUS loans are available to parents of dependent undergraduate students and graduate students, and the government does not pay the interest.[21] The introduction of unsubsidized loans was also part of the 1992 reauthorization to expand eligibility for loans. Interest on unsubsidized loans starts accruing before graduation and is added to the loan balance when the repayment period begins six months after graduation. Thus, students with unsubsidized loans owe much more than they initially borrowed right after graduation and end up paying more for their degree overall. Title IV also has a provision for consolidation loans, which allow borrowers to combine multiple federal loans into a single loan, simplifying their repayment plan and occasionally extending the repayment period, thus reducing the monthly payment amount.[22] The extensive loan programs combined with limited grant programs created by the HEA expanded and solidified the government's reliance on loans to finance access to higher education. The following sections explain why that dependence on loans has resulted in over-indebtedness.

I. The Policy Dependence on the Private Sector

While enrollment in higher education may have increased due to the availability of loans established by the HEA, the pursuit of profit resulted in excessive lending, ultimately leading to today's crisis. The profit motivations of proprietary higher education institutions as well as private banks charged with creating loans defeated the intentions of increasing access and instead created over-indebtedness. The HEA's reliance on private finance created a profit-oriented market for student loans, and the prospect of profit motivated institutions to give out as many loans as possible, regardless of the borrowers' ability to repay them. Thus, the HEA was not a well-designed policy co-opted by profiteering institutions for their own benefit, rather the policy was written to support these institutions. In this section, I will explain how for-profit higher education institutions particularly benefited from Higher Education Act funding and are highly responsible for over-indebtedness. I will also explore the relationship between the federal government and the private institutions that were tasked with providing student loans.

The for-profit higher education industry is plagued with scandals and fraudulent behavior, yet it usually justifies its

[15] *Id. at 10.*
[16] *Id. at 12.*
[17] Mitchell, *supra* Note 11, at 87.
[18] Eric Duffin, SHARE OF U.S. STUDENTS' EXPENSES COVERED BY PELL GRANTS, 2021/22 STATISTA (2021), https://www.statista.com/statistics/222444/share-of-us-students-expenses-covered-by-pell-grant/' (last visited Apr 13, 2022).
[19] Mitchell, *supra* Note 11, at 87.
[20] Hegji, *supra* Note 13, at 14.
[21] *Id. at 16.*
[22] *Id. at 17.*

financing methods as providing access to a college education that would otherwise be unaffordable. These institutions "produce on average significantly higher debt burdens and default rates for former students than other sectors of higher education,"[23] which indicates that while many of these colleges may achieve their mission of providing access, that access does not translate to better employment and income prospects. Understanding for-profit colleges' business models explains why these institutions have produced high debt burdens and high defaults. Their model encompasses five main pillars: rapid enrollment growth, aggressive recruiting, high net prices, maximum use of federal student aid including both grants and loans and spending less on instruction. For-profit college enrollment has fluctuated with the political landscape and, more recently, due to the Coronavirus pandemic. From 2000 to 2009, full-time enrollment in for-profit schools grew from 366,000 to 1.5 million, an increase from 4% to 11% of all full-time college students.[24] In 2010, these institutions were investigated by the Government Accountability Office, and following regulations from the Obama Administration many schools were closed and enrollment declined.[25] Yet the COVID-19 pandemic has created a resurgence of for-profit enrollment, given that many of the schools already conduct classes online and job loss prompted many people to return to school.[26] The rise in enrollment in institutions that produced higher debt burdens increased aggregate student debt in the United States. The pillars of their business model, to (1) maximize the use of federal student aid and (2) spend as little as possible, directly led to high debt burdens and high default rates.

For-profit institutions have successfully maximized the use of federal student aid. At its peak in 2010, proprietary IHEs represented 23% ($33 billion) of federal student aid under Title IV of the HEA while enrolling just 11% (2.4 million) of students.[27] As amended during the 1998 reauthorization in an attempt to reduce fraud, waste, and abuse, proprietary IHEs must derive no more than 90% of their tuition and fees revenue from Title IV funds. Essentially, at least 10% of their total tuition and fees revenues must be from non-Title IV sources.[28] However, the remaining 10% can be taken from other federal programs like those for veterans and private student loans, creating a situation where "for-profit schools have increased their institutional lending to their own students, and if institutional lending is combined with increased tuition, schools can pass the 90% test without reducing the amount of federal aid they receive."[29] While the 90-10 rule reduces some federal support for for-profit college, the underlying policy and financial support from the federal government remains. This shows that the situation with lending to for-profit institutions is not de facto policy, and for-profit institutions are not simply talented at sucking up federal student aid dollars. Rather, the policy is designed for this outcome.

Combined with maximizing federal aid, for-profit institutions "spend the least on instruction in dollars and percentage of overall expenditures. The disparity is greatest among four-year institutions, with about 21% of all expenditures by for-profit schools used for instruction, compared to 25% at public schools and 33% at nonprofits in 2008-2009."[30] Reduced spending on instruction leads to lower quality education, hindering the learning potential of students and ultimately making them less competitive applicants in the job market. The reality of for-profit colleges is that they have to meet the bottom line. They do so through methods of maximizing federal aid and reducing expenses, especially in instruction which has the most adverse effects on their students. The result is over-indebted graduates with low quality education. Evidence shows that graduates from for-profit institutions have higher amounts of debt: "among completers of bachelor's programs in 2007-2008, for example, the median student debt (on federal and non-federal loans) of for-profit college graduates (including nonborrowers) was $31,157, compared to $16,175 at private nonprofit schools and $6,998 for public institutions."[31] The higher amount of debt is accompanied by higher rates of delinquency and default: among students who entered repayment in 2005 the institutions with the lowest delinquency and default rates were private nonprofits where 20% were delinquent and 8% were in default, closely followed by public institutions where 24% were delinquent and 10% were in default. For-profits were drastically higher at 29% delinquent and 24% in default.[32] Thus the provisions in Title IV of the Higher Education Act that supply aid to for-profit and proprietary institutions is a major cause of the current student debt crisis. This was not the result of well-designed policy that has been derailed by profiteering institutions, rather the policy was written to support these institutions. By relying on profit-oriented institutions to increase access to higher education, as

[23] Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASHINGTON & LEE LAW REVIEW 441 (2012).
[24] *Id. at 449.*
[25] Stephanie Riegg Cellini, THE ALARMING RISE IN FOR-PROFIT COLLEGE ENROLLMENT BROOKINGS (2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/11/02/the-alarming-rise-in-for-profit-college-enrollment/ (last visited Nov 22, 2021)..
[26] *Id.*
[27] Stephanie Riegg Cellini & Cory Koedel, *The case for limiting federal student aid to for-profit colleges*, 36 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 934–942 (2017).
[28] CONGRESSIONAL RESEARCH SERVICE & ALEXANDRA HEGJI, THE 90/10 RULE UNDER HEA TITLE IV: BACKGROUND AND ISSUES 1–22 (2021).
[29] Braucher, *supra* Note 23, at 456.
[30] *Id. at 461.*
[31] Braucher, *supra* Note 23, at 457.
[32] *Id. at 459.*

the Higher Education Act intends, this federal policy has contributed substantially to over-indebtedness.

In order to implement the loan programs created by the Higher Education Act, the government relied on a profit-oriented enterprise that gave banks the ability and incentive to make as many student loans as possible. The Student Loan Marketing Association (hereafter referred to as Sallie Mae) was created in 1972 as the government-sponsored enterprise tasked with managing the federal loan programs created by the HEA, specifically under Title IV, Part B Federal Family Education Loan (FFEL) Program. From 1972 to 2004, it serviced and collected federal student loans on behalf of the U.S. Department of Education but ended its ties to the government in 2004 and now offers private student loans.[33] Sallie Mae was established to enhance the availability and reduce the cost of credit for higher education and did so primarily by reducing the risk of capital losses to investors. This facet of their business is important when considering access to credit. By borrowing from the Treasury at low rates and receiving federal subsidies, Sallie Mae was insured against risk, and poor students who were traditionally considered risky could have access to credit and thus educational opportunity. The creation of a secondary market for student loans heavily supported by the Treasury gave banks the ability and incentive to make as many student loans as possible. Through this system, the government created a moral hazard problem given that the only money at risk was federal dollars. To recap Sallie Mae's role in this convoluted lending scheme, "the Treasury Department gave money to the Federal Financing Bank, which lent to Sallie Mae, which provided cash–through warehouse advances and student loan purchases–to banks, which lent to students, who paid schools."[34]

Like for-profit educational institutions, the profit orientation of private entities like Sallie Mae is problematic for ensuring that access to credit for education actually confers the economic benefits of such education. With federal backing, banks were guaranteed profit and thus incentivized to lend as much as possible. The proliferation of credit for higher education also "eased pressure on states to directly finance public colleges through annual budget appropriations. Instead, states allowed a greater share of college costs to shift to students, through the loan program."[35] Not only did the availability of loans to finance education skyrocket, but the entire governmental structure of financing education shifted in favor of this method. In the 1980 reauthorization of the HEA, Congress expanded Sallie Mae's role in the lending industry to include loan consolidation and the ability to make direct loans to students who couldn't get one from another lender.[36] Loan consolidation allowed students to combine multiple federal loans into single loans with longer repayment terms and lower monthly payments, resulting in paying more overall for their education. Overall, by attaching a profit incentive to educational lending and eliminating risk for banks by insuring the loans, the federal government created a system where access to credit increased drastically, but at the cost of over-indebtedness. Once again, this was not a situation where a profit-motivated institution saw an opportunity in already existing policy; rather the federal government established and relied on Sallie Mae, a government sponsored enterprise, to implement their goal of financing higher education.

