



NOTE

Municipalities and the Banking Franchise

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Abstract. The 2008 financial crisis spurred calls to create a financial system that is more responsive to social needs. Subsequently, scholarly and legislative efforts to develop a more democratic and accountable financial system have focused on public options: postal banking, bank accounts with the Federal Reserve, and a national investment authority. While efforts at the federal level have largely stalled, state and local governments have spearheaded the charge through public banking. Across the country, local governments are actively developing public banks to better serve the chartering city as well as its residents.

But legal scholarship has not adequately engaged in a sustained examination of municipal public banking or the efforts of state and local governments to create public banking infrastructure. This Note makes a significant scholarly contribution by exploring recent legal innovations in public banking and reorienting the narrative around financial reform to the local level. Conceptually, this Note seeks to elaborate on the unique public origins and public purpose of banking institutions and to highlight the important logic of decentralization and diffusion of banking powers in American law and political economy. On a practical level, it provides a novel analysis of the legal powers of local governments to establish, capitalize, and govern municipal public banks while also considering potential challenges to this new model of democratic finance.

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Introduction

Since the 2008 financial crisis, there have been increasing calls to create a financial system that is more responsive to social needs.¹ Today, financial resources are “far more likely to be deployed in the purchase of highly opaque financial products than to be absorbed back into productive circuits that are the ultimate source of social wealth.”² People have grown frustrated as banks report robust profits while the rest of the economy seems to struggle with “a rise of long-term structural unemployment, reductions in workers’ average wages, increased poverty rates, and austerity-induced cuts in public expenditures and vital government services.”³ As some have observed, the conventional financial system does not allocate resources in a way that benefits people or their local communities.⁴ Others have suggested that our concentrated and crisis-prone financial system may even be a threat to democracy.⁵

To address this concern, scholars and policymakers have developed several solutions focused on public options—“government provided social good[s] that exist[] alongside a similar, privately provided good.”⁶ The purpose of public options “is to expand equality and opportunity by offering universal access to a good or service at an affordable price.”⁷ While public options gained national

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1. See Frank van Lerven, *Credit Where It's Due*, NEW ECON. FOUND. (Sept. 14, 2018), <https://perma.cc/R8HB-9QPU> (noting that after the 2008 financial crisis, “allocation of bank credit is still fundamentally misaligned with key social and economic objectives”). While progressives have focused on the financial system’s failure to meet social needs, conservatives have also noted the problems with a financial system that privatizes gains and socializes losses. See Jim Geraghty, *Biden’s Big Bank Bailout*, NAT’L REV. (Mar. 13, 2023, 10:01 AM), <https://perma.cc/8PF3-THKD> (noting that today’s financial system is still “a system that has concentrated the benefits among a well-connected few and spread out the costs and risks among the rest of us”).
 2. See KARL BEITEL, ROOSEVELT INST., MUNICIPAL BANKING: AN OVERVIEW 3 (2016).
 3. *Id.* at 3–4.
 4. See, e.g., DEMOS, BANKING FOR THE PUBLIC GOOD: PUBLIC BANK NYC 5–7 (2022) (outlining how the profit motive in private banks leads to negative outcomes like racially discriminatory lending, unaffordable housing development, and overinvestment in the fossil fuel industry).
 5. See Lev Menand & Morgan Ricks, *Rebuilding Banking Law: Banks as Public Utilities*, 41 YALE J. ON REGUL. 591, 636 (2024) (noting that our current monetary architecture undermines the economic preconditions for equal citizenship “by redistributing wealth upwards, funneling credit to business conglomerates and choking off small, local firms, excluding low-income and minority communities from the payments system (or connecting them only at high cost), and fueling financialization”).
 6. Anne Alstott & Ganesh Sitaraman, *Introduction*, in POLITICS, POLICY, AND PUBLIC OPTIONS 1, 1 (Ganesh Sitaraman & Anne Alstott eds., 2021).
 7. Anne Alstott & Ganesh Sitaraman, *Challenges in Designing Equitable Public Options*, in POLITICS, POLICY, AND PUBLIC OPTIONS, *supra* note 6, at 45, 45.

prominence in the debates over the Affordable Care Act, they have been a longstanding feature of American social life and economic organization.⁸ Examples are all around us—“[l]ibraries, post offices, and public schools are classic public options.”⁹ While some of these classic public options like libraries and education are primarily provisioned by local governments, proposals for public options in the financial sector have largely focused on federal interventions. Legislators and scholars have put forward plans to establish banks operated by the U.S. Postal Service (postal banking),¹⁰ create federally chartered public banks,¹¹ provide retail banking services with the Federal Reserve (FedAccounts),¹² and launch a national investment bank.¹³ Despite these designs, little action has been taken at the federal level as congressional gridlock has resulted in most of these proposals being stalled in committee.¹⁴

In contrast, public banking has taken off at the state and local level due to a groundswell of activism and organizing to provide essential financial services to local communities and local governments. And it has for some time. One area of public banking activism, often overlooked,¹⁵ came from the initiative

8. See Alstott & Sitaraman, *supra* note 6, at 1.

9. GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 26-27 (2019).

10. Postal Banking Act, S. 3891, 117th Cong. (2022) (proposing to have the U.S. Postal Service provide basic financial services, including small-dollar loans, small-dollar lending services, small checking accounts and interest-bearing savings accounts, transactional and remittance services, and other basic financial services in the public interest). For an academic discussion of postal banking, see Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 166-69 (2014).

11. Public Banking Act of 2023, H.R. 6775, 118th Cong. (2023) (proposing, among other things, to provide federal chartering and recognition of state-chartered public banks administered by state and local governments and agencies).

12. Banking for All Act, S. 3571, 116th Cong. (2020) (proposing to require Federal Reserve member banks to provide digital pass-through accounts, i.e., digital dollar wallets, to residents, citizens, and businesses domiciled in the United States). FedAccounts would provide a free bank account that can be used to receive money, make payments, and take out cash. For a scholarly discussion of FedAccounts, see John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113, 116-17 (2021).

13. National Infrastructure Bank Act of 2023, H.R. 4052, 118th Cong. (2023) (proposing to establish a national infrastructure bank to invest in and finance infrastructure projects and new job creation). For an academic discussion of a national investment authority, see Robert C. Hockett & Saule T. Omarova, *Private Wealth and Public Goods: A Case for a National Investment Authority*, 43 J. CORP. L. 437, 469-73 (2018).

14. For example, the Public Banking Act has been introduced twice to no avail. See Public Banking Act of 2020, H.R. 8721, 116th Cong. (2020); H.R. 6775.

15. Elizabeth Hidalgo Reese has argued that legal scholars should not assume “that tribal governments have nothing to offer or are simply too different or small to belong in the mainstream of American law,” and that instead we should “engage with tribal governments and tribal law with minds open to previously impossible ideas and

footnote continued on next page

of tribal governments and activists in the late 1980s.¹⁶ Native communities have long been underserved by privately owned financial institutions.¹⁷ Structural exclusion from the financial system has limited Native access to the credit and capital vital to community growth and development.¹⁸ Discrimination has played a prominent role in the lack of credit in Indian Country.¹⁹ But other legal and market impediments have posed barriers as well. Scholars have noted that tribal sovereign immunity has deterred banks from lending in Indian Country due to concerns about contractual enforcement²⁰ and federal laws governing trust property often prevent tribes and Native Americans from using their land as collateral.²¹ These barriers to financial access are further exacerbated by the geographic isolation, lower incomes, and higher unemployment rates in many Native communities.²²

When faced with these issues, some tribes began to take “banking matters into their own hands by owning or controlling their own bank.”²³ In 1987, the Blackfeet Tribe in northwestern Montana became the first tribal government to establish a tribal bank—the Blackfeet National Bank.²⁴ The need for a public

observations.” Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 578 (2021). “Tribal governments are just another kind of subnational American government” *Id.* at 559. Justice Gorsuch has similarly highlighted the important role of tribal governments in the United States: “Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life.” *Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring).

16. See, e.g., Andrew Van Dam, *When Banks Abandoned American Samoa, the Islands Found a Solution Nobody Had Used in a Century*, WASH. POST (May 9, 2018, 7:00 AM EDT), <https://perma.cc/7R89-2B7B> (claiming that American Samoa established “the first new U.S. public bank in almost a century”). In fact, tribal governments have been setting up public tribal banks since the late 1980s. See Ron Wirtz, *Breaching the “Buckskin Curtain,”* FED. RSRV. BANK OF MINNEAPOLIS (Sep. 1, 2000), <https://perma.cc/2QUL-BNTZ> (noting that the Blackfeet Tribe became the first tribal government to own a bank in 1987).
17. See Jenny Small, Note, *Financing Native Nations: Access to Capital Markets*, 32 REV. BANKING & FIN. L. 463, 485, 488-95 (2013) (documenting how the lack of banks in Indian Country poses challenges for Native communities); W. Gregory Guedel & J.D. Colbert, *Capital, Inequality, and Self-Determination: Creating a Sovereign Financial System for Native American Nations*, 41 AM. INDIAN L. REV. 1, 9-19 (2016) (documenting the challenges of accessing capital in Indian Country).
18. BD. OF GOVERNORS OF THE FED. RSRV. SYS., 2002 ANNUAL REPORT 88 (2002).
19. See, e.g., Consent Decree, *United States v. Blackpipe State Bank*, No. 93-CV-05115 (D.S.D. Jan. 21, 1994), ECF No. 6 (prohibiting the bank from discriminating against American Indians); Consent Order, *United States v. First Nat’l Bank of Gordon*, No. 96-CV-05035 (D.S.D. May 7, 1997), ECF No. 24 (same).
20. Small, *supra* note 17, at 488-89.
21. *Id.* at 494.
22. Wirtz, *supra* note 16.
23. *Id.*
24. *Id.*

option began in 1983 when the FDIC shuttered the privately-owned First National Bank in Browning, Montana, the only bank on the Blackfeet reservation.²⁵ The tribal government itself was forced to move its deposits from the reservation to a bank in Great Falls, Montana, about 130 miles away.²⁶ Elouise Cobell, a Blackfeet tribal elder and activist famous for leading a lengthy legal battle against the federal government's century-long mismanagement of Indian trust funds,²⁷ was instrumental in creating a new bank to serve the community. At the time, branch banking was not allowed in Montana, so she lobbied the state legislature to loosen these regulations in hopes that the tribe could attract a new bank to replace it.²⁸ She also tried to persuade "other banks to charter a new bank in Browning but found them reluctant."²⁹ Where the market had failed, Cobell concluded that the Blackfeet Tribe would need to open its own bank.³⁰ The tribal bank opened in 1987 with an initial tribal capital investment of \$1 million.³¹ The bank proved successful, and fourteen years later, a group of at least thirteen Native American tribes and two Alaska Native Corporations formed Native American Bancorporation, a bank holding company, to expand the reach of the Blackfeet National Bank and increase access to capital and financing in Indian Country.³² Today, the bank operates as Native American Bank. Its mission is to "provide access to financial services for Alaska Native and Native American communities creating economic independence, development and sustainability."³³

The Blackfeet National Bank provided a model for tribal banks, which have spread across the country. A survey of Native American-owned banks between 2001 and 2016 found that there were nine banks in the United States

25. *An Indian Banker's Lifelong Crusade*, AM. BANKER (Nov. 23, 1998, 2:00 AM EST), <https://perma.cc/CEV8-9HWQ>.

