A Public Banking Option as a Viable Solution to Counter the Racial Economic Inequality Perpetuated by Predatory Overdraft Fee Schemes

LIVIA STAHLE*†

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Introduction

"*[B]anking lies at the heart of America's racial disparities.*"[1]

Systemic inequalities pervade nearly every facet of the American finance industry. As a result, people of color and low-income individuals face a myriad of challenges that inhibit their ability to access crucial financial services. This is especially problematic in light of America's dependence on commercial financial services and the monumental role such services have in preserving the Nation's ability to operate on a daily basis. Stated differently, to function in the Nation's ever evolving society it is critical to have access to basic financial services.[2] Eliminating disparities in financial access and quality of service among marginalized communities is therefore vital to promoting financial inclusion and dismantling the racial wealth gap.[3]

The finance industry's preferential treatment of white consumers and discriminatory conduct against minorities and low-income individuals is well documented. Together, this discriminatory behavior has worked to diminish underserved communities' ability to participate in the Nation's economy.[4] Banks' mistreatment of low-income individuals and people of color manifests itself in numerous ways, including redlining,[5] inferior

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[1] Stacey Vanek Smith & Darius Rafieyan, *Why We Need Black-Owned Banks*, NPR (July 8, 2020), https://www.npr.org/2020/07/08/889141681/why-we-need-black-owned-banks (introducing a podcast episode arguing that the Civil Rights Act did not address the "systemic bias built into banking").

[2] *See generally Cashed Out: How a Cashless Economy Impacts Disadvantaged Communities and Peoples: Virtual Hearing on H.R. 21 & H.R. 1048 Before the Subcomm. on Oversight & Investigations of the Comm. on Fin. Servs.* 117th Cong. (2021), https://www.congress.gov/event/117th-congress/house-event/LC67623/text (discussing the complexities of the Nation's increased reliance on online commercial banking services and how a cashless economy further excludes people of color and low-income individuals).

[3] *See* Cassandra J. Havard, *'Doin' Banks,'* 5 U. PA. J. L. & PUB. AFFAIRS, 64 (2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1069&context=jlpa ("The demographics of financial exclusion put race and class at the core of unequal treatment."); Chauncey Alcorn, *'Racial Bias Runs Deep' at America's Largest Banks, Study Say*s, CNN (Mar. 18, 2021), https://www.cnn.com/2021/03/18/investing/bank-diversity-racial-bias-study/index.html ("Banks are so essential to everyone being able to function in society and in our economy.").

[4] *See generally* Vanek Smith & Rafieyan, *supra* note 1.

[5] Press Release, U.S. Dep't of Just., Justice Department Announces New Initiative to Combat Redlining, U.S. DEP'T OF JUST. (Oct. 22, 2021), https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-

service,[6] and employment discrimination. Inequalities also exist in bank ownership,[7] financial education, and investment and credit opportunities.

How bank personnel perceive and characterize low-income individuals and people of color constitutes further evidence of the systemic racism embedded in the finance industry. For example, banks frequently mischaracterize people of color as threats and engage in profiling by relying on unsubstantiated and racialized stereotypes.[8] Further, some banks promote and maintain company cultures in which it is acceptable for employees to rely on racial and socioeconomic stereotypes in evaluating consumers' eligibility for financial services or as a justification for providing inferior services.[9]

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redlining ("Redlining is an illegal practice in which lenders avoid providing services to individuals living in communities of color because of the race or national origin of the people who live in those communities."). *See also* Havard, *supra* note 3, at 97.

[6] *See* Emily Flitter, *This Is What Racism Sounds Like in the Banking Industry*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html (In response to ex-NFL player Jimmy Kennedy's questions about why he had been facing difficulties trying to become a private client with the bank, a financial advisor said, "You're also an African American . . . I don't have to tell you what the demographics are like here in Arizona . . . they don't see people like you a lot.") (last updated July 3, 2021). *See also* Press Release, U.S. Senate Comm. on Banking, Hous., & Urban Affairs, Brown, Colleagues Reintroduce Legislation to Fight Discrimination from Financial Institutions (July 26, 2022), https://www.banking.senate.gov/newsroom/majority/brown-colleagues-legislation-discrimination-financial-institutions (announcing reintroduction of the Fair Access to Financial Services Act, which would "prohibit banks and other financial institutions from discrimination in providing goods or services on the basis of race, color, religion, national origin, sex, gender identity, or sexual orientation"). In support of the Act, Senator Cory Booker stated, "for far too long, Black and Brown people have faced significant barriers to access to financial services at banks and other financial institutions, including racial profiling, harassment, and abuse." *Id.*

[7] *See* Vanek Smith & Rafieyan, *supra* note 1 (Black-owned banks represent less than one percent of America's banking assets).

[8] *See, e.g.*, Johnny Diaz & Michael Levenson, *'Black Panther' Director Ryan Coogler Mistaken for Bank Robber in Atlanta*, N.Y. TIMES (Mar. 9, 2022), https://www.nytimes.com/2022/03/09/arts/ryan-coogler-bank-america.html; Vanek Smith & Rafieyan, *supra* note 1; Jaclyn Peiser, *A Black Doctor Says She Was Refused Service At a Bank Because Of Her Race: 'I Felt Like a Criminal'*, WASH. POST (Feb. 3, 2022), https://www.washingtonpost.com/nation/2022/02/03/doctor-malika-mitchell-stewart-lawsuit-racist-bank/ (Ms. Mitchell-Stewart's attorney stated the situation was "a devastating reminder that no matter how hard we try and how far we climb, major corporations in this country still view us as if we are nothing.").

[9] *See* Terri Friedline et al., *Banks as Racialized and Gendered Organizations: Interviews with Frontline Workers*, 96 UNIV. CHICAGO PRESS, SOCIAL SERV. REV. 401, 414 (2022) (finding that bank employees relied on racialized stereotypes to determine whether bank fees should be waived); *see generally* Emily DiVito, *Banking for the People: Lessons from California on the Failures of the Banking Status Quo*, ROOSEVELT INST., (Sept. 8, 2022),

The discrimination within the American finance system has persisted for generations, ultimately creating a system founded upon benefiting white individuals while simultaneously excluding people of color.[10] Author Mehrsa Baradaran illustrates this point by stating, "[w]e had for hundreds of years a race-based credit system, a race-based economy that excluded Blacks, that created poor neighborhoods here and then rich neighborhoods there. . . . [T]he Civil Rights Act [said] no more discriminating. From now on, we're colorblind. And that's not how markets work."[11]

In addition to the systemic harms mentioned above, people of color and low-income individuals are disproportionately targeted in bank schemes that elicit profit through unfair and deceptive business practices. It is well established that banks' exploitative business practices drive people of color and low-income individuals out of the traditional banking system.[12] In response, several states[13] have introduced legislation intended to address the inequalities plaguing the financial system by exploring a public bank. Similar bills have been introduced at the federal level in hopes of combatting racial inequality in the finance system and eliminating the wage gap.[14] Proponents of public banks often point to the Bank of North Dakota ("BND") as an example of a successful and sustainable state bank.[15] The

https://rooseveltinstitute.org/publications/banking-for-the-people/ (documenting racial disparities in "access to information and equal treatment while at bank branches").

[10] Vanek Smith & Rafieyan, *supra* note 1 (quoting Mehrsa Baradaran) ("[G]enerations of exploitation and exclusion have left us with a financial system that is primarily geared toward serving white communities.").

[11] *Id.*

[12] *See generally id.*

[13] PUB. BANKING INST., *Legislation by State*, https://publicbankinginstitute.org/legislation-by-state/ (last visited May 15, 2023). In the last two years, for example, Oregon (S.B. 501, 82nd Leg. Assem., Reg. Sess.), New Mexico (H,B, 75, 55th Leg.), New York (S.B. 1754, 238th Leg. Sess.), Hawaii (H.B. 240 HD1, 31st Leg.), Massachusetts (S.632, 193rd Leg. Sess.) and Washington (S.B. 5509) have introduced legislation related to creating a state-run bank. *Id.*

[14] *See, e.g.*, Public Banking Act of 2020, H.R. 8721, 116th Cong. (2020); Postal Banking Act, S. 4614, 116th Cong. (2020); National Infrastructure Bank Act of 2021, H.R. 3339, 117th Cong. (2021).

[15] *See, e.g.*, Mynor Lopez, *Washington Investment Trust: A Public Complement to Private Banking*, 20 SEATTLE J. SOC. JUST., 558 (2022) (noting "other states, including Washington, look to the BND as a model for creating a state-run bank"); Oscar Perry Abello, *What a Public Bank Can Do for Real People*, YES! (Feb. 19, 2020), https://www.yesmagazine.org/issue/world-we-want/2020/02/19/public-bank-north-dakota (explaining that advocates see BND as "a model for getting state tax money invested in communities" and that some "are looking to the Bank of North Dakota explicitly as a model to emulate or build upon"). *See also* @SFBusinessTimes, TWITTER (Jan. 26, 2021), https://twitter.com/SFBusinessTimes/status/1354217635991400451. S*ee generally* Will

BND was established in 1919 and, at its core, represented the frustration felt by agriculture workers being exploited by big banks' exorbitant interest rates. Farmers within North Dakota sought to mitigate the corporate greed being fueled by North Dakota's working class.[16] As a result, BND was founded upon a mission "to improve the lives of the people of North Dakota with a dedication to service and solvency rather than the maximization of profit."[17] Today, the BND "is the only public bank operating at scale in the United States" and collaborates "with local banks and credit unions to support lending in specified areas."[18]

As noted, other states have shown interest in following a path like North Dakota's due to similar frustrations with banks exploiting vulnerable populations. In October of 2021, California Governor, Gavin Newsom, signed the "Public Banking Option Act"[19] (PBOA) into law, establishing a Blue Ribbon Committee tasked with exploring the feasibility of California creating and operating a state-run bank.[20] Although the Act passed, it is imperative to highlight that it only functions as the initial step in the nuanced process of exploring and perhaps implementing a state-run bank. The legislative history acknowledges the success of the BND, while emphasizing the notable ways in which PBOA is different. For example, the PBOA centers upon evaluating the viability of a "state program that acts as a platform to *connect* participants to no-cost banking services."[21] Moreover, the PBOA was drafted with express acknowledgment and consideration of how predatory banking practices have perpetuated economic inequality and the racial wealth gap.[22]

Peischel, *How A Brief Socialist Takeover in North Dakota Gave Residents a Public Bank*, VOX (Oct. 1, 2019), https://www.vox.com/the-highlight/2019/9/24/20872558/california-north-dakota-public-bank (highlighting the push within California to create a banking system similar to the BND and noting that opponents "call it a government intrusion").

[16] *Taking Matters into Their Own Hands*, BANK OF N.D., https://thebndstory.nd.gov/the-early-years/ (last visited Feb. 27, 2023).

[17] *Id.*

[18] *California Public Banking Option Act: Hearing on A.B.1177 Before the Assemb. Comm. on Banking & Fin.*, 2020–2021 Reg. Sess. 7 (Cal. 2021), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB1177# (statement of Luke Reidenbach, Member, Assemb. Comm. on Banking & Fin. Comm.).

[19] A.B.1177, 2020–2021 Reg. Sess. (Cal. 2021).

[20] *Public Banking Option Act – AB 1177 2021 (PASSED)* LAWYERS COMM. FOR CIVIL RTS. OF THE S.F. BAY AREA, https://lccrsf.org/campaigns/public-banking-option-act-ab-1177/.

[21] ASSEM. FLOOR ANALYSIS UNIT, ASSEM. THIRD READING, A.B. 1177 at 7 (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB1177# (emphasis added).

[22] *See* ASSEM. FLOOR ANALYSIS UNIT, CONCURRENCE IN S. AMEND., A.B. 1177 (2021), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1247

In light of these developments, this Article analyzes the concept of public banking and its potential to mitigate the harms the private banking industry has caused to low-income consumers and people of color. Through this lens, this Article focuses on overdraft fees and exploitative fee schemes associated with depository accounts and their role in perpetuating economic inequality. By virtue of these unfair practices, megabanks work to exclude historically underserved populations from the traditional banking system. Accordingly, Part II addresses the origins of overdraft fees and big banks' alarming reliance on exploitative fee practices as integral to their business models. Part II continues by detailing the related harms endured by low-income individuals and people of color due to big banks' dependence on exploitative fee practices. As a result, it is argued that an alternative banking solution is necessary and that a public banking option can serve as that alternative. Thus, Part III examines California's Public Banking Option Act and its potential to mitigate private banks' weaponization of the Nation's financial system.