As the public outlook on Sallie Mae began to decline, Congress created a direct lending pilot program in 1992. In 1993 as part of his deficit reduction plan, President Clinton proposed entirely replacing the guarantee program with the direct lending program, because "estimates from all of the government's budgeting and auditing agencies showed that direct lending would deliver the same loans to students at significantly lower cost to taxpayers."[37] In 2010, President Obama entirely eliminated the FFEL program in the Health Care and Education Reconciliation Act of 2010. The Congressional Budget Office estimated that replacing the FFEL program with direct lending would generate $68.7 billion in savings over the next 10 years.[38] Through a direct loan program originating from the federal government, profit motivation is not the primary reason for lending, and loose lending at high rates to risky borrowers is not incentivized or insured. Yet we are still dealing with the consequences of an entity like Sallie Mae being responsible for creating a market for loans. Had the government begun with the direct loan program, perhaps access to credit for tuition would have conferred the economic and social benefits of higher education as well.

II. Financing Through Loans Vis-à-Vis Strict Bankruptcy Codes

[33] Troy Segal, HOW A GOVERNMENT-SPONSORED ENTERPRISE (GSE) WORKS INVESTOPEDIA (2021), https://www.investopedia.com/terms/g/gse.asp (last visited Nov 30, 2021).
[34] Mitchell, *supra* Note 11, at 43.
[35] *Id. at 60.*
[36] Erin Dillon, LEADING LADY: SALLIE MAE AND THE ORIGINS OF TODAY'S STUDENT LOAN CONTROVERSY CORE (2007), https://core.ac.uk/reader/71339420 (last visited Nov 30, 2021).
[37] Student Loan History, NEW AMERICA, https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/federal-student-loan-history/ (last visited Nov 30, 2021).
[38] *Id.*

In addition to benefiting from the lending system the Higher Education Act established, private institutions are further protected by strict bankruptcy codes that make the discharge of this educational debt functionally impossible. The second primary reason the HEA's method of increasing access to the stated economic benefits of postsecondary education has been unsuccessful is because of the contradiction between financing higher education through debt while eliminating the process for relief from such debt. These inconsistencies in policy that have direct effects on each other are a crucial part of the explanation for the current student debt crisis.

Bankruptcy is an important aspect to consider when discussing debt burdens because of its intended purpose. In the 1934 Supreme Court Case *Local Loan Co. v. Hunt*, the opinion of the Court argues that bankruptcy "gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[39] Given the high rate of delinquency and defaults, especially among students at for-profits where 29% are delinquent and 24% are in default,[40] bankruptcy could be a necessary and helpful path for some borrowers.

However, since 1976, amendments to bankruptcy codes have made it increasingly difficult to discharge student loans. Prior to the 1976 reauthorization of the HEA, student loans were dischargeable like regular consumer credit. One of the most stringent reforms affecting student loan dischargeability was the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) passed in 2005 and signed into law by President Bush. Overall, BAPCPA decreased the number and type of debts that could be discharged in bankruptcy and expanded the scope of student loans that were nondischargeable. BAPCPA reformed the personal bankruptcy process in the United States in order to make filing for Chapter 7 personal bankruptcy more difficult by setting stringent guidelines and eligibility requirements. To prevent the bankruptcy process from being abused, the Act encouraged Chapter 13 filings instead of filing under the more forgiving Chapter 7.[41] Proponents of the 2005 Bankruptcy Act argued that too many people were taking advantage of the system by filing and could actually pay their debts, and that the high levels of unnecessary filings made consumer credit more expensive. Basically, fewer bankruptcies would make consumer credit cheaper. On the opposing side, critics of the law argued that limiting access to bankruptcy would harm struggling families facing crippling medical debt or other catastrophes, while enriching powerful financial interests.[42]

The major differences between the Chapter 7 and 13 filings are the treatment of debtors' assets and the time frame of the process. Chapter 7 filings result in the liquidation of the debtor's assets which are then distributed to the creditors, and debt is discharged immediately. Chapter 13 filing is designed for a debtor with a regular income because debts are not discharged immediately. Instead, the debtor is responsible for a payment plan to repay creditors over a period of three to five years. The debtor must complete the payments before the debt is fully discharged. Debtors filing under Chapter 13 usually remain in possession of their assets and are protected from lawsuits and garnishments during the process,[43] which is its primary benefit; however, considering the financial position of people looking to file for bankruptcy, many of them do not have substantial assets in the first place.

The only relief borrowers may get is through a strict yet undefined legal standard. Through amendments to bankruptcy code, the only dischargeable student loans are those demonstrated to have an "undue hardship" on the borrower.[44] In order to demonstrate undue hardship, the *Brunner* test is sometimes used. Here the borrower must demonstrate they cannot maintain a minimal standard of living for themself and dependents if forced to repay the loans; circumstances exist showing that the conditions that make repayment a hardship are unlikely to improve substantially during the repayment period; and that they made good faith effort to repay the loans through making past payments or arranging for forbearances.[45] Interpretation of the undue hardship clause has been inconsistent since Congress left it largely undefined, and in most cases the standards are not met. Even the American Bar Association argues that the undue hardship standard is too strict.[46] Given the strictness of the law, finding legal support is difficult and

[39] Local Loan Co. v. Hunt, 292 U.S. 234 (1934).
[40] Braucher, *supra* Note 23, at 459.
[41] Julia Kagan, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT (BAPCPA) INVESTOPEDIA (2021), https://www.investopedia.com/terms/b/bapcpa.asp (last visited Nov 15, 2021).
[42] Assessing the Bankruptcy Law of 2005, INSTITUTE FOR POLICY RESEARCH (2019), https://www.ipr.northwestern.edu/news/2019/assessing-the-bankruptcy-law-of-2005.html (last visited Sep 21, 2021).
[43] Process - Bankruptcy Basics, UNITED STATES COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (last visited Oct 19, 2021).
[44] Student Loans and Bankruptcy, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/business_law/safeborrowing/student/bankruptcy/ (last visited Nov 15, 2021).
[45] *Id.*
[46] 'Undue Hardship' is too Strict a Standard to Discharge Student Loans in Bankruptcy, ABA Argues, AMERICAN BAR ASSOCIATION (2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august-2021-wl/bankruptcy-journal-0821wl/ (last visited Oct 20, 2021).

more expensive, which creates another barrier for already financially strapped borrowers.

Educational loans are subject to these unique rules in bankruptcy because of a concern that students would abuse the bankruptcy and discharge debt when they didn't need to. This concern arose from a 1973 Congressional Commission on Bankruptcy Laws report, but there was little evidence to substantiate their claim.[47] Another justification primarily emphasized by Congress is the sustainability and integrity of the federal student loan program, where nondischargeability allows future students to have access to educational funding, preventing opportunistic graduates from collapsing an otherwise self-sustaining system.[48] Overall, these justifications are founded on the assumption that graduates are guaranteed a financial benefit from their degree. Logically, it makes sense to lend money for education while inhibiting bankruptcy under this assumption because with a degree, students will automatically be able to collect the resources to pay off the loan without hardship. However, given the current situation of a $1.6 trillion crisis, claims that degrees automatically provide that financial benefit allowing students to pay off their loans are unsubstantiated. The justifications for strict bankruptcy codes indicate that the federal government prioritizes protecting and supporting the lending institution rather than the students themselves. By doing so, the lending system has created oppressive debt burdens in the name of increasing access to higher education. Having no means of redress for oppressive debt burdens is a major reason that the intended economic benefits of higher education are not experienced by graduates with student debt. Bankruptcy is one of the only lifelines for many people experiencing intense debt burdens, yet that lifeline is not extended to student loans. These facts highlight the tensions between federal policies: increasing educational access through lending policy that encourages and essentially forces students to take on debt to finance their education, and bankruptcy policy that makes the discharge of this educational debt functionally impossible.

III. The Colorblindness of the Policy and The Racial Wealth Gap

The final factor that has contributed to the student loan crisis despite the original intentions of the program is its colorblindness. The disproportionate burden on Black borrowers highlights the underlying racist implications of policy that doesn't explicitly take into consideration the unique financial situation of students of color and their families. By focusing attention to how the Higher Education Act has affected Black borrowers differently from their White counterparts, the unintended consequences of the act and subsequent bankruptcy reform emerge and begin to explain one of the underlying causes of the racial wealth gap. A 2004 study finds that the racial wealth gap is the largest among the college educated.