26. *Id.*

27. Dennis Hevesi, *Elouise Cobell, 65, Dies; Sued U.S. Over Indian Trust Funds*, N.Y. TIMES (Oct. 17, 2011), <https://perma.cc/MB38-XC2C>. The case resulted in the federal government paying \$3.4 billion in compensation. *Id.*

28. *An Indian Banker's Lifelong Crusade*, *supra* note 25.

29. *Id.*

30. *Id.*

31. *Id.*

32. See Order Approving the Formation of a Bank Holding Company and the Acquisition of a Bank, 87 FED. RESRV. BULL. 719, 747-48 (2001) (order approving the formation of Native American Bancorporation as a bank holding company and its acquisition of the Blackfeet National Bank); see also *id.* at 748 n.9 ("[T]he primary purpose of the proposed acquisition is to enable Blackfeet [National] Bank to expand its lending and community development activities for Native American tribes and their affiliates nationwide.").

33. *About Us*, NATIVE AM. BANK, <https://perma.cc/5NX7-W645> (archived Mar. 23, 2025) (describing the history and mission of Native American Bank).

that were owned by tribal governments.³⁴ Tribal banks play an important role by filling “a gap in the market while contributing to the public interest.”³⁵ One empirical study found that banks owned by tribal governments place a higher priority on community development than privately owned banks.³⁶ Although they have lower returns on assets and equity, tribal banks are more likely to maximize community development objectives.³⁷ Given their potential to support the public interest, tribal banks have long been endorsed by the federal government. In 1995, the Federal Reserve sanctioned tribal ownership of a bank holding company for the first time.³⁸ Since 2002, the Office of the Comptroller of the Currency, the national bank regulator, has published a manual to help federally recognized tribes explore entry into the national banking system by establishing or acquiring control of a national bank.³⁹

A similar story can be seen in the case of public banking in American Samoa, an unincorporated territory of the United States. In 2016, American Samoa established the Territorial Bank of American Samoa (TBAS), a public bank owned and operated by the American Samoan government.⁴⁰ Just like many American Indian tribes, American Samoa had long been isolated from the rest of the financial system. Banking services were so scarce that the U.S. Navy actually established the Bank of American Samoa, the only bank in the territory, back in 1914.⁴¹ This public bank was eventually acquired by the privately owned Bank of Hawaii in 1969, and operated as the primary financial institution for people, businesses, and the territorial government in American Samoa.⁴² But after over forty years of operation, the Bank of Hawaii announced that it intended to withdraw from the territory due to its

34. See Joanie Buckley & Russell Kashian, *Ownership Effects Among Native American Banks, 2001-2016*, 51 APPLIED ECONS. 181, 183 tbl.1 (2019).

35. Small, *supra* note 17, at 495.

36. See Buckley & Kashian, *supra* note 34, at 193-94.

37. *Id.* at 194.

38. See Order Approving the Formation of a Bank Holding Company, 81 FED. RESRV. BULL. 757, 791-92 (1995) (order approving the application of the Oneida Tribe of Indians of Wisconsin to form Bay Bancorporation as a bank holding company and its acquisition of Bay Bank).

39. See OFF. OF THE COMPTROLLER OF THE CURRENCY, A GUIDE TO TRIBAL OWNERSHIP OF A NATIONAL BANK 1 (2002).

40. See Dam, *supra* note 15; see also AM. SAMOA CODE ANN. § 28.0202 (2015) (establishing a public territorial bank “to provide the residents of American Samoa with deposit, lending and investment opportunities, and to assist in the promotion of commerce and industry”).

41. Julie Andersen Hill, *Opening a Federal Reserve Account*, 40 YALE J. ON REGUL. 453, 487 (2023).

42. *Id.* at 487-88.

geographic isolation in the South Pacific and “other factors [that] posed operational challenges.”⁴³

The effects were devastating. Between 2012 and 2016, no new loans were originated in American Samoa, and “[c]onsumers who couldn’t afford to travel to Hawaii or the mainland resorted to backyard lenders and paid usurious rates.”⁴⁴ An American Samoan delegation attempted to entice other Hawaiian banks to open branches in the territory to no avail, and local investors unsuccessfully tried to charter a *de novo* community bank and a credit union.⁴⁵ The government of American Samoa was forced to divest from its local community by moving its public deposits to Zions Bank in Utah, despite the fact that Zions did not operate a branch in the territory.⁴⁶

Advocates eventually turned to public banking to provide a solution. Working out of a leased Bank of Hawaii office, TBAS opened in October 2016 and began creating deposit accounts and making loans to the people of American Samoa.⁴⁷ After a drawn out struggle with federal regulators, TBAS received a routing number from the American Bankers Association and obtained a master account with the Federal Reserve Bank of San Francisco.⁴⁸ With this infrastructure in place, TBAS can now provide cash transfer services connecting American Samoa to the mainland United States and card-swiping machines to merchants.⁴⁹ Since opening, TBAS has obtained over \$400 million in deposits⁵⁰ and has served as a model to other organizers attempting to create public banking institutions in their own communities.

Tribal and American Samoan public banking models have proved to be important case studies for public banking advocates.⁵¹ Since the 2008 financial crisis, interest in public banking has increased, and advocacy organizations

43. BANK OF HAW., 2012 ANNUAL REPORT 1 (2012). The only other depository institution in the territory at the time, the Australian ANZ Amerika Samoa Bank, took deposits but could not provide access to the U.S. payment system, making it a less popular option. Hill, *supra* note 41, at 487-88. ANZ similarly wound up its operations in America Samoa in 2022, leaving TBAS as the only bank left in the territory. *See id.* at 492.

44. Dam, *supra* note 15. It is worth noting that the trip from American Samoa to Honolulu is 2,300 miles, an onerous distance to gain access to the banking system. *See* Jackie Stewart, *The Fight to Bring New Banks to American Samoa*, AM. BANKER (Jan. 10, 2013, 2:55 PM EST), <https://perma.cc/P8GZ-XSE4>.

45. Hill, *supra* note 41, at 488.

46. *Id.*

47. Dam, *supra* note 15.

48. Hill, *supra* note 41, at 491.

49. Dam, *supra* note 15.

50. Hill, *supra* note 41, at 492.

51. *See, e.g.*, JOSÉ CISNEROS, S.F. OFF. OF THE TREASURER & TAX COLLECTOR, MUNICIPAL BANK FEASIBILITY TASK FORCE REPORT 17 (2019) (discussing the Bank of North Dakota, TBAS, and tribal banks).

have developed across the country building campaigns to actualize public banking at the state and local level. Advocates in cities like New York City, Philadelphia, San Francisco, and Washington, D.C., have pursued a local-level strategy to create municipal public banks.⁵² Other advocates in states like Arizona, California, Massachusetts, New Mexico, Oregon, and Washington have pursued a state-level strategy to create a state public bank.⁵³

Public banking advocates have been particularly successful in California.⁵⁴ In 2019, the California Public Banking Alliance (CPBA) played a crucial role in passing the California Public Banking Act (“A.B. 857”), which created a pilot program framework for local governments to charter municipal public banks.⁵⁵ The first law of its kind, A.B. 857 had its origins in the Dakota Access Pipeline. Activists who opposed the pipeline organized a divestment campaign against Wells Fargo, one of the banks providing financing for the project, by petitioning their local governments to pull their deposits from the bank.⁵⁶ When organizers struggled to find an alternative bank for public funds, they turned to the idea of public banks.⁵⁷ The campaign grew as organizers attempted to build political support across the state. The plan was eventually endorsed by over 180 organizations, including seventeen city and county governments in California.⁵⁸ California’s successful legislative push has led to public banking legislation being introduced in other states as well.⁵⁹

While there is new interest in public banking, it is not a new idea, nor is it a radical departure from historical practice.⁶⁰ Public banks were once common in the United States. In the nineteenth century, many states created public banks wholly owned by the state government while others established public banks where the government held only a partial interest.⁶¹ These institutions

52. *See Local Groups by State*, PUB. BANKING INST., <https://perma.cc/DX32-EZ79/> (archived Mar. 23, 2025).

53. *See id.*

54. For an overview of the California public banking advocacy campaign, see Trinity Tran & Sushil Jacob, *How Community Organizing Can Advance Public Bank Legislation*, NEXT CITY (Dec. 3, 2019), perma.cc/NU2N-7V4R.

55. Assemb. B. 857, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

56. Eillie Anzilotti, *The One Strategy that Could Finance the Whole Green New Deal*, FAST CO. (June 26, 2019), <https://perma.cc/858C-8W2Y>.

57. *Id.*

58. Oscar Perry Abello, *California’s More Than Dreamin’ About Public Banks*, NEXT CITY (Sep. 24, 2019), <https://perma.cc/BP92-5FAS>.

59. *See, e.g.*, S. 1754, 2023-2024 Leg., Reg. Sess. (N.Y. 2023); H.B. 75, 55 Leg., 2d Sess. (N.M. 2022).