Finally, Part IV proposes that the federal government establishes a "Public Banking Option Incentive," (hereinafter "Public Option Incentive") a *voluntary* federal program designed to encourage states to explore the feasibility of a state-run bank. The Public Banking Option Incentive would provide states that elected to participate with a set amount of funds to be attributed to the initial inquiry — whether a state-run bank is feasible. The Public Option Incentive would also provide guidelines mirroring aspects of PBOA. By creating a program that incentivizes exploring the viability of a state-run bank, the federal government would empower consumers, advance a more inclusive banking system, make progress toward alleviating economic inequality, and reduce some of its regulatory burdens.

I. Corporate Reliance on Exploitative Overdraft Practices and the Harm to Low-Income Individuals and People of Color

At the outset, defining megabanks and briefly contextualizing their position in America's financial system and the global economy is essential. The term "megabanks" describes the enormous, "too-big-to-fail" institutions that dominate the American financial system.[23] Examples of

("[I]t would be a program established by the state for the purpose of protecting consumers who lack access to traditional banking services from predatory, discriminatory, and costly alternatives.").

[23] *Compare* 159 Cong. Rec. (Bound) S11300 (daily ed. July 11, 2013) (statement of Sen. Brown characterizing the six largest banks as megabanks, a term closely related to the notion of "too big to fail"), *with* Arthur E. Wilmarth Jr., *The Financial Industry's Plan for Resolving Failed Megabanks Will Ensure Future Bailouts for Wall Street*, 50 Ga. L. Rev. 43, 81 (2015) ("Top executives of megabanks prospered even as their shareholders

megabanks include JP Morgan Chase (JP Morgan), Bank of America (BOA), Wells Fargo, Citigroup (or Citi Bank), U.S. Bank, PNC Financial Services, Truist Bank, Goldman Sachs, TD Bank, and Capital One.[24] The term gained traction during the early 2000s due to increased concerns about the rapid expansion of the Nation's private financial corporations and the consumer harms emerging from corporate scandals.[25] Megabanks are characterized by their unprecedented size, excessive wealth, and political power. The political sway of megabanks extends beyond the United States and is visible across the globe.[26] It is important to note that megabanks' exploitation of ordinary consumers span over a variety of financial products and services. However, this discussion focuses on megabanks' predatory overdraft practices, an issue that predates the subprime mortgage crisis and similar corporate catastrophes but remains unchanged.

A. The Emergence of Megabanks and Overdraft Fees as a Profit Machine

Banks derive much of their profit through (1) interest and (2) non-interest income from fees associated with banking services.[27] Activities generating non-interest income include ATM fees, overdraft fees, account fees, and non-sufficient fund ("NSF") fees.[28] Although overdraft practices gained traction in the United States during the late 1980s and early 1990s, overdraft practices have origins dating back to 1728, when the Royal Bank of Scotland granted a consumer's request for a "cash credit."[29] This

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received lackluster or negative returns. Meanwhile, taxpayers and society incurred tremendous costs when financial markets froze and governments were forced to bail out [systemically important financial institutions] and their creditors during the financial crisis.").

[24] *Large Commercial Banks*, FED. RESERVE (Dec. 31, 2022), https://www.federalreserve.gov/releases/lbr/current/. *See also* Matthew Goldberg, *The 15 Largest Banks in the US*, BANKRATE (May 1, 2023), https://www.bankrate.com/banking/biggest-banks-in-america/.

[25] *See, e.g.*, Press Release, U.S. Dep't of Just., Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[26] *See* Wilmarth Jr., *supra* note 23 (noting that megabanks made "a remarkable political comeback" and used their political influence to water down the terms and enactment of the Dodd-Frank Act).

[27] CONG. RSCH. SERV., OVERDRAFT: PAYMENT SERVICE OR SMALL-DOLLAR CREDIT? 1 (2020), https://crsreports.congress.gov/product/pdf/IF/IF11460/2 ("Core banking operations are built around two activities: accepting deposits and making loans. Banks make money from the interest earned on loans and from fees collected for providing certain service.").

[28] *Id.*

[29] *Id.*

mundane transaction ultimately resulted in the Royal Bank introducing the concept of allowing consumers to overdraw their bank accounts.

"Historically, debit cards — unlike credit cards — were not intended to put consumers in debt. When an account lacked sufficient funds, the debit card transaction was simply declined at no charge, similar to how credit cards are declined today when a customer has reached the credit limit."[30] However, in the 1990s, independent consultants began pitching the profitability of overdraft programs to big banks.[31] By the 2000s, big banks began applying overdraft fees to debit card transactions and quickly recognized that the rumors about the lucrative profit opportunities from overdraft programs were true.[32] In fact, overdraft fees served as a safe and reliable source of revenue for banks as the rest of the Nation struggled to regain financial security in the wake of the 2008 economic crisis. As banks became more comfortable relying on overdraft fees to increase profit margins, they quickly surpassed banks' revenue from traditional interest services.[33] Recognizing the lucrative earning potential associated with overdraft fees, banks began to incorporate them into their profit models.[34] When regulators caught wind of the fact that megabanks were becoming increasingly reliant on overdraft fees, they warned legislators and the public about the dangers posed to consumers.[35]

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[30] Peter Smith et al., *Overdraft Fees: Banks Must Stop Gouging Consumers During the Covid-19 Crisis*, CTR. FOR RESPONSIBLE LENDING 2 (June 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-overdraft-covid19-jun2019.pdf (analyzes 2019 overdraft fees of mega-banks as well as their approach to over-draft fees during the COVID-19 pandemic).

[31] *See* Jennifer Surane et al., *US Consumers Who Frequently Overdraft Drive More Than Half of the Profitability of Mass-Market Checking Accounts*, BLOOMBERG (July 25, 2022), https://www.bloomberg.com/graphics/2022-bank-overdraft-fees-costing-consumers-billions/?leadSource=uverify%20wall ("An army of independent advisers spent much of the 1990s pitching bank executives on the powers of implementing 'overdraft privilege' programs. The consultants came armed with data showing that a customer who's charged one non-sufficient-funds fee per month generates as much profitability for lenders as one maintaining a $12,000 average balance . . . They taught lenders how to order the processing of consumer transactions to maximize overdraft fees. Instead of making their normal efforts to collect on debts, banks were told to send letters thanking customers for over drafting, even as they charged them for it.").

[32] *See generally Interview: Bill Strunk*, PBS (Nov. 24, 2009), https://www.pbs.org/wgbh/pages/frontline/creditcards/interviews/strunk.html (discussing the emergence and profitability of overdraft fees in the commercial banking industry).

[33] *See* CONG. RSCH. SERV., *supra* note 27, at 1.

[34] *See id.* ("In the mid-1980s, revenue from fees, known as noninterest income, generally began to grow faster than interest income.").

[35] *See generally* Consumer Fin. Prot. Bureau, Data Point: Overdraft/NSF Fee Reliance Since 2015 — Evidence from Bank Call Reports 3 (2021) (Reliance has been "fairly

Within the last six years, several administrative agencies, including the Consumer Finance Protection Bureau (CFPB), the Office of the Comptroller of the Currency (OCC), the Federal Reserve (Fed), and the Government Accountability Office have released reports or press releases revealing banks' dependence on overdraft fees[36] as a principal source of revenue.[37] For example, recent research from the CFPB warned about banks growing dependency on overdraft and NFS fees, reporting that they accounted for nearly "two-thirds of reported fee revenue."[38] Although reliance on these fees varies by institution, the study found that reliance "was generally stable over time for any given institution."[39] Rohit Chopra, director of the CFPB, commented on this phenomenon, stating, "[r]ather than competing on quality service and attractive interest rates, many banks have become hooked on overdraft fees to feed their profit model. . . ."[40]

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constant between 2015 and 2018 between 65 and 66 percent, increased by over a percentage point to 66.5 percent in 2019, and then declined to 62.4 percent in 2020.").

[36] *See id.* at 2. *See also CFPB Research Shows Banks' Deep Dependence on Overdraft Fees*, Consumer Fin. Prot. Bureau (Dec. 1, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/ [hereinafter *Overdraft Fees*] (CFPB reports indicate banks continue to rely heavily on revenue from overdraft fees); *Prepared Remarks of CFPB Director Rohit Chopra on the Overdraft Press Call*, Consumer Fin. Prot. Bureau (Dec. 1, 2021), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-overdraft-press-call/ [hereinafter *Prepared Remarks*] ("For many big banks, overdraft fees are still the steady, reliable, predictable, easy revenue that shareholders love.").

[37] *See* Consumer Fin. Prot. Bureau, *supra* note 35, at 2; *Prepared Remarks*, *supra* note 36. *See also* Assoc. Press, *Overdraft Fees Are a Cash Cow for Big Banks. Public Pressure Is Making Them Reconsider.*, USA TODAY (Dec. 15, 2021), https://www.usatoday.com/story/money/personalfinance/budget-and-spending/2021/12/15/overdraft-fees-under-pressure-big-banks-abandon-longtime-cash-cow/8907209002/ (increasingly lucrative overdraft fees have made banks the target of public frustration — but they are unlikely to stop the practice); Surane et al., *supra* note 31.

[38] *See Overdraft Fees*, *supra* note 36 ("CFPB researchers estimate that the overall market revenue from overdraft and NSF fees was $15.47 billion in 2019. These overdraft and NSF fees made up close to two-thirds of reported fee revenue, emphasizing banks' heavy reliance on such fees.").

[39] *Id.*

[40] *Id. See, e.g.*, Nathan Bomey, *Agency: TCF National Bank Tricked Customers on Overdraft Fees*, USA TODAY (Jan. 19, 2017), https://www.usatoday.com/story/money/2017/01/19/consumer-financial-protection-bureau-cfpb/96772082/ (reporting CFPB sued CEO Bill Cooper for deceiving customers into "accepting overdraft fees with such aggressiveness" that he named his personal boat the "Overdraft"); *Major Banks That Abuse Overdraft Fees Gave Their CEOs Huge Raises and Have Histories of Consumer Mistreatment*, ACCOUNTABLE.US (May 24, 2022), https://accountable.us/analysis-major-banks-that-abuse-overdraft-fees-gave-their-ceos-huge-raises-and-have-histories-of-consumer-mistreatment/ ("CEOs of Wells Fargo,

Overdraft fees remain popular among commercial banks today and continue to generate extraordinary revenue. For example, in 2019 alone, banks made an estimated $15.47 billion from overdraft and NSF fees.[41] Even in 2020, as the pandemic rocked the global economy and left millions of Americans unemployed, commercial banks took in an estimated $12.4 billion.[42] In the fourth quarter, "banks collected $3.6 billion in service fees . . . , including $2.3 billion in overdraft fees- a 64 % spike from the second quarter of that same year."[43] The pervasiveness of overdraft fees within the commercial banking industry is especially troubling, considering the disparity between the banks' fees and the services they purportedly provide as justification for such fees. Indeed, cumulative overdraft fees can have devastating ramifications for consumers already struggling to make ends meets. However, even a single overdraft fee can have severe implications for consumers that are straining to access basic human needs like food, housing, access to healthcare, or child-care services.[44]

B. Deceptive Practices

Private financial institutions have adopted a slew of deceptive practices to maximize their earnings. Examples of exploitative practices implemented by major U.S. banks include but are not limited to: (1) charging overdraft fees that far exceed the value of the original transaction triggering the fee ("unreasonable fees"); (2) charging consumers overdraft fees multiple times per day; (3) reordering of transactions; (4) hidden "junk fees"; (5) sustained overdraft fees and (6) garnishing essential benefits from consumers to cover overdraft fees including

JPMorgan Chase and Bank Of America have all seen double-digit percentage pay increases and lived lavish lifestyles all while their banks reaped at least $3.76 billion from exploitive overdraft and non-sufficient funds fees in 2021.").

[41] *See* Consumer Fin. Prot. Bureau, *supra* note 35.

[42] Kelly Anne Smith, *Banks Charged Low-Income Americans Billions In Overdraft Fees In 2020*, FORBES (Apr. 21, 2021), https://www.forbes.com/advisor/personal-finance/how-to-prevent-overdraft-fees/.

[43] SEN. ELIZABETH WARREN, SEN. CORY BOOKER & REP. CAROLYN MALONEY, LETTER TO JP MORGAN CHASE & CO. (May 4, 2022), https://www.warren.senate.gov/imo/media/doc/Letters%20to%20JP%20Morgan%20Chase,%20BofA,%20Wells%20Fargo%20re%20Overdraft%20Fees.pdf [hereinafter *Letter From Elizabeth Warren*] ("[P]rofits from overdraft fees have continued to rise even as regulators warned banks against staying hooked on 'exploitative junk fees.'").

