CARCERAL BONDS

by
*Tyler E. Dougherty**

Over the past 50 years, the U.S. financed a massive physical and fiscal expansion of prisons via the municipal bond market—with devastating results. This project is the first to shine a light on the role of municipal debt in state-level carceral decision making, spotlighting the ways that the municipal bond market affects states' capacities to incarcerate.

This Article argues that the two primary controls of states' use of the carceral bond market—(1) market discipline and (2) states' fiscal constitutions—are particularly ineffective at limiting states' spending on prisons. This failure to restrain states' spending through the carceral bond market enables private markets and the ultrawealthy to profit from public incarceration, while simultaneously foreclosing the possibility of decarceral futures. Drawing on surveys of municipal securities, filings, and state constitutions; case law; and media coverage of financial markets, this Article catalogs how the municipal debt market distorts accountability in states' carceral decision making.

Because of this distortion, this Article also argues that issuing carceral debt demands additional process. States issue these carceral bonds, agreeing to pay them back over 30-year terms with little public input. Once a state issues this debt, it becomes incredibly difficult to walk back the carceral clock. Scholars and activists have long looked for levers of power to hold the carceral state accountable, and this Article further argues that they should look to the carceral state's creditors.

* Clinical Assistant Professor of Law and Kriesler Director of the Community Law Clinic, William and Mary Law School. Thank you to the editors of the Lewis & Clark Law Review for making this paper better. The Article is dedicated to the incarcerated clients and communities who guided this work and provided invaluable feedback.

INTRODUCTION

"Money is bullets to be used against the system."

—Martin Sostre[1]

"Youth prisons are shutting down."[2] On January 8, 2018, New Jersey Governor Chris Christie announced the closure of two of the state's long-standing youth prisons after years of political pressure.[3] For decades, activists argued that the prison's use of solitary confinement for children, rampant rates of sexual assault, and anti-Black origins as reformatory schools for wayward children necessitated the facilities' closures.[4]

However, as the governor announced that the prisons would be shuttered, another announcement appeared—this time in the financial news outlets. Instead of promising to keep kids in their homes and out of prison, this announcement focused on the completed bond financing[5] of $160 million that New Jersey had initiated to build new, more "rehabilitative" youth prisons.[6] This bond financing,

[1] MARTIN SOSTRE INST., THE OPEN ROAD INTERVIEW WITH MARTIN SOSTRE: IN CONVERSATION WITH DAVID SPANER 10 (2021), https://www.martinsostre.com/_files/ugd/89ae78_739f65be50124dbab2d32c8ca19c9488.pdf.

[2] Mike Ludwig, *After More Than a Century of "Horrific Conditions," Some Youth Prisons Are Shutting Down*, TRUTHOUT (Jan. 16, 2018), https://truthout.org/articles/after-more-than-a-century-of-horrific-conditions-some-youth-prisons-are-shutting-down.

[3] *Id.*

[4] *Id.*; Lloyd Nelson, *ACLU Calls for Ending Solitary Confinement in NJ Training School for Boys, Other Juvenile Jails*, NJ.COM (Aug. 2, 2013, 3:30 PM), https://www.nj.com/middlesex/2013/08/aclu_calls_for_ending_solitary_confinement_in_nj_training_school_for_boys_other_juvenile_jails.html; Mike Deak, *NJ Training School in Monroe Had 'Culture of Abuse', New Lawsuit Says*, MY CENTRAL JERSEY (Jan. 18, 2024, 2:16 PM), https://www.mycentraljersey.com/story/news/local/courts/2024/01/18/nj-training-school-monroe-lawsuit/72269730007/; Michael Aron, *Advocates Rally to Shut Down Youth Prisons*, N.J. SPOTLIGHT NEWS (June 28, 2017), https://www.njspotlightnews.org/video/advocates-rally-shut-youth-prisons/.

[5] Completing bond financing means the state issued enough bonds to pay for the cost of the new facility. JUSTIN MARLOWE, GOVERNING, GUIDE TO FINANCIAL LITERACY: CONNECTING MONEY, POLICY AND PRIORITIES 20 (2014), https://mrsc.org/getmedia/0B02EDAB-CB16-4A64-81B2-91EB7586F13E/govfinlit.aspx ("A bond is like a mortgage. The borrower takes money from a lender and agrees to pay it back over time with interest. A municipal bond is any bond issued by a state or local government.").

[6] *See Fitch Rates New Jersey EDA's $381MM Bonds 'A-'; Outlook Stable*, FITCH RATINGS (Dec. 27, 2017, 11:00 AM) [hereinafter *Fitch Rates New Jersey Bonds*], https://www.fitchratings.com/research/us-public-finance/fitch-rates-new-jersey-eda-381mm-bonds-a-outlook-stable-27-12-2017.

using lease-revenue bond instruments,[7] did not require supermajority approval by state legislators, did not require voter approval, and was not limited by any constitutional debt limit. Instead, the decision to build the prisons was left to an appointed board of the quasi-governmental New Jersey Economic Development Authority (NJEDA) and selected committees.[8] As a result, these backroom bonds were issued, rated, and sold on the promise that New Jersey would allow a state authority with appointed members, legally separate from the youth prison system, to issue these tax-exempt bonds to build prisons, and then lease the facilities to the state's juvenile department of corrections for 30 years.[9]

Today, over six years later, these bonds have stymied continued efforts by communities and activists to imagine and build a better system for young people.[10] Yet the antiquated Training School for Boys and Hayes Facility for Girls—two of New Jersey's three juvenile detention facilities—remain open, with some of the worst racial disparities of incarcerated youth in the country.[11] At the end of the 30-year bond term, the state will have paid $311.34 million—paying over $10 million per year solely on debt service payments for the unbuilt prisons.[12] All

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[7] A lease-revenue bond (LRB) is a "[f]inancing method where a government or nonprofit issues bonds to acquire a capital [i.e., infrastructural] facility, leases that facility to another government, then repays the bonds with the lease payments." MARLOWE, *supra* note 5, at 34.

[8] *See generally* STATE OF N.J., OFF. OF LEGIS. SERVS., COMMITTEE MEETING OF JOINT STATE LEASING AND SPACE UTILIZATION COMMITTEE (2017) [hereinafter JOINT STATE LEASING & SPACE UTILIZATION COMM. MEETING], https://dspace.njstatelib.org/server/api/core/bitstreams/1a9c14d9-7cb6-4f6b-9cd6-caa0ea7efea8/content (discussing and approving several NJEDA "Notices for Proposed Leases," including for juvenile detention facilities).

[9] *Id.* at 3; N.J. ECON. DEV. AUTH., STATE LEASE REVENUE BONDS: SUPPLEMENT DATED JANUARY 12, 2018 TO OFFICIAL STATEMENT DATED JANUARY 5, 2017, at 4, 16–18, 21 (2018) [hereinafter NJEDA 2018 STATEMENT ON STATE LRBS], https://emma.msrb.org/ES1252475.pdf.

[10] *See* NAACP N.J. STATE CONF., LATINO ACTION NETWORK, SALVATION & SOC. JUST. & N.J. INST. FOR SOC. JUST., *Dissent to Task Force Recommendation on Juvenile Justice Commission Youth Prisons*, N.J. INST. FOR SOC. JUST., (May 2022), https://njisj.org/dissent-task-force-jjc ("New Jersey cannot transform its youth justice system by simply replacing old youth prisons with new, smaller youth prisons.").

[11] RYAN P. HAYGOOD, ANDREA MCCHRISTIAN, YANNICK WOOD, ASHANTI JONES, & JAKE GIRARD, N.J. INST. FOR SOC. JUST., A YOUTH INCARCERATION DISASTER 3, 5 (2022), https://njisj.org/wp-content/uploads/2023/04/600K_To_Damage_Our_Kids_Forever_Final_WEB.pdf; *see also* Joshua Rovner, *Black Disparities in Youth Incarceration*, SENT'G PROJECT (Dec. 12, 2023), https://www.sentencingproject.org/app/uploads/2023/12/Black-Disparities-in-Youth-Incarceration.pdf ("As of 2021, in . . . New Jersey . . . African American youth were at least 10 times as likely to be held in placement as white youth. Between 2011 and 2021 . . . New Jersey saw [its] racial disparity at least double.").

[12] *See* NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 16 (Debt Service Schedule).

the while, the bond issue specifies that the borrowed $160 million can only be used for one thing: building more prisons.[13]

This phenomenon is not limited to New Jersey. Throughout the United States, state and local governments rely on the municipal bond market[14] to finance politically unpopular and sometimes unconstitutional carceral projects.[15] Historically, the municipal bond market had a significant role in some of the most shameful episodes of U.S. history, including the expansion of American chattel slavery, Indigenous land dispossession, and institutionalized segregation in the Jim Crow South.[16] Today, scholars argue that municipal debt continues to enact social violence.[17] However, there has been little attention paid to how financialized public debt promotes investment in state prisons and the larger carceral state.

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[13] The bond issue, akin to a loan contract, specifies that the funds "can only be used for the construction of replacement facilities and cannot be diverted for community programming," even if the construction costs less than initially anticipated. STATE OF N.J.: THE TASK FORCE FOR THE CONTINUED TRANSFORMATION OF YOUTH JUST. IN N.J., YOUTH JUSTICE TASK FORCE REPORT 13 (2022) [hereinafter N.J. YOUTH JUSTICE TASK FORCE REPORT], https://d31hzlhk6di2h5.cloudfront.net/20220510/4e/b9/c4/02/d75de4d2ea5ab1e41992158c/Task_Force_Report_070120_EP.pdf.

[14] The municipal bond market refers to a decentralized system wherein many market actors, such as bond issuers, bondholder–investors, underwriters, etc., buy and sell municipal bonds. When states and municipalities issue bonds, they are borrowing money with the promise to pay it back over time with interest. Typically, states and municipalities sell bonds to underwriters, who then package and resell the bonds to investors. Negotiations as to prices and interest rates depend on issuers' credit rating, states' laws, and other market conditions. While the municipal bond market is comparable to the stock market, the municipal bond market differs "since all transactions occur between individual buyers and sellers of these bonds, rather than in a centralized location such as the stock markets." VICKI ELMER, BONDS AND BORROWING 2, https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/201410_BondsAndBorrowing2006.html/$file/elmer-bonds.pdf (last visited Aug. 30, 2025).

[15] For example, in 2020, the DOJ filed a complaint against the State of Alabama and the Alabama Department of Corrections, listing extensive findings of 8th Amendment violations in the Alabama state prison system, for which the state has recently issued over $725 million in municipal bonds. Complaint at 1–20, United States v. Alabama, No. 2:20-cv-01971 (N.D. Ala. Dec. 9, 2020); *see Fitch Rates Alabama's $725MM Corrections Institution Fin Auth Bonds 'AA'; Outlook Stable*, FITCH RATINGS (June 16, 2022, 11:00 AM) [hereinafter *Fitch Rates Alabama Bonds*], https://www.fitchratings.com/research/us-public-finance/fitch-rates-alabama-725mm-corrections-institution-fin-auth-bonds-aa-outlook-stable-16-06-2022.

[16] *See* Claudio Saunt, *Financing Dispossession: Stocks, Bonds, and the Deportation of Native Peoples in the Antebellum United States*, 106 J. AM. HIST. 315, 317 (2019); *see also* Prentiss Dantzler & Jason Hackworth, *Racial Capitalism and the Propaganda of Conservative Economics*, 56 J. BLACK STUD. 642, 644–46, 648 (2025).

[17] Cities may incur debt to "spur economic development," but do not equitably distribute the economic burden to its citizens when these "financial schemes" fail or backfire. *See, e.g.*, C.S. Ponder & Mikael Omstedt, *The Violence of Municipal Debt: From Interest Rate Swaps to Racialized Harm in the Detroit Water Crisis*, 132 GEOFORUM, June 2022, at 271, 271 (using Detroit,

Over the past four decades, the municipal bond market—how states raise capital by borrowing money from private bondholders to pay for infrastructure projects—has increasingly adapted complex, financialized borrowing.[18] This debt departs from traditional forms of government borrowing and allows states to circumvent state constitutional debt limits, voter input, and political accountability.[19] State courts largely take a realist stance and acquiesce to the growth of these more complex debt instruments, which are traditionally owned by a class of ultrawealthy investors.[20]

This Article argues that the municipal bond market's primary controls—market discipline and democratic checks—fail to create effective mechanisms to restrain state investment in carceral facilities. Instead, the carceral bond market[21] distributes capital into long-term, large-scale prison infrastructure projects, while underwriter investment banks, entrenched bond lawyers, and ultrawealthy bondholder–investors all profit from public prisons.[22] These market actors are incentivized to support *more* debt with increasingly complex terms.[23] Further, traditional democratic constraints for state borrowing are largely ineffective due to the adoption of financialized debt that circumvents state debt limits.[24]

Michigan as a case study to illustrate "the American municipal debt crisis as a condition of financialized racial capitalism," citing the "municipal debt-induced hikes in water bills [which] have engineered humanitarian disasters" as an example of the ramifications of this capitalism-driven racialized harm).

[18] *See generally* John Hagan, Gabriele Plickert, Alberto Palloni & Spencer Headworth, *Making Punishment Pay: The Political Economy of Revenue, Race, and Regime in the California Prison Boom*, 12 DU BOIS REV. 95, 97–98, 101 (2015) (discussing the increasing complexity of debt instruments and the increasing role of sophisticated investors in the bond market, but pointing out that some argue that these debt instruments make capital more quickly accessible to communities looking to build hospitals, public roads, and other public goods).

[19] *See infra* Section II.B.

[20] *See* Richard Briffault, *Courts, Constitutions, and Public Finance: Some Recent Experiences from the States*, *in* FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 418, 442–43 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008); *see also* Hagan et al., *supra* note 18, at 98, 102–03, 114.

[21] Here, the "carceral bond market" describes how states and municipalities use bond financing to pay for carceral infrastructure.

[22] *See* Destin Jenkins, *Ghosts of the Past: Debt, the New South, and the Propaganda of History*, *in* HISTORIES OF RACIAL CAPITALISM 185, 186–87 (Destin Jenkins & Justin Leroy eds., 2021) [hereinafter Jenkins, *Ghosts of the Past*] ("Government debt unlocked profits for underwriting investment banks . . . and delivered interest payments to wealthy bondholders.").

[23] *See infra* Section II.A.2.b.

[24] *See infra* Section II.B.

Most states, including New Jersey,[25] Alabama,[26] New York,[27] Oregon,[28] and California,[29] have used the financialized municipal bond market to finance prison construction and expansion. At first blush, this may not seem controversial. States, with limited means to raise revenues, rely on the municipal bond market to create vital public infrastructure.[30] But more than building toll highways and bridges, building prisons raises fundamental questions of democracy and whether society benefits. With standard 30-year term bonds, states enter debt repayment agreements with bondholder–investors that provide few realistic exit mechanisms.[31] Due to legal, political, and economic constraints on debt default and discharge, bondholder–investors are almost certain to be repaid—even if a state's needs change.[32] Thus, with this structure of *bondholder supremacy*,[33] once debt is issued, it becomes difficult to roll back the carceral clock. Due to this dynamic, this Article also argues that carceral debt demands increased process *prior* to issuance.

Increasingly, legal scholarship looks at structural impediments to abolitionist visions of a non-carceral state.[34] As historian Destin Jenkins contends, the insulation of the municipal bond market from public consciousness leads to "revolts in different directions that never hit the pressure points of the borrower-creditor arrangement."[35] This Article is the first to shine a light on the role of the municipal

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[25] *See* NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9.

[26] *See Fitch Rates Alabama Bonds*, *supra* note 15.

[27] *See New York State Correctional Bonds*, N.Y. TIMES (Sept. 18, 1990), https://www.nytimes.com/1990/09/18/business/finance-new-issues-new-york-state-correctional-bonds.html.

[28] *See* OR. STATE DEBT POL'Y ADVISORY COMM'N, REPORT OF THE STATE DEBT POLICY ADVISORY COMMISSION 29 (2024).

[29] *See Public Finance Division: Listing of Official Statements*, CAL. STATE TREASURER, https://www.treasurer.ca.gov/bonds/os.asp (last visited Aug. 14, 2025).

[30] Meanwhile, democratic control provisions "severely limit[] the ability of states and localities to respond to changes in economic circumstances" and "sharply constrain[] the ways in which states and localities can raise and spend monies." RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 221 (2016).

[31] *See generally* Christine Sgarlata Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness, Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 CARDOZO L. REV. 1455 (2013) (discussing risks associated with investing in municipal bonds).

[32] *Id.* at 1461–62, 1477–79.

[33] According to Destin Jenkins—who coined this term—*bondholder supremacy* is "the supreme confidence that, whether the electorate rejects or passes a crucial bond issue, bondholders will be repaid from some source." Astra Taylor, *Wall Street Doesn't Have to Rule Our Cities: An Interview with Destin Jenkins*, JACOBIN (July 28, 2022), https://jacobin.com/2022/07/municipal-debt-bondholders-race-san-francisco.

[34] *See, e.g.*, Guyora Binder, Anthony O'Rourke & Rick Su, *Police Funding as a Deficit of Democracy, not Deterrence*, 84 OHIO ST. L.J. ONLINE, 2023, at 1, 2–3.

[35] DESTIN JENKINS, THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY 224 (2021) [hereinafter JENKINS, THE BONDS OF INEQUALITY] (referring to San Francisco's "popcorn politics" that occurred due to municipal debt).

debt market in state-level carceral decision making, cataloging the ways the municipal bond market expands states' capacities to incarcerate while foregoing investments in schools, parks, and other life-affirming infrastructure.[36]

While the effects of the municipal bond market on states' carceral capacity have been under-considered, the failures of the U.S. criminal legal system and its violent effects on communities are widely studied in economic, sociological, and public safety terms. Scholars tend to emphasize two theories of reform: regulatory[37] and democratization[38] approaches. By directing attention to municipal debt, this Article seeks to contribute to both schools' understandings of the power of the carceral debt market in decisions about building states' prison capacities. Using surveys of municipal securities filings and state constitutions, case law, and media coverage of financial markets, this Article provides the first comprehensive account of the varied ways that the municipal bond market influences states' decisions to favor prison construction and how traditional mechanisms are not effective at controlling that influence.

This Article will proceed as follows. Part I describes the development of financialized debt to fund states' dramatic carceral expansion over the past 50 years—with devastating results. Part II argues that the principal mechanisms to reign in states' debt—(1) market discipline and (2) states' fiscal constitutions—are particularly ineffective at controlling financialized carceral debt. By examining common bond terms, Part II shows that, as markets continue to pursue profits with more complex debt mechanisms, the failures of present controls become more

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[36] *See* Yannis Kallianos, Alexander Dunlap & Dimitris Dalakoglou, *Introducing Infrastructural Harm: Rethinking Moral Entanglements, Spatio-Temporal Dynamics, and Resistance(s)*, 20 GLOBALIZATIONS 829, 831 (2023) (discussing infrastructural harm and how "[e]ven when infrastructures are not designed with malicious intent, they can, through their productive supply-webs, material and spatiotemporal arrangements, and promise, reinforce deleterious labour conditions and racial segregation").

[37] For those advocating for regulatory-like reform—sometimes referred to as the "New Administrativists"—punitive U.S. politics are a barrier to any rational decarceration efforts. To successfully unravel the U.S. punishment apparatus, i.e., to successfully decarcerate, proponents argue for the use of expertise and regulatory modelling to effectuate change. Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CALIF. L. REV. 683, 689–91 (2023). *See generally* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (arguing that administrative law regulatory practices, such as "traditional administrative law checks" and "establish[ed] expert agencies," can be converted to comparably regulate the criminal justice system).

[38] Democratization proponents focus on the hyperlocal and look to collective mechanisms to reform the criminal punishment system. Democratization scholars argue for localizing who pays for prisons by making counties pay for incarceration. *See, e.g.*, Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 190, 194, 215 (2017); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 327–28, 341, 345–52 (2004); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78–79, 107–08 (2011).

pronounced. Part III begins to explore solutions to this profound democratic deficit in carceral decision making and its attendant harm on communities, advocating for process *prior* to the issuance of bonds.

I. THE RISE OF THE CARCERAL BOND MARKET

> *"[W]henever the department built a new prison, allegedly to ease crowding, the number of people in prison jumped higher than the new buildings could hold."*
>
> —Ruth Wilson Gilmore[39]

A. *Who Pays? The Role of Bondholders in Building Carceral Capacity*

Incarceration costs a *lot.*[40] Over the past 50 years, states' carceral capacity[41] exploded.[42]

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39 RUTH WILSON GILMORE, ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION 348 (Brenna Bhandar & Alberto Toscano eds., 2022).

40 While state budgets reflect hefty corrections costs, much is still undercounted. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUST.: CTR. ON SENT'G & CORR., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 6, 21 (2012), https://www.vera.org/downloads/publications/price-of-prisons-updated-version-021914.pdf ("In states that finance capital assets with current revenues—whether these costs are inside or outside the corrections department—the total cost of prisons in 2010 is understated in this report because prior capital investment appears to be 'free' in the current period even though the assets remain in use.").

41 When describing the increased reliance on incarceration that emerged in the 1980s and 1990s, I avoid the term *mass incarceration*. Dylan Rodríguez compellingly calls out the limits of the term: "'mass incarceration' makes little sense, if only because the actual historical technologies of incarceration have never targeted an undifferentiated 'mass,' but have consistently pivoted on the gendered racial profiling and criminalization of Black, Brown, Indigenous, queer, poor, and colonized (or colonially displaced) peoples." Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1583 (2019).

42 For studies examining the relationship between increased carceral capacity and increased incarceration levels, see, for example, JOAN MULLEN WITH CONTRIBUTIONS BY KENNETH CARLSON & BRADFORD SMITH, U.S. DEP'T OF JUST.: NAT'L INST. OF JUST., AMERICAN PRISONS AND JAILS: VOLUME I: SUMMARY AND POLICY IMPLICATIONS OF A NATIONAL SURVEY 25 (1980), https://www.ojp.gov/pdffiles1/Digitization/75752NCJRS.pdf (comparing how already overcrowded prisons are able to curb the increase in prison populations, while prisons which add additional space have dramatic population increases which almost immediately fill all empty space); Alfred Blumstein, Jaqueline Cohen & William Gooding, *The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence*, 29 CRIME & DELINQ. 1, 2–3 (1983) (re-examining computations in a prior study that estimated how long it would take to fill added capacity in prisons at the then-current rate of expansion); William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 CRIMINOLOGY & PUB. POL'Y 29, 29 (2009) (finding that "the best predictors of prison populations are crime, sentencing policy, prison crowding, and state spending"); and Thomas Guiney & Henry Yeomans, *Explaining Penal*

1. How Can States Afford so Many Prisons?

State and local communities[43] are largely who pay for the expansion of carceral facilities, despite decades of study showing the individual and community harms of incarceration.[44] Some scholars and communities attribute the growth of incarceration in the United States to punitive populism and rising inequality.[45] Others argue that the rise of incarceration should be situated within the larger racialized political economy and the broader carceral state.[46] Ultimately, the racist foundations of punishment in the U.S., developing from chattel slavery, complicate any singular story of the rise of state incarceration in the U.S.

However, the massive physical and fiscal expansion of U.S. incarceration was "not inevitable."[47] For a moment in the 1970s, many believed that decarceration

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Momentum: Path Dependence, Prison Population Forecasting and the Persistence of High Incarceration Rates in England and Wales, 62 HOWARD J. CRIME & JUST. 29, 36 (2023) ("While capital spending did not itself cause prison populations to increase, Spelman found that it did remove a very significant institutional counterweight against inflationary sentencing practices and punitive policy initiatives that were likely to drive up the prison population in the long term." (citation omitted)).

[43] Here, I purposely avoid the term "taxpayer" in favor of communities. As demonstrated by Raúl Carrillo and Camille Walsh, the "taxpayer" is a racialized concept. *See, e.g.*, Raúl Carrillo, *Reflections: Challenging Monetary Sanctions in the Era of Racial Taxation*, 4 UCLA CRIM. JUST. L. REV. 143, 145 (2020). States' revenues are not solely derived from taxes. Instead, there are larger trends toward regressive taxation, which targets poorer communities and under taxes corporations. Further, "the claim of 'taxpayer' almost always has a hidden symbolic meaning premised in whiteness and has served as a currency of exclusion and inequality." CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973, at 4 (2018).