There is no lack of literature on the racial wealth gap. Long-standing and substantial wealth disparities between families in different racial and ethnic groups have not changed significantly between 2016 and 2019, according to data from the 2019 Survey of Consumer Finances (SCF).[49] Wealth is defined as the difference between families' gross assets and their liabilities. "White families have the highest level of both median and mean family wealth: $188,200 and $983,400, respectively. Black and Hispanic families have considerably less wealth than White families. Black families' median and mean wealth is less than 15 percent that of White families, at $24,100 and $142,500, respectively. Hispanic families' median and mean wealth is $36,100 and $165,500, respectively." Median wealth rose for all race and ethnicity groups between 2016 and 2019, yet faster growth in wealth for Black families (33% growth) and Hispanic families (65% growth) only resulted in modest changes in the wealth gap between them and White families, whose wealth grew 3%. The Black-White gap in "median wealth was little changed, from $163,700 in 2016 to $164,100 in 2019, and the White-Hispanic gap fell modestly from $160,000 in 2016 to $152,100 in 2019."[50]

The Black-White asset gap is smaller than the total wealth gap,[51] which implies that there are varying sized gaps in assets versus debts. The average Black family has about 50 cents of debt for every dollar of debt that the average White family has, indicating that at the mean, the Black-White debt ratio is 0.49. While this means that on average Black people have less debt than White people, "it also means that the magnitude by which White debt exceeds Black debt is much smaller than the magnitude by which the total value of Whites' assets exceeds the total value of Blacks' assets,"[52] given that Black people had only 23 cents of assets for every dollar of White people's assets. This means that while Black people and

[47] Report of the Commission on the Bankruptcy Laws of the United States, 29 THE BUSINESS LAWYER 75–116 (1973).
[48] Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1 (2010).
[49] Neil Bhutta et al., DISPARITIES IN WEALTH BY RACE AND ETHNICITY IN THE 2019 SURVEY OF CONSUMER FINANCES THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm (last visited Oct 19, 2021).
[50] *Id.*
[51] N.S. Chiteji, *The Racial Wealth Gap and the Borrower's Dilemma*, 41 JOURNAL OF BLACK STUDIES 345 (2010).
[52] *Id.*

White people are far apart in holdings of assets, they are not so far apart in debt owed. Black people have only one quarter the assets of White people, but one half the debt of White people which contributes to a large wealth gap. Emphasizing debt within analyses of the wealth gap is useful because most discussions about eliminating the gap focus on how Black people can accumulate more assets, and debt is ignored. One of the mechanisms for building wealth is higher education, and access to higher education is obtained by taking out loans. It is also important to demonstrate how debt exacerbates the wealth gap when debt is treated as one of the mechanisms for building wealth.

In "The Racial Wealth Gap and the Borrower's Dilemma," N.S. Chiteji argues that the natural operation of credit markets inevitably prevents Black people from accumulating wealth.[53] Because of the emphasis on assets in discussion of the racial wealth gap, the interaction between debt and assets is ignored, and even when White and Black borrowers are charged the same interest rates, credit markets inadvertently depress prospects for Black wealth accumulation. The amount of debt a person has is a combination of the amount borrowed, the interest rate charged, and the speed at which they pay it off. Interest rates can vary broadly by race, because of explicitly racist lending practices as well as implicit ones that use racist measures of "risk" and structural processes that prevent Black people from possessing assets used as collateral or sufficient incomes. Yet even when these interest rates are consistent among Black and White borrowers, the amount borrowed and the time it takes to pay off the debt are higher and longer for Black borrowers. These findings demonstrate that simply achieving higher education levels as a society will not eliminate the racial wealth gap as long as debt is the dominant mode of increasing access. Given the history of Title IV of the Higher Education Act as the policy foundation for the education credit market, analysis of the disparate impacts of the race neutral policy is necessary.

Title III of the HEA is one of the only times where provisions are specifically tailored toward minority groups, however these provisions are in the form of institutional support rather than direct student support.[54] The programs authorized in Title III provide grants or other financial support to institutions that serve high concentrations of minority and/or needy students, typically referred to as minority serving institutions, in order to strengthen their academic, financial, and administrative capacities.[55] Unfortunately, the benefits of these provisions do not prevail over the drawbacks of a colorblind lending system for students of color.

Along similar lines to Chiteji's emphasis on the debt side of the wealth equation, Seamster builds on Oliver and Shapiro's seminal *Black Wealth, White Wealth* by arguing that in an economy increasingly reliant on debt, it is essential to study debt to fully understand the widening racial wealth gap. In our system, there is good debt and bad debt, which highly correlates to White debt and Black debt. She identifies multiple racialized dimensions of debt: 1) there are different worlds of debt products, 2) differential terms of the same products, i.e. interest rates, and 3) differential returns on debt for White and Black families. White debt promotes opportunities and wealth accumulation because of state structures, while Black debt is harder to convert into assets, has worse terms, and is longer lasting. Overall, "racial discrimination shapes who feels debt as crushing and who experiences it as an opportunity."[56]

The reality of Black debt being harder to convert into assets is particularly true for educational debt given that the benefits of a college degree do not guarantee financial stability for Black graduates as they do for White graduates. The first aspect is income post-graduation. While Black people with a bachelor's degree earn more than their Black peers without them, compared to White graduates they earn less. In 2016, among those with a bachelor's or higher degree, White year-round workers ages 25–34 had higher median annual earnings ($54,700) than their Black peers ($49,400).[57] Income determines the relative burden of repaying debt. Income inequality compounded with the fact that Black students are more likely to borrow and end up with higher amounts of debt means that they experience a higher burden of educational loans than their White peers. 50.8% of Black undergraduate students use student loans to pay for school compared to 40.2% of White students.[58] The final major aspect why the benefits of higher education are not equally distributed to Black students under a debt financing model is that they have less generational and family wealth to use as a safety net in times of financial distress. Scholars agree that one of the major factors contributing to the racial wealth gap is the lack of intergenerational wealth in Black families, which can be traced back to slavery. Lack of family wealth means more borrowing for tuition in the first place, but can also be the

[53] *Id.*
[54] Hegji, *supra* Note 13, at 5.
[55] *Id.*
[56] Louise Seamster, *Black Debt, White Debt*, 18 CONTEXTS 32 (2019).
[57] NATIONAL CENTER FOR EDUCATION STATISTICS (NCES) ET AL., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2018 vii (2019).
[58] Melanie Hanson, STUDENT LOAN DEBT BY RACE [2021]: ANALYSIS OF STATISTICS EDUCATION DATA INITIATIVE, https://educationdata.org/student-loan-debt-by-race (last visited Dec 3, 2021).

decisive factor in whether a graduate can survive a period of financial trouble due to medical problems, job loss, etc. Clearly, when the Higher Education Act established student loans as the primary means of increasing access to higher education, Black students would feel the debt burdens more intensely. Without taking into consideration the reality that Black and White graduates don't experience the same gains from higher education, and ignoring these structural economic factors, the Higher Education Act works against its intended outcome: to provide educational opportunities and social mobility for all.

IV. Solutions in Action–Income Driven Repayment Plans

Since March 2020, under the Coronavirus Aid, Relief, and Economy Security (CARES) Act, student loan payments and interest have been suspended. In response to the economic crisis caused by the COVID-19 pandemic, this debt relief was scheduled to last six months but has been extended once by President Trump and twice by President Biden as new variants of the virus surged and the economic effects of the pandemic persisted. Now, the pause on student loan payments is set to end on May 1. The unanticipated pause in student loan repayments provides an opportunity for reevaluation of the system student debt relief and the loan system overall. Since COVID-19 is becoming endemic and other economic factors like historically high inflation are present, the future of the student loan system is uncertain. While many forms of blanket student loan cancellation, such as Senator Elizabeth Warren's plan to cancel $50,000 of debt per borrower, have been proposed, it is more compelling to focus on a form of debt relief already in practice: income-driven repayment (IDR) plans.

Income-driven repayment was established to make loans more manageable by setting the payments to a percentage of a borrower's income and establishing eligibility for loan forgiveness after 20 to 25 years. Four plans are available: Revised Pay As You Earn Repayment Plan (REPAYE Plan), Pay As You Earn Repayment Plan (PAYE Plan), Income-Based Repayment Plan (IBR Plan), and Income-Contingent Repayment Plan (ICR Plan).[59] The payment amount under each plan is a percentage of discretionary income, calculated as the difference between annual income and 150% of the poverty guideline for the family size and state of residence. The percentage is different depending on the plan, but it ranges from 10 to 20 percent. Under all four plans, any remaining loan balance is forgiven at the end of the repayment period, ranging from 20 to 25 years.

While blanket loan cancellation is obviously controversial, it may be surprising to learn that the debate over income-driven repayment plans as an effective and high priority means of debt relief is also very heated. On one side, those in favor of IDR claim that it is a progressive and effective method of debt relief. Among those on this side of the debate, assistant professor of finance at the University of Chicago Booth School of Business Constantine Yannelis claims that broad student loan cancellation is actually regressive, helping higher-income borrowers more than lower-income ones. However, with IDR, "higher-income people pay more and lower-income people pay less. IDR is thus a progressive policy."[60]

Contrasting the group that views IDR as entirely positive and progressive, there are those in the middle who recognize its drawbacks but identify opportunities for reform to ensure it is an effective method of debt relief. In the American Enterprise Institute's report titled "Fixing Income-Driven Repayment for Federal Student Loans," they highlight how IDR actually favors borrowers with extremely high debts.[61] They mention that The Congressional Budget Office estimates that borrowers with graduate and professional degrees hold 80% of the debt that will be forgiven under IDR. With the current structure of IDR, loan forgiveness is standard after 20 to 25 years regardless of the amount of the debt. Graduate students have more debt overall because they are allowed to borrow more, however with the higher degrees they often have a better ability to repay it, yet are favored in IDR. Those struggling to pay off their loans are not the ones with the highest balances; in fact, 60% of all defaults are from borrowers with less than $10,000 in outstanding debt. This is largely because many borrowers with low balances did not complete their degrees and thus have lower incomes and lower abilities to repay.[62]