[44] *See, e.g.*, Mike Calhoun, *It's Up to Regulators to Stamp Out Excessive Overdraft Fees*, AM. BANKER (Aug. 15, 2022), https://www.americanbanker.com/opinion/its-up-to-regulators-to-stamp-out-excessive-overdraft-fees (describing a single mother's experience after repeatedly being charged overdraft fees: "I still hear my son complain and moan of hunger, and I feel guilty yet defenseless because the money is gone.").

COVID-19 stimulus checks, and unemployment benefits.[45] These practices are briefly discussed in turn below.

1. Unreasonable Fees

As an initial matter, it is essential to note that the sheer cost of a single overdraft fee is unreasonable, considering the services the banks allegedly provide consumers in exchange for the fee. On top of monthly payments consumers pay to participate in "overdraft protection programs," banks lodge overdraft fees ranging from $10 to $35 per transaction.[46] The standard overdraft procedure occurs as follows: the consumer makes a purchase that exceeds the funds available in their account; nevertheless, the bank approves the transaction and temporarily covers the discrepancy. The bank temporarily covers the transaction until the account has been restored to a positive balance. Rather than waiting for the consumer to pay the fee directly, the bank can withdraw the funds owed from the consumer's next deposit.[47] As a result, banks are typically reimbursed within three business days.[48] Thus, the risk that megabanks incur when they temporarily cover the consumer transaction that overdrew the account is negligible compared to the punitive fees they charge consumers for such services. The average cost of transactions triggering an overdraft fee is approximately $20; the average overdraft fee is approximately $35.[49] Consequently, the cost of the overdraft fee typically exceeds the cost of the transaction triggering the fee.

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[45] Smith et al., *supra* note 30, at 1–2. *See also Consumer Comments to CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services*, NAT'L CONSUMER L. CTR. (May 4, 2022), https://www.nclc.org/resources/consumer-comments-in-response-to-the-cfpbs-request-for-information-regarding-junk-fees-imposed-by-providers-of-consumer-financial-products-or-services-2/ [hereinafter *Consumer Comments*].

[46] Smith et al., *supra* note 30, at 1.

[47] *Id.*

[48] *Id. See also The End of Overdraft Fees? Examining the Movement to Eliminate the Fees Costing Consumers Billions: Hybrid Hearing Before the Subcomm. on Consumer Prot. and Fin. Serv.*, 117th Cong. 6 (2022), https://www.congress.gov/event/117th-congress/house-event/LC68228/text?s=1&r=29 [hereinafter *The End of Overdraft Fees? Examining the Movement*]. Jeremie Greer, Executive Director of Liberation in a Generation, argued that bank fees function as "high cost credit": "To put it into perspective, the CFPB found that a majority of overdraft fees were incurred on transactions of $24 or less, and were repaid within 3 days, meaning that a $34 overdraft fee would have an annual percentage rate of 17,000 percent — 17,000 percent." *Id.*

[49] Smith et al., *supra* note 30, at 1; Calhoun, *supra* note 44 (consumer describing $35 overdraft fee as "a momentous amount for a low-income family.").

2. Multiple Fees Per Day and Sustained Overdraft Fees

Further, most contractual agreements permit banks to charge overdraft fees multiple times per day for the same transaction. To consumers' surprise, it is customary for banks to charge several overdraft fees within a single day.[50] Imposing multiple fees within a single day is excessive and unjust. Consumers have urged Congress to prohibit such practices highlighting the consequences they can have on low-income families.[51] For example, one consumer shared their experience incurring multiple overdraft fees in a single day, stating, "I've had paychecks level me it [sic] to zero after being hit with multiple overdraft fees to pay a bill."[52]

Nevertheless, it is standard practice for banks to charge consumers multiple overdraft fees per day. These charges can accumulate and cost account holders between $105 to $210 within a single day. Equally as problematic are "sustained overdraft fees," which charge a fee for each day the account is overdrawn.[53] These practices are unwarranted and underscore

[50] *See* Rebecca Lake, *How Many Overdraft Fees Can Your Bank Charge You In One Day?* MYBANKTRACKER (last updated Feb. 1, 2023), https://www.mybanktracker.com/news/how-many-overdraft-fees-can-your-bank-charge-you-in-one-day (comparing policies of major banks that allow them to charge up to six overdraft fees per day, amounting to a charge of $102–$216 per day).

[51] Kael Wilfrey, Comment on Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Feb. 01, 2022), https://www.regulations.gov/comment/CFPB-2022-0003-0743 ("[A] series of overdraft fees, of multiple $35 fees, because you overdraw your checking account by a few… dollars — in multiple transactions — can literally ruin someone living paycheck to paycheck."); *see also* Joe Valenti, *Overdraft fees can price people out of banking*, CONSUMER FIN. PROT. BUREAU (Mar. 30, 2022), https://www.consumerfinance.gov/about-us/blog/overdraft-fees-can-price-people-out-of-banking/.

[52] Samantha Koelsch, Comment on Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Feb. 10, 2022), https://www.regulations.gov/comment/CFPB-2022-0003-0342. *See also* Melissa Pitcock, Comment on Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Mar. 20, 2022), https://www.regulations.gov/comment/CFPB-2022-0003-1393 ("I'd rather just have the transaction not go through than get hit with *multiple* fees in a short period."); Erin G., Comment on Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Mar. 28, 2022), https://www.regulations.gov/comment/CFPB-2022-0003-2262 ("My father has lost multiple bank accounts and has been pushed into severe financial hardship due to unknown fees and overdraft fees . . . It has happened to him on multiple occasions which made him ineligible for bank accounts and affected his credit. Without a bank account my dad struggled to electronically receive his disability and retirement income further straining his finances. He still has t [sic] been able to fully recover from the constant cycle of issues resulting from hidden fees . . .").

[53] *See generally Overdraft and Account Fees*, FED. DEPOSIT INS. CORP. (last updated Aug. 17, 2022), https://www.fdic.gov/resources/consumers/consumer-news/2021-12.html

banks' efforts to exploit the financially vulnerable.

3. Reordering Transactions

Although reordering transactions has been a deceptive practice used by banks since the early 2000s, it has garnered recent attention.[54] Reordering of transactions consists of banks manipulating the order in which consumer transactions post to their account to increase profits from overdraft fees. This process is sometimes referred to as "authorize positive, settle negative" (APSN) or "reordering transactions."[55] This practice is particularly deceptive because consumers view their accounts and see that they have money to cover certain purchases, only for the bank to reauthorize the transaction in a manner that triggers an overdraft fee. This is significant because "when an account is overdrawn, the posting sequence can have a dramatic effect on the *number* of overdrafts incurred by the account (even though the total *sum* overdrawn will be exactly the same). The *number* of overdrafts drives the amount of overdraft fees."[56] Thus, banks can manipulate the order of transactions to increase profit.[57] The devastating consequences that can follow from such practices are exhibited in the following statement made by a consumer after her bank reordered the transactions on her account.

("Some banks also may charge what are known as continuous overdraft fees, or daily overdraft fees. These are charges assessed every day the account remains overdrawn."); Calhoun, *supra* note 44 (describing continuous overdraft fees as "tantamount to kicking a person when they're down").

[54] *See, e.g.*, *Protecting Consumers from Abusive Overdraft Fees: The Fairness and Accountability in Receiving Overdraft Coverage Act: Hearing on H.R. 1728, S. 1799 & S. 1977 Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 111th Cong. 7 (2009) [hereinafter *Protecting Consumers*].

[55] *See generally CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts Agency Highlights Surprise Overdraft and Surprise Depositor Fees*, Consumer Fin. Prot. Bureau (Oct. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/; Gutierrez v. Wells Fargo Bank, 704 F.3d 712, 716 (9th Cir. 2012) ("'Posting' is the procedure banks use to process debit items presented for payment against accounts. During the wee hours after midnight, the posting process takes all debit items presented for payment during the preceding business day and subtracts them from the account balance . . . If the account balance is sufficient to cover all items presented for payment, there will be no overdrafts, regardless of the bookkeeping method used. If, however, the account balance is insufficient to cover every debit item, then the account will be overdrawn.").

[56] *Gutierrez*, 704 F.3d at 716.

[57] *See id.* ("At issue is a bookkeeping device, known as 'high-to-low' posting, which has the potential to multiply overdraft fees, turning a single overdraft into many such overdrafts. The revenue from overdraft fees is massive. Between 2005 and 2007, Wells Fargo Bank ('Wells Fargo') assessed over $1.4 billion in overdraft fees.").

> Being a first time, single mother, I had to make the decision to use my overdraft protection . . . the $36 dollar fee was worth it to keep my son in daycare for the week. Especially when I would be getting paid in a couple of days and it would all even out. No big deal. Imagine my surprise when I checked my balance and it was more than 400 dollars in the negative. Apparently, Regions decided to reorder transactions for the past few days to incur overdraft charges on 10 transactions instead of just the one transaction. This resulted in $360 in overdraft charges. Instead of $36. When my paycheck hit my account, it was ENTIRELY gone because of this. That was money to pay bills and feed my baby.[58]

4. Garnishment of Essential Benefits

In addition to unfair and disproportionate fees, banks utilize unscrupulous methods of obtaining payment for such fees.[59] For example, it is common for banks to garnish consumers' unemployment benefits to cover overdraft fees. Indeed, during the pandemic, banks garnished consumers' stimulus checks to pay for overdraft fees which, in many instances, consumers had incurred "as a result of pandemic caused hardship."[60] Megabank's initiative to rip critical government benefits out of

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[58] Regions Bank, CFPB No. 2022-CFPB-0008, at 11 (Sept. 28, 2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-_Consent-Order_2022-09.pdf.

[59] This unjust practice is not new. *See, e.g.*, *Protecting Consumers*, *supra* note 54, at 27–28 ("[A]ll the Social Security and SSI are supposed to be exempt from attachment. Banks take that money to pay overdraft fees for overdrafts they permitted to take place.").

[60] Emily Flitter & Alan Rappeport, *Some Banks Keep Customers' Stimulus Checks if Accounts Are Overdrawn*, N.Y. TIMES (last updated Dec. 31, 2020), https://www.nytimes.com/2020/04/16/business/stimulus-paychecks-garnish-banks.html ("Frustrated customers say banks have been seizing some, or all, of their relief payments because their accounts are overdrawn, in some cases as a result of pandemic-caused hardship."). *See also Pandemic Relief Benefits — Unfairness Risks*, 28 CFPB. SUPERVISORY HIGHLIGHTS 18 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf (risk assessment analyzing whether financial institutions engaged in unfair practices in violation of the Dodd Frank Act in connection with their treatment of pandemic relief benefits); Emily Flitter, *Their Finances Ravaged, Customers Fear Banks Will Withhold Stimulus Checks*, N.Y. TIMES (last updated June 21, 2021), https://www.nytimes.com/2020/12/31/business/stimulus-checks-overdraft.html (describing ways banks responded to consumer complaints about their stimulus checks being garnished to cover overdraft fees)*;* Tanza Loudenback, *Some Banks Are Taking Stimulus Checks for Unpaid Debt or Fees. Here's What To Do If It Happens To You*, BUS.

the hands of struggling consumers at the height of the pandemic underscores banks' tendency to prioritize profit above the well-being and essential needs of the consumer.

In effect, the unfair methods discussed in this section "target the poor"[61] and create "a vicious cycle that drives [consumers] deeper and deeper into debt."[62] While megabanks reign in profits from exploiting the financially vulnerable, Americans continue to worry about their financial futures. A study from 2019 illustrates this point reporting that 65% of low-income adults "worry almost daily about paying their bills."[63] Similarly, in 2020, Pew Research Center reported that "61% of Americans say there is too much economic inequality" in the U.S, although views varied across political parties and household income.[64] A related study found that among those who believed the Nation has too much economic inequality, "about eight-in-ten . . .say the U.S. economic system needs major changes or to be completely rebuilt in order to address the issue."[65]

Nevertheless, three of the Nation's largest banks, JP Morgan Chase, Wells Fargo, and Bank of America, charged a total of nearly $3 billion in overdraft fees within the first nine months of 2021.[66] When faced with consumer complaints about the fees imposed on their accounts, banks have been reluctant to reverse the fees and point to company policies that deem the fees valid.[67] Unfortunately, low-income communities and communities

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INSIDER (Apr. 17, 2020), https://www.businessinsider.com/personal-finance/banks-taking-stimulus-checks-unpaid-debt-fees-what-to-do-2020-4.

[61] *Letter From Elizabeth Warren*, *supra* note 43.

[62] Press Release, Joshua Shapiro, AG Shapiro Calls For Consumer Banks To Eliminate Overdraft Fees (Apr. 6, 2022), https://www.attorneygeneral.gov/taking-action/ag-shapiro-calls-for-consumer-banks-to-eliminate-overdraft-fees/.