[44] *See, e.g.*, Michael Massoglia & Brianna Remster, *Linkages Between Incarceration and Health*, 134 PUB. HEALTH REPS. 8S, 8S–9S (2019) (exploring the "social consequences of mass incarceration," including its effects not only on the incarcerated individuals but on their families and communities as a whole); Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71 *passim* (2019) (examining the economic costs and benefits of incarceration, focusing on the impact of crime in prisons).

[45] *See* Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2780 (2022).

[46] *See, e.g.*, David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 PUNISHMENT & SOC'Y 321, 322 (2020) (arguing that "America's exceptional levels of punishment" should be understood as "outcomes of America's distinctive political economy"); ASSATA SHAKUR, ASSATA: AN AUTOBIOGRAPHY 60 (1987) ("The only difference between [prison] and the streets is that one is maximum security and the other is minimum security. The police patrol our communities just like the guards patrol here. I don't have the faintest idea how it feels to be free."). *See* Brittany Friedman, *Carceral Immobility and Financial Capture: A Framework for the Consequences of Racial Capitalism Penology and Monetary Sanctions*, 4 UCLA CRIM. JUST. L. REV. 177, 178–79 (2020).

[47] ORISANMI BURTON, TIP OF THE SPEAR: BLACK RADICALISM, PRISON REPRESSION, AND THE LONG ATTICA REVOLT 162 (2023).

and prison abolition were on the horizon.[48] But things quickly changed. Following the Attica Rebellion in 1971,[49] prison administrators responded by calling for an increase in carceral facilities—arguing that expansion was needed to maintain safety and control.[50] This seemingly apolitical movement to modernize prisons made prison expansion a needed reform, turning the focus away from the future of American life.[51] Over time, prison administrators began discussing "expansionist and punitive imperatives in terms of care and progressivism" to demand additional funding for prison construction.[52] In many ways, however, prison expansion was a tactical imperative: by dispersing the incarcerated population across a wide geographic area, there was less chance of rebellion—particularly by incarcerated

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48 Joshua Dubler & Vincent Lloyd, *Think Prison Abolition in America is Impossible? It Once Felt Inevitable*, THE GUARDIAN (May 19, 2018, 6:00 AM), https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable.

49 On September 9, 1971, more than 1,000 prisoners seized control of Attica maximum security prison, "infamous for its harsh conditions." After five days, the rebellion "ended in a bloody assault by law enforcement," and many prisoners and hostages were killed. Fresh Air, *How the Attica Prison Uprising Started—and Why it Still Resonates Today*, NPR (Oct. 27, 2021, 1:57 PM), https://www.npr.org/2021/10/27/1049295683/attica-prison-documentary-stanley-nelson.

50 In the 1970s, prison administrators asked state legislatures for smaller, more spread-out prisons to improve security. BURTON, *supra* note 47, at 160–61. Now, in Alabama, prison administrators advocate for the opposite: larger, "supermax" facilities, claiming that these types of facilities will better improve security in their new, $1 billion institutions. *Cost of Building a Super-Size Alabama Prison Rises to More Than $1 Billion*, AP NEWS, https://apnews.com/article/alabama-prison-cost-rises-7246b6afc68bd21e4a0c5249adcf7875 (Sept. 28, 2023, 7:05 AM). The American Correctional Association's anti-riot manual from the 1970s "provides the basis for understanding prison expansion. . . . Prison expansion, they claimed, reduced overcrowding. This, of course, is a pernicious myth, given that expanded capacity seems almost inevitably to become inadequate soon after it is made available." BURTON, *supra* note 47, at 160.

51 BURTON, *supra* note 47, at 161, 163–64 (discussing how "[e]xpansion is a reformist imperative that accepts the permanence of the prison as a given and sees its progression as the only viable option," despite presenting an "apolitical public face as a fiscally responsible means of modernizing the carceral system and relieving tension").

52 *Id.* at 164. A law enforcement union representative told the New York state legislature in 1995:

> Without expansion the entire system is at risk. Without expansion there is increased tension between inmates. Without expansion more inmates who should be classified as being in maximum facilities will be in medium and so on down the line. Without expansion the discipline system breaks down, as we have inadequate numbers of special housing units. [sic] As discipline breaks down, so does our control of the system. As you are aware, when control of the system is compromised the potential for a riot, or other disturbances are markedly increased.

Id. at 161 (quoting *Public Hearing on the Effect of Administration Budget Reductions on the Management of the State Prison System: Before the Legislature Assembly Standing Committee on Corrections*, Nov. 28, 1995, Utica, N.Y. (N.Y. 1995) (testimony of Eliot Seide)).

Black people.[53] These reforms reinforced the idea that prison expansion alone would improve the conditions of incarceration and led to the abandonment of decarceral visions.[54]

State and local governments provide U.S. communities with the most visible evidence of their tax dollars every day. The state budget dollars dedicated to prisons represent unbuilt mass transit trains, unfinished schools, and other unrealized "investments in life-affirming institutions."[55] Because of states' limited fiscal flexibilities, state investments in prisons are also more directly antagonistic to public life than budget decisions at the federal level.[56] When states elect to pay debt service on carceral bonds, the payment appears to be a neutral, even unavoidable expenditure.[57] However, this is a political decision that facilitates the building of more prisons, expands carceral capacity, and rejects decarceral policies. Studies suggest that when society builds more prisons, it will fill those prisons to occupy empty cells, regardless of crime rates.[58] Historically, as W.E.B. Du Bois pointed out, there was no connection between increased crime rates and the rise of prisons after chattel slavery.[59] Incarceration has, at best, a minimal deterrence effect on crime.[60] At worst, incarceration has been shown to increase crime rates.[61]

While there were fewer than 600 state prison facilities throughout the United States before 1975, by 2000, there were over 1,000 state prisons—an increase of

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53 *Id.* at 160–61, 163–64.

54 *See id.* at 161, 163–64.

55 *See* Mark Spencer, *Beware the Healthier Cage*, INQUEST (Aug. 31, 2023), https://inquest.org/beware-the-healthier-cage/.

56 *See, e.g.*, Marc-Andre Pigeon & L. Randall Wray, *Can Penal Keynesianism Replace Military Keynesianism? An Analysis of Society's Newest "Solution" for the Hard to Employ and a Proposal for a More Humane Alternative*, SOC. JUST., Summer 2000, at 148, 153 ("[M]ost spending on prisons occurs at the state level, where budgetary constraints are more severe than at the federal level. This means increased spending on the justice system has probably forced cutbacks in other state programs. For example, some studies conclude that education spending has suffered cuts at the expense of greater spending on prisons.").

57 *See* Alex Anderson, *Hiding Out in Prison Bonds*, FORBES, https://www.forbes.com/2008/10/22/prison-correctional-bonds-pf-ii-in_aa_1022fixedincome_inl.html (June 19, 2013, 4:42 PM) (discussing why investment in lease-revenue bonds is relatively low risk because if states stopped making payments and let prisoners out, they "would have some explaining to do").

58 *See, e.g.*, MULLEN ET AL., *supra* note 42, at 25–26.

59 Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 34 (2019) (citing W.E.B. DU BOIS, BLACK RECONSTRUCTION 506 (1935)).

60 DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 1–2 (2017), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf.

61 *Id.* at 2.

approximately 70%.[62] In 2004, more than 40% of operational state prisons had opened in the previous 25 years.[63] From 1977 to 2021, state and local government spending on "corrections" increased by 346%;[64] in 2021 alone, state and local governments spent $87 billion on corrections.[65] Moreover, between 1977 and 2021, "[s]pending growth on corrections . . . was higher than all other major programs except for public welfare.[66] Now, even as prison populations decrease in some jurisdictions, corrections costs do not.[67]

The costs of expanding prisons' physical facilities are uniquely entrenching, where governments make decisions that irrevocably limit the policy choices of future governments.[68] State investment in constructing a new prison is harder to unravel than giving prisons more money for mental health programs, for instance. As Aaron Littman points out, although "improvements may cost the same, a prison with an expensive new heating, ventilation, and air conditioning system is harder to close

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62 SARAH LAWRENCE & JEREMY TRAVIS, URB. INST. JUST.: POL'Y CTR., THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA'S PRISON EXPANSION 2 (2004), https://www.urban.org/sites/default/files/publication/57971/410994-The-New-Landscape-of-Imprisonment.PDF.

63 *Id.*

64 *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures (last visited Aug. 16, 2025) (adjusting for inflation). Between 1982 and 2010, "[s]tates spent about three-quarters of the corrections budget on correctional institutions," including capital outlay and staffing costs. TRACEY KYCKELHAHN, U.S. DEP'T. OF JUST.: OFF. JUST. PROGRAMS, STATE CORRECTIONS EXPENDITURES, FY 1982–2010, at 2 (2014), https://bjs.ojp.gov/content/pub/pdf/scefy8210.pdf.

65 *Criminal Justice Expenditures: Police, Corrections, and Courts*, *supra* note 64. On average, "[s]tate and local governments spent $262 per capita on corrections." *Id.*

66 However, the proportion of funds dedicated to public welfare spending was significantly higher than corrections, so "[i]n real dollars, corrections spending increased $67 billion from 1977 to 2021, while public welfare increased nearly $708 billion." *Id.*

67 *See, e.g.*, KATIE HAYDEN, LINDA MILLS & DEBORRAH BRODSKY, COLLINS CTR. FOR PUB. POL'Y, FLA. TAXWATCH, A BILLION DOLLARS AND GROWING: WHY PRISON BONDING IS TOUGHER ON FLORIDA'S TAXPAYERS THAN ON CRIME 11, 13 (2011), https://www.prisonpolicy.org/scans/floridataxwatch/prisonbonding.pdf (discussing how projected need for prison expansion in Florida for fiscal year 2011–2012 was overstated, yet the bonds to finance this construction were already sold, so the taxpayers were obligated to pay nonetheless). Further, many corrections budgets do not include debt service. In Florida, annual Department of Corrections (DOC) appropriations were around $700 million, but when debt service obligations are included, annual DOC spending amounted to $1.5 billion. *Id.* at 8.

68 *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 888 (2011) (discussing various ways in which government decisions can be entrenching).

than a prison with an expensive new psychiatric staff."[69] Further, the extensive economics—or perhaps a pervasive *belief* that prisons build local economies—makes it more difficult for future governments to make their own carceral policy choices.[70]

Generally, states are limited in what they can pay for high corrections costs directly from their revenues.[71] State revenues come from a variety of sources, including from tax collection.[72] However, most state tax systems are regressive, where poorer people are taxed at higher rates than people with higher earnings.[73] A recent distributional analysis on the tax systems in every state found that "the top 5 percent of households pay a smaller share of all state and local taxes than their share of all income, while the bottom 95 percent pay more."[74] The majority of corporations pay nothing in state corporate income taxes, leaving the poor and middle class with the disproportionate burden of financing public goods.[75] While it represents a relatively small proportion of total state revenue, states also rely on

[69] Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1472 (2021) (noting that "[t]he risk of carceral entrenchment is greatest when the remedial options pursued involve investment in physical infrastructure that is difficult to repurpose, and less acute when human resources are at issue").

[70] *See, e.g.*, Naomi Murakawa, *Mass Incarceration Is Dead, Long Live the Carceral State!*, 55 TULSA L. REV. 251, 259–60 (2020) ("The carceral state, especially at this moment of unprecedented scale, creates constituencies, opportunities, and meaning. Put differently, we tend to study how politics make prisons, but we must also study how prisons make politics.").

[71] *See Criminal Justice Expenditures: Police, Corrections, and Courts*, *supra* note 64; *see also* HENRICHSON & DELANEY, *supra* note 40, at 4–7 (demonstrating that actual corrections spending is much higher than costs represented in corrections budgets because in many states some prison costs "fall outside the corrections budget").

[72] *See generally State Government Finances by State: 2023*, U.S. CENSUS BUREAU (Jan. 2023), https://www2.census.gov/programs-surveys/state/tables/2023/2023%20ASFIN%20State%20 Totals.xlsx.

[73] GABRIEL J. PETEK, BETH ANN BOVINO & SATYAM PANDAY, STANDARD & POOR'S RATINGS SERVS., INCOME INEQUALITY WEIGHS ON STATE TAX REVENUES 2–3 (2014), https://www.documentcloud.org/documents/1301747-s-amp-p-income-inequality-weighs-on-state-tax. Moreover, research shows that when income growth concentrates among the wealthy, state revenues grow more slowly, especially in states that rely more heavily on taxes that disproportionately fall on low- and middle-income households. *Id.* at 5, 12.

[74] CARL DAVIS, ANDREW BOARDMAN, NEVA BUTKUS, ELI BYERLY-DUKE, KAMOLIKA DAS ET AL., INST. ON TAX'N & ECON. POL'Y, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 8 (7th ed. 2024), https://sfo2.digitaloceanspaces.com/itep/ITEP-Who-Pays-7th-edition.pdf.

[75] States are forced to participate in a "fiscal race to the bottom"—competing against one another to reduce corporate taxes. JOSH BIVENS, ECON. POL'Y INST., RECLAIMING CORPORATE TAX REVENUES 2, 5, 17 (2022) https://files.epi.org/uploads/247534.pdf.

criminal court fines to finance corrections systems and prison construction—costs borne disproportionately by over-policed communities.[76]

2. Relying on Markets to Fund the Carceral State

States—with limited revenues and tighter fiscal constraints than the federal government—are only able to sustain such a high level of prison spending because of their continued access to private capital available through the long-term municipal bond market.

Municipal bonds—how municipalities *and* states issue debt to raise capital for infrastructure projects—became increasingly important in carceral state-making as the U.S. embarked on a period of mass punishment.[77] Municipal bonds represent a promise by the governmental entity (the *issuer*) "to repay to lenders (*investors*) an amount of money borrowed, called *principal*, along with *interest* according to a fixed schedule."[78] This Article focuses on the long-term municipal debt states use to finance capital projects.[79]

State and local governments have a fundamental obligation to use public resources to pay for the public good.[80] Many state projects that are financed with municipal debt—including the construction of schools, bridges, and roads—are aimed at fulfilling this obligation.[81] And, in many cases, there are positive, real

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[76] Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 919–22 (2017); Hannah Appel, *Public Thinker: Destin Jenkins on Breaking Bonds*, PUB. BOOKS (Dec. 13, 2021), https://www.publicbooks.org/public-thinker-destin-jenkins-on-breaking-bonds/.

[77] Municipal debt represents debt issued by either a municipality *or* a state. *See* JUDY WESALO TEMEL, BOND MKT. ASS'N, THE FUNDAMENTALS OF MUNICIPAL BONDS 1–2 (5th ed. 2001).

[78] This fixed schedule usually lasts from one to 30 years, and whether that state's tax powers are implicated depends on the type of bond. *Id.* at 1–2, 21.

[79] Capital projects include "construction, renovations, and major repair of institutions; purchase of land, rights-of-way, and existing structures; title searches and related costs; and purchase of equipment having useful life of more than 5 years." KYCKELHAHN, *supra* note 64, at 2. Municipalities and states also take on short-term debt—usually purchased by commercial banks—to cover budgetary shortfalls. *See, e.g.*, Likhitha Butchireddygari, Note, *Taxing Police Brutality Bonds*, 123 COLUM. L. REV. 1017, 1024 (2023) (discussing how municipalities issue municipal debt to pay for police misconduct settlements).

[80] *See* Shaheen Borna & Krishna G. Mantripragada, *Morality of Public Deficits: A Historical Perspective*, 9 PUB. BUDGETING & FIN. 33, 35 (1989) ("The goal of public finance . . . is, ideally, to bring about maximum social welfare.").

[81] TEMEL, *supra* note 77, at 1–2; *see* Nicole M. Boyson & Weiling Liu, *Getting the Vote: Do School Bond Issuances and Outcomes Depend on Ballot Disclosures?* 13 (Ne. Univ. D'Amore-McKim Sch. of Bus., Rsch. Paper No. 4584453, 2023), (showing the correlation between passing of school bonds in school districts in California and the subsequent rise in investments in school districts the next year).

outcomes associated with the additional capital spending available through debt financing.[82]

At its best, municipal debt creates positive externalities for the future. Municipal bonds should serve as "intergenerational equity"—where each generation pays, through debt service, for the received benefit over time.[83] For example, building a bridge—while it presents expensive upfront costs—will continue to benefit the community for decades. At its worst, municipal debt is entrenching—a past government's decisions limits what future governments can accomplish.[84] Carceral systems are notoriously less transparent and present different issues of governance than many other public projects,[85] making carceral debt a subject of concern as it further diffuses accountability.

B. Rise of the Carceral Bond Market

Traditionally, to finance prison construction and build states' carceral capacities, states would either: (1) use a "pay-as-you-go" approach where prison construction was paid for by general revenues; or (2) sell general obligation (GO) bonds to private investors and pay for prisons over a 20- to 30-year period with interest.[86] Due to changing interest rates, deregulation, and increasing financialization during the early 1970s, the municipal bond market grew significantly as tax-free income for wealthy investors.[87] While individual investors

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[82] *See, e.g.*, TEMEL, *supra* note 77, at 1–2 (discussing the "vast array of projects" for which municipal bonds have been used as financing); Boyson & Liu, *supra* note 81, at 26 (finding causal evidence that capital spending on schools does lead to real improvements in school districts).

[83] *See, e.g.*, Kunal Pawa & Christopher Gee, *Public Debt and Intergenerational Equity in Singapore* 5 (Inst. of Pol'y Stud., Working Paper No. 38, 2021) (arguing that beyond evaluating whether projects generally benefit future generations—and thus they should also pay—we should consider other "conceptions of justice such as equality, welfare, and reciprocity" when evaluating whether future citizens will benefit from today's infrastructure projects).

[84] Serkin, *supra* note 68, at 888.

[85] Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462–63 (2014); Katie Dupere, *The U.S. Prison System Isn't Transparent. This Nonprofit Uses Data to Expose the Truth*, MASHABLE (May 25, 2017), https://mashable.com/article/measures-for-justice-data-prisons-tool.

[86] *See* Hagan et al., *supra* note 18, at 102, 110–11 (comparing the "GOB" (general obligation bond) era and "LRB" (lease-revenue bond) era of California's methods of paying for prisons with bonds); Tamim Bayoumi, Morris Goldstein & Geoffrey Woglom, *Do Credit Markets Discipline Sovereign Borrowers? Evidence from U.S. States*, 27 J. MONEY, CREDIT & BANKING 1046, 1052–53 (1995) (comparing U.S. states' municipal bond yields).

[87] *See* Malcolm Sawyer, *What is Financialization?*, INT'L J. POL. ECON., Winter 2013–14, at 5, 7–8. "Financialization" is the "increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies." *Id.* at 6 (quoting FINANCIALIZATION AND THE WORLD ECONOMY 3 (Gerald A. Epstein ed. 2005)); *see also* JOHN BAGLEY, MARCELO VIEIRA & TED HAMLIN, MUN. SEC.

own only 1% of corporate bonds, individual investors own approximately 70% of municipal bonds.[88] Because of the nature of the federal tax exemption for municipal bonds, the individual municipal investors who benefit most from municipal bonds' federal tax benefit are typically wealthy and over 65 years old.[89]

During the tight fiscal conditions of the 1970s, attempts to pay for prison construction from state budgets' general funds continued to fail.[90] State legislatures did not have the will or political capital to use limited state funds to build prisons.[91] As popular support for the Keynesian welfare state subsided, the municipal debt market became increasingly important for states to finance public projects.[92] Most states prohibit borrowing to pay for state operating costs, so long-term bond funding

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RULEMAKING BD., TRENDS IN MUNICIPAL SECURITIES OWNERSHIP 18 (2022), https://www.msrb.org/sites/default/files/Trends-in-Municipal-Securities-Ownership.pdf (discussing drivers of investment strategies of municipal bondholders).

[88] These are owned either privately/directly or through mutual funds. BAGLEY ET AL., *supra* note 87, at 4–7, 18 (noting that in 2022, about 66% of municipal securities were individually held by either households or funds); AM. PUB. POWER ASS'N, MUNICIPAL BONDS AND PUBLIC POWER 1 (2023), https://www.publicpower.org/system/files/documents/70%202023%20PMC%20Issue%20Briefs_Municipal%20Bonds_FINAL%20%281%29.pdf (noting that in 2023, about 70% of municipals bonds were held by individual households "either directly or through bond funds").

[89] "[M]ore than 60 percent of this household tax-exempt interest is earned by taxpayers over 65 years old." AM. PUB. POWER ASS'N, *supra* note 88, at 1; Lisa Beilfuss, *Muni Bonds Shouldn't Be an Investment Only for the Rich*, WALL ST. J.: CENT. BANKING (Aug. 25, 2016, 10:53 AM), https://www.wsj.com/articles/muni-bonds-shouldnt-be-an-investment-only-for-the-rich-1472568793.

[90] Hagan et al., *supra* note 18, at 100–01 (recounting an interview with California State Senator Robert Presley about how, in the 1980s "[Governor Jerry] Brown would put in his budget every year $100 million for prison construction. . . . We'd go back and give the money . . . to do some planning. . . . I always said: 'We had great plans but no prisons.'" (quoting Interview by Patrick Ettinger with Robert Presley, State Sen., Cal., Agency Sec'y, Youth & Adult Corr. Agency, in Sacramento, Cal. (Apr. 17, 2022)).

[91] *Id.* at 101–02 (discussing how "[v]oter support peaked in 1988 for state [general obligation bond] financing of prisons"); *see also* Linda Winikow, *Two Views of Prison Bond Act a Sponsor Sees Passage as Vital*, N.Y. TIMES (Oct. 18, 1981), https://www.nytimes.com/1981/10/18/nyregion/two-views-of-prison-bond-act-a-sponsor-sees-passage-as-vital.html (outlining the proposed alternatives to bond-funded prison expansion endorsed by opponents to the bond issue in California in 1981: to "either to relax our law-enforcement efforts or to release prisoners already incarcerated," and arguing that these alternatives are "irresponsible and counterproductive"); New Prison Construction Bond Act of 1981, CAL. PENAL CODE §§ 7100–7111 (West 1981) (repealed 2015*)* (containing arguments for and against the passage of a bond issue to fund construction of state prisons in California in 1981).

[92] Hagan et al., *supra* note 18, at 102–03 (discussing the rise of lease-revenue bond use beginning in the Reagan era and their popularity due to how little government regulation they required).

is typically limited for capital projects.[93] Thus, legislatures could use bonds to defer the costs of prison construction to the future and reserve present resources for carceral operating costs.

Over time, revenue bonds replaced GO bonds to comprise the majority of the municipal securities market—today making up 69%.[94] These different approaches to funding prison construction involve varying levels of political process and different fiscal costs.

1. Historic Uses of Municipal Debt: General Obligation Bonds

"IF YOU WANT FEWER CRIMINALS ON THE STREETS AND MORE PUBLIC SAFETY, VOTE 'YES' ON PROPOSITION 120"[95]

For most of the 20th century, states relied on general revenues and GO bonds to finance prison construction.[96] GO bonds are guaranteed by a state's "full faith and credit," a state's taxing power, or both.[97] Typically, GO bondholder–investors

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[93] *What Are State Balanced Budget Requirements and How Do They Work?*, TAX POL'Y CTR., https://taxpolicycenter.org/briefing-book/state-and-local-tax/fiscal-federalism-and/what-are-state-balanced (Jan. 2024); *What Are Municipal Bonds and How Are They Used?*, TAX POL'Y CTR., https://taxpolicycenter.org/briefing-book/what-are-municipal-bonds-and-how-are-they-used (Jan. 2024); NAT'L ASS'N OF STATE BUDGET OFFICERS, BUDGET PROCESSES IN THE STATES, 48, 61 (2021).

[94] Cooper Howard, *Municipal Bonds: The State of the States*, ADVISOR PERSPS. (Jan. 27, 2024), https://www.advisorperspectives.com/commentaries/2024/01/27/municipal-bonds-state-of-the-states.

[95] New Prison Construction Bond Act of 1990, CAL. PENAL CODE §§ 7420–7434 (West 1990), http://repository.uchastings.edu/ca_ballot_props/1025.

[96] Chung, *supra* note 31, at 1456–57 ("Until the mid-1970s, the municipal securities market was a small, sleepy corner of the nation's capital markets. . . . Most offerings took the form of general obligation bonds with standard terms." (footnotes omitted)); *see also* Hagan et al., *supra* note 18, at 98, 101–04 (discussing the fundamental change in prison financing in the 1980s–1990s in California when this financing shifted from relying entirely on GO bonds to relying mostly on LRBs).