The American Enterprise Institute's solution to the structural problem of IDR's design of loan forgiveness not being adjusted for the amount of debt a borrower holds is to treat different amounts of debt differently. They claim that "what's needed is a two-pronged approach to reforms that improve the safety net features of IDR while addressing the excessive

[59] Income-Driven Repayment Plans, FEDERAL STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited May 21, 2022).
[60] Constantine Yannelis, A SMARTER WAY TO SOLVE THE STUDENT DEBT PROBLEM UNIVERSITY OF CHICAGO NEWS (2021), https://news.uchicago.edu/story/research-suggests-smarter-way-solve-student-debt-problem (last visited Mar 6, 2022).
[61] Jason D Delisle & Preston Cooper, *Fixing Income-Driven Repayment for Federal Student Loans*, AMERICAN ENTERPRISE INSTITUTE (2021).
[62] *Id.*

benefits that high debt borrowers stand to receive through the program."[63]

Another structural problem that is overlooked by the American Enterprise Institute is that lower payments come at the cost of an extended repayment period, which implies paying more interest over time. In addition, under current Internal Revenue Service rules, borrowers may be required to pay income tax on any amount that's forgiven if there is still a remaining balance at the end of the 20-year repayment period.[64] It is hard to claim that IDR is an effective and progressive method of debt relief given its bias toward those with huge debt and tax disadvantages.

To fill in the blanks between the scholars on all sides of the debate over income-driven repayment's effectiveness, it is useful to evaluate whether it addresses the underlying issues with the Higher Education Act's aid regime identified earlier. The question of the racial wealth gap is of primary interest because of the urgency of the situation, where student loan debt is actively driving racial inequity. Through understanding the impact of income-driven repayment on the racial wealth gap and the material conditions of Black debtors' lives, it is possible to identify whether income-driven repayment is a means for actually delivering the hoped-for benefits of higher education to all students.

Given that income post-graduation is the first factor that makes Black debt harder to convert into assets than White debt, and income determines the relative burden of repaying debt, on paper, income-driven repayment begins to address the income portion of inequality. By limiting monthly payments to on average 10% of discretionary income, income inequality post-graduation has less of an impact on which borrowers feel the crushing burden of debt in the short term. Thus, by looking at the Black White wealth gap exacerbated by student loans purely through a short term and income focused lens, IDR is an effective method of debt relief.

In addition, IDR is attractive because of its progressiveness compared to blanket student loan cancellation. In the context of the racial wealth gap, the Racial Wealth Audit finds that "eliminating student debt for households making $50,000 or below would reduce the racial wealth gap between Black and white families by over $2,000, or nearly 7 percent."[65] They argue that debt relief targeted debt relief programs is more effective at reducing the racial wealth gap rather than blanket loan cancellation. They found that while eliminating all student debt regardless of income does increase the median net worth of White and Black families, it also has the effect of increasing the racial wealth gap by 9% or $3,000 because the typical White family would see a greater total benefit than the typical Black family.[66] It is important to keep in mind that the Racial Wealth Audit finds these numbers to be true for total loan forgiveness, not loan refinancing through IDR. Since loan forgiveness after 20 years of repayment through IDR is an attractive selling point to many families, the reality of the functions of IDR for Black families illuminates whether it is the mechanism that will provide this reduction in the racial wealth gap like the Racial Wealth Audit suggests.

Data from various studies demonstrate that IDR is not the effective, progressive solution to addressing the student loan portion of the racial wealth gap. According to data from the Brookings Institute, of loans being paid back through IDR, the share of loans in which the total balance is increasing rather than decreasing is getting larger to the point where now a majority of loans have a higher balance than they did initially.[67] In addition, data from the National Consumer Law Center found that the total number of borrowers who have ever received full cancellation is only 32 people.[68] Despite the promise and hope of cancellation provided by IDR, most debtors do not experience reduced debts and even fewer receive full cancellation. In fact, in a survey of nearly 1,300 Black borrowers and 100 in-depth interviews, The Education Trust found that 58% of the respondents enrolled in an IDR plan estimated that it would take them 16 or more years to repay their debt, and many doubted they would ever be able to repay it. In addition, "several interviewees worried about making seemingly endless minimum payments" and described their experience in IDR as "shackles on their ankle" or "like Jim Crow."[69] The Education Trust report sums it up

[63] *Id.*
[64] Adam S Minsky, IS STUDENT LOAN FORGIVENESS TAXABLE IN 2022? IT'S COMPLICATED. FORBES (2022), https://www.forbes.com/sites/adamminsky/2022/02/10/is-student-loan-forgiveness-taxable-in-2022-its-complicated/?sh=6589ce6b3de0 (last visited May 21, 2022).
[65] Laura Sullivan et al., LESS DEBT, MORE EQUITY: LOWERING STUDENT DEBT WHILE CLOSING THE BLACK-WHITE WEALTH GAP RACIAL WEALTH AUDIT (2015), http://racialwealthaudit.org/less-debt-more-equity-lowering-student-debt-while-closing-the-black-white-wealth-gap/ (last visited Apr 13, 2022).
[66] *Id.*
[67] Andre M Perry, Marshall Steinbaum & Carl Romer, STUDENT LOANS, THE RACIAL WEALTH DIVIDE, AND WHY WE NEED FULL STUDENT DEBT CANCELLATION BROOKINGS (2021), https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/ (last visited Apr 13, 2022).
[68] Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt, STUDENT BORROWER PROTECTION CENTER (2021), https://protectborrowers.org/wp-content/uploads/2021/03/IDR-Brief-NCLC-SBPC.pdf (last visited Apr 17, 2022).
[69] Jalil Bishop & Jonathan Davis, JIM CROW DEBT THE EDUCATION TRUST (2021), https://edtrust.org/resource/jim-crow-debt/ (last visited Apr 17, 2022).

nicely: "IDR plans effectively make Black borrowers wait for justice, despite widespread agreement that student loans are driving racial inequality in the here and now and that a race-conscious policy solution is needed."[70]

The failures of IDR are not simply problems with implementation or side effects of effective debt relief measures, but rather inherent problems with the structure of the program. While on paper IDR offers a progressive method of debt relief with the potential to reduce the racial wealth gap, data and the lived experiences of Black borrowers demonstrate that it is having the opposite effect. This evidence suggests that instead of prioritizing reforms to IDR, focus should shift to debt cancellation in combination with structural economic changes to eliminate the reasons for why Black students have to borrow more in the first place and have lower incomes post-graduation.

[70] Jalil Bishop & Jonathan Davis, JIM CROW DEBT THE EDUCATION TRUST (2021), https://edtrust.org/resource/jim-crow-debt/ (last visited Apr 17, 2022).

Courts: The Influencers of Policymaking

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Tocqueville famously proclaimed that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] The political question regarding the legality of abortion recently put the judicial branch under the spotlight when Politico published a leaked draft of the *Dobbs v. Jackson Women's Health Organization* decision on May 2, 2022. This leak referenced sections of Justice Samuel Alito's tentative decision stating that "*Roe* was egregiously wrong from the start."[2] Many passages included other strongly worded language rooted in Originalist thought.[3] The consequences of this draft have only escalated tensions within our legal system. This is especially true among many pro-choice advocates that view abortion as a necessity and a constitutional right rather than a public policy issue up for debate, especially since Justice Alito's opinion overturns a matter that many hoped had already been settled by the Supreme Court.

Regardless of the implications of this hot-button issue, it is essential to consider the various frameworks and opinions on whether the courts can affect social change and if groups can look to them to accomplish their policy goals. These beliefs range from the idea that the courts are a "hollow hope" in terms of social change to the idea that courts have unique advantages that can be exploited by legal experts.[4] When considering the multitude of perspectives about the judicial branch, it is evident that courts can be dynamic and powerful in shaping social policy but have varying degrees of success depending on the context of the situation. This essay begins by addressing the confinements of the courts and connecting them with examples of specific issues where the court lacks significant implementation power and issues where it is exceedingly influential. Additionally, groups who look to the legal system must be cautious when considering public opinion backlash that may materialize in reaction to sweeping decisions, but the legal advocacy groups have demonstrated that courts have distinct advantages and the potential to create change. The second half of this essay will detail the unique advantages of the court and how one group, The Federalist Society, has adeptly used the courts to push their policy views forward. In essence, while rulings by the judicial branch do not always directly impact policy implementation, the courts can be highly effective at influencing social change in certain scenarios.