[63] Ruth Igielnik & Kim Parker, *Most Americans Say the Economy Is Helping the Rich, Hurting the Poor and Middle Class*, PEW RSCH. CTR., (Dec. 11, 2019), https://www.pewresearch.org/social-trends/2019/12/11/most-americans-say-the-current-economy-is-helping-the-rich-hurting-the-poor-and-middle-class/.

[64] Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/.

[65] Juliana M. Horowitz et al., *Most Americans Say There Is Too Much Economic Inequality in the U.S., But Fewer Than Half Call It a Top Priority*, PEW. RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority/.

[66] DiVito, *supra* note 9, at 6.

[67] *Consumer Response Annual Report 2021*, CONSUMER FIN. PROT. BUREAU 34 (Mar. 31, 2022), https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf ("[B]anks typically maintained that fees were valid, but sometimes provided partial refunds of fees, stating that they were refunding fees as a courtesy.").

of color disproportionately endure the consequences of banks' dishonest business methods.

C. Exploitative Fee Practices Exacerbate Economic Inequality Among Low-Income Individuals, People of Color, and the Unbanked

The exploitative overdraft fees and fee schemes discussed in the preceding section exacerbate economic inequality and work to exclude minorities and low-income communities from the banking system.[68] In recent years, several studies conducted by various scholars, activists, grassroots organizations, and politicians have painted a disturbing picture of the disproportionate impact that predatory banking policies have on low-income communities and communities of color.[69] "Nine percent of account holders pay 84% of the billions paid annually in these fees, and these consumers tend to carry low balances — averaging less than $350 — and have relatively low monthly deposits."[70]

Furthermore, Black and Latino individuals incur substantially more overdraft fees than white individuals.[71] One study found that Black individuals paid more than double the amount in fees paid by white consumers for checking account services, and Latinos paid triple that amount.[72] In 2020, while the global economy faced great uncertainty posed by the pandemic, Latino households paid $1.1 billion in overdraft fees, and Black households paid approximately $800 million.[73] Correspondingly,

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68 *See* Friedline et al., *supra* note 9 (arguing that banks are racialized institutions perpetuating racial hierarchy and wealth gaps).

69 *See* Smith et al., *supra* note 30; *The End of Overdraft Fees? Examining the Movement*, *supra* note 48; Mehrsa Baradaran, *Rethinking Financial Inclusion: Designing an Equitable System with Public Policy*, ROOSEVELT INST. 5 (Apr. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_FinancialInclusion_Working-Paper_202003.pdf [hereinafter *Rethinking Financial Inclusion*].

70 Smith et al., *supra* note 30, at 3.

71 Michelle Fox, *Black and Hispanic Americans Pay Twice as Much in Bank Fees as Whites, Survey Finds*, CNBC (Jan. 13, 2021), https://www.cnbc.com/2021/01/13/black-and-hispanics-paying-twice-amount-banking-fees-than-whites-survey.html; *see also The End of Overdraft Fees? Examining the Movement*, *supra* note 48 (statement of Elise Crawford-Hicks, Consumer Policy Counsel for Americans for Financial Reform, that Black and Latino accountholders are more likely to overdraw their accounts than white account holders).

72 Matthew Goldberg, *Blacks and Hispanics Hit Harder by Checking Account Fees*, BANKRATE (Feb. 24, 2022), https://www.bankrate.com/banking/checking/checking-account-fees-disparity-survey/. While white accountholders checking account fees decreased, Latino and Black individuals experienced a 31% and 3.2% increase in checking account fees, respectively. *Id.*

73 *The End of Overdraft Fees? Examining the Movement*, *supra* note 48 (statement of Jeremie Greer, Executive Director of Liberation in a Generation); *see also* Press Release,

low-income to moderate households are nearly twice as likely to overdraw their accounts.[74] These statistics are particularly alarming because unbanked households cite unpredictable and excessive fees as a major reason for not having a bank account.[75]

Becoming unbanked or underbanked causes consumers to resort to alternative financial services[76] ("AFS"), including payday loans, money orders, and "check cashing."[77] Americans have undoubtedly become accustomed to the privileges that flow from having a bank account. Indeed, bank accounts and the services they provide are so intrinsic to our everyday life that we forget how much we rely upon these services to function. Mehrsa Baradaran illuminates this point by stating, "[t]he ubiquity of the central bank's payments system only becomes apparent when you consider how people outside of the banking system engage with the economy. Individuals without bank accounts must pay fees to cash checks or purchase debit cards, and without bank accounts, mobile apps are unavailable."[78]

It is paramount to emphasize that alternative financial services are businesses built on exploiting the financially vulnerable during times of economic crisis. AFS, alternatively called "fringe banks," are a last resort for those shut out of the traditional financial system and in dire need of quick access to their money.[79] Providers of alternative financial services

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Nat'l Consumer L. Ctr., Consumer Advocates Urge CFPB to Protect Consumers From "Junk Fees," (May 2, 2022), https://www.nclc.org/consumer-advocates-urge-cfpb-to-protect-consumers-from-junk-fees/.

[74] *The End of Overdraft Fees? Examining the Movement*, *supra* note 48 (statement of Santiago Sueiro, Senior Policy Analyst, UnidosUS).

[75] Fed. Deposit Ins. Corp., 2021 Nat'l Survey of Unbanked and Underbanked Households 2 (2021). Other common reasons included not having enough money to meet minimum balance requirements and lack of trust in financial institutions. *Id.* at 19.

[76] Havard, *supra* note 3 (noting that "fringe banks," a term used to describe entities providing AFS, do not function like a traditional deposit account). However, as a result of exclusion from the traditional banking system consumers have to resort to AFS to perform activities commonly associated with deposit accounts, such as cashing checks. *Id.*

[77] *Consumer Comments*, *supra* note 45, at n.59 ("Civil rights leaders have noted the cost of this financial disenfranchisement when urging reform of bank overdraft practices: 'Once a person is ejected from the mainstream financial system, it becomes difficult to reenter. And the unbanked and underbanked are more likely to end up with no choice except alternative financial services, which are often more expensive and less secure than a responsible mainstream checking account.'") (citing Wade Henderson & Hilary Shelton, *Predatory Overdraft Practices Should Be Stopped*, THE HILL (Aug. 20, 2013), https://thehill.com/blogs/congress-blog/economy-a-budget/159517-predatory-overdraft-practices-should-be-stopped/)).

[78] *Rethinking Financial Inclusion, supra* note 69, at 11.

[79] *See generally* Jim Hawkins & Tiffany C. Penner, *Advertising Injustices: Marketing Race and Credit in America*, 70 EMORY L. J. 1619, 1626 (2021) [hereinafter *Advertising Injustices: Marketing Race and Credit in America*].

deliberately target Black and Latino consumers and prey on the unbanked. They do this through advertising and strategic location.[80] "When banks leave a neighborhood, high cost payday lenders, title lenders, and other fringe banks usually fill the void."[81] Black and Latino consumers are unduly confined to AFS as a result of such targeting practices and the "effects of the segregated debt."[82]

Shockingly, providers of AFS are often more predatory than traditional commercial financial institutions.[83] Resorting to AFS can leave consumers in even more dire financial straits.[84] When a consumer overdraws their account, they are "borrowing"[85] the money from the bank until their next deposit, typically within three days.[86] Although the fees associated with overdraft fees are disproportionate and unwarranted, the interest rates associated with payday loans are far worse. For example, interest rates on payday loans range between 300% and 600%.[87] AFS can

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[80] *Advertising Injustices: Marketing Race and Credit in America*, *supra* note 80, at 1623 (reporting that providers of AFS disproportionately depict Black and Latino consumers in advertising on their websites and at the physical location of the business); Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 939 (2019), https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1387&context=ucilr [hereinafter *Jim Crow Credit*].The "[B]lack community is more than twice as likely as any other race to use payday loans." *Id.*

[81] *Jim Crow Credit*, *supra* note 80, at 939.

[82] *Id.* (detailing the racist history of banking in America).

[83] Henderson & Shelton, *supra* note 77. *See also* BAGARELLA ET AL., THE COST OF FINANCIAL EXCLUSION: UNDERSTANDING THE IMPACT OF THE UNBANKED IN CALIFORNIA 15 (HR&A Advisors, Inc. 2021) [hereinafter *The Cost of Financial Exclusion*]. According to the Financial Health Network, in 2018 Americans spent $189 billion on fees and interest for alternative financial services. Given the roughly 60 million unbanked and underbanked Americans, these preventable expenses average over $3,100 per person annually. *Id*

[84] *See generally Rethinking Financial Inclusion*, *supra* note 69, at 5. Unbanked individuals identifying as falling within the category of low to moderate income spend approximately ten percent of their annual income on AFS fees. *Id.*

[85] *See* DAVID LOW ET AL., DATA POINT: FREQUENT OVERDRAFTERS, 15 (CFPB 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf (explaining that consumers who frequently overdraft have less access to credit).

[86] Smith et al., *supra* note 30, at 1.

[87] Vassilisa Rubstova, *Banking and Poverty: Why the Poor Turn to Alternative Financial Services*, BERKELEY ECON. REV. (Apr. 15, 2019), https://econreview.berkeley.edu/banking-and-poverty-why-the-poor-turn-to-alternative-financial-services/; *see* Megan Leonhardt, *Payday Loans Can Have Interest Rates Over 600% — Here's the Typical Rate in Every U.S. State*, CNBC (Feb. 16, 2021), https://www.cnbc.com/2021/02/16/map-shows-typical-payday-loan-rate-in-each-state.html (the average annual interest rate on payday loans in California is 404%). Texas has the highest average interest rate for pay day loans in the U.S. at an astounding 664%. *Id.*

"trap [consumers] in endless cycles of debt."[88] This often occurs in communities that are already enduring substantial racial wealth gaps.[89] When consumers become confined to AFS and the predatory motives inherent in their business model, it inhibits all areas of financial stability,[90] including homeownership.[91]

Exploitative overdraft fees and fee practices are pushing low-income individuals and people of color out of the banking system, increasing the likelihood that such individuals must rely on predatory AFS.[92] Moreover, as noted, unbanked, and underbanked consumers consistently report unreasonable and unpredictable fees as a major reason they do not have bank accounts. Correspondingly, low-income individuals and people of color are disproportionately unbanked or underbanked.[93] Thus, megabanks continue to perpetuate economic inequality among marginalized individuals by prioritizing profits.[94]

Additionally, megabanks create and enforce a cash-driven culture that prioritizes the banks' bottom line while allowing employees to rely on racial stereotypes to further the banks' profit-seeking goals. For example, one study by the University of Michigan found that bank employees were given considerable discretion in applying fees and waiving overdraft fees.[95] Employees were implicitly encouraged to focus on consumers'

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[88] Michael J. Hsu, Acting Comptroller of the Currency, Remarks to the 2022 Community Development Bankers Association 3 (June 9, 2022), https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-66.pdf .

[89] *Id.*

[90] *See* Michael J. Hsu, Acting Comptroller, Reforming Overdraft Programs to Empower and Promote Financial Health (Dec. 8, 2021), https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-129.pdf.

[91] *See Remarks to the 2022 Community Development Bankers Association*, *supra* note 88.

[92] *See* Calhoun, *supra* note 44 (emphasizing that once consumers have been excluded from the financial system re-entry is incredibly difficult).

[93] BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECON. WELL-BEING OF U.S. HOUSEHOLDS IN 2021 43 (2022), https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf ("Unbanked and underbanked rates were higher among adults with lower income, adults with less education, and Black and Hispanic adults.").

[94] Calhoun, *supra* note 44 (arguing that some banks are "overdraft fee mills" earning more in overdraft revenue than they do in profit). For example, in 2019 and 2020, Woodforest National Bank, First Convenience Bank, and Academy Bank made more in overdraft fees than profit. *Id. See also* Smith et al., *supra* note 30, at 1 ("Bank overdraft fees cause particular harm to low-income consumers and communities of color, who are already disproportionately excluded from the banking mainstream. Bank overdraft practices cause many families severe financial distress in the best of times.").

[95] *See* Friedline et al., *supra* note 9 (white customers and customers with higher account balances were more likely to have overdraft fees waived).

"trustworthiness" and "responsibility" in deciding whether to waive the fee.[96] Yet, responsibility and trustworthiness were often judged based on the consumers' purchases triggering the overdraft fee, their appearance, and overall demeanor — judgments that can be incredibly subjective and laden with bias.[97]

To promote financial inclusion, equality, and autonomy, low-income individuals and people of color should have access to a banking system that does not rely on their exploitation for profit. Unfortunately, although various regulatory agencies have monitored the behavior of big banks for decades, they have infamously avoided accountability for fraudulent practices against consumers.[98] While accountability is desperately needed, there must be an alternative solution to the predatory practices plaguing the American banking industry to mitigate the racism embedded within the system. The following section provides further support for this notion by discussing regulatory efforts and corporate performative activism in light of additional scrutiny and recurring consumer harms at the hands of big banks.