[97] This can differ significantly by state or municipality. *See, e.g.*, NAT'L ASS'N OF BOND LAWS., GENERAL OBLIGATION BONDS: STATE LAW, BANKRUPTCY, AND DISCLOSURE CONSIDERATIONS 5–8 (2014), https://www.nfma.org/assets/documents/other.orgs/nabl.gobonds.8.14.pdf (discussing how "[a] general obligation bond usually carries the pledge of the issuer's powers to produce revenues sufficient for the payment of the debt, and sometimes carries a pledge of specific taxing powers," and going through the legal remedies available to bondholders as a result of these promises). In addition, the

> pledge of the issuer's full faith and credit, however, may be an unlimited or limited pledge. Unlimited tax general obligation bonds . . . require the issuer to levy and collect *ad valorem* taxes to pay the debt service. Limited tax general obligation bonds . . . limit the obligation of the issuer—generally through the bond terms, state statute, or state constitution—in order to levy taxes and pay the bond.

have the right to force the state to collect additional taxes or issue a legislative appropriation if a state defaults on the debt.[98]

Because of this guarantee and historically low rates of default, GO bonds are considered low-risk investments by the municipal bond market.[99] Capital markets charge relatively low interest rates for states to borrow GO debt because of this perceived security.[100] GO bonds are most attractive to certain limited groups of investors because they are exempt from federal taxes.[101]

Before the 1970s, most municipal bond offerings were GO bonds with reasonably simple standardized terms.[102] The relatively safe market conditions influenced how the market was regulated; because municipal bonds were traditionally held by municipal investors until maturity, there were traditionally few disclosure or monitoring requirements.[103] Now, even with progressively more regulation, the bond market remains opaque.[104]

Over time, GO bonds—because of their voting requirements—lost popularity in favor of more complex debt instruments with fewer state constitutional and

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Randle B. Pollard, *Feeling Insecure—A State View of Whether Investors in Municipal General Obligation Bonds Have a Mere Promise to Pay or a Binding Obligation*, 24 WIDENER L.J. 19, 24 (2015) (footnotes omitted).

[98] Chung, *supra* note 31, at 1466.

[99] *Id.* at 1460–61, 1468–69 ("Municipal securities are marketed to investors as 'widow and orphan' securities—i.e., safe for vulnerable and risk averse investors—because state and local government issuers rarely default or obtain discharge." (footnotes omitted)).

[100] John R. Fallon, *Municipal Bonds: In the Shadow of an Underfunded Pension Crisis, Puerto Rico, and a Low Interest Rate Environment*, 24 N.C. BANKING INST. 271, 275–76 (2020).

[101] For further discussion on how the federal tax exemption affects municipal debt markets, see *infra* Part III. Depending on the state and the taxpayer's state of residence, GO bonds can also be exempt from state tax.

[102] Chung, *supra* note 31, at 1456–57.

[103] This changed slightly in 2018, however, when the Municipal Securities Rulemaking Board (MSRB) implemented mark-up disclosure rules to strengthen post-trade transparency. SIMON Z. WU & MARCELO VIEIRA, MUN. SEC. RULEMAKING BD., MARK-UP DISCLOSURE AND TRADING IN THE MUNICIPAL BOND MARKET 2, 4 (2019), https://www.msrb.org/sites/default/files/Mark-Up-Disclosure-and-Trading.pdf (explaining how the 2018 amendments to MSRB Rules G-15 and G-30 were implemented in an effort to increase transparency); MUN. SEC. RULEMAKING BD., SUMMARY OF MSRB GENERAL RULES (G-RULES) G-15, G-30, https://www.msrb.org/sites/default/files/msrb1/pdfs/MSRB-G-Rules-Summary.pdf (last visited Aug. 17, 2025).

[104] W. Bartley Hildreth & C. Kurt Zorn, *The Evolution of the State and Local Government Municipal Debt Market Over the Past Quarter Century*, PUB. BUDGETING & FIN., Winter 2005, at 127, 132–33 (discussing how beginning "[i]n the late 1970s and early 1980s state and local governments were faced with mounting capital needs and fewer degrees of freedom to deal with [those] needs because of high interest rates, inflation and a slowing economy, reduction in federal aid as a result of concern over mounting federal budget deficits, and tax and expenditure limitations on state and local governments").

statutory constraints.[105] Today, state-issued GO bonds account for only 13% of the municipal bond market, and GO bonds are rarely used to fund states' carceral projects.[106]

a. *Constituents Reject Carceral Debt*

This was not always the case. During the 1980s, GO bonds represented the majority of carceral state debt.[107] Throughout the 1980s—a period of great prison expansion—around 50% of state prison construction was financed using GO bonds.[108] In comparison to the pay-as-you-go method,[109] using GO bonds meant legislators could spread the costs of prison construction to future communities and avoid raising taxes for today's voters.[110]

Over time, however, GO bonds posed other challenges—including many states' requirements for voter approval of GO debt.[111] In many states, GO bonds are subject to state constitutional debt limits and require community approval via public referenda.[112] In what has been characterized as a "tax revolt," many states passed state constitutional amendments requiring voters to approve the

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[105] *See What Are Municipal Bonds and How Are They Used?*, *supra* note 93.

[106] Howard, *supra* note 94; Hagan et al., *supra* note 18, at 114.

[107] Chung, *supra* note 31, at 1456–57 (finding that "[m]ost offerings took the form of general obligation bonds with standard terms" up through the end of the 1970s); *see also* Hagan et al., *supra* note 18, at 104 (discussing how GO bonds were the only available form of financing prison expansion in California in the early 1980s).

[108] HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 44–45 (2015) (noting that the remaining 50% of the financing was split as follows: 40% of the financing came from state revenues, using the "pay-as-you-go method," and only the last 10% came from lease-revenue bonds).

[109] Where financing comes from state "cash and current revenues," such that no additional debt accrued. *Id.*

[110] *See* OFF. OF THE LEGIS. ANALYST, A PERSPECTIVE ON BOND FINANCING 1 (1987), https://lao.ca.gov/reports/1987/364_1287_a_perspective_on_bond_financing.pdf (discussing the risks of overusing the GO instrument, such as "the burden their repayment imposes on future taxpayers" if GO bonds are "issued in limitless amounts or [are] used indiscriminately"); AVIRAM, *supra* note 108, at 45 (explaining that "general obligation bonds . . . are paid out of tax revenues").

[111] More than three-quarters of states have debt limitations in their constitutions. Debt limitations derive from Reconstruction-era racism. Some states have a set, maximum amount of debt, while others require public referendum or legislative supermajority for any amount of debt. Still other states have a maximum amount of debt and then require a public referendum or legislative supermajority only if this maximum amount is surpassed. Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1310–13, 1315–16, 1321–22 (1991) ("The Progressive movement pushed for initiative, referendum, and recall provisions as a check on legislative abuses.").

[112] *Id.* at 1315–16; AVIRAM, *supra* note 108, at 45. *See also infra* Section II.B.

commitment of tax revenues during the late 1970s.[113] These anti-tax initiatives further limited states' abilities to raise revenues. State officials initially capitalized on the politics of "tough on crime" to use ballot referenda to finance the prison construction boom throughout the 1980s. For example, one of the last California referenda that voters passed asked: "Is $3 a year for each member of your family worth it to you to remove convicted felons from your neighborhood and put them in secure state prisons so they won't be able to terrorize you and your family? We think it's a wise and safe investment."[114] Still, *even then* voters in many jurisdictions were not uniformly willing to engorge carceral capacity via approving bond referenda.[115]

Generally, voters either rejected carceral bond referenda during this period of carceral expansion, or passed the referenda by small margins.[116] Throughout the 1980s, voters rejected approximately 60% of local jail bond referenda.[117] For example, in North Carolina in 1990, a $200 million bond for prison construction passed by only 50.02% yes to 49.98% no—leaving state legislators to become increasingly fearful that future bond referenda would fail.[118] Even in California—ground zero of the massive prison construction boom of the tough on crime era—voters had reached a limit by 1990.[119] Despite threats that failure to issue prison

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[113] Steven Hayward, *The Tax Revolt Turns 20*, HOOVER INST. (July 1, 1998), https://www.hoover.org/research/tax-revolt-turns-20; Patrick Murphy, *Yes, Prop. 13 is Racist*, ZOCALO (June 29, 2023), https://www.zocalopublicsquare.org/2023/06/29/yes-prop-13-is-racist/ideas/essay/.

[114] New Prison Construction Bond Act Of 1988, CAL. PENAL CODE §§ 7400–7414 (West 1988) (presented as Prop. 80 and approved by voters in general election of Nov. 8, 1988). This was the second-to-last such ballot initiatives approved by California voters. In 1990, the California legislature presented two more ballot measures to use GO bonds to fund prison construction, and only the first of these was passed, and even then, it passed by a narrow margin. Hagan et al., *supra* note 18, at 102.

[115] Hagan et al., *supra* note 18, at 98, 101–02 ("[I]nitial public enthusiasm for prisons to contain growing numbers of inmates waned as the effects of the baby boom and a crack epidemic stabilized and then slowed in the 1980s and 1990s. Statewide voter support required for issuance of general obligation bonds to build new prisons correspondingly declined.").

[116] *Id.* at 101–02 (discussing how California voters stopped passing bond referenda by 1990, forcing the state government to switch to lease-revenue bonds to fund prison construction).

[117] MEGAN MUMFORD, DIANE WHITMORE SCHANZENBACH & RYAN NUNN, THE HAMILTON PROJECT, THE ECONOMICS OF PRIVATE PRISONS 2 (2016), https://www.hamiltonproject.org/publication/paper/the-economics-of-private-prisons/ (citing PRIVATIZING CORRECTIONAL INSTITUTIONS 58 (Gary W. Bowman, Simon Hakim & Paul Seidenstat eds., 1993)).

[118] *North Carolina Prison and Youth Facilities Bonds Referendum (1990)*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_Prison_and_Youth_Facilities_Bonds_Referendum_(1990) (last visited Aug. 17, 2025); *see also* MUMFORD ET AL., *supra* note 117, at 2.

[119] Despite the popularity of the "tough on crime" stance from California's governor in the late 1980s, voter support for prison construction bonds continued to dissipate by 1990,

construction bonds would leave dangerous criminals in voters' neighborhoods, community desire to fulfill the fiscal responsibilities of carceral expansion was much weaker.[120]

Today, states still use GO bonds to finance prison construction for a minority of projects.[121] But, over time, state legislators became more reticent to even put prison construction bonds on the ballot because they feared the referenda would fail.[122] Now, more complicated debt instruments like lease-revenue bonds are favored for their ability to quickly facilitate "off books" prison expansion without many of the voter and budget restrictions imposed by GO bonds.[123] This less accountable, "non-debt debt" contributed to the engorgement of carceral capacity in the U.S. for the past 50 years and worked as an anti-democratic force to subvert voter preferences.[124]

2. *More Complex Debt: Lease-Revenue Bonds*

a. *Growth of Carceral Lease-Revenue Bonds*

During the period of carceral expansion in the 1980s and 1990s, states were concerned that prison bond referenda would fail. To avoid community rejection of carceral bonds, states sought out alternative ways to raise funds for prison construction. There was "considerable political inertia against prison construction" despite support—often overstated—for "tough on crime" policies.[125]

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exemplified by the fact that "in 1990 the legislative leadership floated two ballot initiatives for about a half billion dollars each. The first request passed in June, but the second failed in November." Hagan et al., *supra* note 18, at 101–02. *Compare California Proposition 120, Prison Construction Bond Issue (June 1990)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_120,_Prison_Construction_Bond_Issue_(June_1990) (last visited Aug. 17, 2025) (June passed initiative), *with California Proposition 144, New Prison Construction Bond Measure (1990)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_144,_New_Prison_Construction_Bond_Measure_(1990) (last visited Aug. 17, 2025) (November failed initiative).

120 *See* Hagan et al., *supra* note 18, at 98, 101–02.

121 *See, e.g.*, Katie McKellar, *Legislature Approves $100 Million Bond for Prison Infrastructure*, DESERET NEWS (Mar. 8, 2017, 10:50 AM), https://www.deseret.com/2017/3/8/20607809/legislature-approves-100-million-bond-for-prison-infrastructure (reporting a $100 million increase in prison bond funding passed by the Utah legislature in 2017).

122 *See* Hagan et al., *supra* note 18, at 98, 101–03; MUMFORD ET AL., *supra* note 117, at 2.

123 DAVID MUSICK & KRISTINE GUNSAULUS-MUSICK, AMERICAN PRISONS: THEIR PAST, PRESENT AND FUTURE 76–77 (2017) (discussing how, when confronted with declining voter support for GO bonds, "prison corporations, their politician allies (including state treasurers), creative lawyers and investment bankers devised new ways to finance the prison-building boom. . . . quickly turn[ing] to lease-revenue bonds" (citation omitted)); *see also* Hagan et al., *supra* note 18, at 102–04; Chung supra note 31, at 1458–59.

124 *See infra* Section II.B.1.

125 Joshua Guetzkow & Eric Schoon, *If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation*, 49 L. & SOC'Y REV. 401, 405 (2015); Hagan et al., *supra* note 18, at 101.

States turned to lease-revenue bonds (LRBs). Revenue bonds were not new. Initially, revenue bonds were reserved for projects that, once built, raised their own revenue, such as toll roads, hospitals, parking lots, and colleges.[126] For example, a state may issue debt to build a toll road and pledge the revenues from toll collection to repay the debt over time. Revenue bonds do not require the state's "full faith and credit" like general obligation bonds.[127] Thus, the market treats revenue bonds as higher risk since the revenue is not guaranteed, and the market imposes higher interest and transactional costs.[128]

LRBs are similar to a "conditional sale" that lasts 20–30 years.[129] The mechanism is anything but simple:

> The state creates an entity or agency to build the prison. The agency floats bonds to the public to cover construction of the facility. The agency then leases the right to use the completed prison to the state. The state pays the entity lease payments [through its annual budget]. The entity uses the lease payments to service the bond debt.[130]

The bondholder–investors will yield one and a half to three times their original investment depending on the length of the bond agreement and interest rates.[131]

In this context, LRBs involve a state public authority. Developing in the 20th century—primarily to support economic projects—state public authorities

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126 Chung, *supra* note 31, at 1466; Hagan et al., *supra* note 18, at 102; MUSICK & GUNSAULUS-MUSICK, *supra* note 123, at 76.

127 *What are Municipal Bonds*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/munied (June 5, 2024).

128 AVIRAM, *supra* note 108, at 45 ("Other downsides of using lease revenue bonds are their higher price, stemming from the fact that they are not backed by the state's full faith and credit; the resulting need to back them up by insurance; the private negotiation on their sale, which means no competition from the market; and the many middlemen involved."); *Types of Municipal Debt*, MRSC, https://mrsc.org/explore-topics/finance/debt/types-of-municipal-debt (Mar. 7, 2025) (discussing how GO bonds and LRBs function, including the fact that LRBs are less secure and therefore have higher interest payments). *See, e.g.*, *Fitch Rates California's $480MM Lease Revenue Bonds 'AA-'; Outlook Stable*, FITCH RATINGS (Mar. 21, 2023, 9:53 AM), https://www.fitchratings.com/research/us-public-finance/fitch-rates-california-480mm-lease-revenue-bonds-aa-outlook-stable-21-03-2023 (outlining how in 2023, LRBs issued in California by the state's Department of Corrections were rated AA-, which is below the rating for the state's GO bonds; the lower rating of lease-revenue bonds means higher interest rates).

129 JAN CHAIKEN & STEPHEN MENNEMEYER, U.S. DEP'T OF JUST., LEASE-PURCHASE FINANCING OF PRISON AND JAIL CONSTRUCTION 1, 10–11 (1988), https://www.ojp.gov/pdffiles1/Digitization/114210NCJRS.pdf.

130 Anderson, *supra* note 57; *see also* CHAIKEN & MENNEMEYER, *supra* note 129, at 4–5 fig.1 (explaining how lease-purchase bonds, i.e., lease-revenue bonds, function).

131 *See* CHAIKEN & MENNEMEYER, *supra* note 129, at 5–6; MUSICK & GUNSAULUS-MUSICK, *supra* note 123, at 77–79.

"involve public ownership without public policy."[132] As they developed, public authorities took on many characteristics of firms to avoid giving handouts to different interest groups.[133] Insulated from the electorate and comprised of appointed officials, authorities make public policy decisions transforming "taxpayers into ratepayers subject to user fees."[134] Public authorities will issue bonds to finance capital carceral projects—construction, renovations—that ultimately expand states' capacity to incarcerate.[135]

Prior to the 1980s, LRBs were a small sliver of the entire municipal bond market and were not used to expand carceral projects.[136] Within ten years of the first carceral LRB in California, however, nearly every state had utilized an LRB to finance prison construction.[137] As a prime example, New York state voters rejected a $500 million state GO bond referenda for prison construction in 1981.[138] Subsequently, in 1990, the state relied on its Urban Development Corporation (UDC) to issue LRBs to finance its carceral system. The UDC issued $241.7 million of 30-year bonds to buy Attica Prison—home of the famed rebellion—from the State of New York.[139] Then, the state leased Attica from the UDC for 30 years. The state used the $200 million it made through the initial "sale" to cover gaps in the operating costs of its Department of Corrections.[140] The state paid approximately

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[132] ANNMAIRE HAUCK WALSH, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS 3 (1978).

[133] *Id.* at 35.

[134] ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 14–15 (1996).

[135] *See generally* CHAIKEN & MENNEMEYER, *supra* note 129 (explaining how public authorities assist state and local governments in financing carceral capital projects).

[136] AVIRAM, *supra* note 108, at 44–45; MUSICK & GUNSAULUS-MUSICK, *supra* note 123, at 76–77.

[137] CHAIKEN & MENNEMEYER, *supra* note 129, at 2.

[138] *New York Debt for Improved Correctional Facilities, Proposal 1 (1981)*, BALLOTPEDIA, https://ballotpedia.org/New_York_Debt_for_Improved_Correctional_Facilities,_Proposal_1_(1981) (last visited Aug. 18, 2025); Edwin Rubenstein, *Cranking the Debt Machine*, CITY J. (1992), https://www.city-journal.org/article/cranking-the-debt-machine. *See also* William G. Blair, *Proposal for a $500 Million Bond Issue for Prison Construction*, N.Y. TIMES (Oct. 2, 1981), https://www.nytimes.com/1981/10/02/nyregion/proposal-for-a-500-million-bond-issue-for-prison-construction.html (discussing the New York referenda prior to the vote: "For the first time in a half-century, people in New York State will have an opportunity Nov. 3 to vote for or against a bond issue for the state's prisons: Proposition 1, the $500 million Secure Correctional Facilities Bond Issue").

[139] Rubenstein, *supra* note 138. After the 1986 Tax Reform Act, there was no longer a benefit from positive arbitrage from Reserve Funds. Prior to 1986, the authority "could use as much as 15 percent of the proceeds of the [lease-revenue] bond issue" (with positive market conditions) to reinvest in obligations with higher yield than the initial bond, which would lower the effective cost of the lease-revenue bond. CHAIKEN & MENNEMEYER, *supra* note 129, at 5–6.

[140] Rubenstein, *supra* note 138.

$500,000 in legal fees and administrative expenses and $1.5 million to the bond underwriters from Wall Street banks. With interest payments, the deal cost state constituents at least $490 million in principal and interest payments.[141] Beyond the fiscal concerns of the Attica "lease back," critics were also skeptical that the UDC, initially created after the Civil Rights Era to facilitate the construction of more affordable housing, was now facilitating prison expansion as a de facto jobs program for whites in upstate New York.[142] Instead of considering decarceral efforts like releasing prisoners, the state would fully invest in carceral futures.[143]

Utilizing the LRB instrument, it became easier for states to borrow larger sums of money for prison expansion. Within a decade of California's first carceral LRB issue, "the prison construction project expanded from $763 million to $4.9 billion dollars, a proportional increase of from 3.8 percent to 16.6 percent of the state's total debt for *all purposes*."[144] States across the country adopted the instrument for other carceral projects.[145] While carceral LRBs used the lease-revenue instrument, they differed from similar lease-revenue issues because there was no nontax revenue stream as commonly understood. Instead, the annual appropriation from the state to pay the facility's lease payment is considered the non-tax "revenue."[146]

Notably, LRBs have higher interest rates and transaction costs than GO bonds.[147] Still, many market proponents argue that while LRBs have higher costs,

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[141] *Id.*

[142] *See id.* (discussing how businesses who made political contributions to certain public authorities received contracts for the subsequent jobs that were created by those authorities). A similar phenomenon occurred in California around the same time. *See* Marie Gottschalk, *The Carceral State and the Politics of Punishment*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 205, 212 (Jonathan Simon & Richard Sparks eds., 2013) ("The [California Department of Corrections (CDC)] has been extremely inept at managing what goes on inside its prisons and the other facilities of its vast penal empire, in part because of organized resistance from the powerful prison guards' union and contract provisions that give the guards enormous latitude on the job. However, the department has been highly capable when it comes to building more prisons. Like corrections departments in many other states, the CDC pushed prison construction as a key tool of rural economic development. The CDC's Prison Siting Office was extremely effective at persuading economically distressed communities that a new prison in their midst would bring them an economic windfall.").

[143] *See* Winikow, *supra* note 91.

[144] RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 101 (2007) (emphasis added).

[145] *See, e.g.*, TEX. CRIM. JUST. DIV., STATE OF TEX., PRISON FINANCING AND CONSTRUCTION PLAN 22 (1987).

[146] GILMORE, supra note 144, at 100.

[147] LRBs also require a larger "capitalized interest account to pay debt service during the construction period" than GO bonds. *LEASE-REVENUE BONDS - 6872*, CAL. DEP'T OF GEN. SERVS., https://web.archive.org/web/20250209014124/https://www.dgs.ca.gov/Resources/SAM/TOC/6800/6872 (Sept. 2017).

they are also cost-saving due to their efficiency.[148] With fewer requirements for democratic process, LRBs can reach the bond market for sale relatively quickly, avoiding possible costs associated with changing interest rates and market conditions.

3. How it Works—New Jersey

To finance the construction of the three new youth prisons in New Jersey, the state turned to LRBs. New Jersey, a state with a long history of underfunding state pension obligations and one of the highest debt loads in the country, could use LRBs to avoid state constitutional debt limits and requirements for voter referenda.[149]

The bonds were issued by the New Jersey Economic Development Authority (NJEDA), a quasi-governmental public authority, with a board comprised of unelected governor appointees.[150] The NJEDA was initially designed to facilitate economic growth by lending money to industrial and commercial firms throughout the state.[151] Over time, the NJEDA has become the state's largest issuer of debts.[152] Nationally, this is now the normal course of business. Across the country, public authorities like the NJEDA borrow more billions of dollars than state and local governments combined to finance infrastructure projects.[153]

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[148] *See* Taylor, *supra* note 33 (noting that despite rising interest rates, "the fact remains that financial markets are perhaps the quickest way to raise a ton of funds").

[149] *See* John Reitmeyer, *NJ Still Ranks Among Most Debt-Burdened States*, NJ SPOTLIGHT NEWS (Nov. 27, 2024), https://www.njspotlightnews.org/2024/11/wall-street-credit-rating-agency-ranks-nj-among-states-most-debt-burdened/; Karen Paget, *The Balanced Budget Trap*, AM. PROSPECT (Dec. 19, 2001), https://prospect.org/economy/balanced-budget-trap/ ("Even in states with strict provisions or a political culture that strongly supports budget balance, a plethora of accounting gimmicks have been devised to reconcile flexibility with nominal budget balance. These include . . . underfunding public employee pension funds."). For further discussion of state constitutional debt limits and voter referenda requirements, see *infra* Section II.B.1.

[150] N.J. STAT. ANN. § 34:1B-4 (West 2008).

[151] Matthew Fazelpoor, *ICYMI: NJBiz's Matthew Fazelpoor Sits Down With New Jersey Economic Development Authority's CEO Tim Sullivan Ahead of the NJEDA's 50th Anniversary*, STATE OF N.J. (Oct. 7, 2024), https://www.nj.gov/governor/news/news/562024/approved/20241007a.shtml; NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 18.

[152] *See generally* OFF. OF PUB. FIN., STATE OF N.J., STATE OF NEW JERSEY DEBT REPORT: FISCAL YEAR 2023 (2024).