I. Confinements of the Court

On the surface level, the role of a court is to interpret the law and how it applies to specific cases it hears, not to make policy changes. However, politics and law are intertwined, enabling the courts with a path to shape policy that is guided by several structural components. As illustrated by political scientist and legal professor Robert Kagan, courts are subject to a set of complex rules and regulations determined by fragmented decision-making in a federally structured government.[5] The combination of this fragmented system of government combined with a demand for total justice has led to a system that Kagan has defined as "adversarial legalism."[6] Kagan presents two Janus faces of adversarial legalism to demonstrate that the courts can be very powerful in addressing reform in some contexts, while sometimes there are many actors that slow or inhibit changes to be made. In his example of the good face of the law, he discusses the prison reform cases, in which judges issued rulings describing the minimum prison condition standards of sanitation, food, medical care, and living conditions to address prison conditions in Alabama that were "unfit for human habitation."[7] For one example of the bad face of the law, Kagan presents the story of a thwarted attempt to dredge Oakland harbor and discusses how various environmental groups and outside organizations protested plans because of the negative ecological impacts of moving the sand.[8] These conflicts ended up stalling the process and causing an enormous amount of unnecessary economic damage. In short, there are a variety of different actors inside the legal system with competing interests, which often yields exceptionally complicated cases with outcomes; the rationale behind these cases is difficult to understand and may have enormous

[1] Alexis de Tocqueville, *Democracy in America*, 280 (2000).
[2] Josh Gerstein. 10 key passages from Alito's draft opinion, which would overturn Roe v. Wade - POLITICO, https://www.politico.com/news/2022/05/02/abortion-draft-supreme-court-opinion-key-passages-00029470 (last visited May 21, 2022).
[3] AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).
[4] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?, 15 (2nd ed ed. 2008).
[5] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW, 5 (1. paperback ed., 2. printing ed. 2003).
[6] *Id.* at 9.
[7] *Id.* at 22.
[8] *Id.* at 25-29.

ramifications that stem from these convoluted situations. This trend is only amplified when taking into consideration actors outside of the legal field who can influence social change.

One major inhibitor in implementing social reform is the principle of federalism, which is often used as a form of justification for major legal rulings. This is particularly evident in the South, where many legacies of slavery and the Confederacy continue to live on today. In *Just Mercy*, attorney Bryan Stevenson describes how many Southern monuments were erected in reaction to the 1954 decision in *Brown v. Board of Education* and the Civil Rights movements as well as how banks and state institutions continue to celebrate the birthday of Jefferson Davis.[9] Michelle Alexander, a legal professor and writer, voices ideas that substantiate Stevenson's personal experiences in her book, *The New Jim Crow*, by arguing that despite the progress made during the Civil Rights Movement in the 1960s, America never fully cast aside its deeply embedded racial hierarchy.[10] She supports these ideas by using statistics about the criminal justice system such as, "in fifteen states, blacks are admitted to prison at a rate from twenty to fifty-seven times greater than white men."[11] The cultural history of the South leaks its way into the criminal justice system when rulings open themselves up to state interpretation. For example, the ruling of *Gregg v. Georgia* effectively opened up discretion to judges in state courts in the South to decide the fate of convicted criminals.[12] Under Alabama state law, judges were allowed to override the decision of the jury and replace life verdicts with death sentences, and this included minors and mentally-ill people for years.[13] The system of federalism enabled state and local judges the opportunity to issue decisions that may differ from federal practice, allowing significant variation in rulings that diminish the effects of social change implicated in federal decisions.

II. Landmark Decisions

When analyzing sweeping precedent that can impact major social policies, it is evident that the courts are only one voice in a large crowd. The clearest example of this is *Brown*, where Chief Justice Warren issued a sweeping ruling — seven months after he was confirmed to the Court — that transformed the court from serving as a simple blocking function to a command function by ruling that "Separate facilities are inherently unequal" and ordered school districts to integrate "with all deliberate speed."[14] Political scientist and legal scholar Gerald Rosenberg contends that this Supreme Court decision failed to make a direct causal impact by using statistical data. Rosenberg's analysis reveals few changes to alleviate discrimination between 1955-1964 occurred, proving that the Civil Rights Act of 1964 (passed by the legislative branch) was much more impactful. However, this was largely because it took several actors involved to implement major reform, especially in Southern states with Jim Crow laws; Rosenberg does not entirely account for the influence that *Brown* had on actors within the branches of government and non-governmental actors. For example, President Eisenhower used *Brown* as a source of justification for responding to local efforts to prevent nine Black students from integrating into Little Rock Central High School. He issued Executive Order 10730, in which he effectively federalized the Arkansas national guard and sent in U.S. Army troops to protect the students known as the "Little Rock Nine."[15] In addition, *Brown* provided a shield for local school administrators to deflect blame which made the implementation process significantly easier to carry out, as they were forced to deal with pro-segregationists on the ground. This legal victory for the NAACP also aided the group to increase membership and raise funds.[16] In summary, the decision in *Brown* clearly had a nationwide impact, but it required a collaborative effort among multiple groups for a successful implementation. In other words, *Brown* helped establish legitimacy for social change, sowed the seeds for a productive relationship between governmental branches, and was a tremendous source of influence, but required contributions by additional actors for a massive societal transition to occur.

Another challenge of Supreme Court decisions that decree significant nationwide change is that these high-profile cases may garner a great deal of backlash from public opinion, interest groups, and dissenting Supreme Court justices; the consequences of these rulings are dangerous for the future. Rosenberg argues that the most visible example of backlash occurred during *Roe v Wade*.[17] Rosenberg explains that *Roe*

[9] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (Spiegel&Grau trade paperback edition ed. 2015).
[10] MICHELLE ALEXANDER & CORNEL WEST, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (Revised edition ed. 2012).
[11] *Id.* at 99.
[12] *Gregg v. Georgia*, 428 U.S. 153 (1976)
[13] Stevenson, *supra* note 9, at 70.
[14] Silverstein refers to the Courts' command function as an order which decrees that a specific action must be taken to comply with the law; GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS, 30-34 (2009); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954); *Brown v. Board of Education of Topeka*, 349, U.S. 294, 301 (1954)
[15] Lonnie Bunch. The Little Rock Nine, National Museum of African American History and Culture, https://nmaahc.si.edu/explore/stories/little-rock-nine (last visited May 21, 2022).
[16] Rosenberg, *supra* note 4, at 151-55.
[17] *Id.* at 180-188.

effectively catalyzed the mobilization of Christian evangelical anti-abortion groups because the decision wiped prevailing state abortion laws off the books.[18] Since *Roe*, abortion has been a keystone of right-wing ideology in the US to garner political support for the Republican party among religious groups. One writer from "The *New Republic* described it as 'the worst thing that ever happened to American liberalism,' and charged it with helping to 'create a mass movement of social conservatives that has grown into one of the most potent forces in our democracy.'"[19] Additionally, legal scholar Gordon Silverstein contends that because *Roe* was based on the right to privacy, an entirely judicial premise — as opposed to the Vagueness or Equal Protection Clause — other branches of government were unable to back up the court's decision.[20] The fact that *Roe* was not implemented as smoothly as *Brown* substantiates Silverstein's claim and demonstrates that support from other actors is essential to the implementation process.

Federalism has played a critical role in some states, primarily in the South, which has enacted legislation that finds ways to avoid conflicting with the *de jure* decision that *Roe* wrote into common law but still effecting the *de facto* way in which abortions take place. One recent piece of legislation that exemplifies this is *Senate Bill 8* in Texas, which bans abortions as early as six weeks into pregnancy based on dubious science on a "fetal heartbeat" and allowed ordinary citizens to sue doctors who performed these procedures.[21] This effectively allowed pro-life advocates to act as "bounty hunters" by suing abortion providers.[22] In other words, the system of federalism allowed Texas legislatures to effectively curb the Supreme Court's power to create social change by creating an incentive to deviate from principles outlined in *Roe*.

The recent draft in *Dobbs v. Jackson* only resolidifies this point, as this viewpoint shifted during a period where six justices on the court shared right-leaning perspectives and originalist legal justification. This draft violates Rosenberg's framework of being constrained by the "limited nature of constitutional rights" which entails that there must be legal statutes, judicial precedent, or specific language in the Constitution for decisions to be interpreted in a certain manner.[23] This is demonstrated by Justice Alito, who wrote that *Roe* and *Planned Parenthood v. Casey* must be overturned because the ruling extends beyond the scope of judicial interpretation allotted by the Constitution.[24] Essentially, these words demonstrate that Alito believes preventing judicial activism supersedes following the principles of *stare decisis*, or standing by prior Supreme Court rulings, and the fact that the majority of justices are likely in agreement with Alito shows that sometimes the courts are powerful enough to break their own constraints. Furthermore, the recent protests, legislative statements, and other forms of public backlash to the leaked draft of *Dobbs* support the notion that political backlash can happen on the left. At the moment, it is too early to be certain if the opposition to *Dobbs* will mirror the mobilization of pro-life groups, but the 2022 midterm elections and future events have the potential to further support this theory. In essence, the court is only one small piece of the puzzle when releasing sweeping decisions that can impact social policies that citizens are passionate about. The implementation is left to the executive government as well as state and local government officials and is often met by resistance if there is substantial public opposition to these rulings. However, the court is still able to circumvent many of Rosenberg's constraints and exert some degree of influence in these high-profile cases.

III. The Judicial Domain

In other more specialized and technical areas of law, the court is much more successful at achieving social change as an individual actor. Political scientist Alison Gash uses the term "below-the-radar-tactics" to refer to legal strategies that minimize the frequency or potency of backlash.[25] These include language that receives little public notice, technical areas based on lesser-known statutes or precedent (as opposed to Constitutional amendments), pursuing change in less conspicuous venues, and incremental change.[26] One area of law that Gash focuses on is LGBTQ+ rights, where Gash details how small incremental change has occurred as litigants have pursued equal rights in areas on a case-by-case basis. One of the earlier steps was same-sex parenting, in which advocates focused on promoting the rights of same-sex couples as parents in various state-level courts by grounding

[18] *Id.* at 188

[19] ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS 21 (2015), https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780190201159.001.0001/acprof-9780190201159 (last visited May 21, 2022).