D. Regulatory Efforts, Corporate Performative Activism, and Habitual Harms

As mentioned, megabanks have notoriously evaded accountability for predatory behaviors that have harmed consumers and the general public. Indeed, following the 2008 mortgage crisis, Congress enacted the Dodd-Frank Act, which among other critical initiatives, sought to enhance regulation of the banking industry. The Dodd-Frank Act, and its establishment of the CFPB, has been instrumental in safeguarding consumers' rights.[99] Agencies like the CFPB and the Office of the

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[96] *Id.* (describing employee decisions as being "entrenched with biases").

[97] *Id.* In discussing employee discretion related to waiving overdraft fees one bank teller provided the following example of a consumer purportedly unworthy of receiving a fee waiver: "He had had six [overdraft fees] in the last six months. . . . He was super nice but clearly somebody who has an issue with drugs. He had a baby on the way and . . . probably not gonna be the most responsible parent. Works at Family Dollar." *Id. See also* DiVito, *supra* note 9.

[98] *See* Friedline et al., *supra* note 9 (noting that over the course of five years Wells Fargo fraudulently opened millions of bank accounts which in turn cost consumers millions of dollars). In September 2016, the CFPB, O.C.C., and L.A. City Attorney sanctioned Wells Fargo with a $185 million fine. *Id.*

[99] Although CFPB is has been an important source of enforcement in the area of consumer protection, some scholars make valid arguments that the Dodd-Frank Act could have gone farther and left regulators with too much discretion. *See* Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. Rev. 1247 (2014) (expressing concern about the regulatory approach promulgated by the Dodd-Frank Act and deeming them inadequate to address systemic harms within the financial sector).

Comptroller of the Currency (OCC) have fought against big banks for consumers' rights in various contexts.[100] Unfortunately, despite their efforts, megabanks' habitual harms and staggering profit revenue indicate that regulatory consequences in the form of fines have not served as adequate deterrence.[101] Moreover, recent actions[102] on behalf of banks to reduce or eliminate overdraft fees should be viewed with skepticism. To their credit, it is a step in the right direction that banks have made public statements and policy adjustments that implicitly acknowledge the unfairness inherent in overdraft fees. Ideally, such actions will bolster accountability if banks do not live up to their promises. Nevertheless, the shift in tone is undoubtedly in response to the growing attention surrounding "junk fees." Amid the pandemic, consumers became more vocal about the ramifications of excessive fees and expressed their unwillingness to pay them.[103]

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[100] In line with the previous note, this is not to suggest such agencies are perfect. Some of the criticism regulatory agencies have received stems from the fact that they are not isolated from political pressures and are at risk of regulatory capture. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-69, LARGE BANK SUPERVISION: OCC COULD BETTER ADDRESS RISK OF REGUL. CAPTURE (2019); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-519, BANK SUPERVISION: FDIC COULD BETTER ADDRESS REGUL. CAPTURE RISKS (2020); *Putting Consumers First? A Semi-Annual Review of the Consumer Financial Protection Bureau: Hearing Before the H. Comm on Fin. Serv.,* 116th Cong. (2019), https://www.congress.gov/event/116th-congress/house-event/LC64171/text?s=1&r=2 (statement of Chairwoman Waters commenting on the Trump administration's efforts to hinder the effectiveness of the CFPB and dismantle the agency to benefit the private sector).

[101] *See, e.g.,* Cheryl R. Cooper & Raj Gnanarajah, Cong. Rsch. Serv., IF11129 Wells Fargo — A Timeline of Recent Consumer Prot. And Corporate Governance Scandals (Feb. 27, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11129; *CFPB Orders Regions Bank to Pay $191 Million for Illegal Surprise Overdraft Fees,* Consumer Fin. Prot. Bureau (Sept. 28, 2022) https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/ (characterizing Regions Bank as a "repeat offender"); Peter Hayes, *NBT Bank's $5.7 Million Overdraft Fee Class Settlement Approved,* Bloomberg Law (Oct. 03, 2022) https://www.bloomberglaw.com/product/blaw/bloomberglawnews/banking-law/X80QH2R8000000 ($5.7 million settlement to resolve class action claims brought by consumers that were charged "unfair and unconscionable" overdraft fees for transactions that did not actually overdraw their account over the span of eight years).

[102] Michael J. Hsu, *Don't Be the Last Banker to Update Your Overdraft Program*, AM. BANKER (Mar. 28, 2022), www.americanbanker.com/opinion/dont-be-the-last-banker-to-update-your-overdraft-program ("Recently, several large banks have announced sweeping reforms to their overdraft programs, leading a race-to-the-top.").

[103] *See* Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, 87 Fed. Reg. 5801 (Feb. 2, 2022) ("The CFPB is concerned about fees that far exceed the marginal cost of the service they purport to cover, implying that companies are not just shifting costs to consumers, but rather, taking advantage of a

Consumer concerns regarding junk fees caught regulators' attention, and in turn, administrative agencies vowed to enhance regulatory efforts and hold corporations accountable. Indeed, President Biden publicly condemned junk fees and explicitly denounced surprise overdraft fees as illegal and unfair.[104] Consequently, the Biden administration lodged an initiative to "crack down on junk fees."[105] As a response to mounting scrutiny, banks shifted their tone and began announcing plans to curb or remove overdraft fees.[106] However, banks' history of consistent consumer

captive relationship with the consumer to drive excess profits. Excessive and exploitative fees, whether predictable and transparent to the customer or not, can add up and pose significant costs to people, especially those with low wealth and income. Many Americans have experienced inflated or surprise fees that, however nominally voluntary, are not meaningfully avoidable or negotiable in the moment."); *see also* Rachel Gittleman & Erin Witte, *Junk Fee Blog Series Part 3: The Consumer Financial Protection Bureau (CFPB) Takes On Junk Fees*, Consumer Fed. of Am. (Dec. 13, 2022), https://consumerfed.org/junk-fee-blog-series-part-3-the-consumer-financial-protection-bureau-cfpb-takes-on-junk-fees/ (noting that the CFPB received "at least 50,000" comments in response to its request for information regarding junk fees); *Consumer Fin. Prot. Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices,* Consumer Fin. Prot. Bureau (Oct. 26, 2022), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-06-unanticipated-overdraft-fee-assessment-practices/; *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees,* Consumer Fin. Prot. Bureau (Jan. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/.

[104] *Remarks on Efforts To Prevent the Imposition of Junk Fees by Commercial Enterprises*, Off. Of the Fed. Reg. (Oct. 26, 2022), https://www.govinfo.gov/app/details/DCPD-202200960; Brian Deese et al., *The President's Initiative on Junk Fees and Related Pricing Practices,* The White House (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/.

[105] *See* Deese et al., *supra* note 104. *See also* Megan McCluskey, *What to Know About Biden's Crackdown on 'Junk' Fees*, TIME (Oct. 31, 2022), https://time.com/6225677/biden-junk-fees/.

[106] DiVito, *supra* note 9, at 6; Ken Sweet, *Banks Slowly Reconsider Overdraft Fees, Amid Public Pressure*, U.S. News & World Report (Dec. 14, 2021), https://www.usnews.com/news/business/articles/2021-12-14/banks-slowly-reconsider-overdraft-fees-amid-public-pressure ("[I]t's unlikely the financial services industry will entirely wean itself off such a cash cow anytime soon"). *See also* Max Abelson & Jenny Surane, *Sen. Elizabeth Warren pushes CEOs of three major banks to kill overdraft fees*, L.A. Times (May 4, 2022), https://www.latimes.com/business/story/2022-05-04/elizabeth-warren-pushes-banks-to-kill-overdraft-fees; Alex Horowitz & Linlin Liang, *Large Banks Improve Overdraft Policies and Cut Fees*, Pew Rsch. Ctr., (June 21, 2022), https://www.pewtrusts.org/en/research-and-analysis/articles/2022/06/21/large-banks-improve-overdraft-policies-and-cut-fees.

harm,[107] recent litigation, and comments made by top executives warrant viewing such commitments with skepticism. Indeed, some commentators have expressed concerns that banks will simply re-characterize certain types of revenue likely attributed to overdraft fees to make up for the lost revenue.[108]

Again, megabanks' deep financial dependence on overdraft revenue makes their demise unlikely, despite the public relations statements made by banks alleging a commitment to remove overdraft fees altogether.[109] One commentator illustrates this concern by stating, "Of course, banks wouldn't just eliminate a major revenue stream without plans to make it up somehow: You should be on the lookout in case banks try to make up the money by increasing other fees or by levying new ones. . . ."[110] Correspondingly, comments made by big bank executives cast doubt on banks alleged commitment to eliminating overdraft fees.[111] For example, in response to questions about JP Morgan Chase's deceptive overdraft practices, CEO Jamie Dimon attempted to shift the blame from the bank's misconduct to consumer's by faulting customers who *choose* to bank with megabanks and *agree* to their terms.[112] Dimon declared the bank believed

[107] *Protecting Consumers*, *supra* note 54 ("[C]onsumers most likely to be charged repeated overdraft fees are younger consumers and lower-income consumers. In a system hugely out of balance, our big financial institutions are collecting enormous fees from people who have nothing to spare, making them even less able to meet their obligations.").

[108] *See generally* Alicia Adamczyk, *Big Banks Are Slashing Overdraft Fees — Here's How to Avoid Them Altogether*, CNBC (Jan. 19, 2022), https://www.cnbc.com/2022/01/19/bank-of-america-wells-fargo-announce-changes-to-overdraft-fees.html ("Of course, banks wouldn't just eliminate a major revenue stream without plans to make it up somehow: You should be on the lookout in case banks try to make up the money by increasing other fees or by levying new ones, Tumin says. Monthly checking or savings account maintenance costs might go up, for example, or they could start charging for paper statements, if they don't already."). *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104468, REGULATORS HAVE TAKEN ACTIONS TO INCREASE ACCESS, BUT MEASUREMENT OF ACTIONS' EFFECTIVENESS COULD BE IMPROVED (2022) ("Federal Reserve economists showed that certain banks subject to the interchange fee cap increased prices for checking accounts by increasing monthly service fees.").

[109] Adamczyk, *supra* note 108.

[110] *Id.*

[111] *See, e.g.*, Sen. Elizabeth Warren, *Senator Elizabeth Warren Questions Big Bank CEOS on Overdraft Fees*, YOUTUBE (May 26, 2021), https://www.youtube.com/watch?v=4I5Ua3tLeKM (noting that J.P Morgan collects more than seven times the amount of overdraft revenue than its competitors and refused to refund the $1.46 billion it took from consumers during the pandemic, despite the "breaks" Congress gave lenders during the pandemic to allow them to help consumers).

[112] Max Reyes, *Bank Executives Steer Clear of No-Overdraft Pledge in Testimony*, BLOOMBERG LAW (Sept. 22, 2022),

providing overdraft services and imposing the corresponding fee was "the right thing to do."[113] He pointed to lengthy consumer agreements and emphasized that he had "faith in the American public to make their own choices."[114] In September 2022, Bank of America CEO Brian Moynihan stated, "[w]e don't believe the full elimination of them is actually a good result."[115] Further, recent enforcement actions against banks indicate an unwillingness to abandon overdraft fee schemes.[116] In 2022 alone, the CFPB has recuperated millions in fines from private banks for exploiting consumers through overdraft fee schemes.[117]

II. Analyzing California's Public Banking Option Act as a Viable Model for Financial Inclusion

A. An Introduction to the Benefits of Public Banking

Having access to participate in a zero-cost Public Banking Option is necessary on both equitable and practical grounds. Furthering economic inclusion requires abandoning the theory of commercial financial services as a fruit of capitalism and instead recognizing that access to banking, in our modern world, is a basic need. The current financial system confines people of color and low-income individuals to banks that measure their worthiness for banking services in terms of potential profit. "Consumers that are deemed unprofitable are either rejected by the bank outright or repelled by punishing fees . . . the most prevalent fees . . . are overdraft fees."[118] As a result, the "cash-strapped" consumers face exorbitant costs

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https://www.bloomberglaw.com/product/blaw/bloomberglawnews/banking-law/XAENK26O000000.

[113] *Id.*

[114] *Id.*

[115] *Id. See also Federal Regulators Fine Bank of America $225 Million Over Botched Disbursement of State Unemployment Benefits at Height of Pandemic*, Consumer Fin. Prot. Bureau (July 14, 2022), https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-fine-bank-of-america-225-million-over-botched-disbursement-of-state-unemployment-benefits-at-height-of-pandemic/.