[153] *See, e.g.*, *Public Authorities*, OFF. OF THE N.Y. STATE COMPTROLLER, https://www.osc.ny.gov/public-authorities (last visited Aug. 18, 2025) (noting that in New York, "[m]ore than 95 percent of all State-funded debt outstanding was issued by public authorities without voter approval"); Taylor, *supra* note 33 ("[T]he Action Center on Race and the Economy (ACRE) has estimated that these municipal debt deals transfer over $160 billion a year from taxpayers to investors and to Wall Street.").

The decision to authorize the $160 million in bonds (and millions in interest payments and financial costs) occurred with little public political process.[154] Prior to the issuance of the bonds, the state agency seeking the funds—the Juvenile Justice Commission—worked with the state agency that oversees construction—the state's Division of Property Management and Construction (DPMC).[155] Together, the state agencies "identified two (2) sites in the State to build new modern, facilities" and "decided to proceed with the *construction*" of the facilities.[156] With the DPMC's approval, the Juvenile Justice Commission requested that the NJEDA authorize and issue the bonds.[157] The authority—NJEDA—selects its own underwriters and issues its own revenue bonds, without state input.[158] Direct state involvement in authority bond issuance is limited, as the responsibility for authority bond decisions rests with the authorities themselves, not with the DPMC.[159]

The primary political scrutiny that occurred prior to issuing the bonds included two hearings: one before the State House Commission and the other before the State Leasing and Space Utilization Committee.[160] Notably, at the State Leasing and Space Utilization Committee hearing—an open meeting—public comments were not allowed.[161] Both committees approved the locations where two of the three prisons would be constructed, which were then written into the bond covenants.[162] The proposed locations and costs of the prisons were never before the state legislature for a *full* vote. Contrastingly, if the bonds had been issued by the state

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[154] *See* NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 16; *Fitch Rates New Jersey Bonds*, *supra* note 6.

[155] NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 2–3.

[156] *Id.* at 3 (emphasis added).

[157] *Id.*

[158] *See id.* at 18 (discussing the authority of the NJEDA to issue bonds and enter into any "agreements and arrangements necessary or incidental to the performance of its duties").

[159] The NJEDA has the authority to issue and sell bonds with the purpose of "render[ing] assistance to governmental bodies, such as the State," yet does not have the authority to "incur any indebtedness on behalf of or in any way obligate the State or any political subdivision thereof." *Id.* at 18.

[160] *See* STATE OF N.J., STATE HOUSE COMM'N, PROPOSED MEETING AGENDA 1–2 (2017). *See generally* JOINT STATE LEASING & SPACE UTILIZATION COMM. MEETING, *supra* note 8 (meeting transcription and documents).

[161] JOINT STATE LEASING & SPACE UTILIZATION COMM. MEETING, *supra* note 8, at 15. Despite the fact that 40 people signed up to testify about this issue at this meeting, the committee restricted public comments to indications that the commentor was either "for" or "against" the proposal to build more prisons. When one community member began to describe *why* she was "for" this proposal, the senator leading the meeting told her she could "submit written testimony," but the committee would not "take testimony on these issues." *Id.* at 16.

[162] *Id.* at 3–5, 30–31; *see* NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 3.

itself instead of the state's public authority, the state constitution would have required that the bonds be voted on by public referenda.[163]

Ultimately, the state authority paid the Fitch Rating Agency for an independent rating of the creditworthiness of the authority to repay these bonds. Fitch rated the approximately $160 million in LRBs with an "A-" rating.[164] In determining the creditworthiness of the bonds, Fitch considered the state's high debt burden and net pension liabilities, noting that "New Jersey's response to cyclical downturns has largely rested with its ability to reduce expenditures, including making no appropriation for pension contributions."[165] Here, the bond rating agency rewarded the state for prioritizing debt repayment over pension obligations.

In 2019, over a year after the New Jersey prison bonds were issued, a protest erupted across the street from Newark, New Jersey's West Side High School.[166] High school students joined community groups in protesting the announcement that one of the state's new youth prisons would be built a few blocks from the school at an old Pabst brewery location.[167] During a rally, the young organizers were clear: our community does not want more youth prisons.[168] Through their organizing, the community groups and students effectively pressured the state to agree that the environmentally compromised site in their Newark neighborhood was not appropriate for a prison.[169] In part because of their activism, six years later, construction has yet to begin at any location.[170]

But the state remains steadfast: the prisons will be built. As of June 2023, the state had already paid approximately $49 million via lease payments—still owing approximately $153 million of the $160 million borrowed.[171] The state has also

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[163] N.J. CONST., art. VIII, § 2, para. 3(b).

[164] *See Fitch Rates New Jersey Bonds*, *supra* note 6.

[165] *Id.*

[166] Rebecca Panico, *Protesters Call on Murphy to Halt Construction of New Youth Jails*, TAPINTO (May 19, 2019, 8:54 AM), https://www.tapinto.net/towns/newark/sections/government/articles/protesters-call-on-murphy-to-halt-construction-of-new-youth-jails.

[167] *Id.*

[168] *Id.*; Colleen O'Dea, *Newark NIMBY on State Plan to Build Juvenile Justice Facility in Brick City*, NJ SPOTLIGHT NEWS (Apr. 16, 2019), https://www.njspotlightnews.org/2019/04/19-04-15-newark-nimby-on-state-plan-to-build-juvenile-justice-facility-in-city/.

[169] O'Dea, *supra* note 168.

[170] *Juvenile Justice Commission Facilities*, YOUTH JUST. COMM'N, DEPT. OF L. & PUB. SAFETY, STATE OF N.J., https://www.njoag.gov/about/divisions-and-offices/youth-justice-commission-home/youth-justice-commission-facilities/ (last visited Aug. 20, 2025); *see* Sophie Nieto-Munoz, *Social Justice Groups Seek Quicker Closure of Juvenile Lockups*, N.J. MONITOR (Nov. 22, 2024, 7:00 AM), https://newjerseymonitor.com/2024/11/22/social-justice-groups-seek-quicker-closure-of-juvenile-lockups/.

[171] OFF. OF PUB. FIN., *supra* note 152, at 35. New Jersey will pay approximately $10.6 million in debt service per year for 30-year issue, roughly totaling $311.34 million in

incurred significant fees from issuing the bonds, paying approximately $329,204 in legal fees, trustee's fees, rating agency fees, and other miscellaneous expenses.[172] And, most recently, in 2024, the state increased the budget—approving an additional $60 million for the construction of the third planned prison.[173]

II. MARKET DISCIPLINE AND DEMOCRATIC CONSTRAINTS FAIL TO CONTROL CARCERAL DEBT

"[M]unicipal borrowers truncated long-term political horizons. Paying the next bill took precedence over addressing the social crisis of austerity."

—Destin Jenkins[174]

Society primarily relies on: (1) market discipline and (2) democracy to control how states engage the municipal debt market. The municipal bond market is orientated toward what Destin Jenkins describes as "bondholder supremacy."[175] Over time, municipal bond market actors became increasingly confident that states will prioritize repaying municipal debt service in times of fiscal difficulty.[176] Both market discipline and democratic controls operate within this paradigm and prioritize municipal bond market interests over the interests of both the communities paying back the debt service and the communities most affected by the public projects being financed.

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payments over the 30-year life of the bonds. NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 16.

[172] NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 17.

[173] S. 3511, 221st Leg., Reg. Sess. (N.J. 2024). Because New Jersey was relatively flush with cash after the COVID pandemic and the passage of the CARES Act, the state was able to pay for additional construction costs from the debt repayment fund. *See* Reitmeyer, *supra* note 149 (discussing how "[m]any states, including New Jersey, enjoyed healthy tax-collection growth coming out of the worst years of the COVID-19 pandemic, and that helped generate the revenue needed to do things like pay down bonded debt"). While New Jersey was able to pass this through the budget process, approval of $60 million is much different than the $230 million that would have been needed without the bonds. *See* NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 15, 17 (outlining that the 2018 LRBs "are being issued to finance: (i) a portion of the costs of the Juvenile Justice Commission Facilities Project," and listing the amount to be deposited in the project fund as roughly $169 million).

[174] JENKINS, THE BONDS OF INEQUALITY, *supra* note 35, at 218.

[175] *Id.* at 215; *see also* Taylor, *supra* note 33.

[176] *See* JENKINS, THE BONDS OF INEQUALITY, *supra* note 35, at 215–16 (noting that "the dramatic shift in the nature of urban governance" in the 1980s "was expressed through the accommodation of cities to the rhythms of an extractive market, prioritizing bondholders over the electorate"); Taylor, *supra* note 33 (discussing how, beginning in the 1980s, the shift toward bondholder supremacy caused "bondholders [to] have great confidence that democracy [wouldn't] interfere with their repayment; they [felt] that democracy was something for city officials to worry about").

This Part explores how both market and democratic mechanisms should function to control states' municipal debt; how they specifically fail in the carceral context; and begins to argue that due to the specific accountability and transparency issues in the criminal punishment system, carceral debt requires *enhanced* process. Without community participation, current structures do little to prevent states from taking on extreme carceral costs with questionable benefit, which may ultimately have devastating effects on public life.

A. Market Discipline

A vision of an apolitical, rational municipal bond market prevails.[177] With the decline of the welfare state and rise of neoliberalism, state and local governments have increasingly relied on markets to fund critical infrastructure projects.[178] Most municipal bond market actors believe that the market can efficiently discipline state borrowers by incentivizing restraint—primarily through pricing debt higher as states incur excessive debt levels.[179] Bond market proponents argue that these dynamics are the most efficient method to regulate state borrowing and stop states from taking on unsustainable levels of debt.[180]

However, historically and in recent times, the municipal bond market failed to protect both bondholder–investors and communities from debt defaults and in solving even larger social problems.[181] Municipal market discipline fails to respond to the climate crisis, failed to address systemic racial inequities in how cities build critical infrastructure, and failed to protect Detroit and Jefferson County, Alabama, from default and subsequent decline of municipal life.[182]

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[177] *See* Bayoumi et al., *supra* note 86, at 1050; *but see* John N. Robinson III, *W.E.B. Du Bois and the Racial Economics of Inclusive Capitalism*, ITEMS (Jan. 22, 2019), https://items.ssrc.org/race-capitalism/w-e-b-du-bois-and-the-racial-economics-of-inclusive-capitalism/ ("[T]he 'market economy' is not to be taken too seriously on its own ideological terms, but is better described as analogous to any other political arena—its structure and outcomes are molded by specific policies, practices, and institutions that emerge as a result of political agitation and resistance.").

[178] *See* Joseph Stiglitz, *The Harms of Infrastructure Privatization: A Step Backward in Progressive Policymaking*, ROOSEVELT INST. (July 26, 2021), https://rooseveltinstitute.org/blog/the-harms-of-infrastructure-privatization-a-step-backward-in-progressive-policymaking/ (arguing against recent proposals to privatize infrastructure projects).

[179] *See* Bayoumi et al., *supra* note 86, at 1046–48.

[180] Clayton P. Gillette, *Bondholders and Financially Stressed Municipalities*, 39 FORDHAM URB. L.J. 639, 653, 670, 675 (2012).

[181] *See* William B. English, *Understanding the Costs of Sovereign Default: American State Debts in the 1840's*, 86 AM. ECON. REV. 259, 261–63 (1996) (discussing historical debt defaults); O'Dea, *supra* note 168 (discussing how a recent municipal bond market failed to solve a social problem).

[182] *See, e.g.*, JACKIE WANG, CARCERAL CAPITALISM 176 (2018) (detailing how Detroit, Michigan was forced into bankruptcy after it "had to devote more and more of its budget to paying off debts"); Melinda Dickinson, *Alabama County Files Biggest Municipal Bankruptcy*,

This Section explores how market discipline is an imperfect control for states' general municipal debt and then further considers the pronounced failures of market discipline to control states' carceral spending via the municipal bond market.

1. How the Market Disciplines: Pricing of Debt as Private Regulation

Bond pricing is the municipal bond market's primary mechanism for discipline.[183] Beyond the price of the debt, there are few, mainly disclosure-related, regulations to protect bondholder–investors from investing in bad debt. However, there are even fewer protections for the communities ultimately responsible to pay for these debts. Current reporting requirements focus on preventing bondholder–investor risk—not the risks of debt to constituent communities.[184]

The municipal bond market ("the market") thus relies on debt pricing to privately regulate how much debt states incur. Seeing itself as apolitical, the market purportedly prices debt based solely on the risk that the state-issuer will not repay its debt. For revenue debt, the market also considers the viability of the revenue-raising project.[185] In addition to the creditworthiness of the issuer, municipal debt pricing also implicitly depends on the purpose of the financing and the attractiveness of the municipal bond debt compared to other investments.[186] "Creditworthiness"

REUTERS (Nov. 10, 2011, 6:52 AM), https://www.reuters.com/article/world/alabama-county-files-biggest-municipal-bankruptcy-idUSTRE7A94CQ/ (discussing Jefferson County, Alabama's bankruptcy filing in 2011 after its "debt escalated in the mid-2000s when bond issuance deals to upgrade its sewer system soured"); Triet Nguyen, *Property Insurance: A Direct Link Between Climate Risk and Municipal Bond Creditworthiness*, BOND BUYER (Jan. 12, 2024, 10:57 AM), https://www.bondbuyer.com/opinion/property-insurance-a-direct-link-between-climate-risk-and-municipal-bond-creditworthiness (discussing how the municipal bond market ignores climate risks); Erika Smull, Evan Kodra, Adam Stern, Andrew Teras, Michael Bonanno & Martin Doyle, *Climate, Race, and the Cost of Capital in the Municipal Bond Market*, PLOS ONE, Aug. 9, 2023, at 1, 18–20, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0288979#sec020 (finding that "biases in the market that are priced into bond yields can have substantial and long-term implications for the fiscal conditions of a community," and analyzing data to determine that the municipal bond market prices further systemic racism).

[183] Carin Wagner, *The Bond Market's Role in Shaping U.S. Fiscal Responsibility*, GHPIA (July 11, 2024), https://ghpia.com/the-bond-markets-role-in-shaping-u-s-fiscal-responsibility/; *see also* Richard C. Schragger, *Citizens Versus Bondholders*, 39 FORDHAM URB. L.J. 787, 793–95 (2012) [hereinafter Schragger, *Citizens Versus Bondholders*] (discussing how municipal bond market pressure is a more effective mechanism for discipline than political pressure or influence).

[184] As Chung argues, the federal regulatory regime is investor- and default-centric. Once there is an initial disclosure of certain facts relating to default risk, "risk is dealt with as an economic issue through pricing and other deal terms." Chung, *supra* note 31, at 1461, 1485.

[185] *See* Schragger, *Citizens Versus Bondholders*, *supra* note 183, at 792.

[186] SEC. & EXCH. COMM'N OFF. OF INV. EDUC. & ADVOC., INVESTOR BULLETIN: MUNICIPAL BONDS: UNDERSTANDING CREDIT RISK 2, https://www.sec.gov/files/municipalbondsbulletin.pdf (last visited Aug. 20, 2025) ("For example, if you are considering purchasing municipal securities that finance speculative projects, including those involving for-profit businesses, pay close attention to the potential risks involved.").

therefore can be "a fluid assessment that change[s] depending on the type of information with which creditors had to work."[187]

In theory, market discipline functions like this: as states and their public authorities take on more debt, the price of borrowing increases. Rising borrowing costs should incentivize the state from incurring excessive debt. However, even if the state does not cease borrowing irresponsibly due to rising costs, eventually the market should intervene by denying the state further access to credit.[188] Further, by increasing the cost of borrowing, states—with limited revenue streams—may have to make difficult fiscal decisions to repay the expensive debt incurred.[189] If a state stops making payments to its pension fund in order to make debt service payments, for example, state politicians should experience political pushback for that decision. Or, in some cases, residents will leave the state because of high debt payment and fewer services.[190]

In practice, the market does not behave this way. Contrary to the idea that the bond market only disciplines irresponsible "bad apple" issuers, the bond market systemically distributes money inequitably.[191] Perpetuated through its numerous actors—including hired rating agents, investment banker underwriters, financial advisors, and highly compensated bond counsel—the market behaves and prices debt irrationally.[192] Further, there is evidence that bond market participants directly influence policymakers—especially at the state level.[193] More than municipalities, state officials cater to market interests to avoid contagion for municipalities

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[187] Jenkins, *Ghosts of the Past*, *supra* note 22, at 201–02.

[188] Bayoumi et al., *supra* note 86, at 1046–48, 1057.

[189] Christine Sgarlata Chung, *Rising Tides and Rearranging Deckchairs: How Climate Change is Reshaping Infrastructure Finance and Threatening to Sink Municipal Budgets*, 32 GEO. ENV'T L. REV. 165, 188 (2020) ("State and local governments have far fewer and far more limited options for raising capital. They cannot, as a practical matter, issue equity securities, nor can they easily leverage or sell off assets to generate funds. State and especially local governments also may be subject to tax caps or other limits on levy power or indebtedness. . . . There may be practical or political constraints on the taxing power of state and local governments as well, especially in financially distressed municipalities. Also, while the merger, consolidation or dissolution of subnational governments, shared services agreements, or some combination thereof have the potential to generate cost savings or improved service delivery, residents generally have not embraced these approaches and savings are not guaranteed." (footnotes omitted)).

[190] *See* Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 868 (2012) [hereinafter Schragger, *Democracy and Debt*] (describing how the incentive for local governments to be fiscally responsible in the Tieboutian market model derives from the decisions of residents and firms on where to reside, noting that, in this model, residents "will choose jurisdictions that are fiscally sound while punishing (by exiting) those jurisdictions that are overextended").

[191] *Id.* at 873–74 (arguing that "[r]ich jurisdictions get richer, pulling capital out of poorer jurisdictions, when neoclassical economics would otherwise predict convergence").

[192] *See id.* at 871.

[193] *See id.* at 874.

throughout the state.[194] However, because: (1) debt is systemically mispriced and (2) municipal bond market actors profit from more borrowing,[195] the market's incentives to restrain excessive borrowing are ineffective—particularly for carceral debt.

2. *Why Market Discipline Does Not Work*

a. *Systemically Mispriced*

For market discipline to be effective, there is an assumption that credit rating agencies and the market "can generate accurate predictions."[196] The market should be making debt more expensive for irresponsible state-issuers and cheaper for prudent state-issuers.

However, historic and contemporary fiscal struggles show: (1) that the market systemically misprices debt and (2) that market players are incentivized to facilitate more and more debt deals.[197] In recent memory, the bond market failed to account for risk prior to the subprime mortgage crisis, failed (and continues to fail) to consider risk of climate crisis, and continuously misprices risk for Black-majority cities when seeking financing to build infrastructure.[198] Studies continue to find that there is a "Black Tax" akin to redlining in the municipal bond market that makes borrowing more expensive for municipalities with populations with a large proportion of Black residents.[199]

Empirical studies also show that the municipal bond market systemically misprices debt in the U.S. through its outsize focus on the risk of default—even

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[194] Schragger, *Citizens Versus Bondholders*, *supra* note 183, at 802 ("States, unlike localities, may also be more inclined to placate the credit markets, either because state officials worry about spillover effects or because bankers exercise more power than do local citizens at the state level.").

[195] *See* Schragger, *Democracy and Debt*, *supra* note 190, at 871; Bayoumi et al., *supra* note 86, at 1046–48.

[196] Schragger, *Democracy and Debt*, *supra* note 190, at 867–68.

[197] *See* MANRIQUE SAENZ, GEOFFREY KEIM, NARCISSA BALTA, ATIF CHAUDRY, ZHUO CHEN ET AL., INT'L MONETARY FUND, STRATEGY, POL'Y, & REV. DEP'T, STAFF GUIDANCE NOTE ON THE SOVEREIGN RISK AND DEBT SUSTAINABILITY FRAMEWORK FOR MARKET ACCESS COUNTRIES 6 (2022); Benton Lewis, Christopher Machera & Samantha Patel, *The Rise of Private Credit & Its Impact on Acquisition Dynamics*, BLOOMBERG L. (Sept. 2023), https://www.bloomberglaw.com/external/document/X8GKQD10000000/m-a-professional-perspective-the-rise-of-private-credit-its-impa.

[198] *See* sources cited *supra* note 182 and accompanying text.

[199] *See, e.g.*, Smull et al., *supra* note 182, at 3 ("Our combined findings indicate a systemic mispricing of risk in the municipal bond market, where communities with greater percentages of Black residents pay more for municipal debt, but communities with higher climate risk do not."); *see also* Jade A. Craig, *Rate Covenants in Municipal Bonds: Selling Away Civil Rights and Fair Housing Goals*, 102 DENV. L. REV. 191, 212–14 (2024) (arguing that municipal bonds' unchecked rate covenants allow municipalities to accept bond conditions that disproportionately harm low-income people and people of color).

when, in actuality, default is incredibly rare.[200] Municipal debt investors "are generally compensated for interest rate risk and credit risk."[201] Bondholder–investors choose projects with less "risk" of default over projects with higher returns.[202] A municipal bond spread should correlate to the risk of default, thus it is surprising that the average municipal bond spread is so high (74% to 84%) given that municipal default is so rare.[203] Typically, this pricing would imply a high-risk premium—even though that premium is not supported by the rarity of municipal default.[204]

Ultimately, considering that there are so few occurrences of municipal default—and the unlikelihood that bondholder–investors would not receive their investment—it seems that the market is not efficiently pricing the debt.[205] Instead, bondholder–investors demand an extra yield premium for "even small amounts of perceived or potential increase in default risk."[206] This mispricing increases costs for

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200 *See, e.g.*, Michael Schwert, *Municipal Bond Liquidity and Default Risk*, 72 J. FIN. 1683, 1684 (2017); Matthew D. Peppe & Haluk Unal, *Do Municipalities Pay More to Issue Unrated Bonds?* 2 (FDIC Ctr. for Fin. Rsch., Working Paper No. 2022-12, 2022).

201 NATHAN WILL, JUSTIN FERRERA, CECIL-FRANCIS BRENNINKMEIJER & KEVIN KHANG, VANGUARD RSCH., ROADS, SCHOOLS, AND HOSPITALS: A BRIEF TOUR OF THE MUNICIPAL BOND MARKET 9 (2024).

202 This is true "even if the expected value of a riskier project exceeds that of the riskless project." Gillette, *supra* note 180, at 669.

203 This is after adjusting for tax exemption and covers the period of 1998 through 2015. Schwert, *supra* note 200, at 1684; *see also* Schragger, *Citizens Versus Bondholders*, *supra* note 183, at 798 ("The paucity of full-scale municipal defaults—at least in the latter half of the twentieth century—might instead be attributed to the emergency of the federal government as a stabilizing force. The federal government serves two roles with respect to sub-federal jurisdictions. First, the federal government plays an important regulatory role, policing the credit markets (at least to some extent) and limiting (if not eliminating) corruption. Second, the federal government has taken on the bulk of redistributive spending. Local governments receive direct aid from the federal government. More important is the aid that flows to individuals through federal social welfare programs. The rise of the social welfare state means that economic downturns do not necessarily lead to economic collapse.").

204 Schwert, *supra* note 200, at 1713.

205 This might be due to the limited number of investors that benefit from the tax exemption as is. Schwert suggests:

> [i]f lowering state and local government borrowing costs is a policy objective, then my results imply that focusing on improving liquidity in the municipal bond market will have a smaller effect than focusing on the source of the default risk premium. If the tax exemption is the source of this premium, then it would be worth examining alternative schemes for the federal government to subsidize state and local issuers without inducing market segmentation.

Id. at 1718.

206 Kenneth A. Kriz & Qiushi Wang, *Municipal Bond Risk Premia During the Financial Crisis: Model and Implications*, MUN. FIN. J., Summer 2016, at 29, 30.

state-issuers while bondholder–investors profit. State-issuers—and ultimately constituents—take on the risk burden instead of the investors.[207]

Further, the opaqueness of the municipal debt market contributes to the market's inability to appropriately price debt.[208] Underwriters exert "substantial market power over investors, particularly when those investors are small."[209] Traditionally, underwriters profited significantly from manipulating information asymmetry between institutional and smaller bondholder–investors.[210] The municipal debt market is less transparent than other debt markets, allowing for widespread pricing distortion.