60. *See infra* Part I.

61. ANDREW P. SCOTT, CONG. RSCH. SERV., NO. IF12216, PUBLIC BANKS: HISTORY AND RECENT PROPOSALS 1 (2022).

played a crucial role in economic development and state building.⁶² For example, the Vermont State Bank and the Bank of the Commonwealth of Kentucky “were owned entirely by the state; governed by directors appointed by the legislature; had no dedicated capital but banked on the whole of the state’s credit; and operated to provide currency and credit widely in agricultural economies.”⁶³ Other states, such as Missouri, Indiana, and Virginia, established banks where the state government held a partial ownership interest.⁶⁴ Ownership of bank shares was a major source of fiscal capacity for the states in the early antebellum period.⁶⁵ Pennsylvania chartered the Bank of Pennsylvania in 1794 with a \$1 million subscription, “receiving a peak total of \$313,034 in bank dividends in 1815” or roughly \$6 to \$8 billion in annual revenue in contemporary dollars.⁶⁶ In creating these institutions, state legislatures aimed to develop social infrastructure—they intended to provide for the public welfare through the “deliberate geographic and functional allocation” of money and credit.⁶⁷

The oldest continually operating public bank in the United States is the Bank of North Dakota (BND), established in 1919.⁶⁸ It was created during a tumultuous period to “address market failures associated with monopoly power among large financial and business institutions.”⁶⁹ That purpose continued through the Great Depression, during which the BND played a stabilizing role for the state. Following a wave of foreclosures on local farms, the BND acquired and leased back farms to farmers at reasonable rates, eventually selling the farms back to the original “occupants’ heirs at below-market prices.”⁷⁰ The BND also was intimately connected with local governments. During the Great Depression, the BND “helped counties and cities meet their fiscal needs by financing government projects and investing in municipal bonds.”⁷¹

62. See SUSAN HOFFMANN, *POLITICS AND BANKING: IDEAS, PUBLIC POLICY, AND THE CREATION OF FINANCIAL INSTITUTIONS* 72-75 (2001).

63. *Id.* at 75.

64. SCOTT, *supra* note 61, at 1.

65. See Richard Sylla, John B. Legler & John J. Wallis, *Banks and State Public Finance in the New Republic: The United States, 1790-1860*, 47 J. ECON. HIST. 391, 393 (1987).

66. *Id.* at 396; Christine Desan & Nathan Tankus, *Public Banking in the United States: Historical Lessons for Today*, 59 WILLAMETTE L. REV. 331, 340 (2023).

67. HOFFMANN, *supra* note 62, at 90.

68. See N.D. CENT. CODE § 6-09-01 (2025) (creating a public state bank “for the purpose of encouraging and promoting agriculture, commerce, and industry”).

69. YOLANDA K. KODRZYCKI & TAL ELMATAD, *FED. RSRV. BANK OF BOS., THE BANK OF NORTH DAKOTA: A MODEL FOR MASSACHUSETTS AND OTHER STATES?* 5 (2011).

70. *Id.* at 7.

71. *Id.* at 7-8.

Despite America's long history of public banking and the recent resurgence of interest, legal scholarship has not adequately engaged in a sustained examination of municipal public banking.⁷² The focus on federal interventions means that scholars have not given sufficient attention to the efforts of state and local governments to create public banking infrastructure and how state and local law shapes those efforts. This Note seeks to fill that gap by exploring recent legal innovations in public banking and reorienting the narrative around financial reform to the local level. Conceptually, this Note elaborates on the unique public origins and public purpose of banking institutions. It also highlights the important logic of decentralization and diffusion of banking powers in American law and political economy. Finally, this Note provides a novel analysis of the legal powers of local governments to establish, capitalize, and govern municipal public banks while also considering potential challenges posed by this new mode of democratic finance.

This Note proceeds in four Parts. Part I lays out a theory of municipal public banking. It seeks to highlight the important public and localist roots of American banking theory and political economy. It focuses on the public origins and public purpose of the banking franchise and considers the important logic of decentralization and diffusion of banking powers that has been a quintessential component of American banking practice for centuries.

Part II turns to the purposes a municipal public bank could fulfill. It explores how municipal public banks could help local governments better manage their financial resources; fund long-term investments in housing, infrastructure, and other local policy priorities; and facilitate better access to financial services for residents that have been excluded from the traditional financial system.

Part III then dives into the complex legal questions regarding the structure of a municipal public bank. It begins with an examination of the legal powers of local governments to establish municipal public banks in the first place. Express state legislative authorization is the clearest path, as illustrated by California.⁷³ But cities in jurisdictions with broad home rule powers may apply

72. One of the most thorough treatments of public bank design is Saule T. Omarova, *Public Banking as an Institutional Design Project*, 41 YALE J. ON REGUL. 1128 (2024). Omarova's account of public banking primarily focuses on developing "a conceptual framework for a better, more granular, understanding of public banking as an *institutional form of finance*." *Id.* at 1134. She advocates for a broader "ecosystem of public banking" coordinated through the country's central bank. *Id.* at 1136 (emphasis omitted). This Note, in contrast, focuses on public banking as a state and local government law question. It concentrates on the practical legal realities that public bank designers will face when they attempt to establish public banks at the state and local level. Given its local government focus, this Note also expressly treats municipal public banks as a municipal finance tool.

73. See *infra* Part III.A.1.

for a banking charter within existing state and federal legal frameworks or seek to establish a municipal public bank on their own initiative through a charter amendment or an enabling ordinance.⁷⁴ Next, Part III examines the question of funding. Specifically, it looks at the financial resources cities have available to capitalize a municipal public bank and considers how local government law affects the ability of municipalities to contribute capital and make deposits.⁷⁵ Part III concludes with the important issue of municipal public bank governance. It discusses how cities can use a two-tiered governance structure to balance the bank's democratic accountability and public purpose with the technical expertise required to manage a modern financial institution.⁷⁶

Finally, Part IV considers potential challenges for the municipal public banking model. It addresses the limits to the legal powers of local governments to establish municipal public banks, the financial costs of funding a public bank, and governance risks created by municipal involvement in the banking franchise.

Before moving on, I want to outline some important issues related to municipal public banking that I will not address in this Note, but which I hope will be analyzed in future research. First, I do not address many of the important issues related to how these institutions would plug into the existing bank regulatory framework. Rather, this Note is largely focused on the powers of local governments to establish and operate municipal public banks. Banking is, of course, a highly regulated industry, and it is likely to be the case that municipal public banks would be subject to supervision by state and federal regulatory authorities.⁷⁷ There are a plethora of federal banking law requirements that would have a major impact on municipal public banks, including federal deposit insurance requirements,⁷⁸ bank holding company regulations,⁷⁹ source of strength requirements,⁸⁰ capital requirements,⁸¹

74. See *infra* Part III.A.2.

75. See *infra* Part III.B.

76. See *infra* Part III.C.

77. For example, all public banking institutions organized under California's A.B. 857 must receive federal deposit insurance pursuant to the Federal Deposit Insurance Act. See CAL. GOV'T. CODE § 57602(a) (West 2024). The FDIC would thus have the power to supervise and regulate these institutions. See 12 U.S.C. § 1813(q)(2)(A) (establishing the FDIC as the "appropriate Federal Banking agency" for all "State nonmember insured bank[s]"); *id.* § 1819(a)(Tenth) (granting the FDIC power to prescribe "rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing").

78. See 12 U.S.C. § 1815(a); 12 C.F.R. §§ 303.20-303.25 (2024) (outlining procedures for applying for deposit insurance).

79. See 12 U.S.C. § 1841.

80. See 12 U.S.C. § 1831o-1.

restrictions on covered transactions,⁸² and Federal Reserve Master Account application requirements for access to the national payment system.⁸³ This Note's localist orientation also does not mean to suggest that a national framework for municipal public banks is not required. As others have observed, state and local public banks serve a complementary role to other national efforts to move finance in a more democratic direction.⁸⁴

Second, this Note does not discuss state-level public banks. The BND model suggests public banking can be undertaken at the state level. So why focus on cities? For one, cities have a unique place in democratic theory. As Tocqueville observed in *Democracy in America*, municipal institutions are the heart of free government.⁸⁵ A localist orientation allows public banks to serve a function similar to Tocqueville's town meeting, which can "bring [liberty] within the people's reach, [and] teach men how to use and how to enjoy it."⁸⁶ Municipal public banks, at least in theory, are closer to their communities and can allocate capital more effectively. They can also bring banking under democratic oversight, promote popular participation, and support local communities.⁸⁷

Another reason is empirical. Much of the advocacy around public banking has emerged at the local level and it is easier to build consensus around public banking proposals at the local rather than the state level. There is also no reason to think that cities are too small to sustain public banks. Many cities actively pursuing municipal public banks are larger than states—for example, the city of San Francisco has a larger population than North Dakota.⁸⁸ This

81. See 12 C.F.R. § 3.10 (2024).

82. See 12 U.S.C § 371c; 12 C.F.R. § 223 (2024).

83. See Federal Reserve Banks Operating Circular No. 1 (effective Sep. 1, 2023), <https://perma.cc/M9YB-KQCB> (outlining the policy which governs account relationships with the Federal Reserve System and setting forth the terms under which a financial institution may open, maintain, and terminate a master account).

84. See LEV MENAND, *THE FED UNBOUND: CENTRAL BANKING IN A TIME OF CRISIS* 144 (2022); cf. Omarova, *supra* note 72, at 1168 (noting the need to unify local public banking initiatives into a "high-priority national project" with "supportive systemic conditions").

85. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73 (Henry Reeve trans., Saunders & Otley 1835).

86. *Id.*

87. It is in the combined action of individuals and local public authorities that can accomplish "what the most energetic centralized administration would be unable to do." *Id.* at 130-31.

88. Compare *San Francisco City, California Census Bureau Profile*, U.S. CENSUS BUREAU, <https://perma.cc/7BGJ-CGWP> (archived Mar. 23, 2025) (indicating that San Francisco's population in 2020 was 873,965), with *North Dakota Census Bureau Profile*, U.S. CENSUS BUREAU, <https://perma.cc/6XJE-22QM> (archived Mar. 23, 2025) (indicating that North Dakota's population in 2020 was 779,094).