[116] Hayes, *supra* note 101; *CFPB Orders Regions Bank to Pay $191 Million for Illegal Surprise Overdraft Fees*, Consumer Fin. Prot. Bureau (Sept. 28, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/ ("Repeat offender will refund at least $141 million to customers and pay $50 million penalty."); Public Enforcement Actions, 87 Fed. Reg. 72458, 72458 (Nov. 25, 2022) (citing Regions Bank, CFPB No. 2022-CFPB-0008 (2022)).

[117] *See* Public Enforcement Actions, *supra* note 116.

[118] *Rethinking Financial Inclusion*, *supra* note 69, at 12. *See generally Justice for All: Achieving Racial Equity Through Fair Access to Housing and Financial Services, Hearing before the Committee on Fin Serv.*, 117th Cong. (2021), https://www.govinfo.gov/app/details/CHRG-117hhrg43995/CHRG-117hhrg43995

just to participate in the economy.[119] An equitable society involves equal access to the payment systems upon which our society depends.

As a practical matter, by creating a public entity that offers a zero-cost, zero-fee public bank, the government would reinvest in low-income communities and communities of color. Mehrsa Baradaran, Professor of Law at the University of California Irvine, describes it best: "[T]he problem is lack of access to the *payments system*. Each time you purchase something at a store or online, make a sale, pay a bill, write a check, or get paid for work, you are interacting with an expansive (if often hidden) *payments system*."[120] Those excluded from the system must jump through hoops in the form of extra fees, travel, and discriminatory treatment to gain access to their money.[121] Thus, as an equitable principle, we must recognize that the private banking industry is not a system built on inclusion, but instead one built to perpetuate exclusion.

Providing consumers with the option to participate in public banks' zero-cost financial services would help eliminate reliance on the financially-motivated megabanks that depend on imposing fees, meaning that more money could remain in communities of color and low-income communities.[122] Accordingly, a public banking option could have a

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(Congresswoman Rashida Tlaib recounting a conversation with an investment banker who stated, "Well, we can't make money off of Latinos.").

[119] *Rethinking Financial Inclusion*, *supra* note 69, at 4.

[120] *Id.* (internal citations omitted).

[121] *See, e.g.*, Margaret Coker, *How Title Lenders Trap Poor Americans in Debt With Triple-Digit Interest Rates*, PROPUBLICA (Nov. 14, 2022), https://www.propublica.org/article/title-lenders-trap-georgia-residents-in-debt ("Ball's wife, Gloria Ball, developed severe health problems. They faced huge medical bills, yet their bank refused to refinance their mortgage. Left with few options for raising cash, Robert Ball drove to TitleMax, a business that prospers in Georgia's banking deserts and lends money at terms that would be illegal for other financial institutions. 'I was desperate' for quick cash, Ball said. 'They welcome folk like me.'").

[122] *See generally* Rickey Gard Diamond, *How Public Banking Could Make Black Lives Matter*, MS. MAGAZINE (July 8, 2020), https://msmagazine.com/2020/07/08/how-public-banking-could-make-black-lives-matter/ (citing MEHRSA BARADARAN, THE COLOR OF MONEY (2017) ("[A public bank] operates as a public utility for shared public goals that finance small businesses, farming and affordable student loans.")); *A California State Public Bank*, CAL. REINV. COAL., https://calreinvest.org/about/ca-public-bank/ (last visited Apr. 17, 2023) ("Traditional financial institutions are motivated first and foremost by profits. They extract wealth from the earth, workers, and communities without regard to how their decisions impact the well-being of BIPOC communities or the sustainability of these choices. . . . Investing public money back into communities will advance the economic well-being and development of communities that have historically not benefited from profit-first models."); *Justice for All: Achieving Racial Equity Through Fair Access to Housing and Financial Services, Hearing before the Committee on Fin Serv*., 117th Cong. (2021), https://www.govinfo.gov/app/details/CHRG-117hhrg43995/CHRG-

meaningful impact on working toward dismantling racial and economic inequality. Baradaran, a proponent of Public Banks, underscores the need to redress economic harms endured by people of color:

> In 1863 . . . the Black community owned a total of 0.5 percent of the total wealth in the United States — not surprising, since slaves were forbidden to own anything, and few freed blacks in the North had accumulated wealth. *"But what's staggering is that more than 150 years later, the number has barely budged — Blacks still own only about 1 percent of the wealth in the United States."*[123]

Providing consumers with a reliable and cost-free alternative to the financial services traditionally associated with megabanks is a tangible step toward increasing economic equality. It is time to recognize that meaningful progress toward economic equality undeniably requires fixing the financial structure that brought us to this point.

Additionally, as we grapple with the financial ramifications of the pandemic, it has become increasingly evident that the Nation is too reliant on private corporations to provide the benefits necessary to meet the basic needs of the public. For example, after finding that economic stimulus payments were critical during the pandemic, the government wrestled with how to distribute them.[124] Members of Congress proposed resorting to traditional mailing — a process that could take six to eight weeks. Notably, under this proposal "[u]nbanked and underbanked Americans would need to wait longer for their checks and cash them in person at a fee of up to 10 percent."[125] Although leaders like Former-Speaker Nancy Pelosi and Rep. Rashida Tlaib advocated for national digital accounts that could directly offer funds to the consumer through the Post Office, such proposals were not implemented into the CARES Act.[126] As a result, states resorted to contracting with megabanks to distribute funds.[127] However, the ramifications of this decision quickly became apparent as banks applied stimulus checks to consumers' past debts, many of which were overdraft

117hhrg43995 (Congresswoman Rashida Tlaib noting that by offering a public bank through a state or municipality governments would be investing in the communities as opposed to commercial banks which operate solely to profit).

[123] BARADARAN, *supra* note 122, at 9.

[124] *Rethinking Financial Inclusion*, *supra* note 69, at 2.

[125] *Id.*

[126] *Id.* at 3.

[127] *See* Aaron Mak, *Bank Websites Are Crashing Because Everyone Wants Their Stimulus Money*, SLATE (Apr. 15, 2020), https://slate.com/technology/2020/04/coronavirus-stimulus-payments-checks-bank-irs-down.html (describing issues megabanks had dispersing stimulus checks at the height of the pandemic).

fees.[128] Consumers faced similar issues trying to access their unemployment benefits.[129]

Correspondingly, the regulatory regimes in place are ill-equipped to tackle the enormous responsibility of regulating the banking industry which is rampant with corporate greed, and corruption. This country has struggled with the task of regulating private banking entities since the Great Depression and tried a variety of regulatory approaches.[130] Despite the efforts of administrative agencies tasked with protecting consumers from unfair business practices utilized by these mass conglomerates, success has been limited.[131] As but one example, the Financial Crisis Inquiry Commission — after an extensive analysis into the circumstances causing the 2008 mortgage crisis — stated,

> In case after case after case, regulators continued to rate the institutions they oversaw as safe and sound even in the face of mounting troubles, often downgrading them just before their collapse. And where regulators lacked authority, they could have sought it. Too often, they lacked the political will — in a political and ideological environment that constrained it — as well as the fortitude to critically challenge the institutions and the entire system they were entrusted to oversee. Changes in the regulatory system

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[128] *See, e.g.*, 166 CONG. REC. H4643 (daily ed. Sept. 22, 2020); *Inclusive Banking During a Pandemic: Using FedAccounts and Digital Tools to Improve Delivery of Stimulus Payments: Hearing before the Task Force on Fin. Tech.*, 116th Cong. Serial No. 116–95 (2020) [hereinafter *Inclusive Banking During a Pandemic*]; H.R. 6850, 116th Cong. (2020).

[129] *See, e.g.*, *Federal Regulators Fine Bank of America $225 Million Over Botched Disbursement of State Unemployment Benefits at Height of Pandemic*, Consumer Fin. Prot. Bureau (July 14, 2022) ("Bank of America has contracts with various state agencies to deliver unemployment and other benefit payments to consumers electronically through prepaid debit cards and accounts."); *see also Inclusive Banking During a Pandemic*, *supra* note 128 (describing New York City residents, primarily people of color, waiting for hours in enormous lines to cash unemployment checks at the only bank that provide the service without a fee).

[130] *Regulation by Hypothetical*, *supra* note 99 (detailing the history of bank regulation). In fact, many of the deceptive practices described in Part II can be traced back to the early 2000s. *See Protecting Consumers*, *supra* note 54 (noting that the practice of reordering transactions was a cause for concern four years prior in 2005).

[131] *See generally* THE FIN. CRISIS INQUIRY COMM'N, Final Report of the Nat'l Comm'n on the Causes of the Fin. and Econ. Crisis in the U.S., (Jan. 2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [hereinafter *Final Report on the Causes of the Economic Crisis*]; *Protecting Consumers*, *supra* note 54 (Appendix A details regulatory failures over the course of several years, illustrating an overwhelming lack of commitment to consumer protection amongst regulatory strategies).

> occurred in many instances as financial markets evolved. But as the report will show, the financial industry itself played a key role in weakening regulatory constraints on institutions, markets, and products. It did not surprise the Commission that an industry of such wealth and power would exert pressure on policy makers and regulators.[132]

Moreover, many scholars specializing in consumer protection and bank regulation fear that the pandemic has placed consumers in vulnerable position due to relaxed regulatory standards and government bail outs.[133] In light of the foregoing concerns, the following section moves beyond theory and provides an illustration of what a modern Public Bank could look like by analyzing California's recently enacted Public Banking Option Act.

B. California's Public Banking Option Act

"The demographics of California's unbanked mirror national trends: [t]hey are disproportionately Black, brown, and/or low-income."[134] The California Department of Financial Protection and Innovation (CDFPI) reports that an estimated 5.6 to 7.6% of Californians are unbanked.[135] In California, "[f]orty-six percent of all Black households, 41 percent of all Latino/a households, and 13 percent of Asian and Pacific Islander (API) households in California are unbanked or underbanked."[136] Moreover, 81% of unbanked Californians earn less than $15 per hour.[137] Recognizing that Black, Latino, and Spanish-speaking individuals "bear the brunt of the costs of banking exclusion," the Roosevelt Institute launched a study designed to gain further data regarding their banking experiences.[138] The Institute studied California's banking experiences within major counties, including Alameda, Los Angeles, Sacramento, San Diego, and Santa Clara. The study sent canvassers out to various banks to investigate Black, Latino, and Spanish-speaking individuals' experience.[139]

The findings underscore the need for alternative banking options

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[132] *Final Report on the Causes of the Economic Crisis, supra* note 131, at xviii.
[133] *See generally* Arthur E. Wilmarth Jr., *Why Taming the Megabanks Should Remain a Top Priority for Financial Regulators and Policymakers*, 93 U. Colo. L. Rev. 1061 (2022).
[134] DiVito, *supra* note 9.
[135] Cal. Dept. of Fin. Prot. and Innovation, BankOn Cal. (2021), *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/BankOn-California-Report-2021.pdf?emrc=afc73b.
[136] DiVito, *supra* note 9, at 7.
[137] *Id.*
[138] *Id.* at 8.
[139] *Id.* (explaining how canvassers visited over 100 banks, located in both majority-white and non-white neighborhoods and asked specific questions related to no-cost or low-cost bank account options).

within California: for example, the data demonstrated discrepancies in how banks treated canvassers of color and Spanish-speaking canvassers compared to white English-speaking canvassers.[140] Canvassers that identified as people of color were disproportionately turned away when requesting information and reported feeling unwelcome at the bank.[141] A Black canvasser reported that when had they the chance to talk to a bank employee, the employees' responses to their questions "felt rushed" and the employees provided short responses even though the bank was not busy at the time.[142] In contrast, the white canvassers had a very different experience. Only one white canvasser was turned down and they reported "that they felt bankers . . . were willing to expend time and energy" to answer their questions.[143] These examples of discriminatory behavior exacerbate "the mistrust that communities of color have toward the private banking sector, which actively excluded them for decades through racist banking policies."[144]

Furthermore, the study revealed that bank employees were generally unwilling to discuss accounts without fees and were reluctant to provide transparent information about the terms of overdraft programs. When employees were willing to discuss affordable bank account options, the information provided was "confusing and sometimes misleading."[145] The study underscored that the private banking industry continues to engage in practices that work to exclude low-income individuals and people of color.[146] Specifically, the research found:

1. Race and language disparities in access to information and equal treatment while at bank branches;
2. A prevalence of overdraft-fee-based accounts and a reticence on the part of bank staff to disclose cheaper alternatives when those options exist; and
3. A near-total lack of no-fee, no-minimum balance account options at surveyed banks.[147]

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[140] *Id.* at 9.
[141] *Id.* ("When canvassers of color went into banks to request account information, bank staff turned them away nearly one-third of the time. The reasons bank staff provided for turning prospective customers away included: that the canvasser needed to make an appointment, that staff were too busy to talk or were at lunch, and that all the relevant information was available on the bank's website.").
[142] *See, e.g.*, *id.*
[143] *Id.* at 10.
[144] *Id.* at 9 (citing DON'T FIXATE ON THE RACIAL WEALTH GAP: FOCUS ON UNDOING ITS ROOT CAUSES, THE ROOSEVELT INST., (2020)).
[145] *Id.* at 16.
[146] *See, e.g.*, *id.* at 12.
[147] *Id.* at 3.