Despite this evidence that the U.S. municipal bond market misprices debt systemically, states are still incentivized to pursue market-determined "creditworthiness" to keep borrowing costs low—even if that means cutting services for constituents.[211] And evidence shows that states often take dramatic, herculean efforts to cut these services and prove themselves to the municipal bond market.[212] Here, "the state is no ordinary borrower; it is a borrower endowed with the legal power to loot the public to pay back its creditors."[213]

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[207] WANG, *supra* note 182, at 176. In the context of the financialization of infrastructure, scholars look at how local governments take on market-oriented risk. *See, e.g.*, Stephanie Farmer, *Cities as Risk Managers: The Impact of Chicago's Parking Meter P3 on Municipal Governance and Transportation Planning*, 46 ENV'T & PLAN. A 2160, 2160–61, 2171 (2014) (explaining how "[t]he city and residents of Chicago absorbed additional fiscal risk" when the city privatized the city's parking meters: "The combination of steep increases to the meter rates, true-up penalties, and higher borrowing costs associated with the lower bond rating constitute a transfer of wealth from the public to the private sector as value flows from city residents into the coffers of global financial investors"); Sawyer Phinney, *The Policing of Black Debt: How the Municipal Bond Market Regulates the Right to Water*, 44 URB. GEO. 1584, 1586 (2023) ("In some cases, this means governance expands the scope of financialized infrastructure regulation beyond the asset itself to encompass 'punitive' activities needed for continuous accumulation of capital.").

[208] Kent Hiteshew & Ivan Ivanov, *Should Every Town and Village Have Unfettered Access to the Municipal Bond Market?*, PROMARKET (May 28, 2024), https://www.promarket.org/2024/05/28/should-every-town-and-village-have-unfettered-access-to-the-municipal-bond-market/.

[209] Christine Cuny, *When Knowledge is Power: Evidence from the Municipal Bond Market*, 65 J. ACCT. & ECON. 109, 109 (2018).

[210] *See* John Hund, Christian Lundblad, Christos A. Makridis & Giang Nguyen, *Rising Investor Sophistication and Declining Profitability in Municipal Bond Underwriting* 3 (Dec. 9, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4867270. However, there is evidence that underwriter profit is decreasing over time. *Id.* at 2, 31 (investigating underwriters' profitability during the period from 2005 through 2023 and finding a "large decline in primary market markups" and noting that "the percentage of profit from these markups for underwriters ha[d] fallen nearly by 50% from 2005 to 2023").

[211] Mikael Omstedt, *Reading Risk: The Practices, Limits and Politics of Municipal Bond Rating*, 52 EPA: ECON. & SPACE 611, 612 (2020).

[212] *See id.* at 612, 627.

[213] WANG, *supra* note 182, at 173.

b. *Market Actors are Incentivized to Facilitate More Debt*

The agents of the municipal bond market all increase profit when more debt is issued. As Richard Schragger points out, the underwriter, financial advisor, bond counsel, and credit rating agency all have "an interest in promoting borrowing, especially in economically flush times."[214] With this dynamic and these incentives, market discipline is an ineffective tool to control municipal debt. When considering the different interests of bond market actors, their respective roles in imposing market discipline are undermined by their separate incentives to profit by promoting borrowing. Undoubtedly, market players also directly influence long-term debt policy decisions—particularly at the state level.[215]

i. *Underwriters*

First, bond underwriters—investment banks like Bank of America, Morgan Stanley, or Wells Fargo—have an interest not just in promoting borrowing, but also an interest in promoting specific types of borrowing. A bond underwriter acts as an intermediary between the issuers and the bondholder–investors by agreeing to directly purchase the bonds in bulk and then sell them to investors.[216] Municipal underwriters organize the bond issuance, market the bonds to appeal to potential bondholder–investors, buy bonds from the states, and then resell them to investors for an initial profit in the primary market.[217]

Here, the underwriter is typically hired by the issuer in a negotiated bond sale.[218] The investment banks underwriting the bond issues primarily profit through the price difference of purchasing and reselling the bond—called an "underwriter's discount."[219] Issuers are further incentivized to provide an increased underwriter's discount to encourage underwriters to "market bonds more broadly" and keep the

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[214] Schragger, *Democracy and Debt*, *supra* note 190, at 871.

[215] This influence may have a bigger impact at the state rather than the municipal level. *Id.* at 874.

[216] Memorandum from the U.S. House of Representatives, Comm. on Fin. Servs. Majority Staff to the Members of the Comm. on Fin. Servs. (Apr. 23, 2021), https://www.congress.gov/117/meeting/house/112526/documents/HHRG-117-BA00-20210428-SD002.pdf.

[217] MUN. SEC. RULEMAKING BD., ROLES AND RESPONSIBILITIES: THE FINANCING TEAM IN AN INITIAL MUNICIPAL BOND OFFERING 3–4 (2018), https://www.msrb.org/sites/default/files/Financing-Team.pdf.

[218] *See id.* at 1. Sometimes it can be a competitive bond sale—usually only if required by law. In the carceral context, it is more often a negotiated sale. *See id.*; *see, e.g.*, Justin Marlowe, *For Muni Bond Sales, Brand Matters*, GOVERNING (July 25, 2018), https://www.governing.com/archive/gov-muni-bond-investor-road-show.html.

[219] CITIGROUP GLOB. MKTS. INC., MUN. SEC. DIV., AN OVERVIEW OF MUNICIPAL FINANCE 37 (2021), https://www.union.edu/sites/default/files/becker-career-center/202104/overview-municipal-finance-feb-2021.pdf.

price of debt low.[220] And, if underwriters know that the original price of a bond is low, they are incentivized to hold the bonds and then sell them for even more profit on the secondary market.[221] Today, underwriter profits are declining, in part because of better market transparency.[222] This may further incentivize underwriters to promote certain types of bond deals which yield higher profits.

Underwriters profit more from bond issues with higher interest costs, such as LRBs as compared with GO bonds. Therefore, underwriters may favor debt structures biased toward higher interest costs.[223] Further, as the supply of municipal debt increases, state-issuers will pay higher interest rates to make their projects more attractive to the limited pool of municipal investors.[224] This dynamic also incentivizes underwriters to promote more borrowing. Additionally, underwriters may favor bonds with longer maturities, as these bonds typically pay higher interest rates than bonds with shorter maturities because of the increased market risk over the longer life of the bond.[225] Taken together, municipal underwriters have significant motivations to favor lengthy, complex, and high-interest debt projects.[226]

Overall, underwriters exert significant power in the market, creating potential adverse effects—particularly for "'issuers in smaller states and in some of the narrower, credit-challenged sectors.'"[227] Issuers with less institutional power can be

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[220] Most of the time, governments are required to obtain the lowest bids, but market actors argue that "more spread can incentivize underwriters to market bonds more broadly and should garner lower yields and better bond pricing." Shruti Singh & Skylar Woodhouse, *Citigroup, UBS Exit Munis After Market's Profits Plummet by 50%*, BLOOMBERG (June 21, 2024, 9:31 AM), https://www.bloomberg.com/news/articles/2024-06-21/citigroup-ubs-exit-munis-after-market-s-profits-plummet-by-50.

[221] Max Theiler, *Muni Bonds: The Price is Not Enough*, FIDERES (Mar. 2, 2018), https://fideres.com/muni-bonds-the-price-is-not-enough/.

[222] Hund et al., *supra* note 210, at 2, 29 (discussing how recent policy changes which heightened disclosure requirements and improved market transparency, paired with increased participation in the bond market from institutional investors, has caused recent, significant change to the municipal bond market).

[223] Daniel G. Garrett, *Conflicts of Interest in Municipal Bond Advising and Underwriting*, 37 REV. FIN. STUD. 3835, 3837 (2024).

[224] *See* discussion *infra* Part III on tax exemption.

[225] MUN. SEC. RULEMAKING BD., FACT SHEET: SEVEN QUESTIONS TO ASK WHEN INVESTING IN MUNICIPAL BONDS (2010) [hereinafter MSRB, SEVEN QUESTIONS] https://www.msrb.org/sites/default/files/msrb1/EMMA/pdfs/SevenQuestionstoAskAboutMunicipalBonds.pdf.

[226] However, it is important to note that when interest rates are expected to rise, shorter duration municipal bonds are favored. *See id.* ("Under such conditions, issuers may find it advantageous to call a bond and reissue identical bonds paying a reduced interest rate in a process known as refunding.").

[227] Joe Mysak, Opinion, *Bond Underwriting Industry Continues to Contract: Muni-Wise*, BLOOMBERG L. NEWS (Apr. 13, 2023, 8:50 PM) (quoting Email from Justin Marlowe, Univ. of

"'easily be taken advantage of—urged to issue needless or poorly structured bonds.'"[228] Even state-issuers, with more market power than municipal-issuers, are often "'pushed to accept high interest rates or duped into paying hundreds of thousands in unreasonable fees.'"[229] Once a relationship is established, issuers typically continue to use the same underwriter in future issues—a choice that often increases issuers' costs significantly.[230] The extent of underwriter influence in the bond market and how bondholder preferences may affect carceral debt are further examined in Section II.3.

ii. Financial Advisors and Bond Counsel

Bond issuers engage financial advisors and hire bond counsel.[231] Both market actors are compensated by issuer-paid fees and often favor more complex bond issuances.[232] First, the financial advisor has a fiduciary duty to the issuer and typically advises issuers regarding the terms of the bond agreements and how to navigate the bond market.[233] Yet advisors are typically looking for predictable revenue streams and long-term relationships with issuers so that they may continue to earn fees from future projects. Here, the advisor generally wants the issuers to be able to take on *more* debt, which may be in conflict with keeping an infrastructure project's costs low.

Chicago's Harris Sch. of Pub. Pol'y to author), https://news.bloomberglaw.com/banking-law/bond-underwriting-industry-continues-to-contract-muni-wise.

[228] Renping Li, *When the Thin Bench Gets Thinner: Investment Bank Consolidation and Municipal Finance* 2 (Jan. 11, 2025) (quoting Sarah Butrymowicz & Nichole Dobo, *Short on Financial Knowledge, Some School Districts Get Bad Deals on Bonds*, HECHINGER REP. (Apr. 22, 2019), https://hechingerreport.org/short-on-financial-knowledge-some-school-districts-get-bad-deals-on-bonds/), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4687748.

[229] *Id.* (quoting Butrymowicz & Dobo, *supra* note 228).

[230] Huaizhi Chen, Lauren Cohen & Weiling Liu, *Calling All Issuers: The Market for Debt Monitoring* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29790, 2022) ("On average, over our sample, an issuer uses the *same* lead underwriter for 87% of its bonds. Moreover, we find that an issuer who remains in the same 'sticky' underwriter relationship at the time their bond becomes unlocked is 7.5 percentage points more likely to delay calling than an issuer who has switched its underwriter since the issuance.").

[231] *See id.* at 5; CAL. DEBT & INV. ADVISORY COMM'N, CALIFORNIA DEBT ISSUANCE PRIMER 3–8 (2005), https://www.treasurer.ca.gov/cdiac/debtpubs/primer.pdf. Large-scale issuers like states are more likely to have internal, in-house advisors. CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 12.

[232] *See Debt Issuance Transaction Costs*, GOV'T FIN. OFFICERS ASS'N (Feb. 28, 2013) [hereinafter GFOA *Debt Issuance Transaction Costs*], https://www.gfoa.org/materials/debt-issuance-transaction-costs.

[233] *See id.*; *Selecting and Managing Underwriters for Negotiated Bond Sales*, GOV'T FIN. OFFICERS ASS'N (Feb. 28, 2014) [hereinafter GFOA *Selecting and Managing Underwriters*], https://www.gfoa.org/materials/selecting-and-managing-underwriters-for-negotiated.

Then, issuers also engage bond counsel. Bond counsel is primarily responsible for providing a legal opinion that: (1) the issuer is authorized to issue the proposed bonds and has met all legal requirements necessary; and (2) that interest payments for the proposed securities will be excluded from gross income tax of the bondholder–investors.[234] While the issuer pays the fees to engage bound counsel, bond counsel is fundamentally protecting the interests of the bondholder–investors in the bond sale.[235] Further, the issuer pays bond counsel more depending on the complexity of the bond issue.[236] Bond counsel may profit more from more complex debt issuances, as they can charge higher fees and secure future relationships with satisfied issuers.

iii. Credit Rating Agencies

Credit rating agencies also profit from working on a higher volume of municipal debt projects. The state-issuer contracts with the credit rating agency to rate the bond, which critics argue may create incentives for the credit rating agency to give distorted ratings in order to garner future business.[237] Critically, credit ratings arguably matter more in the municipal debt market than in other markets, as more bondholder–investors are individual, noninstitutional investors.[238] Thus, the municipal bond market may be more reliant on ratings agencies than the corporate bond market, which has more investors with independent methods to evaluate projects.[239] This dynamic conflicts with rating agencies' incentive to create lasting relationships with issuers so that they continue to receive contracts.[240]

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[234] *Types of Legal Counsel*, GOV'T FIN. OFFICERS ASS'N (Sept. 28, 2018), https://www.gfoa.org/materials/types-of-legal-counsel; CAL. DEBT & INV. ADVISORY COMM'N, *supra* note 231, at 5–6.

[235] CAL. DEBT & INV. ADVISORY COMM'N, *supra* note 231, at 5 (outlining how the need for bond counsel emerged "in the second half of the 19th century when a number of issuers of railroad bonds disclaimed liability on their bonds on the basis of their own errors"); *see also* Thomas Spigolon, *Bond Counsel Law Firms See Mixed Results in 2023*, BLOOMBERG L.: DAILY REP. ONLINE (Nov. 10, 2023), https://www.bloomberglaw.com/document/X8EJK89G000000?jcsearch=hdh45egeemf#jcite (noting that, even during a poor performing period, the top 50 municipal bond counseling firms were still counsel on $266.3 billion in bond financing over three-quarters of 2023).

[236] *See* GFOA *Debt Issuance Transaction Costs*, *supra* note 232.

[237] Cezary Podkul & Gunjan Banerji, *Inflated Bond Ratings Helped Spur the Financial Crisis. They're Back.*, WALL ST. J. (Aug. 7, 2019, 12:22 PM) https://www.wsj.com/articles/inflated-bond-ratings-helped-spur-the-financial-crisis-theyre-back-11565194951.

[238] *See* Jason Hackworth, *Local Autonomy, Bond-Rating Agencies and Neoliberal Urbanism in the United States*, 26 INT'L J. URB. & REG'L RSCH. 707, 710 (2002); BAGLEY ET AL., *supra* note 87, at 6–7.

[239] *See* Hackworth, *supra* note 238, at 708, 710, 716.

[240] *See id.* at 719; Podkul & Banerji, *supra* note 237.

Overall, evidence shows that market players—in line with their interests in promoting borrowing—are more focused on the market in the short term.[241] This short-term orientation is confirmed by how the market responds to municipal default—often allowing issuers back into the market surprisingly quickly following payment default.[242] Still, some will argue that the market's interest is in creditworthy bonds, and this will ultimately produce positive government-issuer behavior, such as not overly investing resources in carceral projects beyond a rational amount. Bondholder–investors should want to limit excessive state spending and promote healthy debt markets—otherwise, it is less likely that their debt will be repaid. But the short-term interests of the market undermine this theory. Market players are incentivized to care more about short-term yields, with less consideration for the long-term health of the municipal debt market.[243] As debt repayment has become more and more apolitical, bondholder–investors are confident that they will be repaid—even if it requires budget cuts in other areas.[244] Thus, actors prioritize immediate profits—particularly through creating more complex, higher interest bond issues.[245]

3. *There is no Market Discipline for Carceral Debt*

For the reasons argued above, market discipline is ineffective at controlling states' carceral debt. This Section surveys some of the market dynamics that incentivize carceral debt and shows how these dynamics distort market constraints.

a. *Carceral Bonds are Priced as Safe Investments*

The bond market's risk-averse preferences and idiosyncrasies affect the types of projects that can access affordable financing via municipal bonds.[246] The market incentivizes the issuance of bonds for carceral infrastructure over other projects

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241 Schragger, *Democracy and Debt*, *supra* note 190, at 871 ("The short-term interests of market makers may also explain why cities and states can often return to the credit markets even after a default.").

242 *Id.* at 871, 874.

243 *See id.* at 871–73.

244 Taylor, *supra* note 33 (discussing bondholder supremacy and how "bondholders have great confidence that democracy won't interfere with their repayment; they feel that democracy was something for city officials to worry about").

245 *See* Chung, *supra* note 31, at 1458–60, 1523 (outlining how "[e]ven smaller issuers now use complex, highly customized financing structures and products such as interest rate swaps," and how "[p]ublic officials' incentive to consider the possibility of short-term savings but not long-term risks contributes to the possibility of harm").

246 *See* James Chen, *Revenue Bond: Definition, Types, and Examples*, INVESTOPEDIA, https://www.investopedia.com/terms/r/revenuebond.asp (Feb. 27, 2021) (discussing how public schools cannot issue LRBs as they are run entirely on tax dollars and do not generate their own revenue to repay the bond).

because state prison construction bonds are deemed "safe" debt that can attract investors.[247]

Revenue bonds—the dominant method used for prison construction financing—are rated based on the "feasibility of the project being financed" and the creditworthiness of the issuer.[248] By pricing debt according to a project's perceived risk of default, the bond market should stop states from incurring unsustainable, irrational debt levels that could ultimately lead to spending or service cuts. However, the market has failed to quell irrational carceral debt—in part by marketing carceral debt as akin to critical state infrastructure projects like state water, sewer, and utility services.[249] Bondholder–investors are advised to consider "the essentiality of the project" to evaluate the risk that a state will not appropriate funds for prison lease payments during tough times.[250] For example, during Puerto Rico's municipal debt crisis, it only made debt service payments for "essential" services.[251]

For bondholder–investors evaluating the risks of carceral debt, carceral expansion is an essential service. For these investors, the worst-case scenario would be a "state slashing its corrections budget" because of "how that may impact an investor's debt holdings into prison bonds."[252] In that situation, bondholder–investors ultimately believe that even in tough fiscal times, governments will prioritize paying back debt related to prison leases. According to one Forbes analyst, "[a]ny state that would stop making lease payments on its correctional facility bonds and set incarcerated offenders out on the streets would have some explaining to do. The stakes are too high for society to permit such default. We think the risk is minimal for prison bonds."[253]

Marketing prison construction bonds as such "safe" investments contributes to the availability of financing. It is easier to secure financing to construct prisons than to raise funds for incarcerated people's medical care, improve guard retention, or significantly increase reentry supports.[254] This dynamic creates perverse incentives for state-issuers to issue carceral bonds to finance capital costs—sometimes seeking to free up other areas of state carceral budgets. State-issuers do not hide that they

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[247] Anderson, *supra* note 57.

[248] True Tamplin, *Revenue Bonds*, FIN. STRATEGISTS, https://www.financestrategists.com/wealth-management/bonds/revenue-bonds/ (Sept. 1, 2023).

[249] *See* Anderson, *supra* note 57 (noting that "[t]he stakes are too high for society to permit such default" when discussing carceral bonds).

[250] CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 12.

[251] J.D. Ho, *Puerto Rico's Debt Crisis: Overview*, EBSCO (2021), https://www.ebsco.com/research-starters/politics-and-government/puerto-ricos-debt-crisis-overview.

[252] Jayden Sangha, *Criminal Justice Reform in the United States*, MUNICIPALBONDS.COM (May 29, 2019), https://www.municipalbonds.com/education/criminal-justice-reform-an-attractive-political-soundbite/.

[253] Anderson, *supra* note 57.

[254] *See* Littman, *supra* note 69, at 1471–72.

sometimes issue debt for carceral capital costs because that is what is available—not what is necessarily most needed to improve state prison systems.[255] Sawyer Phinney argues that the municipal bond market acts to reinforce racial inequality and uneven racialized development by assigning creditworthiness to white communities.[256] Similarly, the municipal bond market assigns creditworthiness to carceral projects based on the idea that prisons are more essential than other public goods, such as schools.[257]

The easy availability of financing for carceral projects forecloses the possibility of decarceration. In the past, when unable to sustain the costs of carceral facilities, states would use centralized systems to increase the pace of prison releases and reduce prison overcrowding.[258] However, today, the easier access to carceral capital influences how states respond to the constant crisis in U.S. prisons and U.S. prison infrastructure.

b. Bond Market Power in Bond Covenants

To make carceral bonds attractive to the bond market, states and their financing authorities make concessions within the bonds' legal covenants which gives power to the bond market. Underwriters and other market actors often use their power to make bond agreements more attractive to bondholder–investors.[259] As pricing is the primary mechanism for bond market actors to impose "discipline" on state and municipal borrowers, issuers often agree to unfavorable concessions in their bond covenants to reduce perceived "risk" and lower the borrowing costs.[260] These terms often favor bondholder–investors, assigning them outsized power in

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[255] *See, e.g.*, Ralph Chapoco, *Alabama Lawmakers Appear to Accept New $1 Billion Price Tag for Elmore County Prison*, ALA. REFLECTOR (Mar. 17, 2023, 12:09 PM), https://alabamareflector.com/2023/03/17/alabama-lawmakers-appear-to-accept-new-1-billion-price-tag-for-elmore-county-prison/. For instance, funding for medical costs or compensation for guards in prison systems is sometimes the most essential, and yet the most overlooked. A stark example comes from Alabama, when one state legislator said, "You can't pay for salaries with a bond issue. . . . I keep hearing that we could use this money in a better way. Not this money. The only way you can use bond money is for one-time construction." Chip Brownlee, *Tuesday Committee Vote to Decide Future of Prison Construction Plan*, ALA. POL. REP., https://www.alreporter.com/2017/05/16/tuesday-committee-vote-decide-future-prison-construction-plan/ (May 17, 2017, 5:49 AM).

[256] Phinney, *supra* note 207, at 1585.

[257] *Id.* at 1587; *see also* Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 930 (2021) ("For much of American history, jails were seen by courts and legislatures as elements of local governance so essential that they warranted special exemption from fiscal limitations.").

[258] *See* Jonathan Simon, *The New Overcrowding*, 48 CONN. L. REV. 1191, 1195 (2016).

[259] *See* GFOA *Selecting and Managing Underwriters*, *supra* note 233; CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 11–14.

[260] *See* Adam Hayes, *Bond Covenant: Definition, Example, Affirmitive Vs. Negative*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bond-covenant.asp (May 17, 2022).

the agreements and extra security that the debt will be repaid. As a result, once the bonds are issued, it becomes difficult for the state to make any changes to the agreement or respond to democratic pressures.

In a negotiated bond sale—again, more common for carceral, non-general obligation debt—an underwriter is selected to purchase the bonds and will then market and sell the bonds to bondholder–investors.[261] The underwriter is involved early in the process to tailor the terms of the bonds to "meet the demands of the underwriter's investor clients, as well as the needs of the issuer."[262] The underwriter's sales and marketing role becomes more important in negotiated sales.[263] The underwriter often has more involvement in the terms of the bonds than the constituents, and underwriters typically favor negotiated sales.[264]

At this early stage—without any public process—issuers can consult with underwriters and advisors to add additional terms that favor the investors. For example, because LRBs have less security than GO bonds, to make the bonds more attractive to investors, issuers will sometimes cross-collateralize and link all state building leases.[265] In other words, if the state defaults on the lease payments for one building, creditors can take another state building as collateral.[266] As an additional example, issuers can include non-substitution clauses in the agreements, meaning that the state government may not contract with any other entity to build another facility if a state legislature fails to appropriate funds to pay the lease obligation.[267] Issuers have also further reduced investor risk by strengthening non-appropriation clauses in LRB agreements by including, for example, a "stipulat[ion] that the government unit will not cancel the contract for convenience, for unsatisfactory performance by the facility, for lack of need for the facility, or for any reason other than non-appropriation of funds by the legislature."[268] In other instances, issuers

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[261] WM Financial Strategies, *Bond Sale Methods (Competitive vs. Negotiated Bond Sales)*, MUNIBONDADVISOR, https://www.munibondadvisor.com/SaleChoice.htm (last visited Aug. 24, 2025).

[262] *Id.*; PMA SEC., LLC, UNDERSTANDING MUNICIPAL BONDS: HOW MUNICIPAL BONDS ARE SOLD IN A PUBLIC OFFERING (2020), https://www.pmanetwork.com/wp-content/uploads/2020/06/Muni-Bonds-101_2020_06Jun.pdf (describing benefits of negotiated sales for underwriters); CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 11–15.

[263] *See* GFOA *Selecting and Managing Underwriters*, *supra* note 233.

[264] *See Pricing Bonds in a Negotiated Sale*, GOV'T FIN. OFFICERS ASS'N (Mar. 4, 2022), https://www.gfoa.org/materials/selecting-and-managing-underwriters-for-negotiated.

[265] *See, e.g.*, UTAH FOUND., THE ROLE OF BONDS IN UTAH: A GUIDE TO UTAH BONDING AND ITS BENEFITS AND LIMITATIONS 3–4 (2014), https://www.utahfoundation.org/wp-content/uploads/rr724.pdf.