Note aims to evaluate municipal public banks as an important case study on new models of democratic finance.

I. A Theory of Municipal Public Banking

There is growing recognition in the scholarly literature that the modern financial system is reliant on the public power to franchise private financial institutions to fulfill a key public role: creating money.⁸⁹ Societies have long devised different ways to create money.⁹⁰ But the idea that the public plays a crucial role in money creation has both constitutional and doctrinal foundations.⁹¹ Today, these powers have been outsourced or delegated to

89. See Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1147-49 (2017) (concluding that it is “the sovereign public that ultimately generates and underwrites capital flows in a modern financial system”). This includes directly issued public liabilities like Federal Reserve notes and Treasury securities, as well as “publicly accommodated and monetized private liabilities” issued by privately controlled financial institutions. *Id.*; see also Saule T. Omarova, *The People’s Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1239-40 (2021) (“Privately owned banks and other financial institutions, in turn, distribute sovereign credit-money throughout the economy, effectively collecting ‘privatized seigniorage’ for their services.”); Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1383 (2021) (describing how the creators of the national banking system envisioned each national bank as “a miniature central bank with a government ‘franchise,’” and the national banking system as a whole as “a unitary piece of public infrastructure” rather than “a series of private ventures”); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 974 (2021) (describing banks as “government instrumentalities with private managers acting in a public capacity”); Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 766 (2018) (“Insofar as banks are engaged in money creation, they do so pursuant to what amounts to a franchise arrangement.”); Peter S. Smedresman, *Bank Deposits - A Troublesome Evolution*, 35 INT’L FIN. L. REV. 50, 50 (July-Aug. 2016) (“The privilege of accepting deposits from the public is the exclusive franchise of the commercial banking sector, under authority granted by bank regulators.”); *The Community Reinvestment Act: Assessing the Law’s Impact on Discrimination and Redlining Before the Subcomm. on Consumer Prot. & Fin. Insts. of the H. Comm. on Fin. Servs.*, 116th Cong. 9 (2019) (statement of Mehrsa Baradaran, Professor of Law, University of Georgia School of Law) (noting that “banks have public duties because they are essentially public institutions” and that “[b]anks cannot function, and have never functioned, without extensive federal government support”).

90. MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 815 (2022); see, e.g., CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 37-50 (2014) (discussing how money is a constitutional project that has been engineered in many different ways over the centuries).

91. See U.S. CONST. art. I, § 8, cl. 5 (“Congress shall have power . . . To coin Money [and] regulate the Value thereof.”); *Ling Su Fan v. United States*, 218 U.S. 302, 310 (1910) (“The power to ‘coin money and regulate the value thereof, and of foreign coin,’ is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States.”). For further sources, see Menand, *supra* note 89, at 977 nn.115-17. The footnote continued on next page

banks.⁹² In the modern economy, bank deposits serve as the largest source of money for the general public.⁹³ A bank's power to create money stems from its power to lend money and issue deposit liabilities.⁹⁴ As the Supreme Court has noted, banks "do not merely deal in, but are actually a source of, money and credit."⁹⁵ This power to create money, however, is not without limit.⁹⁶ Banks create new money through lending.⁹⁷ That is, banks create new money by lending deposits into circulation.⁹⁸

government's money monopoly has also been supported on economic grounds. See Gary B. Gorton & Jeffery Zhang, *Protecting the Sovereign's Money Monopoly*, 75 ALA. L. REV. 955, 960 (2024).

92. See Menand, *supra* note 89, at 959, 974.

93. See U.S. DEP'T OF THE TREASURY, THE FUTURE OF MONEY AND PAYMENTS: REPORT PURSUANT TO SECTION 4(B) OF EXECUTIVE ORDER 14067, at 3 (2022) (noting that there are "\$2.2 trillion in Federal Reserve notes, \$3.3 trillion in reserve balances, and \$50 billion in coin outstanding" but approximately \$20 trillion in private commercial bank money in circulation). Under a more functional approach to money like that used by Morgan Ricks, other private monies like repurchase agreements, commercial paper, and money market mutual fund shares, among others, far eclipse sovereign money claims like circulating currency, insured deposits, and bank balances at the Federal Reserve. See MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION 32-35 (2017).

94. *Hearings on H.R. 5357 Before the Comm. on Banking & Currency*, 74th Cong. 217 (1935) (statement of Marriner Eccles, Governor, Federal Reserve Board) (explaining how "the banking system creates money" through "the process of loaning money [and] extending credit," which "increases bank deposits"); JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 1114 (Elizabeth Boody Schumpeter ed., 1954) ("It is much more realistic to say that the banks 'create credit,' that is, that they create deposits in their act of lending, than to say that they lend the deposits that have been entrusted to them."). As Morgan Ricks has explained, confusion over the monetary function of bank deposits stems from the fact that the term "deposit" has two meanings—it refers simultaneously to (1) "the monetary instruments a bank issues" and (2) "the assets it receives in exchange for those instruments." RICKS, *supra* note 93, at 57. When thinking about the monetary function of banks, it is more useful to focus on the former than the latter. The legal powers that enable banks to augment the money supply are generally the same for federally chartered and state-chartered banks. See, e.g., 12 U.S.C. § 24(Seventh) (empowering national banks to "carry on the business of banking . . . by receiving deposits" and "loaning money on personal security"); N.Y. BANKING LAW § 96(1) (McKinney 2024) (empowering New York state banks to "receive deposits of moneys" and "lend money on real or personal security").

95. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 326 (1963).

96. See Lev Menand, *The Logic and Limits of the Federal Reserve Act*, 40 YALE J. ON REGUL. 197, 211 n.67 (2023) (noting the regulatory limits on a bank's ability to create money); RICKS, *supra* note 93, at 57 (noting the economic constraints on a bank's ability to create money).

97. See Menand, *supra* note 89, at 975.

98. See *id.*; RICKS ET AL., *supra* note 90, at 816 (describing how banks create money "by increasing the balance in a borrower's account using 'the bookkeeper's pen'").

Because of their monetary function, banks are not like other commercial enterprises, or even like other types of financial institutions.⁹⁹ Indeed, “banks are unique among financial institutions in that they alone are permitted by law to accept . . . deposits.”¹⁰⁰ They are *special*.¹⁰¹ As Lev Menand has noted, “The actual relationship between the state and the banking system is . . . [that] banks are government instrumentalities with private managers acting in a public capacity.”¹⁰² Thus, the banking franchise is inextricably reliant on the state and is legally empowered through a system of licensing, backed by government guarantees, and regulated through government oversight and supervision.¹⁰³

This view of banking follows a rich legal and historical tradition. In this Part, I lay out a legal theory of municipal public banking by tracing the history of banking in the United States to highlight its important public and localist roots. In doing so, I seek to emphasize the public origins of banking institutions in the United States and America’s long history of public involvement in the business of banking. I also aim to focus on the important logic of decentralization and diffusion of banking powers to the American political economy. Together, these two strands serve as a theoretical foundation and justification for the model of municipal public banking discussed later in this Note.

A. The Public Origins of American Banking Powers

The earliest American banks were created to overcome an important governance problem: a pronounced lack of credit and money in the colonies.¹⁰⁴

99. For the conventional view of banks as intermediaries, see, for example, RICHARD SCOTT CARNELL, JONATHAN R. MACEY, GEOFFREY P. MILLER & PETER CONTI-BROWN, *THE LAW OF FINANCIAL INSTITUTIONS* 65 (7th ed. 2021) (defining banks as “*financial intermediaries that offer payment services*”). From this view, banks are not so different from other financial services firms, like investment funds, insurance companies, and broker-dealers. See, e.g., *id.* at 609 (stating that “the banking and securities businesses have grown to be close economic substitutes”); *Non-Bank Financial Intermediation*, FIN. STABILITY BD., <https://perma.cc/6AB6-FDKX> (archived Mar. 23, 2025).

100. *Phila. Nat’l Bank*, 374 U.S. at 326; see also Ricks, *supra* note 89, at 800-01 (noting that banks “have a legal monopoly on deposit creation” and “occupy a privileged position in our system of money and payments”).

101. See generally E. GERALD CORRIGAN, FED. RES. BANK OF MINNEAPOLIS, ANNUAL REPORT: ARE BANKS SPECIAL? 7 (1982) (arguing that banks are special because they facilitate the payment system by offering transaction accounts, supply a backup source of liquidity for all other institutions, and provide a transmission mechanism for monetary policy).

102. Menand, *supra* note 89, at 974.

103. See Hockett & Omarova, *The Finance Franchise*, *supra* note 89, at 1155.

104. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 69 (1957) (“American banking differed also from Old World banking in that it originated in a want of capital, not in a surplus of it.”); Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, the Social*
footnote continued on next page

American banking differed from its European banking predecessors in that it originated from a lack, rather than a surplus, of capital.¹⁰⁵ It was well acknowledged then, as it is today, that the key function of banks is to create money.¹⁰⁶

During the first half of the eighteenth century, most of the American colonies established public land banks (also called loan offices) to issue paper banknotes secured by a portfolio of mortgaged real property.¹⁰⁷ The land banks were essentially administrative agencies—governed by a board appointed by the legislature or the governor and council.¹⁰⁸ The actual lending decisions were made at various levels. In Pennsylvania, the loan office was administered at a provincial level, while in New England, New York, and New Jersey, lending decisions were made by local town boards or county boards.¹⁰⁹

The land banks served several core public functions. First, interest earned by the land banks expanded state capacity by generating public revenues.¹¹⁰ Colonial governments used land bank revenues to build schools, public buildings, and engage in redistributive policies for the poor.¹¹¹ Land banks also enabled colonial governments to reduce the tax burden on the populace.¹¹² Second, land banks allowed colonial governments to engage in direct credit allocation.¹¹³ The public land banks were able to provide cheaper credit to important industries like agriculture.¹¹⁴ Crucially, they also were able to provide credit to those who could not afford it elsewhere. One of the principal objectives of the land-banking system was to provide “loans to farmers which they could scarcely obtain from other sources.”¹¹⁵ By creating a public option

Responsibility, 49 BUFF. L. REV. 1011, 1022 (2001) (“These banks were founded because of the scarcity of credit in America.”).