The report concluded by advocating for a public banking option to address the inequities embedded in California's banking industry. Researchers praised California's PBOA and demonstrated optimism that the CalAccount Program would promote inclusivity and benefit millions of Californians upon implementation.

As noted, Governor Gavin Newsom signed and enacted California's Public Banking Option Act in 2021,[148] establishing a "CalAccount Blue Ribbon Commission" to explore the feasibility of California implementing a "CalAccount Program," which would provide Californians with the option to enroll in a "zero-fee, zero-penalty, federally insured transaction account."[149] The CalAccount Program would provide essential services at no cost to the consumer. For example, the Program would offer depository services,[150] automatic payment options, and "robust and geographically diverse mechanisms for accessing account funds and account management tools that facilitate the automation of basic financial transactions."[151] These features help to effectuate the Program's goal of being "designed to serve the needs of individuals with low or fluctuating income."[152]

The Act authorizes the State Senate to appoint the following individuals to serve as members of the Commission: banking expert(s) specializing in deposit accounts, a public banking advocate, an individual specializing in "economic and racial justice and cultural competence," and a consumer protection advocate with "expertise in banking access and financial empowerment including within historically unbanked or underbanked communities."[153] Correspondingly, the Governor will appoint an employee representative and a consumer protection specialist affiliated with an academic institution to serve as members of the Commission.[154] The Commission is also responsible for exploring the practicability of the

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[148] CAL. GOV'T CODE § 100100 (West).
[149] *Id.* § 100104(a)(1)(A) (West).
[150] *Depository Services*, Off. of the Comptroller of the Currency https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/depository-services/index-depository-services.html ("Depository services include checking and savings accounts, and transfer of funds (e-payments through online banking or debit cards).") (last visited May 17, 2023).
[151] CAL. GOV'T CODE § 100104 (a)(1)(A).
[152] *Id.* § 100104.
[153] *Id.* §100104(a)(1)–(9). *See also Frank Robinson and Paulina Gonzalez-Brito Appointed to the CalAccount Blue Ribbon Commission*, SEN. TONI G. ATKINS (Sept. 7, 2022), https://sd39.senate.ca.gov/news/20220907-frank-robinson-and-paulina-gonzalez-brito-appointed-calaccount-blue-ribbon-commission (describing Frank Robinson and Paulina Gonzalez-Brito's qualifications and experience working on banking issues in underserved communities).
[154] CAL. GOV'T CODE § 100104(B)(5)–(6).

Program logistics by establishing features including processes for enrollment centered upon maximizing participation; mechanisms for consumers to deposit, transfer, and withdraw funds with zero fees; and a system in which account holders could elect automatic payments to authorized payees.[155]

In establishing enrollment procedures that maximize Program participation, the Commission must facilitate the process for individuals without a federal or state-issued ID, individuals experiencing homelessness or without permanent housing, and individuals under eighteen.[156] Moreover, the Program Administrator is responsible for connecting and collaborating "with other state and local government programs providing individuals with financial accounts" to create a procedure "enabl[ing] program accountholders to transfer funds between their CalAccounts and their other state-managed or locally managed accounts. . . ."[157]

Although this stage marks the preliminary phases of implementing such a monumental program, it has still been praised as "landmark legislation."[158] For example, the California Public Banking Alliance (CPBA) emphasized that the Act addresses "the inequities in financial services acutely felt by communities that have been hardest hit by the pandemic and recession, inequalities such as discrimination, predatory lending, and vicious spirals of debt."[159] The CPBA noted that by providing a public banking option, the Act mitigates the circumstances leading consumers to resort to alternative financial services. As such, the Act works toward "reducing the wealth gap and helping Californians to avoid catastrophic debt."[160]

If implemented, the CalAccount Program would expand access to quality financial services among people of color and low-income

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[155] *Id.* §100104(C)–(J).
[156] *Id.* § 100104(K)(i)–(iii).
[157] *Id.* § 100104(L)(iv).
[158] Rick Girling et al., *California Public Banking Option Act (AB 1177) Passes the State Legislature*, CAL. PUB. BANKING ALL. (Sept. 11, 2021), https://californiapublicbankingalliance.org/news/california-public-banking-option-act-ab-1177-passes-the-state-legislature/; Andrew Kushner, *Opinion: California Can Lead in Ending Exploitative Overdraft Fees*, E. BAY TIMES, (Aug. 5, 2022), https://www.eastbaytimes.com/2022/08/05/opinion-california-can-lead-in-ending-exploitative-overdraft-fees/ (arguing that California must take the lead to "stop banks and credit unions from ripping off consumers with overdraft fees").
[159] Girling et al., *supra* note 158 ("[I]t's very expensive to be poor. Minimum balance requirements, late fees, overdraft fees, higher interest rate charges for loans to the financially insecure, as well as check cashing and money order fees add up to substantial financial burdens placed on those least able to pay.").
[160] *Id.*

individuals. Some commentators believe that "by using public money to create money locally, public banks can reverse decades of racist disinvestment."[161] In effect, the CalAccount Program would create the space to prioritize the needs and well-being of low-income communities and communities of color as opposed to banks' profit margins.[162] By granting consumers the option to obtain financial services from sources outside the public sector, the CalAccount Program could work toward rebuilding the trust between marginalized communities and financial service providers.[163] "The financial services sector — and the companies that dominate it — grew to the central role it plays in our economy through the exploitation of enslaved people, who for centuries were considered valuable financial investments to be bought, sold, and traded."[164]

The structural racism engrained in the finance industry is still "clear today in who can — and cannot — afford access to traditional banking services."[165] The racist history of the banking industry is also apparent in comparing the cost and quality of financial services provided to white and non-white individuals. People of color must spend more to open a bank account, face higher risks of account closures, and experience more adverse treatment than white individuals. Thus, it is plain that despite legislation aimed at safeguarding consumers of color banks, their services, and fee structures "functionally, if not overtly, discriminate" against marginalized individuals.[166] A public bank option would work toward redressing these harms and the systemic financial exclusion on the basis of race by providing zero-cost services to facilitate economic stability. A public banking option would save millions of dollars for people of color and low-income

[161] Ameya Pawar & Harish I. Patel, *Public Banking Can Help Bridge the Racial Wealth Gap in the Post-Pandemic Recovery* CHI. REP. (July 7, 2020), https://www.chicagoreporter.com/public-banking-can-help-bridge-the-racial-wealth-gap-in-the-post-pandemic-recovery/; Rashida Talib & Eduardo Suplicy, *Prioritizing People to Build Back the Economy*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/opinion/covid-economic-aid-recovery.html (noting Brazil's success in implementing a public bank that has "brought countless Brazilians into the financial system on just terms offering free accounts and low-interest loans while fostering the equitable development of communities long marginalized by commercial banks.").

[162] Girling et al., *supra* note 158; *see also* Talib & Suplicy, *supra* note 161.

[163] *See generally* DiVito, *supra* note 9, at 2 (explaining the racist history of private financial sector).

[164] *Id.* at 4. ("The financial, banking, and insurance industries quickly oriented around, and therefore enabled, this market for chattel slavery.").

[165] *Id.*

[166] *Id.* at 2.

individuals and enhance the economy as a whole.[167]

Although the CalAccount Program would resemble a remarkable step toward economic equality, it is not perfect. For example, if the Blue Ribbon Committee Program is feasible, CA must invest a significant amount of resources into outreach programs across the state. Financial education and community discussion are vital to achieving the goals of the Program. Based on the foregoing, the following section proposes a federal initiative designed to incentivize states contemplating similar programs.

III. Proposal

A. A Public Option Incentive

I propose that the federal government create a "Public Banking Option Incentive" ("Public Option Incentive") to supply states with funds designated toward assessing the possibility of a public banking option. Specifically, these funds would facilitate the deliberative and investigatory process by which states determine the feasibility of a state run-bank, like California's current process under PBOA. It is important to note that the Public Option Incentive would be *voluntary* and that although those wishing to participate would receive funds toward the initial information-gathering phase, the states would ultimately be responsible for creating and financially maintaining the bank. Ideally, this program would encourage states to investigate the experiences of their unbanked and underbanked populations and assess whether a public banking option would benefit their needs. The Public Option Incentive would encourage states to give special consideration to the banking issues low-income individuals and people of color face. It would also provide states with guidelines to address the financial harms people of color and low-to-moderate-income communities have endured to both draw awareness and to prevent perpetuation of the same injustice.

At the outset, it is essential to point out that this proposal should not be construed as advocating for the complete elimination of private corporations from the banking industry. Such a suggestion is far too remote considering the Nation's dependence on megabanks and implicates a range of complexities beyond the scope of this Article. Instead, this proposal is intended to convey that consumers should have the option to choose between a depository service provided by a profit-motivated private actor or a free, reliable, quality financial services provided by a state-run bank. It is also paramount to clarify that this argument does not assume that state-

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[167] *See generally The Cost of Financial Exclusion*, *supra* note 83, at 15 (estimating that increased banking access could save $3.3 billion in California).

run governments are perfect and free of corruption or harmful practices.[168] People of color and low-income individuals have expressed reasonable concerns in light of the historical harms and traumas they have experienced at the hands of the state. This argument does not serve to invalidate those experiences and legitimate concerns. Rather, the Public Option Incentive is intended as a harm reduction measure in a country where private corporations have unrelenting political power. Such a program could serve as a harm reduction measure because the state is inherently less interested in exploiting consumers than megabanks that operate solely to profit.[169] The state inevitably has a greater interest in creating an inclusive banking system because being underbanked or unbanked is linked to other socioeconomic issues the state has a vested interested in solving.[170]

B. The Logistics — The Public Option Incentive in Action

The goal of the Public Option Incentive would be to facilitate and encourage states to assess a public banking option and to determine whether such an option would be responsive to the needs of the unbanked and underbanked communities, people of color, and low-income individuals. Administrators of the Public Option Incentive would encourage states to undergo evidence-based policy decisions and to avoid assuming the needs of underserved populations in assessing whether a state-run bank would mitigate the challenges poor communities and communities of color face in accessing financial services.

As noted, this Program would provide states with a set amount of funds to supplement the cost of the information-gathering stage. The information-gathering stage represents the initial inquiry into the feasibility of a state-run bank. This stage may consist of examining the logistics of

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[168] *See Poll: Public Distrusts Wall Street Regulators as Much as Wall Street, Say Regulators Are Ineffective, Biased, and Put Own Ambitions Before Public Interest*, CATO INST., (Sept. 19, 2017), https://www.cato.org/news-releases/2017/9/19/poll-public-distrusts-wall-street-regulators-much-wall-street-say-regulators (48% of participants stated they had "hardly any confidence" in Wall Street and government financial regulators).

[169] *See* Wilmarth Jr., *supra* note 23.

[170] *See, e.g.*, *Rethinking Financial Inclusion*, *supra* note 69, at 21–22 (arguing that access to basic financial services should be viewed as a public utility and that "[o]pening this system to the unbanked and underbanked would not cause any disruptions to the financial market, but would be a boon to LMI families who currently pay to use a public resource"). "[P]ostal banks would offer free savings and checking accounts, which would enable the unbanked and underbanked to engage in simple financial transactions through the public payments system instead of high-cost nonbank options, such as check-cashing or prepaid debit cards. Such an option would put approximately $89 billion per year back into the pockets — or bank accounts — of the unbanked." *Id. See also* DiVito, *supra* note 9, at 17–18 (illustrating how a Public Banking Option can operate as a harm reduction measure).

implementing a state-run bank, receptiveness to the idea throughout the state, the financial sustainability of a state-run bank, the fiscal risks, and the intended scope of the program. It would also involve working out the practical challenges that come with the enormous task of establishing a state-run bank. For instance, the state government should establish processes for electronic funds transfers, direct deposit, and other services, and weigh the practicality of providing such services at no cost to the consumer.