[266] *Id.*

[267] CHAIKEN & MENNEMEYER, *supra* note 129, at 6.

[268] *Id.*

will attempt to make carceral bonds more attractive by emphasizing that the leased land and projects can be repurposed for future private use.[269]

Arguably, bonds' refunding provisions are an area where issuers have relative power over bondholder–investors.[270] Nearly 95% of long-term municipal debt is callable—meaning that the issuer can refund the money, pay off the debt, and terminate existing legal covenants.[271] Callable bonds permit the issuer to repay the bond prior to its maturity (i.e., "call back" the bond from the bondholder–investor) at a specified price.[272] Since 2017, if an issuer recalls a bond before the typical ten-year "call" period, the interest will no longer be tax-exempt.[273] Therefore, current refundings, or refunding bonds no more than 90 days prior to the call date (typically ten years after issue), are favored.[274]

Often, call provisions are used by issuers to take advantage of changes in interest rates.[275] Counterintuitively, however, refunding a bond typically costs the issuer and is not economically advantageous.[276] Largely, issuers lose money when refunding bonds because of inefficient decisions about when to exercise bonds' call

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[269] *Id.* at 8 ("While this may seem improbable in the case of prisons and jails, in fact some minimum security facilities can be so located and designed that they would be suitable office buildings. Further, land or adjacent property can be included along with the prison or jail facility in the lease-purchase contract. The land alone, even if the facility were to be demolished, could equal in value the amount of the investment by bondholders."); *see also supra* Section I.B.2.b (regarding youth facilities in NJ).

[270] *See* CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 18–23 ("[T]he issuer has to balance whether to seize the 'bird in the hand' and do the advance refunding or wait until the bonds are callable and hope that similar savings can be achieved."); *see generally* Chen et al., *supra* note 230 (exploring the relative efficiency or inefficiency of certain refunding decisions made by government bodies with callable bonds). However, the issuer is ultimately paying for the call provision, which gets included in the price of the bond. CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 19 ("Since the issuer is basically 'buying a call option' from the buyer of a bond, the additional flexibility of being able to call the bond costs the issuer.").

[271] Chen et al., *supra* note 230, at 1; *see* CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 19.

[272] *See, e.g.*, NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 7.

[273] *Refunding Municipal Bonds*, GOV'T FIN. OFFICERS ASS'N (Mar. 8, 2019) [hereinafter GFOA *Refunding Municipal Bonds*], https://www.gfoa.org/materials/refunding-municipal-bonds.

[274] *See* INTERNAL REVENUE SERV., INTERNAL REVENUE BULLETIN NO. 2019-24, NOTICE 2019-39 § 2.

[275] GFOA *Refunding Municipal Bonds*, *supra* note 273 ("Generally, when enough time passes and the call date approaches, the government will assess current market rates at that time, and if current market rates are below the interest rates on the outstanding bonds, the government can issue refunding bonds at a lower interest rate and realize debt service savings."). *But see* Chen et al., *supra* note 230, at 7, 11, 26–27 (discussing how "municipals' sub-optimal exercise of their bonds' call options" is an inefficient practice and often causes the issuers to lose money, while advance refunding results in the opposite).

[276] *See* Chen et al., *supra* note 230, at 26–27.

options.[277] Noneconomic or political refundings are possible but rarely used by issuers.[278] While issuers can "remove or revise burdensome bond covenants" by refunding a bond in theory, there are typically substantial additional costs for an issuer to refund a bond specifically to eliminate certain contract conditions.[279] Amending the bond instrument to change fundamentals—like where the facility is located—is also burdensome and requires the approval of the trustee representing the bondholder–investors.[280]

Once the bonds are issued—often with little public process—it becomes incredibly difficult to wind back the clock of the carceral project. This reality was recognized with the youth prison bonds in New Jersey. In 2018, the state appointed a Youth Justice Task Force to advise the state on "strategies for continuing the reform of the state's youth justice system."[281] In a report of its findings, the Task Force acknowledged the need to establish "smaller, more therapeutic secure facilities," but noted that the state was unable or unwilling to roll back the clock on the bond instruments.[282] When the Task Force inquired about what requirements were present in the bond agreements, the state responded:

> In order to change these [prison] locations or to add a site, the bonds would need to go through a cumbersome amendment and approval process. It was further determined that the existing bond funding can only be used for the construction of replacement facilities and cannot be diverted for community programming. In other words, any savings realized by spending less than the full bond amount could not be used to fund community-based alternatives.[283]

This and similar carceral bond agreements typically offer few, burdensome routes to exit agreements early.[284] Like most lease-revenue agreements with 30-year terms, the New Jersey authority has a "call" option to redeem the bond agreement, or pay it back early, after ten years.[285] If the NJEDA exits the agreement before the

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[277] *Id.* at 26–27 ("We calculate that roughly $1.38 billion dollars per year are lost by public issuers by delaying the exercise of their early redemptions, totaling over $26 billion dollars lost between 2001 and 2018 even after accounting for the costs of issuance and other transaction costs.").

[278] *See* GFOA *Refunding Municipal Bonds*, *supra* note 273.

[279] *See id.*

[280] *See Bond Indenture Explained: Key Terms, Covenants & Obligations*, UPCOUNSEL, https://www.upcounsel.com/bond-indenture-agreement (May 21, 2025); *see also* GFOA *Debt Issuance Transaction Costs*, *supra* note 232 (addressing the role of bond trustees in bond transactions).

[281] N.J. YOUTH JUSTICE TASK FORCE REPORT, *supra* note 13, at 1.

[282] *Id.* at 12–13.

[283] *Id.* at 13.

[284] *See, e.g.*, NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, app. II, at 66–70 (listing the amendment procedures of the bond agreement).

[285] *Id.* at 7.

ten-year mark, the issuer will need to pay a premium and the bonds will lose their tax-exempt status.[286] The earlier the issuer NJEDA attempts to redeem the bonds, the higher the premium required to pay the bonds back early.[287] By the ten-year mark, the NJEDA will have already spent over $100 million in debt payments for the prisons—even if nothing has been built.[288]

In practical terms—absent a decline in interest rates or change in issuer credit ratings—utilizing the call option at the ten-year mark will most likely not make sound financial sense for the issuing authorities.[289] To call the bond for non-interest rate reasons—like community uproar about the youth prisons—costs the issuer significantly.[290] Further, because there are so many sunk costs that will have accrued by the ten-year call date, it is unlikely to make economic sense (even when interest rates change favorably). There may also be possible long-term market costs when redeeming bonds for political reasons. Such decisions may reflect poorly on the issuer and affect future borrowing costs.[291] Some may argue that the call provision gives NJEDA power in the agreement, as the issuer still *can* exit. However, in almost every circumstance, authorities will only use a call mechanism to reduce costs when interest rates rise.[292] It would not be economically wise for New Jersey to exercise its call option if it waits until the ten-year call period to redeem the bond. In addition to the millions already paid, the NJEDA—through appropriations from the state—will have paid significant costs associated with a negotiated sale. The state—through

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[286] *See* Chen et al., *supra* note 230, at 11 n.10 ("While municipal bonds can still be advance refunded into taxable bonds, these are less attractive to some investors given their less favorable tax treatment following the 2017 Act, and thus, less attractive to municipals as well."); *Bond Basics: Optional Redemption*, NABL, https://www.nabl.org/bond-basics/official-redemption/ (last visited Aug. 24, 2025) ("There may be a negotiated Premium for an Optional Redemption.").

[287] *Bond Basics: Optional Redemption*, *supra* note 286.

[288] *See* NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 16.

[289] *See* GFOA *Refunding Municipal Bonds*, *supra* note 273 ("Debt policies should also contemplate when a government will consider a refunding whose primary purpose is not debt service savings. Governments will sometimes pursue refundings to eliminate restrictive bond/legal covenants, restructure the stream of debt service payments, or achieve other policy objectives. In such cases, GFOA recommends that the policy objectives and benefits, along with any economic loss of the refunding, should be clearly understood and articulated to all stakeholders, as well as how such a decision fits into a long-term financial plan.").

[290] *See supra* notes 278–80 and accompanying text; *see also Sovereign Default: Definition, Causes, Consequences, and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sovereign-default.asp (July 30, 2025).

[291] *Sovereign Default: Definition, Causes, Consequences, and Example*, *supra* note 290.

[292] MSRB, SEVEN QUESTIONS, *supra* note 225 ("Bonds are most commonly called because the bond is paying a higher interest rate than current market rates."); *see Valuing Callable Municipal Bonds*, PIMCO, https://www.pimco.com/us/en/resources/education/valuing-callable-municipal-bonds (last visited Aug. 24, 2025).

the authority—will have paid fees for its bond counsel, ratings agency, and underwriter.[293]

Most carceral bond agreements err toward the market preferences of underwriters, both in terms of type of issue and length of issue.[294] Lease-revenue carceral bonds have higher interest and transaction costs—favored by underwriters because these characteristics should increase profits.[295] Further, the majority of LRBs mature after 30 years—another preference of underwriters.[296]

Some may question why state-issuers would agree to unfavorable terms or make hasty initial decisions about the projects that cannot be walked back. However, when establishing the bond terms, state-issuers are making decisions about the future. State-issuers are more likely to make voluntary bargains that leave them worse off in this context because—just like in general contract theory—people are poor predictors of future events and poor predictors of future preferences.[297] Market actors advise issuers on how to keep borrowing costs low—often with implications for democracy.[298] By prioritizing low borrowing costs, long-term carceral decision making occurs in backrooms with few checks on prison administrators' preferences for carceral expansion.

c. For Market Discipline to Work, There Must be Political Pressure

Further, for the market to impose discipline, there must be political consequences if states issue unsustainable levels of debt. With limited revenues, if states prioritize debt repayment over services for constituents—especially during tight fiscal conditions—there should be constituent response. However, the nature of carceral debt makes this less likely.

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[293] NJEDA 2018 STATEMENT ON STATE LRBS, *supra* note 9, at 17 (detailing the various costs of the NJEDA's bond purchases); *see also* GFOA *Debt Issuance Transaction Costs*, *supra* note 232 (discussing how "certain costs are embedded within the bids received from underwriters in a competitive sale"); Theiler, *supra* note 221 ("[O]ur work and other studies have shown that negotiated sale prices are more mispriced than competitive.").

[294] Theiler, *supra* note 221; *see also* GFOA *Debt Issuance Transaction Costs*, *supra* note 232.

[295] *See* Schragger, *Democracy and Debt*, *supra* note 190, at 871; *see also* Chen et al., *supra* note 230, at 11 (discussing how issuers are "attentive to interest rates and seek to benefit from reduced cash outflows").

[296] MSRB, SEVEN QUESTIONS, *supra* note 225 (discussing how bonds with longer maturities pay higher interest rates); CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 7 (detailing that there is "strong market demand for 30-year and longer maturities").

[297] *See generally* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?* (John M. Olin L. & Econ., Working Paper No. 146, 2002) (exploring the "limits on foreseeability and other cognitive restrictions" in the contracting process).

[298] *See* Schragger, *Democracy and Debt*, *supra* note 190, at 874–75 (discussing how heightened borrowing costs can eat into provisions for public services and cause officials to pay a "political price," especially if the debt causes a bankruptcy, which would embarrass public officials).

First, states' municipal debt payments are distributed over large populations, and typically over 20- to 30-year periods.[299] Thus, the average constituent's marginal tax increase due to carceral expansion is unlikely to spark immediate political pushback.[300] The abstraction of carceral debt at the state level also lends to accountability problems. With so much state-level debt issued through public authorities run by appointed members, there is a less clear connection as to which party is responsible for the unpopular carceral project. Additionally, state officials are making decisions about how future communities' resources will be used. It is often future politicians who will be forced to take political accountability for debt incurred by politicians from the past.[301] For example, while lame duck New Jersey Governor Chris Christie issued the $160 million youth prison bonds, it was his successor, Governor Phil Murphy, who received more significant scrutiny about the costs of the project.[302] Years after the debt was initially issued, this political pushback occurred at a point where it will cost significantly more money to abandon the project.[303]

Taken together, the pricing distortions of carceral debt, the relative power of bond market agents in securing bond covenants, and the lack of political accountability all contribute to why the market is particularly poor at controlling states' carceral debt. While the bond market sees itself as an apolitical agent simply facilitating states' demand for prisons, this vision refuses to recognize the bond market's influence on the types of projects that can access affordable financing.

B. Democratic Constraints

1. Fiscal Constitutions and States' Municipal Debt

States also use constitutional debt limits, state referenda requirements, and anti-taxation balanced budget requirements to control municipal bond debt. This Section explores why these democratic mechanisms—comprising states' fiscal constitutions—are unable to control states' contemporary carceral debt.

With little fiscal flexibility and few mechanisms to discharge liabilities, states rely heavily on debt financing to provide essential services to communities.[304] States'

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299 Schragger, *Democracy and Debt*, *supra* note 190, at 875; CITIGROUP GLOB. MKTS. INC., *supra* note 219, at 7 (discussing typical term lengths of long-term bonds and emphasizing the market demand for longer-term bonds).

300 Schragger, *Democracy and Debt*, *supra* note 190, at 875.

301 *Id.*

302 Dana Difilippo, *Jail's Roof Repair a Reminder of N.J.'s Stalled Reforms on Youth Incarceration*, N.J. MONITOR (Mar. 16, 2022, 7:09 AM), https://newjerseymonitor.com/2022/03/16/jails-roof-repair-a-reminder-of-n-j-s-stalled-reforms-on-youth-incarceration/.

303 *Id.*

304 Steven Malanga, *The Indebted States of America*, CITY J. (2013), https://www.city-journal.org/article/the-indebted-states-of-america.

fiscal capacities and constraints have huge effects on people's daily lives—from how people get to work to the quality of their children's schools. Nineteenth- and twentieth-century reforms sought to limit excessive use of the municipal debt market primarily through democratic checks.[305] These reforms are ineffective at controlling contemporary carceral municipal bond debt, in part, because they incentivize states to use "non-debt debt" that evades public scrutiny. Non-debt debt describes bonds designed to avoid legal restrictions on borrowing—often relying on markets to create increasingly financialized debt.[306]

Traditionally, states have struggled to garner widespread voter approval for the costs of carceral expansion.[307] Many states thus prefer to finance carceral projects using non-debt debt instruments to avoid legal borrowing limitations and to avoid public scrutiny.[308] For example, lease-revenue debt, one of the primary non-debt debt instruments used by states to expand carceral capacity, is not counted against a state's debt limit.[309] This non-debt debt ultimately has less democratic process than envisioned by the reformers trying to ensure that states did not spend beyond their means. Today, there is a distinct disconnect between what state constitutions say about limitations on municipal debt and how states behave.[310]

a. Debt Limits

Nineteenth-century democratic reforms sought to use public voice to limit how private interests profited from public resources.[311] States used public bonds to borrow on behalf of private industry; however, communities were ultimately left to pay for the often unfinished projects.[312] Leading up to the 1840s, northern and midwestern states used municipal bond debt to build large-scale transportation projects, such as canal or railroad systems, with foreigners holding a substantial amount of the debt.[313] By issuing debt to facilitate private interests building railroads, northern and midwestern states thought that the increased transportation

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305 *Id.* ("Over a 15-year period, 19 states wrote debt limitations into their constitutions.").

306 *Id.* (citing Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 918 (2003) ("[S]timulated in part by the desire to avoid the substantive caps and voter approval requirements of the state constitutions, states and localities have developed financial instruments, what I refer to as 'non-debt debts.'")).

307 *See* discussion *supra* Section I.B.1.a.

308 Schragger, *Democracy and Debt*, *supra* note 190, at 869–70; Sangha, *supra* note 252.

309 *See* KORI DONALDSON, COLO. LEGIS. COUNCIL STAFF, ISSUE BRIEF: CERTIFICATES OF PARTICIPATION, Colo. Legis. Council 15-11, at 1 (2015).

310 Briffault, *supra* note 306, at 909.

311 Schragger, *Democracy and Debt*, *supra* note 190, at 867.

312 Briffault, *supra* note 306, at 912–13 (describing how state courts expanded the definition of "public purpose" in order to "counteract the economic effects of the Great Depression").

313 English, *supra* note 181, at 261–62; CHRISTOPHER SHORTELL, RIGHTS, REMEDIES, AND THE IMPACT OF STATE SOVEREIGN IMMUNITY 58–62 (Robert J. Spitzer ed., 2008).

infrastructure would boost the economy and it would be easy to pay back the debt.[314] When economic conditions changed, private investors could not complete the railroad and canal projects.[315] The expected windfall of revenues never came, and there was not enough revenue to pay back the debt service.[316] Communities were left to pay for the failed projects; facing raised taxes and long-term economic and political consequences, many states repudiated the debts.[317] When bondholders sued state governments for payment, some state courts sided with the bondholders; however, even with these rulings in place, bondholders often could not recoup their money.[318] Following these widespread state defaults on municipal debt in the 1840s, states responded by imposing constitutional debt limits in an attempt to stop market actors from profiting during speculative booms in the railroad, canal, and turnpike industries as states expanded westward.[319]

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314 *See* English, *supra* note 181, at 261–65 (discussing how multiple states saw the benefits New York attained through the construction of the Erie Canal and wanted to emulate that success in their own large-scale infrastructure projects; however, many states borrowed heavily to fund these projects and were unable to complete them, causing them to default on that debt); Alison R. Buccola & Vincent S.J. Buccola, *The Municipal Bond Cases Revisited*, 94 AM. BANKR. L.J. 591, 598 (2020) (outlining the economic benefits midwestern states anticipated achieving through investing in railroad construction during this period, including increasing the value of farmland and "bring[ing] a wider variety of manufactured goods to market"); SHORTELL, *supra* note 313, at 58–62.

315 English, *supra* note 181, at 261–62; SHORTELL, *supra* note 313, at 58–59.

316 Between 1841 and 1843, nine states defaulted on municipal bond debt. English, *supra* note 181, at 265 (showing states that defaulted temporarily or whose debts were repudiated in the early 1840s); SHORTELL, *supra* note 313, at 59.

317 Buccola & Buccola, *supra* note 314, at 599 (noting that when states defaulted, "[l]ocal governments took up the slack"); SHORTELL, *supra* note 313, at 72–73, 77–82 (discussing state court cases where bondholders sued state governments following repudiations of this debt, as well as the economic and political effects felt by the states after their repudiations); Briffault, *supra* note 306, at 917 (outlining the "wave of tax increases adopted to pay off the state debts" following the defaults in the early 1940s).

318 Only three cases were brought to court in response to these defaults, all in state courts. According to Christopher Shortell, "the doctrine of sovereign immunity played a decisive role in the inability of bondholders to recoup their losses" because sovereign immunity prevented federal cases against the state governments and limited the ability of the state courts to enforce rulings against the state governments. SHORTELL, *supra* note 313, at 67, 69–70, 72–73, 76–77; *but see* Buccola & Buccola, *supra* note 314, at 603–04 ("[T]he standard account rests on three mutually supportive propositions about the cases that are assumed rather than proved to be true. *First*, the federal and state courts were locked in regional or class conflict, almost in a battle, the state courts stretching to find bonds invalid and the federal courts reflexively upholding and enforcing them."). While courts could not necessarily order bondholders' repayment, defaulting states' "reputations in credit markets" were damaged and these states faced "loss of access to new loans." English, *supra* note 181, at 268.

319 *See* Briffault, *supra* note 306, at 911–12; SHORTELL, *supra* note 313, at 80–81. Some of these constitutional changes also limited where public resources could be put and gave courts an

In the southern states, there was a different pathology of municipal debt crisis that affected how states attempted to constrain municipal debt. Southern states had raised money to create and expand state banks by issuing municipal bonds for local banks to sell to raise capital.[320] Because enslaved Black people were considered property and treated as securitized, taxable assets, some revenue extracted through the labor of enslaved Black people was used to repay bondholders.[321] As Claudio Saunt demonstrates, these state banks then used dispossessed native land to raise more capital, which expanded and increased the profits of chattel slavery.[322]

By the early 1840s, nine states had defaulted on municipal bond debt.[323] To repay the high debts, states imposed unpopular tax increases which provoked widespread political pressure.[324] These abuses of the municipal bond market inspired states to further amend their state constitutions: "By 1851, six of the nine defaulting states had called constitutional conventions to draft new restrictions on state borrowing."[325] Ultimately, by 1860, nineteen states had implemented constitutional debt limits, seeking to force state governments to act within their means.[326]

These debt limits have varying degrees of efficacy at controlling state debt. Notably, most southern states during the Reconstruction period had debt limits that still proved to be ineffective.[327] During and immediately after the Civil War,

"enforcing" role. Briffault, *supra* note 306, at 911–12 ("State constitutions were amended to require that state spending or lending be for a public purpose; to bar the gift of loan of state credit except for a public purpose; and to ban direct state investment in business corporation obligations."); SHORTELL, *supra* note 313, at 81 ("[F]ive states adopted provisions granting authority to state courts rather than legislatures to consider claims against the state.").

320 *See* Caroline Sage Ponder, The Life and Debt of Great American Cities: Urban Reproduction in the Time of Financialization 69 (Sept. 2017) (Ph.D. dissertation, University of British Columbia) (on file with University of British Columbia) ("Over the same three years that American cotton production (1833–1836) doubled in size, financialization worked to bring more than 150,000 enslaved laborers to the Mississippi Delta from the east coast. Historian Ira Berlin (2010) refers to this period of forced internal migration (roughly 40 years in total) as the 'second middle passage', its tragic violence mirroring the harrowing experience of the original Middle Passage, the transatlantic voyage from West Africa to North America. Permanently separated from their families back east, hundreds of thousands of enslaved people were [brought] into the area over the middle decades of the nineteenth century using joint-stock banking investment funds sourced from most of the world's major financial centers. . . ." (footnotes omitted)).

321 *See* Edward E. Baptist, *Toxic Debt, Liar Loans, and Securitized Human Beings: The Panic of 1837 and the Fate of Slavery*, COMMONPLACE: THE J. OF EARLY AM. LIFE (Apr. 2010), https://commonplace.online/article/toxic-debt-liar-loans/.

322 Saunt, *supra* note 16, at 315, 317.

323 *See supra* note 316.

324 Briffault, *supra* note 306, at 917.

325 Felipe Ford Cole, *Unshackling Cities*, 90 U. CHI. L. REV. 1365, 1389 (2023).

326 Before 1840, no state had debt limitations in their constitution. Briffault, *supra* note 306, at 917.

327 *Id.*; Sterk & Goldman, *supra* note 111, at 1311.

southern states faced major expenditures—including rebuilding prisons, railroads, and bridge infrastructure destroyed during the Civil War.[328] Without pre-War revenues akin to the capital generated by enslaving Black people through chattel slavery and extracting labor, Reconstruction states borrowed massive amounts via municipal bonds. This time, courts responded to the debtors differently than they had to the railroad borrowers in northern states. When post-Reconstruction southern states did not want to repay the debt, they pursued repudiation.[329] In part relying on inaccurate narratives that the southern debt had been incurred due to profligate state spending by "carpetbagger" governments, the Supreme Court eventually allowed these southern states to repudiate their debt.[330]

Today, more than three-fourths of states have constitutional debt limitations of differing scopes.[331] These largely procedural restrictions on state borrowing include: requiring legislators to specify a single project for funding, requiring legislators to assign specific revenue streams to fund new debts, or requiring voter approval for debts of a certain level.[332] These state constitutional debt limits also have a downstream effect, which can force governments to take on more responsibilities, further encouraging more local debt.[333] Ultimately, these democratic checks were more efficient at controlling traditional bond debt—including that from GO bonds—but did not imagine how more financialized, contemporary debt instruments could circumvent this framework.[334]

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[328] *See* Sterk & Goldman, *supra* note 111, at 1310.

[329] *Id.* at 1310–12.

[330] *Id.* at 1311; Hans v. Louisiana, 134 U.S. 1, 9, 13, 20–21 (1890) (expanding the 11th Amendment to dismiss a Louisiana citizen–bondholder's suit against his own state when Louisiana repudiated its bonds in violation of the Contracts Clause); *see also* Jenkins, *Ghosts of the Past*, *supra* note 22, at 202 ("Reconstruction debts were illegitimate; the extension of suffrage to Negroes, 'who had no conception of law, no tradition of organized government, and who had acquired in their relatively brief contact with white people no knowledge of government and no capacity for participation in it,' had made it so." (quoting J.G. de Roulhac Hamilton, *Those Southern Repudiated Bonds*, 3 VA. Q. REV. 490, 498 (1927)).