105. HAMMOND, *supra* note 104, at 69.

106. See Morgan Ricks, *Regulating Money Creation after the Crisis*, 1 HARV. BUS. L. REV. 75, 76 (2011). When banks lend, they create money, and it is the government-chartered banks that create most of the money in the economy. Menand, *supra* note 89, at 975.

107. See E. James Ferguson, *Currency Finance: An Interpretation of Colonial Monetary Practices*, 10 WM. & MARY Q. 154, 168 (1953); Theodore Thayer, *The Land-Bank System in the American Colonies*, 13 J. ECON. HIST. 145, 145 (1953) (noting that land banks were “public institutions created and operated by various Colonial governments”).

108. See Thayer, *supra* note 107, at 152.

109. *Id.*

110. See *id.* at 156-57.

111. *Id.*

112. *Id.*

113. Desan & Tankus, *supra* note 66, at 335.

114. Ferguson, *supra* note 107, at 168.

115. *Id.*; see also *id.* at 171 (noting that colonial governments used public land banks to lend “money to farmers at low rates of interest”).

for credit, the colonial governments were also able to affect broader private credit conditions. By lending below prevailing market rates, the public land banks “had the salutary effect of bringing down the interest charged by private persons,” which some at the time described as usurious.¹¹⁶

After the Revolutionary War, the new country began to pivot its financial system from direct administration of financial institutions to chartering.¹¹⁷ By 1790, there were three chartered banks in operation, and “each bank was a public bank; that is, it was distinctly more than a private institution.”¹¹⁸ Though the active management of these banks was private, “it was bound as well as enfranchised by governmental authority, and the state was as often as not a shareholder.”¹¹⁹

Unlike the gradual development of private banking in England and continental Europe that was later supplemented with public banking, the United States saw banking arrive by transplantation.¹²⁰ In designing its banking system, the United States largely looked to the important public institutions in Europe as a model, including the Bank of England, the Bank of

116. Thayer, *supra* note 107, at 156.

117. Desan & Tankus, *supra* note 66, at 337.

118. HAMMOND, *supra* note 104, at 67.

119. *Id.* For example, the first chartered bank in the United States, the Bank of North America (BNA), sourced a significant portion of its original capital from public coffers. Robert Morris, then the Superintendent of Finance, used \$250,000 in United States specie loaned from France to buy shares in the BNA, while individuals only purchased \$70,000 in stock. JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970*, at 6-7 (1973); James Wilson, *Considerations on the Bank of North America*, in 2 *THE WORKS OF JAMES WILSON* 824, 826 (Robert G. McCloskey ed., 1967). Municipal governments were also involved. New York City owned a tenth of the stock in the Manhattan Company, a water utility and banking business established in 1799, and even had city representatives on the board of directors. HAMMOND, *supra* note 104, at 154.

120. HAMMOND, *supra* note 104, at 68.

Amsterdam,¹²¹ and the Bank of Venice.¹²² Thus, banking came to America “in public rather than private guise.”¹²³

But during the nineteenth century, the state monopoly on banking slowly dissolved as access to the banking franchise was expanded.¹²⁴ The public banks, which had adapted private wealth and management to public purposes through charters that granted privileges and exacted duties, gave way to a more private conception of banking that centered private ends and individual gains.¹²⁵ This privatized conception of banking may be partly attributed to the shift from direct administration to corporate chartering, which drew legal separation between state-chartered banks and the government.¹²⁶ This divide was strengthened over time by the courts, which began to recognize the individual property rights of investors in business corporations.¹²⁷

This ideological shift is perhaps best exemplified by *Trustees of Dartmouth College v. Woodward*.¹²⁸ In drawing the public/private distinction as applied to the corporate form, the Supreme Court eroded the view of corporations as public franchises of the state.¹²⁹ As Justice Story explained in his concurrence, “a bank created by the government for its own uses, whose stock is exclusively

121. Interestingly, one of the early European public banks, the Bank of Amsterdam, was chartered by a municipal government in 1609 to regulate the quality of the money supply and facilitate mercantile trade. See HOFFMANN, *supra* note 62, at 29. Through much of the sixteenth and seventeenth centuries, the monetary base was in great disorder. An idea to address this problem developed in the Dutch Republic was to establish banks in the principal commercial towns to take over the functions of the private moneychangers and cashiers, which were simultaneously banned. The Bank was managed by three commissioners elected by the Town Council from the circle of the municipal regency, and they oversaw the operations of the bank, which were executed by an expert assay-master. J.G. van Dillen, *The Bank of Amsterdam*, in HISTORY OF THE PRINCIPAL PUBLIC BANKS 79, 83-86 (J.G. van Dillen ed., 2d ed. 1964).

122. HAMMOND, *supra* note 104, at 68.

123. *Id.*

124. *Id.* at 67.

125. *See id.*

126. *See* Desan & Tankus, *supra* note 66, at 343 (noting that “the corporate form itself reduced state legislative control”).

127. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 40 (1999).

128. 17 U.S. (4 Wheat) 518 (1819).

129. *See id.* at 638-39 (concluding that public chartering does not make a private corporation public). The public/private distinction was more crisply drawn by Justice Story in his concurrence. *See id.* at 668-69 (Story, J., concurring) (“Another division of corporations is into public and private”). Justice Story explains that “public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government,” but if “the foundation be private, though under the charter of the government, the corporation is private.” *Id.* at 669.

owned by the government, is, in the strictest sense, a public corporation.”¹³⁰ But “a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature.”¹³¹

At the same time, shifts in state fiscal policy also contributed to a more privatized conception of banking. Beginning in the 1820s and 1830s, states began to change their banking policies from direct ownership of corporate shares to taxation.¹³² Instead of purchasing shares in banks to obtain dividends, states began to levy taxes on bank capital.¹³³ This increased the private character of banks by reducing the state’s direct ownership interest.

As the legal status of corporations as public franchises slowly eroded, state legislatures eventually created general incorporation laws that granted access to the corporate form to the public at large.¹³⁴ This was also the case in banking. Many states sought to abolish the special monopoly privileges of legislatively chartered banks by adopting free banking laws—general laws permitting anyone to open a bank if they met certain regulatory requirements.¹³⁵ New York, which spearheaded the free banking movement and served as a model for other states,¹³⁶ also began the trend of explicitly stripping public purpose requirements from bank charters.¹³⁷ The expansion of access to the banking franchise led to the growth of the number of banks, which “ineluctably broke down the unique association of the first few banks with the state and also with commerce. But in the process of becoming adapted to private enterprise, banks never lost all the birthmarks of their public origin.”¹³⁸

This birthmark can be seen in the long tradition in American jurisprudence of recognizing the uniquely public nature of banks. During the nineteenth century, the federal government and the states were both actively engaged in the business of banking. At the federal level, Congress chartered a national bank twice, the First Bank of the United States (1791-1811) and the Second Bank of the United States (1816-1836), to provide a uniform paper currency, help the Treasury administer public finances, and provide capital to

130. *Id.*

131. *Id.*

132. Sylla et al., *supra* note 65, at 393.

133. *Id.*

134. FRUG, *supra* note 127, at 40.

135. HOFFMANN, *supra* note 62, at 87.

136. Menand, *supra* note 89, at 989.

137. HOFFMANN, *supra* note 62, at 87.

138. HAMMOND, *supra* note 104, at 68-69.

develop a strong industrial base for the fledgling nation.¹³⁹ At the state level, there were a diversity of ownership and governance structures of public banking institutions. Many states, including Alabama, Kentucky, Illinois, Vermont, Georgia, Tennessee, and South Carolina, created public banks wholly owned by the state government.¹⁴⁰ Other states, such as Missouri, Indiana, and Virginia, established banks where the state government held a partial ownership interest.¹⁴¹ These state-level public banks served a number of crucial public functions, such as extending credit to industry, providing “a circulating medium for everyday economic transactions,” acting “as the fiscal agent for the state”; generating “revenue for state government operations, obviating the need for taxation”; financing investments in public infrastructure; and regulating “other banks in state.”¹⁴²

But even as the state’s ownership interest was largely excised from banking institutions by the early twentieth century,¹⁴³ bank powers themselves continued to create a strong public interest in the management and regulation of such institutions.¹⁴⁴ This view was sustained through the creation of modern banking system during the Civil War and continued well into the twentieth century.

The modern banking system was formed when Congress enacted the National Bank Act of 1864 (NBA).¹⁴⁵ The NBA established a system of federally-chartered national banks supervised by what would become the Office of the Comptroller of the Currency, a bureau within the Department of the Treasury.¹⁴⁶ National banks “were not designed to facilitate private wealth creation, but to serve as premodern independent agencies.”¹⁴⁷ These new institutions were often described as “essential instruments” and “franchises” of the state.¹⁴⁸

139. See generally CARNELL ET AL., *supra* note 99, at 18-22 (providing an overview of the First and Second Banks of the United States).

140. SCOTT, *supra* note 61, at 1.

141. *Id.*

142. HOFFMANN, *supra* note 62, at 72.

143. But see *supra* notes 68-71 and accompanying text (discussing the notable exception of the BND).

144. See *infra* note 156.

145. National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12, 28, 31 of the U.S.C.).

146. See *id.* at 99-100.

147. Menand, *supra* note 89, at 996-97.

148. *Id.* at 997-98.