[20] *The Texas Heartbeat* Act, S.B. 8, 87th Cong. § 2021 ; Silverstein, *supra* note 14, at 122-127.

[21] María Méndez and Eleanor Klibanoff, *What the end of Roe v. Wade would mean for Texas' past, current and future abortion laws*, THE TEXAS TRIBUNE (2022), https://www.texastribune.org/2022/05/03/texas-abortion-law-roe/ (last visited May 21, 2022).

[22] Chelsea Tejada. Texas' Bounty Hunter Abortion Ban is a Dire Warning of What Lays Ahead for Our Reproductive Rights | News & Commentary, AMERICAN CIVIL LIBERTIES UNION (2022), https://www.aclu.org/news/reproductive-freedom/texas-bounty-hunter-abortion-ban-is-a-dire-warning-of-what-lays-ahead-for-our-reproductive-rights (last visited May 21, 2022).

[23] Rosenberg, *supra* note 4, at 35-36.

[24] Gerstein, *supra* note 2

[25] Gash, *supra* note 19, at 30.

[26] *Id.* at 30-31.

arguments in the welfare of the children.[27] This disconnect allowed litigants to leverage below-the-radar tactics to accomplish their objectives in lower-level courts without much opposition. The most noteworthy Supreme Court ruling regarding same-sex rights was *Obergefell v. Hodges*, in which Justice Kennedy ruled that the Due Process Clause of the Fourteenth Amendment guarantees the right to same-sex marriage.[28] However, this decision was limited in nature because it only encompassed marriage rather than decreeing sex to be a class subject to strict scrutiny.[29] Furthermore, this decision came at an important period in public opinion, where over 60% of the public *supported* gay marriage, compared to when 60% were *opposed* to it one decade earlier.[30] As a whole, litigants have been able to make progress on LGBTQ+ rights through technical arguments and incremental change, where the courts retain strong influence.

Another area where the visibility of the courts remains low is the criminal justice system. Along with same-sex marriage agreements, this is an area that many members of the public do not witness regularly and those within the system are also unable to voice their concerns. In addition to the Alabama prison reform cases in the 1970s, several influential Supreme Court rulings regarding capital punishment were recently released. In *Just Mercy*, Bryan Stevenson describes how his firm, The Equal Justice Initiative (EJI), was constantly swamped with clients on Death Row and he was constantly working with the highest stakes on the line — the life of his clients. These include the Supreme Court decisions in *Miller v. Alabama*, which banned life imprisonment without parole for minors, and *Madison v. Alabama*, which ended the death penalty for those battling dementia.[31] These cases may have been small and incremental, but they dramatically alleviated the strain that on-the-ground actors faced daily. These rulings constitute social change because they alter the larger criminal justice system, where actors like Stevenson are confined.

IV. The Unique Advantages of the Court

The previous sections of this essay have demonstrated that Courts may directly impact social policy in some circumstances but have less influence when major social policy issues arise. The following sections focus on the implications of this for groups looking towards the court to accomplish policy goals. Once again, this is a very complex and nuanced issue, but there are several unique advantages to the current legal system. Legal scholar Thomas Burke presents three broad incentives to explain the prominent position that litigious policies play in terms of political change.[32] The insulation incentive can allow the judicial branch to capture an issue and make it central to the court, the control incentive can serve to overrule federalism, and the cost-shifting incentives place a target on suing private individuals for damage, as opposed to the government.[33]
The insulation incentive is especially applicable to abortion laws, where Congress has yet to get involved in the right to privacy. Before the conservative majority took charge of the Supreme Court and the recent *Dobbs* draft leak, Democrats did not have any strong incentive to enact a federal statute on abortion, because the social policy that *Roe* created suited their wants and needs. However, since these evolvements, the "Women's Health Protection Act," which ties the Commerce Clause to the abortion procedure has been increasingly discussed in the House of Representatives.[34] This situation exemplifies that the insulation incentive is coveted by a political party that is dominant in the judicial branch but lacks power in the legislative branch. Simply put, litigants must consider what side of the aisle is in charge of deciding their case.

Burke's control incentive is essential to this process as well, as federalism is a considerable limitation to the Supreme Courts' power.[35] While state and local governments can always seek to find workarounds regarding various rulings, decisions that explicitly shift jurisdiction from the states to the federal government are essential for policy change. One example is *Katzenbach v. McClung*, in which the court ruled that since the meat in the burgers was from a different state, the restraint was subject to the Commerce Clause and could not legally discriminate.[36] The link between human rights and hamburgers shifted jurisdiction to the state as well as highlighted the allure of using lateral precedent through areas where the Court has ruled broadly in the past. The case also reveals that grounding legal arguments in Constitutional rights can be an appealing way to establish social change with nationwide impact. However, utilizing these less-technical

[27] *Id.* at 102-104, 117-122.
[28] *Obergefell v. Hodges*, 576 U.S. 644 (2015)
[29] As of May 22, 2022, only race, national origin, religion, and alienage are subject to strict scrutiny; Strict scrutiny | Wex | US Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/strict_scrutiny (last visited May 22, 2022).
[30] Justin McCarthy. Gallup Inc, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP.COM (2015), https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx (last visited May 21, 2022).
[31] *Miller v. Alabama*, 567 U.S. 460 (2012); *Madison v. Alabama*, 586 U.S. 718 (2019)
[32] THOMAS FREDERICK BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY. (2004).
[33] *Id.* at 14-16.
[34] Amanda Hollis-Brusky. Could Congress pass a law making abortion legal nationwide? - The Washington Post, https://www.washingtonpost.com/politics/2022/05/04/roe-overturned-congress-abortion-law/ (last visited May 21, 2022).
[35] Burke, *supra* note 32, at 15.
[36] *Katzenbach v. McClung*, 379 U.S. 294 (1964),

grounds is also one potential source of backlash, demonstrating the complexity of strategies to influence policy change.

The first step in attempting to contribute toward social change is to appoint judges with like-minded views. Many Supreme Court justices, such as Justice Ginsberg, have alleged that judges are non-political actors and do not represent a particular party, group, or interest.[37] However, the potential of the judicial branch to influence social policy has increased the partisan role of legislators, led special interest groups to become more involved, and caused the media to bring more attention to the issue. This transformation has turned the judicial selection of Supreme Court justices from an idealist, nonpartisan process into an alternative battleground to the legislative branch for policymaking that is partisan through every step. At the ground level, many lawyers, think-tank organizations, and interest groups have invested millions of dollars into trying to target cases that will reach sympathetic judges, demonstrating the importance of the selection process. Interest groups utilize a variety of tactics to achieve their goals including testifying at congressional hearings, dissemination of key information to the public about the nominee, media advertisements, and direct lobbying of legislatures and their staff.[38] In sum, the process of achieving policy goals through the court differs greatly from the legislative branch.

V. The Power of the Federalist Society

As previously mentioned, one influential group is the Federalist Society, a legal group based on libertarian and conservative principles founded to challenge the liberal ideology dominating many elite institutions. Political scientist and politics professor Amanda Hollis-Brusky has dubbed this group a "political epistemic network," meaning "an interconnected network of experts with policy-relevant knowledge who share certain beliefs and work to actively transmit and translate those beliefs into policy."[39] Specifically, network members come together and unite during events where they discuss commonly-held beliefs and values. However, the real power of the network is when these individuals go back into their respective fields and infuse these beliefs into practice. These fields encompass a variety of different actors that influence policy including the legislative and executive branches, state politicians, think tanks, academics, and more.[40] The Federalist Society has grown to exert tremendous influence on the Supreme Court, as all six conservative-leaning justices have ties to this group. The Federalist Society played an especially influential role in cabinet members and judicial selection in the Trump administration.[41] Many judges tied to the Federalist Society are often influenced by conservative or libertarian ideas to make certain legal decisions.[42] The ability of this small interest group with minority ideals to capture a branch of government demonstrates the potential that outside groups can have in infusing partisan policy into the judiciary.

One example where the Federalist Society has had tremendous success is by solidifying the Second Amendment, the right to bear arms. One important contributor to this initiative is the "National Rifle Association" (NRA), which has funded millions of dollars each election cycle to preserve this amendment, but the Federalist Society has been the group responsible for solidifying these Second Amendment rights into law.[43] There were two legal arguments for this right; the first part depended on whether these rights were interpreted as an individual or collective right and the second on whether the amendment applied to regulations by the state or only the federal government.[44] The first argument was ruled on in *DC v. Heller*, where the Court issued a 5-4 ruling that D.C. firearms restrictions violated the Second Amendment because the right to bear arms was an individual rather than a collective right.[45] Scalia's ruling used an argument regarding the "prefatory" and "operative" clauses which include logic from a Federalist Society network member named Eugene Volokh.[46] Additionally, 21 legal experts filed *amicus curiae* briefs including Reagan's former attorney general, Edwin Meese.[47] The second part of the debate was addressed in *McDonald v. Chicago*, where the Supreme Court ruled in a 5-4 decision issued by Justice Alito that local governmental bans on handguns were unconstitutional "because the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment."[48] Once again, the logic in the decision regarding whether the right applies to state governments relies heavily on the work of Federalist Society members network as Justice Thomas' concurrence draws on Curtis' Originalist argument to overturn prior precedent in the

[37] CHRISTOPHER P. BANKS & DAVID M. O'BRIEN, COURTS AND JUDICIAL POLICYMAKING 126 (2008).
[38] *Id.* at 135.
[39] Hollis-Brusky, *supra* note 2, at 10
[40] *Id.* at 15.
[41] *Id.* at 12.
[42] *Id.* at 13.
[43] Blake Ellis and Melanie Hicken, The money powering the NRA, CNNMONEY, //money.cnn.com/news/cnnmoney-investigates/nra-funding-donors/index.html (last visited May 21, 2022).
[44] Hollis-Brusky, *supra* note 2, at 39.
[45] *District of Columbia v. Heller* 554 U.S. 570 (2008).
[46] Hollis-Brusky, *supra* note 2, at 47.
[47] *Id.* at 46.
[48] *McDonald v. Chicago*, 561 U.S. 472 (2010); Hollis-Brusky, *supra* note 2, at 50.