[331] Sterk & Goldman, *supra* note 111, at 1315 (noting that some states limit debt by amount, some require public referendum, some require a legislative supermajority, and still others require a combination of these).

[332] *See id.* at 1361–64 (discussing various state constitutions' debt limitation amendments).

[333] This ultimately led to strong municipal debt limitations in state constitutions. *See* Gelpcke. v. City of Dubuque, 68 U.S. (1 Wall.) 175, 176, 203 (1863). *See also* SHORTELL, *supra* note 313, at 81–82 ("[C]onstitutional debt limitations result in 'devolution' of debt to municipalities. . . . Where states are unable to respond to citizen demands, citizens may turn to another government, either local or national.").

[334] Micah Johnson, The Effect of State-Level Constitutional Debt Limitations on the Costs of Capital 30–31 (Aug. 16, 2019) (Graduate Capstone Project, James W. Martin School of Public Policy & Administration) (on file with University of Kentucky's Institutional Repository) ("According to the U.S. Census Bureau, the combined states in 2015 owed more than $1.15 trillion in outstanding debt issuances. That tells us two things; 1) the constitutional debt

Traditionally, only revenue bonds were exempt from state constitutional debt limits because they raised funds from non-tax sources that could then be used to repay the debt independently.[335] Courts have created exceptions to state constitutional debt limits relying on the "special fund doctrine."[336] Over time, states and municipalities increasingly used revenue bonds instead of the more traditional debt forms, in part so that the debt was externalized from states' debt limits and popular referenda requirements. Now, revenue bonds are one of the primary methods states use to circumvent debt constraints.[337] Ironically, the democratic reforms limiting state debt ultimately incentivize states to use revenue bond instruments *more* because they are not considered debt on a state's balance sheet.[338] The states with stronger constitutional debt limits tend to "have a larger number of public authorities, have more functions that are addressed by public authorities, [and] rely on authorities to issue a larger percentage of the state's public infrastructure debt."[339]

Although New Jersey's state constitution has a debt limitation clause, the LRBs used for the youth prisons are not subject to it.[340] New Jersey is a state with highly publicized budget shortfalls, with state worker pension fund costs often blamed.[341]

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limitations are marginally effective, at best; and 2) investors seem more than happy to trust the fiscal security of the states.").

335 However, 14 states have a constitutional debt limit that applies to at least some forms of revenue bonds; in a few other states, "all revenue bonds issued by the state must be approved by the voters." Beverly S. Bunch, *The Effect of Constitutional Debt Limits on State Governments' Use of Public Authorities*, 68 PUB. CHOICE 57, 58 (1991).

336 Dennis J. Heil, *Another Day Older and Deeper in Debt: Debt Limitation, the Broad Special Fund Doctrine, and WPPSS 4 and 5*, 7 U. PUGET SOUND L. REV., 81, 81 (1983) (defining the "Special Fund Doctrine" as "provid[ing] that an obligation which was to be repaid solely from a particular project financed was not debt subject to constitutional, statutory, or charter limitations"); Susan P. Fino, *A Cure Worse Than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959, 960 (2003) (discussing how courts narrowed the application of state constitutional debt limits); David E. Pinsky, *State Constitutional Limitations on Public Industrial Finance: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 317–17 (1963) (discussing courts' consideration of municipal special fund financing).

337 Briffault, *supra* note 306, at 918–19.

338 *Id.* at 925–27.

339 Bunch, *supra* note 335, at 66.

340 JOINT STATE LEASING & SPACE UTILIZATION COMM. MEETING, *supra* note 8, at 10 (containing comments from a New Jersey state legislator regarding how the proposed LRBs for youth prison construction circumvent the state constitution); *see* Lonegan v. State, 809 A.2d 91, 97 (N.J. 2002) ("We have, with rare exception, held that independent state authorities issuing bonds or other debt obligations that are not backed by the State's full faith and credit are not debts of the State for purposes of the Debt Limitation Clause.").

341 Nikita Biryukov, *New Jersey Faces Steep Deficits in Coming Years, Group Warns*, N.J. MONITOR (Feb. 13, 2024, 5:12 PM), https://newjerseymonitor.com/2024/02/13/new-jersey-faces-steep-deficits-in-coming-years-group-warns/.

In 2008, looking to reign in state spending, voters approved an additional state constitutional amendment to further limit state authorities' ability to incur debt without voter approval.[342] With the new amendment, the state is required to seek voter approval of future revenue bonds approved by state authorities—purportedly including the NJEDA.[343] A New Jersey appellate court, similarly to courts in other states, relied on the difference between lease payments and direct legislative appropriations to find that the state's Debt Limitation Clause was not implicated because of the financialized nature of the LRBs.[344] Because the state was not formally bound to pay the debt, the NJEDA did not create debt for the state.[345] In other words, because the lease agreement associated with the LRB does not *require* an annual appropriation, the appellate court differentiated the debt as not subject to the state constitutional limit.

Community groups with both decarceral and fiscally conservative missions often challenge the issuances of complex debt to build carceral facilities in states across the U.S.[346] These legal challenges widely fail because of courts' realist approaches.[347] Ironically, these 19th-century state constitutional debt limits, originally designed to encourage democratic process in debt decision making, ended

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342 *N.J. Split on Statewide Ballot Questions*, NBC N.Y., https://www.nbcnewyork.com/news/local/nj_split_on_statewide_ballot_questions/1848505/ (Nov. 5, 2008, 12:15 AM).

343 N.J. CONST. art. VIII, § 2, para. 3. *But see* John D. Draikiwicz, *New Jersey Passes Referendum to Limit State Borrowing*, GIBBONS (Nov. 18, 2008), https://www.gibbonslaw.com/resources/publications/recovery-zone-bonds-offer-opportunities-for-county-projects-and-private-industry-11-18-2008 (laying out exceptions to the voter approval requirement in this 2008 amendment).

344 Wisniewski v. Murphy, 186 A.3d 321, 330 (N.J. Super. Ct. App. Div. 2018); *see also* Schulz v. State, 639 N.E.2d 1140, 1143, 1148–49 (N.Y. 1994); Dykes v. N. Va. Transp. Dist. Comm'n, 411 S.E.2d 1, 4–5 (Va. 1991).

345 The Court noted:

> so long as the bonds stated on their face that they did not create a financial obligation for the State, they did not contravene the [Debt Limitation Clause (DLC)]. To repay the debt on the bonds, the [New Jersey Building Authority (BA)] used rents paid by the State. The Court found the BA was independent of the State and did not create debt for the State, and therefore, the bonds issued did not violate the DLC, notwithstanding the fact that the rent payments were ultimately paid by the State.

Wisniewski, 186 A.3d at 330 (internal citations omitted). Notably, the Debt Limitation Clause (DLC) is not implicated when debt is created by an independent authority—distinct from the State—that has its own source of revenue. *Lonegan*, 809 A.2d at 97 (holding that—despite the fact that the funds used to repay the debt on the bonds were rents paid by the State—the N.J. Building Authority was independent of the State and did not create debt for the State, thus the bonds issued did not violate the DLC).

346 *See, e.g.*, Taxpayers for Improving Pub. Safety v. Schwarzenegger, 172 Cal. App. 4th 749, 757 (2009).

347 Schragger, *Democracy and Debt*, *supra* note 190, at 870; *see also* Briffault, *supra* note 306, at 941.

up encouraging an increased reliance on "off books," increasingly financialized debt with significantly fewer democratic checks.[348]

b. Referenda and Limitations on Taxation

Then, in the 20th century, states sought to limit their legislatures' ability to incur debt by requiring either referenda with extraordinary popular consent or supermajority legislative approval. These progressive era reforms and anti-tax initiatives in the latter part of the 20th century pushed for initiative, referendum, and recall provisions as a check on legislative power.[349]

Progressive reformers first attempted to insulate bond decisions from special-interest groups by adopting corporate-esque public authority structures that were not subject to voter input.[350] Reformers thought that more technocratic budget decision making would stop interest groups from taking advantage of public resources. In many ways, this technocratic turn disempowered constituents and empowered financiers to use collective public resources to make profit by diverting funds to already privileged communities.[351]

In the latter part of the 20th century, just as communities sought to expand their prison capacities, a "tax revolt" and period of high interest rates sparked a new wave of demands for constraints on states' ability to impose taxes.[352] These constraints aimed to limit state and local government spending through tax and expenditure limitations (TELs) and further supermajority approval requirements.[353] By limiting states' abilities to spend and impose new taxes, TELs give priority to "taxpayers" as an identity group over recipients of public benefits.[354]

Today, 16 states require legislative supermajorities to raise state taxes.[355] Research around TELs reflects that they are mostly ineffective at limiting state

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[348] *See* Briffault, *supra* note 306, at 926–27 (discussing the increase in "backdoor financing").

[349] *See* Schragger, *Democracy and Debt*, *supra* note 190, at 866.

[350] *See* Sterk & Goldman, *supra* note 111, at 1329–30, 1333 (discussing the role of interest groups prior to constitutional debt limitations and public authorities as "escape devices" from debt limitations); *see also* Taylor, *supra* note 33 (describing financiers and creditors as "technocratic experts rather than a special-interest group"). State governments will circumvent debt rules creating "a classic agency problem," and "we should expect agency losses to the extent that voters cannot monitor the actions of the state government." Colin H. McCubbins & Mathew D. McCubbins, *Proposition 13 and the California Fiscal Shell Game*, 2 CAL. J. POL. & POL'Y, 2010, at 1, 2.

[351] Taylor, *supra* note 33.

[352] Hayward, *supra* note 113; Briffault, *supra* note 306, at 929–30.

[353] Briffault, *supra* note 306, at 930; McCubbins & McCubbins, *supra* note 350, at 2.

[354] Briffault, *supra* note 306, at 909.

[355] *How to Raise a Tax*, NCSL, https://www.ncsl.org/fiscal/how-to-raise-a-tax? (Apr. 22, 2025). Typically, tax limitations require legislative supermajority or voter approval to raise or add new taxes. Briffault, *supra* note 306, at 928–29.

spending.[356] Overall, research supports that attempts at tax expenditure limitation increase non-debt debt and weaken governmental transparency and accountability.[357] State governments often attempt to circumvent these limitations by "burying spending within nongermane bills, by devolving fiscal responsibility to other agents who are not subject to the limitations, by inventing new debt mechanisms, and by privatizing public policy."[358]

2. *More Traditional Democratic Debt Control Mechanisms are Inadequate for Carceral Debt*

The period of mass carceral expansion in the U.S. coincided with states' increased reliance on the municipal bond market to pay for infrastructure. As states increasingly utilized more complex LRBs to finance carceral projects, the bonds were marketed to state legislatures as a way for states to avoid "cumbersome" legal debt limits and administrative procedures required for GO bonds.[359] The "cumbersome" procedures generally include referenda requirements or needing the approval of legislative supermajorities.[360]

For the reasons discussed above, more restrictive democratic controls on state debt are unlikely to constrain state spending on prison construction. By more stringently restricting state debt, states would likely pass on budget needs to local governments, making local governments responsible to close any gap in incarceration costs.[361] Then, because state budgets are finite, states may take money away from essential services to invest in incarceration. State budgets are further limited because they cannot easily obtain relief from liabilities.[362] While bond markets do respond negatively to democracy, the financialized nature and use of public authorities in financing carceral projects evades these democratic controls.[363]

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[356] McCubbins & McCubbins, *supra* note 350, at 2.

[357] Schragger, *Democracy and Debt*, *supra* note 190, at 869–70. *But see* James M. Poterba & Kim Reuben, *State Fiscal Institutions and the U.S. Municipal Bond Market*, *in* FISCAL INSTITUTIONS AND FISCAL PERFORMANCE 181, 184 (James M. Poterba ed., 1999) (noting that balanced budget and antideficit provisions in the state constitution have an important effect on borrowing costs).

[358] McCubbins & McCubbins, *supra* note 350, at 2.

[359] CHAIKEN & MENNEMEYER, *supra* note 129, at 2–3 (describing how LRBs can circumvent numerous procedural roadblocks, such as constitutional debt limits, restrictions on incurring new debt, voter resistance, the need for a special election, and pressures of litigation).

[360] *Id.*; Briffault, *supra* note 306, at 928–29.

[361] *See* D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L., ECON., & ORG. 62, 93 (1996) (presenting studies showing that when there are strict fiscal limits at the federal level, states end up borrowing more).

[362] *See* Schragger, *Democracy and Debt*, *supra* note 190, at 876–80 (discussing the limited solutions for municipal and state fiscal mismanagement).

[363] *See* James M. Poterba & Kim S. Reuben, PUB. POL'Y INST. OF CAL., FISCAL RULES AND STATE BORROWING COSTS: EVIDENCE FROM CALIFORNIA AND OTHER STATES, at vi (1999)

Beyond LRBs, states utilize increasingly more complex debt instruments to fund prison expansion—often relying on private entities instead of public authorities to provide financing.[364] In many cases, these instruments have even fewer requirements for democratic checks than LRBs.[365] Fundamentally, however, these instruments still use public funds to finance carceral expansion—with market actors profiting.[366] The continued development of newer and more complicated forms of prison financing suggests that traditional democratic controls will continue to be ineffective as the bond market pursues increasingly financialized instruments.

a. Certificates of Participation (COPs)

For decades, more and more states have utilized certificates of participation (COPs)—sometimes called lease-financing bonds—to finance carceral projects.[367] Similar to LRBs, the debt from COPs is secured by the streams of revenue generated by using a carceral facility, rather than the state-issuer promising its full faith and credit.[368] For COPs, an investor is purchasing a share of the anticipated lease payments from the state—without a bond being issued. Unlike bonds, COPs are "secured" financings, meaning investors have rights to the underlying property if the issuer defaults on lease payments.[369]

("[T]he bond market reacts in different ways to revenue restrictions and expenditure limits. States with expenditure limits typically borrow at lower rates than other states, but those that restrict tax increases or require supermajorities to increase taxes face higher borrowing costs."). *But see* Poterba & Reuben, *supra* note 357, at 192–93, 204 (arguing that states with constitutional tax limitations have higher borrowing costs, and finding that "states with weak antideficit provisions face borrowing costs 10 to 15 basis points higher than similar states with stricter antideficit rules [and r]estrictions on state authority to issue long-term general-obligation debt are associated with lower borrowing costs, although the point estimates suggest weaker effects for these institutions").

[364] For example, in Colorado, "[l]egislative authorization is required for both proposed COP [(Certificates of Participation)] issuances and for the more traditional form of lease-purchase where one rents-to-own an existing building or property. Legislative authorization is also required for annual lease payments." DONALDSON, *supra* note 309; *see also* Colo. Crim. Just. Reform Coal. v. Ortiz, 121 P.3d 288, 294 (Colo. App. 2005) (holding that the COPs did not violate the state constitution because they are not considered state debt since lease payments are subject to annual appropriation by the state legislature).

[365] *See, e.g.*, KATHLEEN BROWN, CAL. DEBT ADVISORY COMM'N, GUIDELINES FOR LEASES AND CERTIFICATES OF PARTICIPATION 4–5 (1993) (discussing Certificates of Participation as one debt instrument that is not subject to the same restrictions as lease-revenue bonds).

[366] *See id.* at 4 ("For all intents and purposes, [Certificates of Participation] function like municipal bonds.").

[367] *See id.* at 5–6.

[368] SUZANNE M. KIRCHHOFF, CONG. RSCH. SERV., R41177, ECONOMIC IMPACTS OF PRISON GROWTH 19 (2010) (quoting MARTIN E. GOLD, BROWN & WOOD LLP, ASS'N OF STATE CORR. ADM'RS, ALTERNATIVES FOR FINANCING PRISON FACILITIES, at iii (1999)).

[369] When a bond is secured by lease revenues, that is lease-revenue bond. In theory, a certificate holder can foreclose on a facility in the case of a default. WASH. STATE OFF. OF FIN. MGMT., BUDGET INSTRUCTIONS, PART 2: FINANCING GUIDELINES 22, 32 (2024),

Marketed as "one of the easiest financing techniques," COPs are also tax-exempt. [370] Here, the expected rental revenues and interest earnings from the prison determine the size of the facility to be built.[371] COPs pay investors via revenues from the lease instead of profits from bond interest.[372] COPs are generally perceived as riskier and thus are more expensive than GO debt.[373] Bond and underwriter counsel work and are compensated for creating more complex agreement terms that give additional power to the creditors, including using master lease arrangements which leverage multiple state leases.[374]

When able, states use COPs to expand carceral capacity with even fewer restrictions than LRBs.[375] For example, in 1994, Oregon voters passed Ballot Measure 11, a law creating new mandatory minimums and requiring that youth charged with certain crimes be tried as adults.[376] Following the passage of this "tough on crime" measure, the state sought creative financing mechanisms to construct additional carceral facilities to house people being treated more punitively by Measure 11.[377] A few years earlier, voters had rejected $96 million in GO bonds for prison construction.[378] Yet, between 1995 and 2008, Oregon embraced COPs to build new prisons, and its COP debt rose from $191 million in fiscal year 1995 to $1.1 billion in fiscal year 2008.[379] The State of Oregon directly connects its carceral

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https://ofm.wa.gov/sites/default/files/public/budget/instructions/capital/2025-27/Part2InstructionsCombined.pdf.

370 S. Swendiman & T.C. Hafey, Abstract, *Small Jail Financing: Taking Stock of the Options*, CORR. TODAY, December 1988, at 28, https://www.ojp.gov/ncjrs/virtual-library/abstracts/small-jail-financing-taking-stock-options; *see also* James Chen, *Certificates of Participation (COP): Definition, Uses, Taxation*, INVESTOPEDIA, https://www.investopedia.com/terms/c/certificateofparticipation.asp (Aug. 17, 2024) ("Certificates of participation do not require voter approval and can also be issued more quickly than referendum bonds.").

371 ELMER, *supra* note 14, at 9 ("Bonds to finance the capital facility can be issued at a tax-exempt rate, with the rental stream and interest rate determining the size of the issue, and hence the size of the facility to be built.").

372 U.S. DEP'T OF JUST., OFF. OF THE FED. DET. TR., FINANCING DETENTION FACILITIES 24–25 (2009), https://www.justice.gov/archive/ofdt/ofdt-handbook-20090422.pdf.

373 *Id.* at 24.

374 *See, e.g.*, *Lease Revenue and Certificates of Participation*, ORRICK, https://www.orrick.com/en/Practices/Lease-Revenue-and-Certificates-of-Participation (last visited Aug. 30, 2025).

375 Some states require COPs approved by State Finance Committee, while some "require[] prior legislative approval of real estate financing contracts in the capital budget." *See* WASH. STATE OFF. OF FIN. MGMT., *supra* note 369, at 32.

376 OR. STATE DEBT POL'Y ADVISORY COMM'N, *supra* note 28, at 29.

377 *Id.* app. B at 9.

378 *Oregon Measure 5, Bonds for Prison Buildings Amendment (May 1986)*, BALLOTPEDIA, https://ballotpedia.org/Oregon_Measure_5,_Bonds_for_Prison_Buildings_Amendment_(May_1986) (last visited Aug. 30, 2025).

379 OR. STATE DEBT POL'Y ADVISORY COMM'N, *supra* note 28, at 29, app. B at 9.

expansion with the drastic increase in complex state debt over this period.[380] Here, the prison financing market circumvented state democratic fiscal controls by evading the bond issuing process, but still ultimately created new liabilities for the state.

b. *Public-Private Partnerships (The Alabama Story)*

"'It is, however, a good way around opposition to bonding.'"

—Joseph Krist, Muni Bond Analyst[381]

Increasingly, as private prisons approach "junk" status both in the market and in society, the private prison industry has also pursued creative mechanisms to continue profiting from incarceration. Heavily lobbied for by private prison corporations, some states use Public-Private Partnerships (P3s) to privately finance the construction of public prisons.[382] P3s involve a lease-purchase agreement between a private developer and the state government where the state makes the annual lease payments to use the prison facility. The private, outside investor designs and builds the project on the state's behalf.[383] The developer profits by managing financing and construction risks; the state can avoid using traditional bond instruments that reduce its debt capacity.[384] Private-public prison construction partnerships are generally taxable.[385]

In 2021, the State of Alabama sought to use a private-public agreement to construct three new supermax prisons for a total of $2.64 billion to be paid back over a 30-year period.[386] The state's prison system has long been under U.S. Department of Justice (DOJ) investigation; in 2019, the DOJ submitted notice that it was investigating conditions of confinement in Alabama's state prisons for men, finding reasonable cause to believe that the pattern and practice of conditions in the

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[380] *Id.*

[381] Shelly Sigo, *The Cost of Alabama's Prison P3 Soars*, BOND BUYER (Sept. 9, 2020, 11:39 AM), https://www.bondbuyer.com/news/the-cost-of-alabamas-prison-p3-soars.

[382] IN THE PUB. INT., AN EXAMINATION OF PRIVATE FINANCING FOR CORRECTIONAL AND IMMIGRATION DETENTION FACILITIES 1 (2018), https://www.inthepublicinterest.org/wp-content/uploads/ITPI_PrivatePrisonP3s_June2018FINAL.pdf.

[383] Rob Allen & Paul English, *Public-Private Partnership in Prison Construction Management* 4–7, (Just. & Dev., Working Paper No. 83347, 2013).

[384] *See* IN THE PUB. INT., *supra* note 382, at 10.

[385] *Id.* at 2.

[386] Sigo, *supra* note 381.

prisons violated the Eighth Amendment.[387] Even in 2019, however, the DOJ was clear: building new prisons alone will not rectify the unconstitutional conditions.[388]

Still, Alabama continued to seek funding using the private partnership. After publishing a request for proposals to build the new supermax prisons, the Alabama Department of Corrections entered confidential negotiations with developer teams who would design, build, and finance three supermax carceral facilities and then lease them back to the State of Alabama for a period of 30 years.[389] Even at the outset, the proposed prisons would not provide enough beds to cure the prison overcrowding throughout the state.[390]

Alabama eventually chose a private prison company, CoreCivic Inc., and another developer to build the prisons.[391] According to the plan, $850 million of the taxable P3 bonds were to be issued by the Public Finance Authority of Wisconsin as a conduit issuer.[392] The state would also use $400 million of federal funds given to the states for COVID-19 relief to pay for the project.[393] When rating the bonds,

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387 U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 1 (2019), https://www.justice.gov/crt/case-document/file/1149971/dl?inline=.

388 *Id.* at 47 ("While new facilities might cure some of these physical plant issues, it is important to note that new facilities alone will not resolve the contributing factors to the overall unconstitutional condition of ADOC prisons, such as understaffing, culture, management deficiencies, corruption, policies, training, non-existent investigations, violence, illicit drugs, and sexual abuse. And new facilities would quickly fall into a state of disrepair if prisoners are unsupervised and largely left to their own devi[c]es, as is currently the case.").

389 Sigo, *supra* note 381 (remarking on the "confidential negotiation period to ensure and secure the best possible value for the state"; however, the cost and scope of the project changed during negotiations).

390 During the Alabama prison strikes, Mr. Glasgow, founder of The Ordinary People Society, said, "That's how you're going to deal with overcrowding? By adding more beds? . . . That makes me and my family targets to keep your capacity levels up. We become a commodity again." Instead, the strikers demanded: eliminating life without parole sentences, establishing parole criteria, repealing Alabama's Habitual Felony Offender Act, reducing the 30-year minimum before parole eligibility for juveniles to 15 years, and creating a review board to oversee the Alabama prisons. Sam McCann, *What You Need to Know about the Alabama Prison Strike*, VERA INST. (Oct. 27, 2022), https://www.vera.org/news/what-you-need-to-know-about-the-alabama-prison-strike.

391 Chip Barnett, *Alabama's $850 Million P3 Deal Aims to Replace Overcrowded Jails*, BOND BUYER (Apr. 14, 2021, 1:01 PM), https://www.bondbuyer.com/news/alabama-heads-to-market-with-850-million-p3-prison-deal.