In the wake of the NBA, the Supreme Court had more than several occasions to hear cases involving these new federal “instrumentalities.”¹⁴⁹ Throughout, the Court affirmed their public character. In the 1870 case *First National Bank v. Lanier*, the Court noted that banks “were created to subserve public purposes, and not the mere private interests of their stockholders.”¹⁵⁰ The *Lanier* Court expressly adopted the franchise view of banking. Rather than seeing the transfer of stock as a matter of private contract, the Court noted that “[t]he power to transfer . . . stock is one of the most valuable franchises conferred by Congress on banking associations.”¹⁵¹ This franchise from the state “contributes to make the shares of the stock a safe mode of investment,” and “should be in a form to secure public confidence.”¹⁵² Five years later, the Court described national banks as “instruments designed to be used to aid the government in the administration of an important branch of the public service.”¹⁵³ Although privately owned and profit driven, banks still “may serve a public purpose, and such public purpose justifi[es] [their] creation.”¹⁵⁴ In the classic NBA preemption case *Davis v. Elmira Savings Bank*, the Court clarified that “[n]ational banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.”¹⁵⁵

Indeed, banking jurisprudence continued to emphasize the public nature of banks well into the twentieth century.¹⁵⁶ Courts have consistently referred to

149. For a discussion of banks as instrumentalities of the states and the federal government, see Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1290-94 (2014). It is worth noting that the instrumentality view of national banks was gradually abandoned by the Supreme Court around the time of the New Deal. See Roderick M. Hills, Jr., *Exorcising McCulloch: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. PA. L. REV. 1235, 1262 (2013). Nevertheless, banks still serve important public functions. See *infra* note 156 and accompanying text.

150. 78 U.S. (1 Wall.) 369, 374 (1870).

151. *Id.* at 377.

152. *Id.*

153. *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875).

154. *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 446 (1891).

155. 161 U.S. 275, 283 (1896).

156. See, e.g., *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (noting that “banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation” and comparing banks to utility companies); *Pue v. Hood*, 22 S.E.2d 896, 899 (N.C. 1942) (noting that banks are “wholly a creature of statute doing business by legislative grace and the right to carry on a banking business through the agency of a corporation is a franchise which is dependent on a grant of corporate powers by the State.”); *Jackson v. Long*, 167 S.E.2d 583, 585 (Ga. 1969) (noting that “banking affects the public interest and welfare,” and “this public interest is sufficiently important to justify the State in prohibiting banking in any other manner [inconsistent with state regulation]”); *First*

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banks as government “instrumentalities” that are franchised by the state to perform important public functions. In *Schaake v. Dolley*, the Kansas Supreme Court found that “banking has ceased to be, if it ever was, a matter of private concern only, like the business of the merchant, and for all purposes of legislative regulation and control it may be said to be ‘affected with a public interest.’”¹⁵⁷ Similar views were expressed by the North Dakota Supreme Court, which concluded that “the business of banking is so intimately connected with the public interest that the Legislature may prohibit it altogether, or may prescribe the conditions under which it may be done.”¹⁵⁸ Justice Holmes, writing for the Supreme Court in *Noble State Bank v. Haskell*, explained that “the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary... it may go on from regulation to prohibition except upon such conditions as it may prescribe.”¹⁵⁹

Louis Brandeis, perhaps more famous for his views on antitrust than on banking law,¹⁶⁰ typified the Progressive Era view of banks as core public institutions. In his book *Other People's Money*, Brandeis argued that “[b]ank deposits are an important part of our currency system. They are almost as essential a factor in commerce as our railways. Receiving deposits and making loans therefrom should be treated by the law not as a private business, but as one of the public services.”¹⁶¹ In his view, bank directors’ role as “the ultimate judges of bank credit,” meant that banks exercise “a function no less important to the country’s welfare than that of the judges of our courts, the interstate commerce commissioners, and departmental heads.”¹⁶² Brandeis’s contemporary, Senator Robert Owen, the first Chair of the Senate Committee on Banking and Currency and the sponsor of the Federal Reserve Act, said that “a bank is a public-utility institution and cannot be treated as a private affair.”¹⁶³

Am. Bank & Trust Co. v. Ellwein, 198 N.W.2d 84, 98 (N.D. 1972) (noting that “banks are engaged in a business affected with the public interest”); *In re Battle Creek State Bank*, 575 N.W.2d 356, 360 (Neb. 1998) (noting that “a banking corporation is unlike a purely private corporation in that a banking corporation is a quasi-public institution subject to the special banking rules and regulations of the State”).

157. 118 P. 80, 83 (Kan. 1911).

158. *Divide Cnty. v. Baird*, 212 N.W. 236, 238 (N.D. 1926).

159. 219 U.S. 104, 113 (1911).

160. *But cf.* Kathryn Judge, *Brandeisian Banking*, 133 YALE L.J.F. 916, 942 (2024) (highlighting the connections between Brandeisian thought and banking law).

161. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 63 (Frederick A. Stokes Co. 1914).

162. *Id.* at 67.

163. *Id.* at 64 (quoting Owen).

The New Deal banking framework reaffirmed banking's public character.¹⁶⁴ It centralized monetary policy in the hands of the Federal Reserve, nationalized some bank liabilities through FDIC deposit insurance, and implemented an invigorated system of supervision and oversight.¹⁶⁵ Although the New Deal banking order remains largely in place, deregulatory interpretations adopted by banking regulators and legislative reforms adopted by Congress in the 1980s and 1990s have eroded some of its key provisions.¹⁶⁶ Nevertheless, even today, the business of banking remains inexorably linked to its public franchise. Every “aspect of banking, including deposits, loans, and simple financial transactions, relies on a robust network of government support.”¹⁶⁷ Given the long history of government participation in the business of banking and the important public character of banks even absent direct government ownership, banks have always been different from other

164. See Jamie Grischkan, *Regulating Bank Mergers: Past and Present*, 2024 U. ILL. L. REV. 557, 562 (noting that the public utility ideal in banking reached its “apex with the financial reforms of the New Deal”).

165. See RICKS ET AL., *supra* note 90, at 876-77 (noting that “[p]ublic control of the banking system was central to the New Deal financial order”).

166. For example, banking regulators adopted increasingly expansive interpretations of permissible banking or financial activities that allowed financial institutions to develop into large financial conglomerates. See Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 279 (2013) (discussing regulatory interpretations by the Federal Reserve and the Office of the Comptroller of the Currency that relaxed statutory restrictions on bank activities). At the same time, banking regulators also outsourced their supervisory function to market actors, shifting the government's focus on bank supervision from substantive oversight to process policing. See Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1541 (2018) (discussing the decline of discretionary oversight and the rise of financial conglomerates). In essence, “the banking agencies unilaterally disarmed, rolling back their oversight of bank business practices and adopting permissive bright-line rules focused on shareholder equity levels.” Menand, *supra* note 89, at 955. On the legislative front, Congress overturned New Deal-era prohibitions on interstate branching and permitted bank holding companies to acquire banks in any other state. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101(a), 108 Stat. 2338, 2339 (codified as amended at 12 U.S.C. § 1842) (adopting uniform branching and interstate acquisition rules at the national level and overturning the McFadden Act, which prohibited the interstate acquisition of a bank by a bank holding company unless specifically authorized by the laws of the state where the bank was located). And the Gramm-Leach-Bliley Act partially repealed New Deal-era provisions separating commercial and investment banking. See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (1999) (repealing sections 20 and 32 of the Glass-Steagall Act).

167. Mehrsa Baradaran, *A Public Option in Banking: Postal Banking*, in *POLITICS, POLICY, AND PUBLIC OPTIONS*, *supra* note 6, at 153, 155.

business enterprises, and even other types of financial institutions. They are uniquely intertwined with the government and the public interest.¹⁶⁸

B. The Localist Ethos Governing American Banking Powers

Just as debates about how best to use banks to support public functions have spanned U.S. history, the political economy of banking powers was also defined by concerns over the level of concentration of economic power. Of course, broader concerns driving centralization and decentralization of power have been a mainstay of political discourse in American democracy since the founding.¹⁶⁹ But they can also be seen clearly in the early debates over power in the banking system. As scholars like Saule Omarova and Graham Steele have pointed out, the driving motivation for the American system of bank regulation was to prevent concentration of economic and political power.¹⁷⁰ Indeed, a core component of the American theory of banking that emerged over time relates to the decentralization of power and control and a concern about democratic accountability in the banking system.

The politics of banking have long caused significant controversy.¹⁷¹ Debates raged about whether bank powers should be centralized or decentralized. Alexander Hamilton was a major proponent of a centralized banking system.¹⁷² In 1790, Hamilton sent Congress his *Report on the National Bank*, which argued in favor of a single national bank that could augment the productive capital of society, establish a uniform national paper currency to circulate as money, and act as a fiscal agent of the federal government by facilitating payment of taxes and raising money during times of crisis.¹⁷³ In

168. See Fred Block, *Democratizing Finance*, 42 POL. & SOC. 3, 12 (2014) (noting that “government and financial intermediaries have long been deeply intertwined and interdependent”).

169. This was the essence of the debates over federalism. See Michael W. McConnell, Book Review, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1492 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)).

170. Saule T. Omarova & Graham S. Steele, *Banking and Antitrust*, 133 YALE L.J. 1162, 1237 (2024) (noting that the American system of banking regulation was “designed to operate as structural safeguards against excessive concentrations and abuse of economic and political power that private banks enjoy by virtue of their special relationship with the sovereign state”).

171. See MENAND, *supra* note 84, at 68–69.

172. See Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519, 530 (2022) (noting that “Hamilton envisioned a single federally chartered bank”).

173. Alexander Hamilton, *Report on a National Bank*, in 1 THE WORKS OF ALEXANDER HAMILTON 59, 59–66 (New York, Williams & Whiting 1810).

Hamilton's view, once the national bank was set up, "no other bank, public or private, [would] be permitted" during the bank's thirty-year term.¹⁷⁴

But Hamilton's proposal immediately drew criticism from those who were worried about the concentrated political and economic power such a bank would create.¹⁷⁵ James Madison argued that the country would be better served by "several banks properly distributed, than by a single one."¹⁷⁶ Thomas Jefferson went even further. He noted that "the monopoly of a single bank is certainly an evil."¹⁷⁷ And his distrust of banking institutions eventually led him to believe that "banking establishments are more dangerous than standing armies."¹⁷⁸ Jefferson's antipathy towards banks and bankers was demonstrated by his conviction that states should have the right to "exclude [bankers] . . . as we do persons afflicted with disease."¹⁷⁹ But, he eventually concluded that if banks were to exist, they should be small, decentralized, and locally rooted.¹⁸⁰

Initially, Hamilton's argument in favor of centralization won out. The First and Second Banks of the United States were chartered by Congress, but the political backlash against the institutions for what "looked like a new aristocracy" was swift.¹⁸¹ Under President Andrew Jackson, the Second Bank of the United States was put to rest when he vetoed the bill to renew its charter.¹⁸² As scholars have noted, "Jackson had won his war against federal

174. HAMMOND, *supra* note 104, at 47; *see also* Kress, *supra* note 172, at 530 (citing Hammond's account).

175. Of course, others also opposed the creation of a national bank on legal grounds. *See* Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in THE PAPERS OF THOMAS JEFFERSON 275, 276 (James P. McClure & J. Jefferson Looney, eds., digital ed. 2024), <https://perma.cc/UT93-H93F> (concluding that "[t]he incorporation of a bank, and other powers assumed by this bill have not, in my opinion, been delegated to the U.S. by the Constitution").