Slaughter-House cases.[49] In both of these arguments, Federalist Society network members were able to significantly influence like-minded justices. The influence and clout of the Federalist Society allowed for network members to effectively transform their ideology into social policy through the courts.

Undoubtedly, one must analyze the perspectives on both sides of the aisle when examining if the courts can affect social change. For example, abortion demonstrates that a win for the Christian right is a loss for the progressive left and vice versa, marking a zero-sum game. Furthermore, solidifying the status quo can also be a victorious form of social policy as exhibited by these cases regarding gun rights that affirmed the broad scope of the Second Amendment. This policy issue demonstrates that just because the courts do not implement progressive policies does not mean that they are weak or powerless to do so. In contrast, courts can also showcase their power by successfully preventing change. The Federalist Society has been instrumental in manipulating the courts to get the outcomes they want, a resounding success story as a group that targeted the judicial branch to accomplish their policy goals. To respond, liberal legal experts must follow suit to become more organized if they are looking to counter the effects of the Federalist Society.

VI. Conclusion

Silverstein aptly states that the judicial branch can shape, constrain, save, or kill politics, but one action that the courts do not take is implementing social policy. Instead, there is one word that encompasses the role of the courts: they influence. The influence of the courts is dependent on many circumstances and can be more easily conceptualized through comparison to more traditional "influencers." In technical areas where the language of the law is prevalent, where rulings are heavily grounded in precedent, or where the court does not initiate its command function, the court exerts a strong influence over their domain, similar to influencers in their specific industry. However, when the Supreme Court issues a groundbreaking ruling, backlash and opposition are sure to follow. In these instances, the courts' influence over social change is a smaller piece of the puzzle and other actors have greater control over implementation, similar to influencers who use their platform to push political agendas or ideas in areas outside their expertise. One implication for groups who look towards the courts as a beacon of hope for social change is that pursuing litigation is a strategic decision involving a variety of factors that have been discussed throughout this essay. Another implication, which is especially critical for liberal groups, is to look at the Federalist Society as a successful case study and mobilizing a group with specific interests by using a similar strategy to influence the courts. In conclusion, even in instances where the judicial branch is only one actor within a larger group, the influence of the courts continues to be an instrumental part of social change that cannot be ignored.

[49] Hollis-Brusky, *supra* note 2, at 54.

Confirming Justices: How Robert Bork Changed the Supreme Court Confirmation Process

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Before 1917, Supreme Court nominees were confirmed by a simple vote from the Senate.[1] Senators could vote 'yay' or 'nay,' but did not have a chance to ask the nominee questions about their past work and experiences. That changed in 1916 when the Senate held the first hearing for a Supreme Court nominee, although the nominees themselves were not part of the hearing. Only later in the 20th century would the nominees get invited to field questions and speak for themselves. Thus, over the 20th century, the Supreme Court nomination process evolved considerably, gradually becoming a more public affair with a great deal of attention focused on the nominees.

In this paper, I will discuss the origins and developments of Supreme Court nomination hearings. Then, I will argue that the ultimately failed confirmation process of Robert Bork marked a significant change in the Supreme Court nomination process by discouraging future nominees from revealing how they would rule in future cases. Bork's hearing became a cautionary tale for Supreme Court nominees who came after him. His failed confirmation demonstrated that being outspoken in personal judicial beliefs can, and nowadays will, cost candidates their nomination.

The first Supreme Court nominee hearing was for President Woodrow Wilson's nominee, Louis Brandeis. Initially, nominees were not present at confirmation hearings — supporters and opponents of the nominees attended to voice their opinions before the Senate. Nominees then began appearing in private sessions "to only answer very particular questions about a well-defined narrow topic that the Senate had very precise questions about".[2] It was not until 1939 that the first nominee would come in-person.

Confirmation hearings with the nominee present were not by institutional design. Franklin D. Roosevelt nominated Felix Frankfurter to the Supreme Court in 1939, but Frankfurter was brought in for questioning after suspicions emerged that he was a Communist.[3] Felix Frankfurter was the first nominee to openly testify and defend himself when senators asked him very detailed questions.[4] Senators asked him about life as an immigrant in America, and how he would uphold the United States Constitution. Hearings were never meant to be public but ended up becoming so after questions about the nominees were inevitably raised. Frankfurter's public hearings and following nomination marked an increase in democratic accountability, as citizens could read about the confirmation process. Since Frankfurter was confirmed, succeeding nominees have participated in public hearings.

In 1978, following Justice Lewis Powell's unexpected retirement, an opening in the Supreme Court left an opportunity for conservative President Ronald Reagan to change the Court's composition in his favor. Warren Burger had been named Chief Justice of the Supreme Court in 1969, thus marking the beginning of the Burger Court. The Burger Court was in great contrast to the Warren Court that preceded it, as the Warren Court was historically liberal. On the Burger Court, Justice Powell was a conservative, but he was often seen as a "swing vote" on the court. He voted with the majority on many landmark cases for liberal causes such as *Roe v. Wade*, which recognized a woman's right to undergo an abortion. When Justice Powell retired, there was extreme uncertainty regarding the Supreme Court's liberal majority. President Reagan embarked on changing the leadership of the court from liberal to conversative by nominating a strong proponent of conservatism — Robert Heron Bork.

Before his nomination, Robert Bork was a monumental figure in conservative law teachings.[5] Bork was a conservative law professor at Yale University and later served as a circuit judge for the United States Court of Appeals for the District of Columbia Circuit for five and a half years.[6] During his time as a law professor and on the Court of Appeals, Bork was a strong proponent of the legal theory of Originalism, believing that the Constitution should be interpreted as it would have been at the ratification of the Constitution by the framers. At the time, this mode of constitutional interpretation was not

[1] Guy Raz, Scot Powe, *A History of Supreme Court Confirmation Hearings*, National Public Radio (July 12, 2009) https://www.npr.org/templates/story/story.php?storyId=106528133 (last visited May 15, 2022)
[2] Jeffrey Rosen, *The Constitution Center, Podcast Transcript: The History of Supreme Court Confirmation Hearings*, https://constitutioncer.org/podcast-transcript-history-of-supreme-court-confirmation-hearings (last visited May 15, 2022)
[3] *Id.*
[4] *Id.*
[5] *See generally* Solicitor General: Robert H. Bork, The United States Department of Justice, https://www.justice.gov/osg/bio/robert-h-bork (last visited April 15, 2022)
[6] *Id.*

widely accepted in the legal profession and prompted disapproval.

Bork criticized many Supreme Court decisions based on the outcome, not the reasoning. One of Bork's strongest opinions that he developed as a law professor was his theory of antitrust law. Bork defended the argument for minimal government intervention in regulating large corporations.[7] Bork criticized the Supreme Court's development of a right to privacy as a result.[8] Bork disagreed with the Court in other ways as well. For instance, he did not believe the Equal Protection Clause applied to women. He was an advocate for the censorship of vulgar language in art and online, claiming the First Amendment does not protect explicit art. He also opposed abortion, believing that it was not a constitutional right.[9] Bork's publicly expressed opinions on hot-button issues gave senators ample material to question him about during his confirmation hearing.

In 1987, Reagan nominated Robert Bork to the Supreme Court, shining a light on his Originalist views.[10]At the start of the hearings, Bork and Reagan felt great confidence going into the nomination process. At the time, the Senate majority leader Robert Byrd reported that Bork would likely be confirmed.[11] But Bork was not met with immediate support from Republicans or Democrats. Within an hour of his hearing beginning, Democratic Senator Ted Kennedy launched an attack against Bork, distorting Bork's previously stated views. Kennedy's passionate speech against Bork's nomination consolidated Democrats to vote as a unified bloc against Bork's nomination.

During the hearing, Bork laid out his Originalist views in front of the Judiciary Committee, explaining that he did not think judges should interpret beyond the extent of the writing of the Constitution.[12] In one example, Bork denounced *Griswold v. Connecticut*, the 1965 ruling that struck down a state law stopping married couples from using contraceptives and subsequently recognized the right to privacy for the first time.[13] Bork claimed the ruling was illegitimate, not supported by the text of the Constitution, and that there was no general right to privacy outlined in the Constitution. At the time, Originalism was not a widely accepted method of interpretation, and his views were seen as out of the norm. In addition to his then-controversial method of Constitutional interpretation, Bork's demeanor during confirmation hearings also attracted attention. Rather than presenting his positions in a mature and polished manner, Bork lectured to the Judiciary Committee.[14] He was perceived as unfriendly, and his views grated against the mainstream and attracted controversy. White House staff worked with Bork to try and change his disposition, but their efforts failed.[15]

After twelve days of hearings, the Senate voted 42 to 58, and Bork's nomination was defeated. There were many reasons for Bork not being confirmed. Special interest groups like the National Organization for Women or the NAACP raised tens of thousands of dollars lobbying against his nomination.[16] Furthermore, Bork's hearings were televised, drawing news outlets and radio stations to Washington.[17] The setting for Bork's confirmation was not ideal, as the makeup of the Senate and the publicity made it more difficult for his Originalist views to be accepted. It was not until the 1980s when more conservative justices were on the Supreme Court that Originalism became accepted.