Similarly, the initiative would provide states with guidelines to address the financial harms people of color and low-to-moderate-income communities have endured. First, the guidelines would stress the importance of establishing a Commission that reflects the community's diversity. Second, they would urge states to appoint experts in racial, economic inequality, and cultural competence as members of the Commission. Third, the guidelines would note that Commission members should have experience working with the underbanked and unbanked populations and have extensive knowledge about the factors contributing to their exclusion from traditional banking services. Finally, the guidelines would make clear that the program's success is contingent upon citizens' receptiveness to the notion of a public bank. Therefore, the principles would recommend states begin exploring a public banking option by assessing receptiveness to the notion of a public bank. This inquiry is vital, especially among low-income communities and communities of color.

C. Arguments in Support of a Public Option Incentive

Consumers should have meaningful choices in determining how to manage their money. Unfortunately, the current market strips consumers of a meaningful choice as they are faced with options that are much of the same — private corporations that are habitual offenders of critical consumer protection laws and regulations. The federal government, by offering to fund states willing to explore the idea of a public banking option, would heighten attention brought to this issue and ideally generate conversations and policy debates about the impact of exploitative banking practices specifically impacting the state. Moreover, this would allow the federal government to empower consumers, advance a more inclusive banking system, make progress toward alleviating economic inequality, and alleviate some of its regulatory burdens. Federal funding for state-run public banking would empower consumers by allowing them to choose if they would like to utilize a public or private banking system. Furthermore, such a system would work toward dismantling wealth inequality among people of color and low-income communities, rebuild trust in the banking system, and provide a more inclusive option for the unbanked.

1. The Public Option Incentive as a Tangible Step Toward a More Inclusive Banking System and Dismantling Economic Inequality

As mentioned, a voluntary, zero-cost, zero-fee banking option would reduce the financial harm from exploitative fee practices that disproportionately impact low-income communities and communities of color. Similarly, it would provide the unbanked and the underbanked another option instead of resorting to alternative financial services and the egregious cost associated with such services. As noted, the interest rates associated with these "loans" vary by lender and state, with the average interest rate landing at 400%.[171] By using targeted advertising and encroaching upon banking deserts, providers of alternative financial services push low-income consumers even further out of the traditional banking system and "into high-cost, high-risk products creat[ing] a second-class tier of banking."[172]

It is apparent that exploitative fee schemes that profit big banks make it exceedingly difficult for people of color and low-income individuals to combat economic inequality. In addition, the research discussed herein demonstrates examples of the discrimination experienced by people of color seeking out information and access to traditional services at private banks. People of color reported feeling unwanted and unaccepted.

This notion is illustrated by the following comment made by a Latina individual after her experience with a private bank: "I have never felt so discriminated against in my life. Imagine, if they are treating us like this before they even take our money, how will they treat us once they get our money?"[173] A public banking option would create community based financial services that prioritize inclusivity over profit while simultaneously empowering consumers.[174]

2. Megabanks are Too Entangled in the Distribution of State and Federal Benefits

There is additional support for a public banking option in light of the government's reliance on the private sector to provide critical welfare benefits.[175] Private corporations' entanglement in federal and state benefit

[171] *Advertising Injustices: Marketing Race and Credit in America*, *supra* note 79, at 1625.
[172] *Id.* at 1622.
[173] DiVito, *supra* note 9, at 12.
[174] *See, e.g.*, Talib & Suplicy, *supra* note 161.
[175] *See Regulation by Hypothetical*, *supra* note 99 ("[O]ne thing is certain: regulation by hypothetical — like past approaches to bank regulation — raises profound questions about the proper mix of private and public power in the financial industry."); Wilmarth Jr., *supra* note 23.

programs is to the detriment of people of color and low-income individuals. Accordingly, states should have their own systems to administer benefits to citizens. This could be achieved by implementing a public banking option. The problems arising from corporations' involvement with state and federal assistance programs became apparent during the pandemic when Black and Latino communities were hit the hardest by COVID-19 related job-losses.[176] Several states contracted with banks to disburse unemployment funds and stimulus checks.[177]

The federal government, states, and consumers relied upon megabanks to distribute critical unemployment benefits to eligible citizens as the Nation grappled with COVID-19 and experienced unprecedented levels of unemployment.[177] Instead of disbursing unemployment funds in an efficient and effective manner to help consumers during such a challenging time, BOA froze thousands of accounts so that recipients could not access their funds.[178] Banks also garnished customers stimulus checks to cover for overdraft fees customers had incurred, in some cases, as a result of the pandemic.[179] People should not have to live in fear that their bank might withhold funds from their unemployment benefits or stimulus checks during a global health emergency. The Public Banking Option Fund has the potential to give states the opportunity to provide benefits to citizens directly.

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[176] *See* Mark Hugo Lopez et al., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RSCH. CTR. (May 5, 2020), https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/ (61% of Hispanic and 44% of Black individuals said that they or a member of their household had lost their job because of COVID-19). Furthermore, "[B]lack (73%) and Hispanic adults (70%) said they did not have emergency funds to cover three months of expenses; around half of white adults (47%) said the same." *Id.*

[177] *E.g.*, Bank of America, N.A., CFPB No. 2022-CFPB-0004 (July 2022) at 7.

[177] *Federal Regulators Fine Bank of America $225 Million Over Botched Disbursement of State Unemployment Benefits at Height of Pandemic*, Consumer Fin. Prot. Bureau (July 14, 2022), https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-fine-bank-of-america-225-million-over-botched-disbursement-of-state-unemployment-benefits-at-height-of-pandemic/. *See* Flitter, *supra* note 60 (consumer stating his $600 stimulus check was "the equivalent of a pool noodle while my wife, child, myself and my now crippled business are drowning in the open sea"); Nizan Geslevich Packin & Srinivas Nippani, *Ranking Season: Combating Commercial Banks' Systemic Discrimination of Consumers*, 59 AM. BUS. L.J. 123 (2022) (describing the United States' reliance on banks in facilitating social policy programs).

[178] Bank of America, N.A., CFPB No. 2022-CFPB-0004 (July 2022) at 16–17.

[179] Flitter, *supra* note 60 (describing various ways banks responded to consumer complaints about their stimulus checks being garnished to cover overdraft fees).

3. We Cannot Regulate Our Way Out of This

A common phenomenon, within the history of our Nation's regulatory system, is "a cat-and-mouse game of industry change followed by regulatory response. Often, a crisis or industry innovation leads to a new regulatory regime."[180] Megabanks are simply too large, too powerful, and too profitable. Consumer advocates have been raising the red flag about megabanks predatory practices for nearly twenty years.[181] There must be another option. Unfortunately, even highly anticipated forms of regulatory enforcement against megabanks are followed by repeat harms.

4. The Realities of Implementation

President Biden's recent announcement, discussing plans to ramp up regulatory efforts and dismantle junk fees including exploitative and surprise overdraft fees,[182] suggests the administration may be receptive to the program proposed herein. Biden's announcement demonstrates the federal government's awareness of the problem and how it harms consumers nationwide. Moreover, it may indicate a willingness to dive deeper into the issue by discussing a long-term solution. Historically the federal government has opted for federal regulation in response to megabanks exploitation of consumers, however, megabanks have not been deterred. Given this failure, the federal government may be willing to look at alternative solutions such as a public banking option.

Although the intricacies and political dynamics of federalism exceed the scope of this article, it is worth noting that Public Option Incentive is more practical than sweeping legislation creating a federal bank. This assertion is based on three reasons. First, states are in the optimal position to advance public banking programs because they can best address the specific issues facing consumers in that state, as opposed to the federal government which would be required to adopt a one size fits all approach. A one size fits all approach would be insufficient to respond to the intricacies of the banking issues consumers face in each state.

Second, it is unlikely that states would favor a federally controlled public bank program because allocating control of these funds to the federal

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[180] *Regulation by Hypothetical*, *supra* note 99.

[181] *See, e.g.*, Alex Berenson, *Banks Encourage Overdrafts, Reaping Profit*, N.Y. TIMES (Jan. 22, 2003), https://www.nytimes.com/2003/01/22/business/banks-encourage-overdrafts-reaping-profit.html (cautioning that banks' interest in and dependence on overdraft fees was a "major shift"); *Bringing More Unbanked Americans Into the Financial Mainstream, Hearing Before the U.S. Senate*, 107th Cong. (May 2, 2002), https://www.govinfo.gov/app/details/CHRG-107shrg88055 (discussing overdraft fees and the unbanked).

[182] Deese et al., *supra* note 104.

government could upset the balance struck by federalism by giving too much power to the federal government. Third, although a federal mandate to the states implementing a public banking option may sound appealing, it would inevitably bring about several challenges from states arguing that the federal government is encroaching upon state power.

D. Addressing the Public Option Incentive's Shortcomings and Potential Criticisms

1. Why the Public Banking Option Incentive is Preferable Over Calls for Additional Regulations

It is certainly reasonable to ponder the benefits of creating additional regulations that would require banks to meet more rigid requirements to conduct business within the state. Although this notion is compelling for efficiency and financial purposes, history reveals that we must do more to safeguard people of color and low-income individuals from abuse by the private financial sector. We cannot rely on private corporations to enhance the goals of the Public Option Incentive with the same vigor as the state.

Regulatory efforts over the last several decades, followed by repeat offenses, show that federal regulatory efforts alone are insufficient. There must be an alternative solution. Despite the progress and critical efforts by agencies like the CFPB, OCC, and Federal Reserve, banks continue to commit unapologetic harm against the Nation's most vulnerable consumers. Again, history tells us that regulatory efforts have not been effective in combatting banks' predatory practices. The results of regulatory enforcement will also inevitably depend on various administrations heading the administrative agencies charged with regulating banks. Consistent enforcement might not be sustainable due to varying enforcement philosophies among administrations.

In that same vein, we cannot rely on private corporations to work toward financial inclusion with the same vigor as the state. Albeit pessimistic, this assertion is grounded in the fact that banks are profit motivated.[183] They generally lack incentive, aside from public praise, to facilitate the goals promoted by the Public Incentive Option. Moreover, if history is predictive of megabanks' behavior, they would likely find ways to exploit programs advancing financial inclusion or evade increased regulations to bolster profit. Thus, consumers must have the option to participate in traditional financial services or a trustworthy, reliable account service run by the state.

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[183] *See, e.g.*, *A California State Public Bank*, CAL. REINV. COAL., https://calreinvest.org/about/ca-public-bank/ (last visited Apr. 17, 2023).

2. Concerns Regarding the Cost of Implementation

Concerns about the costs associated with such a program are inevitable and warranted. Undergoing the project of creating a state-run bank is an enormous task that comes with substantial expenses. The information gathering phase alone is incredibly costly- thus the possibility of federal government contribution could motivate many states. Although it is not possible to propose a precise dollar amount for the cost of the Public Option Incentive, rough estimates can be discerned by looking at the expenses California is expending during the information gathering process. California allocated $4 million from its 2022-2023 budget to go toward the "market analysis, the first step in the creation of the CalAccount program as required by the California Public Banking Option Act."[184] Albeit a hefty price tag, it is worthwhile to consider the cost-saving benefits over the long-term and the amount of money the federal government continues to dish out to bail out, and often insure, megabanks.

The United States has spent trillions of dollars bailing out megabanks.[185] Indeed, during the COVID-19 pandemic banks obtained enormous subsidies from the federal government, coupled with other financial benefits like zero-percent interest.[186] During the pandemic alone, "the Fed provided over $50 billion of discount window loans to banks."[187] Economists warn that megabanks have become dependent on government bailouts which in turn fuels their risk prone behavior, and lack of regard for regulations. We must explore alternative mechanisms to protect consumers in the long-term.

Conclusion

In sum, the Public Option Incentive provides a mechanism to encourage states to investigate the banking needs of their residents and identify systemic harms. Ideally, it would entice states to explore an alternative solution to a long-lasting problem — exploitative overdraft practices that exacerbate economic inequality and the racial wealth gap. It would serve to reduce the enormous amount of pressure the Nation places upon regulatory industries that are admittedly imperfect, but also often understaffed and underfunded. They are tasked with regulating the monster

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[184] *Community Coalition Applauds Investment in CalAccount, a Zero-Cost Banking Services Platform for All Californians*, CAL. REINV. COAL. (May 16, 2022), https://calreinvest.org/press-release/governors-budget-blueprint-affirms-californias-commitment-to-closing-financial-services-and-racial-wealth-gap/.

[185] *See Bailout Tracker*, PROPUBLICA (last updated Aug. 18, 2022), https://projects.propublica.org/bailout/list.

[186] *See generally* Wilmarth Jr., *supra* note 133, at 1077, 1080.

[187] *Id.* at 1080.

that has become the banking industry. We cannot continue to be complacent in the role the financial industry has assumed while excluding the most vulnerable communities. The program proposed herein may serve as a more long-term solution. One that would empower vulnerable communities to engage with the Nation's economy and take a step toward redressing the traditional finance industry's racist history.