176. James Madison, *The Bank Bill*, in THE PAPERS OF JAMES MADISON 372, 373 (J.C.A. Stagg ed., digital ed. 2024), <https://perma.cc/XA4X-DDQB>.

177. Letter from Thomas Jefferson to Albert Gallatin (June 19, 1802), in THE PAPERS OF THOMAS JEFFERSON 620, 621 (James P. McClure & J. Jefferson Looney, eds., digital ed. 2024), <https://perma.cc/CFW6-VXTN>.

178. Letter from Thomas Jefferson to John Taylor (May 28, 1816), in THE PAPERS OF THOMAS JEFFERSON 86, 89 (James P. McClure & J. Jefferson Looney, eds., digital ed. 2024), <https://perma.cc/Z7A3-V23E>.

179. CARNELL ET AL., *supra* note 99, at 5 (quoting Jefferson).

180. Kress, *supra* note 172, at 531.

181. *See* MENAND, *supra* note 84, at 71-72 ("By allowing private investors to expand the money supply, the government had lodged 'vast powers . . . in the hands of less than fifty individuals, who may make the whole monied capital of the United States bow to them, or suffer incalculable derangements and losses.' To the Bank's critics, this was 'an aristocracy worthy of the resistance . . . an aristocracy paramount to the law of the United States.'" (quoting Hezekiah Niles, *To Correct Abuses by the Bank*, NILES' WKLY. REG., Mar. 7, 1818, at 17, 23)).

182. *Id.* at 72.

involvement in the U.S. financial system” and “[f]or the next three decades, the states provided the sole legal framework for banking.”¹⁸³

During the nineteenth century, a legal regime which Lev Menand has termed the “American Monetary Settlement” took shape.¹⁸⁴ The American Monetary Settlement relied on (1) the government’s *delegation* of the power to augment the money supply to investor-owned, government-chartered banks; (2) the *separation* of banking from commerce to prevent unfair trade practices; (3) the *diffusion* of banking institutions to allow anyone to participate in the banking franchise; and (4) the *supervision* to coordinate the activities of different actors within a diffuse banking system.¹⁸⁵

This diffusion, or decentralization, within the banking system was key to the system’s political viability and remains a core feature of the American banking structure even today. As Jeremy Kress has noted, state banking law played a major role in preserving small and localized banks during this period.¹⁸⁶ And the localist instinct continued to hold true, even as the federal government stepped in to create the national banking system during the Civil War. The modern system of national banks created under the NBA, which intended (but failed) to stamp out state banks, was still designed to create local, independent institutions.¹⁸⁷ “Nationalization without centralization was the keynote of the law.”¹⁸⁸ This decentralized system proved politically resilient. As Jamie Grischkin has noted, “even as the second industrial revolution and the rise of managerial capitalism fostered economies of scale and scope never before seen, commercial banking remained a predominantly small and local affair.”¹⁸⁹

183. MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET TAHYAR, *FINANCIAL REGULATION: LAW AND POLICY* 38 (2d ed. 2018).

184. See MENAND, *supra* note 84, at 72-83; Menand, *supra* note 89, at 980-1012.

185. MENAND, *supra* note 84, at 74-83.

186. See Kress, *supra* note 172, at 532 (concluding that “by the close of the nineteenth century, U.S. policymakers had embraced a philosophy of decentralization in the banking sector”). Indeed, “policymakers prioritized decentralization in the banking sector for much of the first two hundred years of the Republic.” *Id.* at 530.

187. Menand, *supra* note 89, at 998-99; see also *Stock Exchange Practices: Hearings on S. Res. 84 and S. Res. 239 Before a Subcomm. of the Comm. on Banking and Currency*, 72d Cong. 2032 (1933) (statement of Frederick W. Lehmann, Solicitor General) (“The banks created by the national banking act, were, and were designed to be, local institutions and independent of each other, but under national control and supervision.”).

188. *Stock Exchange Practices: Hearings on S. Res. 84 & S. Res. 239 Before a Subcomm. of the Comm. on Banking & Currency*, 72d Cong. 2032 (1933) (statement of Frederick W. Lehmann, Solicitor General). “[T]he paramount purpose was to secure a uniform national system of currency, and to do this without the creation of a great central institution like the old United States Bank.” *Id.* at 2030.

189. Grischkan, *supra* note 164, at 564.

Similar debates played out in the early twentieth century. In 1913, Congress passed the Federal Reserve Act to establish the nation's central bank—the Federal Reserve System.¹⁹⁰ But rather than creating a single, centralized institution, Congress opted to create a decentralized system, “a composite of several parts, both public and private, organized on a regional basis with a central governmental supervisory authority.”¹⁹¹ This was in response to the key political debates at the time. One of the axes of debate focused on how much public or private control should be enshrined in the Federal Reserve System.¹⁹² But debates also swirled around a second axis—how centralized or decentralized control of the country's new central bank should be.¹⁹³ Proponents of a decentralized system argued that it was necessary to check the political power of a central bank and equitably distribute money and credit across the country. In their eyes, the goal of the Federal Reserve System was “to decentralize the people's money and disseminate it, under Government control, where it is most needed, instead of permitting it to be used for the aggrandizement of our monopoly builders” on Wall Street.¹⁹⁴ To achieve this decentralized vision, the Federal Reserve System would “establish regional banks, to decentralize this dangerous concentration of capital in the few great centers of speculation and gambling, and to place the money of the country where those who are engaged in legitimate industry may secure adequate accommodations at all times.”¹⁹⁵ Indeed, as Representative Carter Glass concluded, the United States' vast geography and economically diverse regions made a single, centralized central bank undesirable.¹⁹⁶ In the end, President Woodrow Wilson proposed the Federal Reserve Act's key compromise where “a Washington-based, government-controlled supervisory board” would sit atop of the “essentially private, decentralized central banks flung... throughout the country.”¹⁹⁷ Throughout the twentieth century, the Federal Reserve System would continue to evolve—centralizing political control in the Board of Governors and increasing its public governance.¹⁹⁸ But its structure continues to show the strong pull of decentralization of banking powers in American political economy.

190. Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended at scattered sections of 12 U.S.C.).

191. *Reuss v. Balles*, 584 F.2d 461, 462 (D.C. Cir. 1978).

192. See PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 20-21 (2016).

193. See *id.*

194. 50 CONG. REC. 4697 (1913) (statement of Rep. Elsworth Bathrick).

195. 50 CONG. REC. 872 (1913) (statement of Sen. Ellison Smith).

196. H.R. REP. NO. 63-69, at 12 (1913).

197. CONTI-BROWN, *supra* note 192, at 21.

198. *Id.* at 30-31.

This localist ethos continued as a key component of the New Deal framework, where it was seen as desirable for bankers to live “in the communities they served, enhancing their legitimacy and increasing the likelihood that their communities would prevent them from abusing their franchise.”¹⁹⁹ The decentralization of bank powers was crucial to the New Deal order. As President Roosevelt stated in his address to Congress, “The power of a few to manage the economic life of the Nation must be diffused among the many or be transferred to the public and its democratically responsible government.”²⁰⁰ The concentration of bank powers “becomes particularly dangerous when it is exercised from a distance.”²⁰¹

Despite many years of mergers and increased financial concentration, the U.S. banking system is far more decentralized than that of most other countries.²⁰² In 2021, the five largest banks in the United States held just under 50% of total commercial banking assets.²⁰³ The global average for asset concentration is over 80%.²⁰⁴ The United States is significantly lower than other developed countries like Canada (84%), Singapore (92%), Sweden (93%), and Germany (94%).²⁰⁵ In part, this stems from the localist ethos and practice of American banking law.²⁰⁶ There is a deeply rooted idea that banks should extend loans and take deposits within a limited market area defined by local and community boundaries.²⁰⁷ Decentralization of banking powers allows this

199. RICKS ET AL., *supra* note 90, at 873.

200. FRANKLIN D. ROOSEVELT, STRENGTHENING AND ENFORCEMENT OF ANTITRUST LAWS, S. DOC. NO. 75-173, at 6 (3d Sess. 1938).

201. *Id.* at 8.

202. MENAND, *supra* note 84, at 81. “[T]he U.S. banking industry remains much less concentrated than banking in many other countries, and the size of the largest banks relative to GDP is still low when compared to other countries.” FIN. STABILITY OVERSIGHT COUNCIL, 2011 ANNUAL REPORT 57 (2011), <https://perma.cc/Z3HM-GHSZ>.

203. *Global Financial Development Database*, WORLD BANK, <https://perma.cc/48UU-BNHT> (archived Mar. 23, 2025) (using data from the five-bank asset concentration indicator (GFDD.OI.06) for 2021 by country).

204. *Id.*

205. *Id.*

206. See Omarova & Steele, *supra* note 170, at 1220 n.319 (noting the importance of geographic restrictions in preventing undue concentration of financial power); Judge, *supra* note 160, at 917-18 (noting the impact of unit banking laws in keeping the U.S. banking system decentralized); RICKS ET AL., *supra* note 90, at 873-75 (noting how branching and merger restrictions helped maintain a decentralized banking system).