The failure of Bork's confirmation was unusual, as nominated appointees were normally confirmed. Since the first Supreme Court appointment in 1789, there have since been 164 nominations.[18] Of those 164 nominations, only 37 have failed.

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[7] *See, e.g.*, Peter Shamshiri, *The Enduring Myth of Robert Bork, Conservative Martyr*, Balls and Strikes (Nov. 29, 2021) https://ballsandstrikes.org/legal-culture/bork-nomination-enduring-myth-conservative-martyr/

[8] *Id.*

[9] Al Kamen, Edward Walsh, *Bork Lays Out Philosophy*, Washington Post (Sep. 16, 1987) https://www.washingtonpost.com/archive/politics/1987/09/16/bork-lays-out-philosophy/712ed563-97bb-4d81-b7e5-8e5d8bd17f13/

[10] *Id.*

[11] *See generally* IIya Shapiro, *The Original Sin of Robert Bork*, CATO Institute (Sep. 9, 2020) https://www.cato.org/commentary/original-sin-robert-bork (last visited April 15, 2022)

[12] Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, National Public Radio, (Dec. 19, 2012) https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever

[13] Al Kamen, Edward Walsh, *Bork Lays Out Philosophy*, Washington Post (Sep. 16, 1987) https://www.washingtonpost.com/archive/politics/1987/09/16/bork-lays-out-philosophy/712ed563-97bb-4d81-b7e5-8e5d8bd17f13/

[14] *See generally* IIya Shapiro, *The Original Sin of Robert Bork*, CATO Institute (Sep. 9, 2020) https://www.cato.org/commentary/original-sin-robert-bork (last visited April 15, 2022)

[15] *Id.*

[16] William G. Myers III, The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork, 17 Hastings Const. L.Q. 399 (1990), https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol17/iss2/5

[17] *See* Frank Guliuzza III, Daniel J. Reagan, David M. Barrett, *Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?* Marquette Law Review (Winter 1992), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1682&context=mulr

[18] *See* Barry J. McMillion, *Supreme Court Nominations, 1789 to 2020: Actions by the Senate, the Judiciary Committee, and the President*, Congressional Research Service (Mar. 8, 2022) https://sgp.fas.org/crs/misc/RL33225.pdf

Eleven of these nominations were withdrawn by the President, and fifteen lapsed at the end of a Congressional session, leaving Bork as one of the mere eleven Supreme Court nominees to be rejected by Senate vote.[19]

There are many theories as to why Bork's nomination failed. One senior political aide explained that "Bork betrayed himself as Bork today."[20] Many in favor of his nomination hoped that Bork would be able to present himself as a flexible moderate, but his explicit articulation of his opinions dashed those hopes.[21] Ultimately, it was Bork clearly supporting and voicing his belief in Originalism that cost him his confirmation. Bork's nomination process mainly focused on his philosophy regarding the Constitution rather than concentrating on his judicial competence or character traits.

Following Robert Bork's failed attempt at getting confirmed for a seat on the Supreme Court, the hearing process nowadays is sometimes seen as "useless."[22] Because candidates are trained through "murder boards," they are taught how to steer away from revealing how they intend to vote on pressing cases. Murder boards are composed of White House aides and other administrative officials "coaching" a nominee.[23] The board helps prepare candidates answer difficult questions and how to deflect attention from difficult or controversial topics. Robert Bork did the exact opposite and seemingly ignored the training on how to craft a response to Senators. Bork highlighted the results of previous cases and how he would vote if given the opportunity.

To see this change in effect, consider Supreme Court Justice Ruth Bader Ginsburg's confirmation hearing that took place in 1993.[24] Ginsburg explained that "Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide."[25] Ginsburg clearly stated that she was not willing to shed light on how she would vote in future court cases. Ginsburg's response was in stark contrast to Bork's. Whereas Bork voiced his opinions outside of the Judiciary Committee and in the Committee hearings regarding how he would vote in future cases, Ginsburg refused to.[26] Following her hearing and confirmation, the Ginsburg Rule was informally established. The Ginsburg Rule is as follows: "nominees should not, in replying to questions from Judiciary Committee members, disclose their personal views or opinions on issues if there were a possibility the issues in the future would come before the Court."[27] This rule has set the standard for following justices to abide by. Many nominees have invoked this rule, refusing to address their views of previous cases or how they would rule in the future. For example, Amy Coney Barrett cited the Ginsburg rule, saying she would provide "no hints, no previews, no forecasts".[28] Justice Barrett refused to answer questions regarding controversial topics such as abortion rights or the Constitution. Using the principles of the Ginsburg Rule would have helped Robert Bork in his confirmation process. Since he clearly stated how he would vote in Supreme Court cases, he broke the Ginsburg Rule before it was created.

Nominees succeeding Bork learned to not explain or voice their opinions on specific legal issues and precedents. Justice Elena Kagan argues that in hearings for other nominees following Bork's, "repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis." [29] Justice Kagan emphasizes that political theater has come from Supreme Court hearings, and how there is a broader shift away from arguing legal theory.[30] Hearings have now become more intense and emotional, adding to the already significant importance of discussing the background of nominees. An example of this would be Brett Kavanaugh's sexual assault allegations, and the incredible anger and fear expressed about his nomination and during his confirmation hearing.[31] Supreme Court hearings now include

[19] *Id.*
[20] *See* Al Kamen, Edward Walsh, *Bork Lays Out Philosophy*, Washington Post (Sep. 16, 1987) https://www.washingtonpost.com/archive/politics/1987/09/16/bork-lays-out-philosophy/712ed563-97bb-4d81-b7e5-8e5d8bd17f13/
[21] *Id.*
[22] Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, National Affairs (Fall 2016) https://www.nationalaffairs.com/publications/detail/restoring-the-lost-confirmation
[23] William Safire, *On Langue; Murder Board at the Skunk Works*, The New York Times (Oct. 11, 1987) https://www.nytimes.com/1987/10/11/magazine/on-language-murder-board-at-the-skunk-works.html
[24] *Biography of Associate Justice Ruth Bader Ginsburg*, Supreme Court of the United States, https://www.supremecourt.gov/about/biographyginsburg.aspx
[25] Denis Steven Rutkus, *Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue*, Congressional Research Service (Jun. 23, 2010) https://sgp.fas.org/crs/misc/R41300.pdf
[26] *Id.*
[27] *Id.*
[28] Mark Sherman, *Barrett cites 'Ginsburg rule' that Ginsburg didn't follow*, ABC News (Oct. 13, 2020) https://abcnews.go.com/Politics/wireStory/barrett-cites-ginsburg-rule-ginsburg-follow-73589988
[29] *See* Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, National Affairs (Fall 2016) https://www.nationalaffairs.com/publications/detail/restoring-the-lost-confirmation
[30] *Id.*
[31] Sheryl Gay Stolberg, Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel With Tears and Fury*, New York times (Sept. 27, 2018) https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html

a great deal of information about a nominee's past and draw attention away from the nominee's views as a result.

In response to Bork's nomination, Barnett and Blackman in *National Affairs* outline three steps to a smooth confirmation process.[32] The first step is to commit wholly to the Constitution and the underlying principles of the text. Next, to show a commitment to legal precedent. Lastly, a nominee must decline to answer specific questions about cases, citing that the case or related issue might come to the Supreme Court in the future. These three tools help nominees refrain from giving away information that senators could later weaponize during the confirmation hearing. Ruth Bader Ginsburg, and other supreme court nominees, have followed these three steps, successfully securing their position on the Supreme Court.

Robert Bork did not follow the majority of the "rules" that lead to confirmation. Bork did not show a commitment to legal precedent, as he questioned many rulings. Furthermore, he did not decline to answer specific questions about rulings in the future, and important feature of successful nomination hearings. Robert Bork later earned recognition in the Merriam Webster dictionary with the word "borked" — defined as getting rejected in becoming a judicial nominee through an attack on one's character, background, and philosophy.[33] This term ultimately represents the failure of his hearings and his nomination as a whole.

Robert Bork's hearing served as a lesson for following Supreme Court nominees. Since Bork clearly stated his views and how he would vote in future cases, nominees have adapted their way of addressing pressing questions by not clearly stating their views. Nowadays, the Senate and the American public hardly gain insight into a nominee's views and are left to look at their work outside of the Senate hearings to gain a better understanding of how they will act as a judge on the Supreme Court. Because of this, there is a lack of clarity and honesty between Supreme Court nominees and their politics. Bork's views were clear, and how he clearly stated how he would vote on future cases, giving the Senate and the public an understanding of what to expect. Nowadays, new practices of concealing information during confirmation hearings add to greater uncertainty of how potential new Supreme Court justices will rule if confirmed.

[32] *See* Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, National Affairs (Fall 2016) https://www.nationalaffairs.com/publications/detail/restoring-the-lost-confirmation

[33] *"Bork,"* Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/bork#etymology

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