392 *Id.*

393 Rebekah Riess & Devon M. Sayers, *Alabama GOP Governor Signs Bills to Use Covid-19 Relief Funds to Build Prisons into Law*, CNN POL., https://www.cnn.com/2021/10/01/politics/alabama-covid-relief-prison-bills-signed-governor-kay-ivey/index.html (Oct. 1, 2021, 11:14 PM). For context, in 2019 the state of Alabama only had $723 million of outstanding GO bonds. Barnett, *supra* note 391. Alabama's state constitution has a prohibition on state debt, so it has amendments for GO bonds. ALA. POL'Y INST., GUIDE TO THE ISSUES: CONSTITUTIONAL AMENDMENT NUMBER 2 ON THE NOVEMBER 6, 2012, BALLOT, https://alabamapolicy.org/wp-

the rating agency noted that "the highly supportive termination plan with full debt repayment in all scenarios" improved the project's bond rating.[394] In other words, the debt agreement had ensured that, even with the risks that the state may want to close the facilities in the future, the debt would be repaid.[395]

Alabama's fiscal constitution, with one of the strictest state constitution debt limits in the country, did not limit this borrowing.[396] However, community organizers concerned about the state's debt and Alabama's prison system intervened. Activists from the Alabama Justice Initiative, rural residents, and the financial sector organized to challenge the private-public prison bonds by targeting Barclays Bank—the bonds' investment bank underwriter.[397] Barclays had previously made a public commitment to divest from the private prison industry.[398] Initially differentiating the private-public project from traditional private operations, Barclays had bid to serve as the project's lead underwriter.[399] Through concentrated organizing focused on the investment bank, Alabama activists were able to pressure Barclays out of the bond issuance and kill the deal.[400]

However, the desire to build prisons came back with a vengeance. In 2022, the Alabama Corrections Institution Finance Authority (ACIFA)—a 12 member board of governor appointees—tried again and issued up to $625 million in LRBs to finance the construction of two new prison facilities.[401] This time, the state would

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content/uploads/2020/11/GTI-Brief-Constitutional-Amendment-2-2012.pdf (last visited Aug. 30, 2025).

394 Barnett, *supra* note 391.

395 Potential risks that were mitigated by the favorable termination plan included "political sensitivity [and] future consolidation of inmates away from the facilities or closures of the facilities." *Id.*

396 *See* ALA. CONST., art. XI, § 213; Mike Cason, *Judge Dismisses Jim Zeigler Lawsuit Challenging Kay Ivey's Prison Lease Plan*, AL.COM, https://www.al.com/news/2021/05/judge-dismisses-jim-zeigler-lawsuit-challenging-kay-iveys-prison-lease-plan.html (May 17, 2021, 9:12 PM) (reporting on a state court's ruling that Alabama's prison financing arrangement would *not* "violate restrictions in the state Constitution on putting the state of Alabama in debt").

397 Oliva Paschal & Elisha Brown, *How Alabama Organizers Blocked Gov. Ivey's Prison Lease Plan*, FACING S. (June 17, 2021), www.facingsouth.org/2021/06/how-alabama-organizers-blocked-gov-iveys-prison-lease-plan.

398 Eddie Burkhalter, *Barclays Aiding Alabama Prison Financing Despite Pledge Against Private Prison Companies*, ALA. POL. REP. (Apr. 6, 2021, 7:44 AM), https://www.alreporter.com/2021/04/06/barclays-aiding-alabama-prison-financing-despite-pledge-against-private-prison-companies/; Anna Hrushka, *Barclays Drops Private Prisons as More Banks Weigh Reputational Risks*, BANKING DIVE (Aug. 1, 2019), https://www.bankingdive.com/news/barclays-drops-private-prisons-as-more-banks-weigh-reputational-risks/560037; Paschal & Brown, *supra* note 397.

399 Paschal & Brown, *supra* note 397; Burkhalter, *supra* note 398.

400 Paschal & Brown, *supra* note 397.

401 *Fitch Rates Alabama Bonds*, *supra* note 15.

use LRBs issued by the ACIFA and lease the facilities back to the Alabama Department of Corrections.[402] When the new underwriting banks struggled to sell the new bonds, they raised the bonds' yields to make them more lucrative to the market—and thus required higher interest rate payments from the state's constituents.[403]

Just a few months later, the ACIFA voted to increase the maximum funding of the prison facility by over $300 million to a total of $975 million.[404] In 2024, the state passed a supplemental $150 million bill from its general revenues to further add to the prison construction budget.[405] Alabama's Department of Corrections' budget already accounts for nearly a quarter of the state's general appropriations fund.[406] Ultimately, these more complex debt instruments incentivize issuers and bond market players to work around typical municipal financing constraints.[407]

III. FRAMES FOR COLLECTIVE CARCERAL DECISION MAKING

Above, this Article catalogs how municipal debt markets finance and facilitate an undemocratic process where state carceral agencies and budget offices envision the future of prisons.[408] Once carceral debt is issued, it is incredibly hard to unwind the clock. Today, scholars and activists seeking to dismantle the tentacles of the carceral state target levers of power.[409] In this vein, communities use state and local corrections budgets as battlegrounds of values.[410] As the carceral system raises

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402 *Id.*

403 *See* Amanda Albright & Danielle Moran, *Alabama's Prison Bonds Hit Snag Amid Weak Demand, Litigation*, BLOOMBERG L. NEWS (June 28, 2022, 12:45 PM), https://news.bloomberglaw.com/capital-markets/alabama-prison-bonds-face-hurdle-from-litigation-ahead-of-sale.

404 Chapoco, *supra* note 255.

405 Mike Cason, *New $3.4 Billion Alabama Budget Increases Spending on Prisons, Medicaid, Mental Health*, AL.COM, https://www.al.com/news/2024/05/new-alabama-budget-increases-spending-on-prisons-medicaid-mental-health.html (May 2, 2024, 6:24 PM).

406 *Mass Incarceration and Unconstitutional Prisons*, ALA. APPLESEED CTR. FOR L. & JUST., https://alabamaappleseed.org/mass-incarceration/ (last visited Aug. 30, 2025).

407 *See, e.g.*, *Lease Revenue and Certificates of Participation*, *supra* note 374 (detailing the complicated lease financing mechanisms the firm works on as bond counsel, including "avoid[ing] the need for a funded reserve fund, typical in most lease financing structures").

408 *See supra* Section II.B.

409 Littman, *supra* note 257, at 864–65.

410 Naomi Murakawa, *Say Their Names, Support Their Killers: Police Reform After the 2020 Black Lives Matter Uprisings*, 69 UCLA L. REV. 1430, 1436 (2023) ("As an umbrella group of more than fifty Black-led organizations, the Movement for Black Lives developed an invest-divest framework in its 2016 *Vision for Black Lives* and its 2020 BREATHE Act. Sometimes referenced simply as defund the police, the divest-reinvest framework calls for ending the war on Black people by funding, for example, healthcare, employment, and reparations with resources divested from police, prisons, military, and fossil fuel subsidies."); *see also Invest-Divest*, MOVEMENT FOR BLACK

fundamental questions of accountability, budget constraints serve as an important tool.[411] But, as the municipal debt system diffuses the costs and obligations of incarceration, there is even less accountability.

Historically, people's campaigns targeted municipal bond underwriters through activism. During the Civil Rights Movement, the Congress of Racial Equality (CORE) and the National Association for the Advancement of Colored People (NAACP) organizers used direct action and legal strategies to target the municipal debt underwriters who facilitated lending to southern states to build segregated schools.[412] In Alabama, this strategy had some success. While organizers successfully quelled the state's attempt to use a public-private partnership to finance over $1 billion in prisons, the bond market's preferences still prevailed.[413] Because the bond market is willing to finance public prison projects with incredibly high budgets, those are the types of projects that can access funding—even against popular demand.

Here, the abstraction of municipal debt from the public consciousness creates an absence of democratic process in issuing carceral bonds. Without democratic process, frequent crises emerge—like when a bond is issued, and protest erupts when it is time to find a site.[414] This Part outlines why increasing traditional democratic controls of municipal debt will still not work to control state spending on incarceration. It then suggests how the public can explore more collective frames to make decisions about carceral futures.

LIVES, https://m4bl.org/policy-platforms/invest-divest/ (last visited Aug. 30, 2025) ("We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people.").

411 *See* Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. L.J. 841, 846 (2024); *but see* DANIEL L. HATCHER, INJUSTICE, INC. 117–19 (2023) (examining the ways the justice system exploits poor people and children to generate revenue: "many local governments still view detaining children as a means of economic development").

412 Destin Jenkins, *Breaking the Bonds of Segregation: Civil Rights Politics and the History of Modern Finance*, 128 AM. HIST. REV. 1643, 1643–44 (2023).

413 Paschal & Brown, *supra* note 397; Chapoco, *supra* note 255.

414 For example, in Oklahoma, GO bonds for the construction of a new jail were approved but questions about location and the total budget remain. An anti-prison organizing group, People's Council for Justice Reform, "continues to believe that the (Board of County Commissioners) has moved forward with no detailed, specified plan as to how much the jail will cost, where it will be built, who will have oversight over the mental health facility, and how much it will cost to fund operations of both the jail and mental health facility." Karen Pierog, *Jail Bonds Languish in Oklahoma County Amid Uncertainty About Location*, BOND BUYER (June 11, 2024), https://www.bondbuyer.com/news/jail-bonds-languish-in-oklahoma-county-amid-uncertainty-about-location.

A. *Failures of the Ballot*

Democratic reforms alone will not rectify the public process problems in decisions about carceral debt. When first implemented, democratic debt limits sought to stop states from spending beyond their means.[415] However, today, carceral state spending presents different questions. New, financialized debt challenges the efficacy of traditional controls from states' fiscal constitutions. Increased voting requirements are insufficient to solve the carceral debt democratic deficit because of: (1) political disenfranchisement and (2) concerns about how referenda may fail minority interests.

1. *Political Disenfranchisement*

Increasing voter input in carceral decision making may seem like an obvious solution to control carceral debt. As demonstrated above, voters are apt to vote "no" on carceral bonds.[416] States therefore work to circumvent voters through using more complex non-debt debt. In response to this trend, constituents increasingly attempt to impose referenda requirements on more types of complex debt.[417] However, because of political disenfranchisement and concerns about racial prejudice in referenda, increased voting requirements are insufficient to solve the carceral debt democratic deficit.[418]

First, a large proportion of those most affected by incarceration are disenfranchised from the political process.[419] As Dorothy Roberts argues, the criminal legal system's supervision of certain communities—specifically Black communities—"has a disempowering impact that extends far beyond electoral politics."[420] In the vast majority of states, people incarcerated for felonies cannot vote.[421] Further, not only can formerly incarcerated people—a disproportionate number of whom are Black—not vote on ballot initiatives in many states without onerous process, but the criminalization of certain communities excludes them from

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[415] Briffault, *supra* note 306, at 911–12.

[416] *See supra* Section I.B.1.a.

[417] *See, e.g.*, *N.J. Split on Statewide Ballot Questions*, *supra* note 342.

[418] The historical right to vote on bond referenda is fragile. In fourteen states, only property owners could vote on bond referenda until 1970. City of Phoenix v. Kolodziejski, 399 U.S. 204, 212–13 (1970) (finding that restricting the right to vote to property taxpayers in elections on GO bonds violated the Equal Protection Clause).

[419] Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1600–01 (2017).

[420] *Id.* at 1602; *see also* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 807 (2021) ("[E]veryday practices of policing preclude poor people of color from being full democratic subjects.").

[421] *Felon Voting Rights*, NCSL, https://www.ncsl.org/elections-and-campaigns/felon-voting-rights (Aug. 19, 2025).

democratic participation on a larger scale.[422] Racialized communities that have experienced over-policing and incarceration as social control are those with the most personal knowledge about the realities of incarceration, but their demands would be the most disenfranchised from carceral debt decisions using a voting framework.[423]

2. *Referenda and Debt Limits Fail to Protect Minority Interests*

Relying solely on referenda and direct democracy to create process for carceral debt raises concerns about how to protect minority interests from racial prejudice. Studies suggest that, when primed to believe that prisons hold more Black people, respondents were more concerned about crime and more accepting of punitive policies.[424] This supports the lengthy literature on the role of race in public opinion about crime, where anti-Black racism contributes to voters' punitive behavior.[425]

Additionally, referenda often rely on "[a]ppeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems."[426] As demonstrated by the "Is $3 a year for each member of your family worth it to you to remove convicted felons from your neighborhood?" question posed to California referendum voters in 1988,[427] how referenda are framed often obfuscates the true democratic questions posed. Instead of "do you want your taxes to go toward prisons for the next 30 years instead of schools?"—the question hides context.[428]

Instead, "[s]tate limitations on debt do little to protect minorities against majority oppression."[429] Even when the project benefits a few—for instance, a fancy new sports stadium—the burden of the debt falls on communities who will pay back the debt through state income tax, regressive taxation, and court fines and fees.

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422 *Id.*; Roberts, *supra* note 419, at 1602.

423 *See* Roberts, *supra* note 419, at 1605–06.

424 Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1950–52 (2014) (demonstrating that "exposing people to a world with extreme racial stratification increases their support for the policies that help maintain that stratification").

425 Steven E. Barkan & Steven F. Cohn, *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, 52 SOC. PROBS. 300, 311 (2005).

426 *See* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 19 (1978).

427 *See* sources cited *supra* note 116 and accompanying text.

428 *See* Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 76 (2020) ("[W]hen presented with a limited set of political responses to violent crime, they will choose punitive measures, not because of an abiding punitiveness, but because they want the state to do *something*, and in a neoliberal political economy, criminal law is usually the only *something* available.").

429 Sterk & Goldman, *supra* note 111, at 1305.

B. Inefficient Decision Making

As a consequence of the abstraction of municipal debt and lack of process, society makes inefficient decisions about resources and incarceration.[430] A more honest cost–benefit analysis would consider the true fiscal and societal costs of using complex debt to expand carceral capacity.

As is, the municipal bond process relies on the expertise of prison administrators, state finance bureaucrats, politicians, and the market to determine the optimal level of carceral facilities.[431] Because the debt issuance becomes so hard to undo, these initial decisions about the need for new prisons will affect communities for the next 20–30 years, at least.[432] Process would allow an honest and open cost–benefit analysis of what society sacrifices to pay for—and pay off—carceral debt.

1. Process Would Allow Open Cost–Benefit Analysis of Carceral Debt

Scholars and activists have long argued that there are accountability problems with the allocation of resources in the criminal legal and incarceration systems.[433] Some scholars advocate for moving carceral costs to the local actors largely responsible for imposing incarceration.[434] Sheldon Evans advocates for using regulatory systems to tax carceral actors' non-optimal use of incarceration.[435] However, municipal debt's hidden role in the costs of incarceration complicates our ability to allocate resources. If today's actors are making decisions about the allocation of carceral resources but tomorrow's constituents are paying, it may be difficult to hold political and local actors accountable.

By pushing past the abstraction of municipal debt, society can have a more open debate about the use of public resources to incarcerate—and what other

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430 *See* Taylor, *supra* note 33 (demonstrating that even when municipal debt is brought to voters, the perspective is limited because ballots only provide a "yes-or-no question" when instead voters "could see a dilemma about whether we should borrow to fund a public hospital or a school, or they could see a broader question of what cities should spend their money on to begin with").

431 *See* discussion *supra* Part I.

432 *See* Rubenstein, *supra* note 138 (describing the long-term and often undemocratic debt obligations created by lease-purchase bonds); Reitmeyer, *supra* note 149 (explaining how bond obligations and pension liability in New Jersey created a financial crisis that "will take decades to undo").

433 *See* Gold, *supra* note 411, at 909 (advocating for budget constraints as accountability in criminal legal system); Bierschbach & Bibas, *supra* note 38, at 190, 194; W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 109–14 (2014). Also, see Franklin Zimring and Gordon Hawkins's "correctional free lunch," where state prisons are built and maintained using state resources and budgets, while local actors—primarily law enforcement, prosecutors, and elected officials—are paid and supported by city and county resources and budgets. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 139–40 (1991).

434 *See, e.g.*, ZIMRING & HAWKINS, *supra* note 433, at 140–41.

435 Evans, *supra* note 37, at 689–91.

services society is foregoing to pay for prisons. Further, there are long-term costs inherent in carceral expansion that extend beyond the purchase price of a prison. First, a growing externalities analysis shows the expansive economic and social costs of incarceration on individuals and communities.[436] Further, carceral municipal debt is entrenching and functions as a tax transfer from future constituents to present day constituents[437]—especially when used to invest in prison construction versus prison services.[438] The government of today's decisions about carceral facilities will limit tomorrow's societal visions. Government actors—like people—are poor predictors of future events and future preferences. Yet, carceral fiscal entrenchment "usurps for its own use the taxing and spending authority of future governments."[439]

State-issuers and bond market actors often argue that too much community input makes borrowing more expensive for states. Proponents of LRBs argue that the delays associated with putting bond issues up for a vote will cost communities due to possible interest rate and market changes.[440] However, a state's contention that democracy costs too much money in the bond market is not persuasive when considering the long-term costs of carceral investment.

2. *Process Would Allow Open Cost–Benefit Analysis of Carceral Debt's Tax Exemption*

Because of municipal debt's tax exemption, municipal bonds serve as tax-free wealth accumulation for the ultrawealthy.[441] Municipal debt's federal tax exemption functions as an (inefficient) federal subsidy without the transparency of the typical budget process.[442] As designed, municipal bonds' tax exemption should reduce states' borrowing costs. This tax exemption should further encourage state and local governments "to provide the optimal amount of public services."[443]

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436 *Id.* at 687–88.

437 Serkin, *supra* note 68, at 906.

438 Littman, *supra* note 257, at 865.

439 Serkin, *supra* note 68, at 905.

440 CHAIKEN & MENNEMEYER, *supra* note 129, at 14–17 (comparing the cost of LRBs to GO bonds to taxpayers over time depending on various hypothetical interest rates).

441 Abbye Atkinson, *Making Public Debt a Public Good*, LPE PROJECT (Sept. 16, 2021), https://lpeproject.org/blog/making-public-debt-a-public-good/ ("[P]ublic debt is a public good. It is meant to function symbiotically in the polity, providing liquidity to fund present public projects that will yield returns for both municipal residents and private investors alike.").

442 *See* MARLOWE, *supra* note 5, at 19–20; Policy Brief, Justin Marlowe & Martin J. Luby, Municipal Bond Tax Exemption: History, Justifications, Criticisms and Consideration of Reforms 21, 23 (Apr. 2025), https://sdmn.org/wp-content/uploads/Municipal-Bond-Tax-Exemption-Policy-Paper_UC-and-UT_April-2025.pdf.

443 GRANT A. DRIESSEN, CONG. RSCH. SERV., RL30638, TAX-EXEMPT BONDS: A DESCRIPTION OF STATE AND LOCAL GOVERNMENT DEBT 3–4 (2018) (explaining why the tax liability on taxable corporate bonds allows tax-exempt municipal bonds to have lower interest rates).

In reality, the federal government loses more revenue by making municipal bonds tax-exempt than the issuer receives in subsidy.[444] Critics have argued that municipal debt's tax exemption does not promote the total supply of capital available for public investment.[445] But instead, the tax exemption mostly serves to incentivize states using municipal debt over taxation to fund infrastructure and development.[446]

The tax exemption limits the amount of possible municipal investors, as most investors do not need tax-free income and instead choose to invest their money where it will earn the highest returns.[447] Institutional investors, for instance, already have low marginal tax rates, so they benefit less from the tax subsidy associated with municipal debt.[448] Due to this small pool of interested investors, the municipal bond market is more volatile than other fixed markets.[449] Further, the municipal market is more "vulnerable to changes in the investment preferences or tax status of investors."[450] Overall, tax policy has broad implications on how states use municipal debt.[451] Scholars have long noted that tax exemptions permit the government to hide

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444 Marlowe & Luby, *supra* note 442, at 21 (using a simple example to show that "[t]he amount the federal government is giving up in federal tax revenues . . . is less than the amount the municipal borrower is receiving in lower interest costs . . . as provided by tax exemption"); *see also* Roger H. Gordon & Gilbert E. Metcalf, *Do Tax-Exempt Bonds Really Subsidize Municipal Capital?* 2–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. w3835, 1991) ("Rather than borrowing initially to finance the capital expenditures and then raising municipal taxes in each future period to pay the interest charges on the municipal debt, a community could instead raise taxes initially to finance the capital expenditures.").

445 *See* Gordon & Metcalf, *supra* note 444, at 3.

446 Scott Greenberg, *Reexamining the Tax Exemption of Municipal Bond Interest*, TAX FOUND. (July 21, 2016), https://taxfoundation.org/research/all/federal/reexamining-tax-exemption-municipal-bond-interest/.

447 Marlowe & Luby, *supra* note 442, at 22 (noting that municipal bonds tax-exempt status is "attractive to investors who have a tax liability and unattractive to those that do not" which "dramatically reduces the pool of potential buyers").

448 Schwert, *supra* note 200, at 1684–85.

449 Cooper Howard, *Why the Tariff Rollout Spooked the Muni Market*, CHARLES SCHWAB (Apr. 22, 2025), https://www.schwab.com/learn/story/why-tariff-rollout-spooked-muni-market.

450 ANGELA MILLER, WIS. LEGIS. FISCAL BUREAU, STATE LEVEL DEBT ISSUANCE 2 (2021), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2021/0079_state_level_debt_issuance_informational_paper_79.pdf.

451 For example, issuers can no longer advance refund tax-exempt bonds with tax-exempt bonds prior to a ten-year call date. GOV'T FIN. OFFICERS ASS'N, FREQUENTLY ASKED QUESTIONS: ADVANCE REFUNDINGS OF MUNICIPAL BONDS 2, https://www.nasact.org/files/News_and_Publications/White_Papers_Reports/2020_11_Advance_Refunding_of_Municipal_Bonds.pdf (last visited Aug. 30, 2025); GFOA *Refunding Municipal Bonds*, *supra* note 273.

subsidies.[452] As is, the municipal bond tax exemption for carceral bonds serves as a subsidy transferring wealth from communities to typically wealthy investors.[453] Because of its abstraction, there is little attention considering whether the exemption efficiently provides states with the "optimal" amount of carceral capacity.[454]

3. Possible Collective Frames

In considering the widespread effects of the municipal debt market in carceral decision making, this Article argues that there should be additional process *prior* to the issuance of the carceral debt. Still, other robust administrative processes, like New York City's Uniform Land Use Review Process (ULURP), are often critiqued as preserving the status quo.[455] K. Sabeel Rahman encourages us to design administrative processes that "enhance the countervailing power of ordinary citizens."[456] Ultimately, without more process, we are making inefficient decisions about carceral capacity that contribute to an unaccountable allocation of power.

CONCLUSION

U.S. prisons remain in a constant state of crisis. States use prison overcrowding, poor conditions, and prisoner safety as imperatives to build—even when incarcerated populations decline.[457] These carceral decisions largely depend not on the constituents who will ultimately pay or the incarcerated people inside the prisons, but on states' access to the municipal debt market.

Traditional controls for how states incur debt—(1) market discipline and (2) fiscal constitutions—are ineffective at controlling carceral spending. Market incentives, such as greater profits for more, complex debt, encourage states to issue

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452 *See, e.g.*, Claude W. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 423 (1934) ("Many exemptions would not be condoned by taxpayers were their true character exposed.").

453 Marlowe & Luby, *supra* note 442, at 3–4.

454 While not the focus of this Article, others have compellingly argued that using municipal debt to pay for police brutality settlements is against the purpose of the tax preference. *See generally* Butchireddygari, *supra* note 79 (arguing that tax-exempt municipal bonds used to satisfy police brutality payouts "enables the wealthiest individuals to benefit from the suffering of victims of police brutality").

455 *See* CITIZENS BUDGET COMM'N, IMPROVING NEW YORK CITY'S LAND USE DECISION-MAKING PROCESS 1–2, 16 (Sept. 2022), https://cbcny.org/sites/default/files/media/files/REPORT_Land-Use_09062022_0.pdf.

456 Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 552 (2021) (citing K. Sabeel Rahman, *From Civil Tech to Civic Capacity: The Case of Citizen Audits*, 50 PS: POL. SCI. & POL. 751, 751, 755 (2017)).

457 BURTON, *supra* note 47, at 23 ("[Victor] Martinez's [(spokesperson of a New York City anticarceral prison revolt)] analysis contradicted that of DOC officials, who preferred to frame the 'disorder' as a reaction to jail conditions, especially overcrowding.").

debt. States circumvent traditional democratic checks through less accountable, complex debt agreements with appointed public authority boards. This opaque debt evades democratic accountability. And often, by the time communities realize that a prison has been financed, the debt has already been issued, and it is too late. Improving the process to give communities power *before* the debt is issued may help states better allocate resources to represent constituents. But—even more—additional process can cut through the abstraction of municipal debt to give communities a chance to fight for what services they want the state to provide.