207. As stated in a report commissioned by the National Monetary Commission to survey state banking laws and practices in the early twentieth century, there is a “very general desire of each American community, no matter how small, to have its banks managed by its own citizens.” NAT’L MONETARY COMM’N., 61ST CONG., STATE BANKS AND TRUST COMPANIES SINCE THE PASSAGE OF THE NATIONAL-BANK ACT, S. DOC. NO. 61-659, at 135 (3d Sess. 1911). That preference can still be seen today in the prominence of community banks in the U.S. banking system. See FDIC, 2012 COMMUNITY BANKING STUDY 1-5

footnote continued on next page

public franchise to focus its business on traditional banking activities and rely on personal relationships and specialized community knowledge in making lending decisions.²⁰⁸ It serves as an important basis for the political origins and local interest in public banking.

II. The Benefits of Municipal Public Banking

The important public nature of banking coupled with the fundamental role of decentralization provides the theoretical foundation for democratic oversight and local participation in the banking system. This has become even more salient as everyday life has been transformed by financialization—a “pattern of accumulation in which profits accrue primarily through financial channels rather than through trade and commodity production.”²⁰⁹ As Robert Hockett and Saule Omarova have shown, when financialization increases, “financial institutions find it more profitable to channel credit toward markets in financial instruments, in which they have significant informational and institutional advantages, than toward real-economy projects with long-term payoffs that depend on a variety of macroeconomic factors these financial institutions cannot control.”²¹⁰ The idea of public banking is meant to combat financialization—it seeks to reorient financial resources from speculative accumulation to activities that support real economic activity and the public interest at the local level. To that end, this Part explores current financial challenges cities and communities face and describes how municipal public banks can help local governments alleviate those problems. Specifically, it examines how municipal public banks can help cities better manage their financial resources; fund long-term investments in housing, infrastructure, and other local policy priorities; and facilitate better access to financial services for local residents.

A. Managing Local Government Finances

Local governments have significant financial resources that they must manage for the benefit of the public. In 2021, local governments generated \$2.4

(2012) (noting that in 2010, 94% of all chartered banks are community banks, which are defined by their reliance on “traditional relationship banking and limited geographic scope of operations”).

208. See Robert DeYoung, William C. Hunter & Gregory F. Udell, *The Past, Present, and Probable Future for Community Banks*, 25 J. FIN. SERVS. RSCH. 85, 104-06 (2004) (describing how community banks are “relationship lenders”).

209. Greta R. Krippner, *The Financialization of the American Economy*, 3 SOCIO.-ECON. REV. 173, 174 (2005).

210. Hockett & Omarova, *supra* note 89, at 1215.

trillion in revenue, made \$2.2 trillion in expenditures, held \$2.7 trillion in securities and cash, and owed about \$2.1 trillion in outstanding debt.²¹¹ Estimates from the Federal Reserve indicate that state and local governments held more than \$750 billion in cash and bank deposits in 2023.²¹²

The current structure of municipal banking services enables shareholder-owned banks to leverage public funds for private gain. State statutes or municipal charters require local governments to select depository institutions in which to place public deposits.²¹³ Large cities, like Los Angeles and San Francisco, must manage hundreds of bank accounts with private banks.²¹⁴ For example, in 2024, Los Angeles held \$442 million in deposits at various financial institutions and managed pooled investments of public assets valued at over \$15 billion.²¹⁵ In addition, public pensions and other municipal retirement account programs held nearly \$78 billion in assets.²¹⁶ And these banking services are costly. In the case of Los Angeles, the city pays “over \$340 million in banking fees and over \$1.3 billion in interest just to borrow from commercial banks each year.”²¹⁷

Another problem local governments face in relying on shareholder-owned private banks is that private banks may use public funds to finance investment outside of the community the local government is set up to serve. For example, requirements that commercial banks make investments in local communities proportional to local government deposits are difficult to enforce because the fungible nature of money makes it impossible to determine if the investment objectives are being met.²¹⁸ “Since money is a free-flowing object of trade

211. *2021 State & Local Government Finance Historical Datasets and Tables*, U.S. CENSUS BUREAU (2023), <https://perma.cc/XN5E-WJZN>.

212. *State and Local Governments; Total Currency and Deposits; Asset, Level*, BD. OF GOVERNORS OF THE FED. RESRV. SYS., <https://perma.cc/W32W-XTNG> (archived Mar. 23, 2025).

213. See 15 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 39.58 (3d ed. 1985).

214. This inefficiency is largely attributable to the cap on deposit insurance. See 12 C.F.R. § 330.15(a)(2) (2024) (providing deposit insurance up to the standard maximum deposit insurance amount of \$250,000 for demand, time, and savings deposits for custodians of funds of state, county, municipality or political subdivisions). As Lev Menand and Morgan Ricks have argued, “[i]nsuring all deposits upfront would . . . simplify cash management practices for countless businesses and other institutions,” including, for our purposes, local governments. See Lev Menand & Morgan Ricks, *Opinion, Scrap the Bank Deposit Insurance Limit*, WASH. POST (Mar. 15, 2023, 7:15 AM EDT), <https://perma.cc/52CS-SVJR>.

215. See CITY OF LOS ANGELES, *ANNUAL COMPREHENSIVE FINANCIAL REPORT 78* (2024), <https://perma.cc/FD6D-TYQQ>.

216. *Id.*

217. Trinity Tran, *Transcending Finance with Public Banking*, INST. FOR THE FUTURE (Apr. 20, 2023), <https://perma.cc/V552-ZN6Q>.

218. David Allardice, *State and Local Government Deposits in the District: Law and Deposit Allocation*, 3 FED. RESRV. BANK CHI. ECON. PERSPS. 22, 31 (1977).

which ignores political boundaries, attempts to use state and local deposits to promote social goals and objectives may be of little avail.”²¹⁹ Of course, the Community Reinvestment Act (CRA) was adopted to encourage financial institutions “to help meet the credit needs of the local communities in which they are chartered.”²²⁰ Despite its lofty goals and nearly fifty years on the books, scholars like Peter Conti-Brown and Brian Feinstein have concluded that the CRA has failed to meet its objectives.²²¹ Indeed, I discuss many of these stark inequalities that persist in Part II.C.²²²

Modern American cities also rely heavily on the bond market to meet their financial needs.²²³ Municipal public banks are seen by proponents as an avenue to break municipal dependence on the bond market.²²⁴ Scholars have observed that the contemporary powerlessness of cities arises not merely from the strictures of state and federal government on local finances, but also from “the discipline imposed on it by private capital.”²²⁵ Destin Jenkins’s pathbreaking book *The Bonds of Inequality* has done much to highlight the structural dependence of the modern American city on the municipal bond market and how this dependence has given financiers and ratings agencies an outsized influence over municipal finance and policy.²²⁶ The bond market is where the financial services industry extracts rents from the infrastructural needs of cities and their residents all while being backed by public subsidies. “Bankers collect underwriting fees, bondholders collect principal and tax-exempt interest—income backed by layers of guarantees—and analysts and information brokers collect subscription fees.”²²⁷ This structural dependence on the financial sector is compounded by city governance changes that nest

219. *Id.*

220. 12 U.S.C. § 2901(b).

221. Peter Conti-Brown & Brian D. Feinstein, *Banking on a Curve: How to Restore the Community Reinvestment Act*, 13 HARV. BUS. L. REV. 335, 340 (2023) (noting that “despite some meaningful steps in the right direction, the CRA has failed to deliver on its promise, as access to credit and other banking services continues to be highly stratified and wealth inequality continues to grow”). Conti-Brown and Feinstein survey the empirical literature evaluating the CRA, which they describe as “vast as it is uncertain.” *Id.* at 351.

222. See *infra* Part II.C. As Conti-Brown and Feinstein also observe, “the persistence of banking deserts, underinvestment in lower-income and minority communities, and the racial wealth gap” demonstrate the CRA’s general failure. Conti-Brown & Feinstein, *supra* note 221, at 351.

223. See Nadav Shoked, *Debt Limits’ End*, 102 IOWA L. REV. 1239, 1247–48 (2017).

224. See Omarova, *supra* note 72, at 1149–50.

225. Felipe Ford Cole, *Unshackling Cities*, 90 U. CHI. L. REV. 1365, 1368 (2023).

226. DESTIN JENKINS, *THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY* 7 (2021).

227. *Id.* at 2.

“bond financiers in urban government” and make city technocrats reliant “on the opinions of those who [seek] to protect bondholder interests at the expense of residents’ social welfare.”²²⁸ These constraints place drastic limits on cities as they attempt to tackle many of the most pressing social, economic, and environmental challenges of our time.²²⁹

Finally, cities face several legal and economic restraints on their ability to fund basic social provisions. Even though local governments are responsible for providing many of our most basic public goods and services,²³⁰ state governments exercise significant control over the ability of local governments to generate revenue through taxation and borrowing.²³¹ On the taxation front, virtually all cities can use property taxes to generate revenue,²³² but other sources are more variable. State law limits many cities’ ability to impose sales taxes, and is even more restrictive with regard to income taxes.²³³ To get a sense of proportions, in 2021 30% of local government general revenues came from property taxes, whereas just 5% came from general sales taxes, and only 2% came from individual income taxes.²³⁴ In addition to taxes, cities often rely on fees, dues, and special assessments—“charges residents pay for services provided, as opposed to taxes levied to provide public services generally.”²³⁵ These charges tend to be more flexible than taxing and borrowing because

228. *Id.* at 3.

229. Cole, *supra* note 225, at 1368.

230. See Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 299-301 (2016) (noting that cities are often relied on to provide sanitation, public safety, infrastructure, public spaces, public health services, regional transportation services, and local economic development).

231. WESLEY THARPE, CTR. ON BUDGET & POL’Y PRIORITIES, EASING STATE RESTRAINTS ON LOCAL TAXING POWER CAN STRENGTHEN DEMOCRACY, PROMOTE PROSPERITY AND EQUITY 1 (2023) (noting that many restrictions on local governments “are baked into decades- or even centuries-old statutes or state constitutions governing the rules around state and local power”).

232. CHRISTINA K. MCFARLAND & CHRISTOPHER W. HOENE, NAT’L LEAGUE OF CITIES, CITIES AND STATE FISCAL STRUCTURE 17 tbl.1B (2015) (showing that every state grants cities the authority to collect property taxes). But “several cities are not authorized to levy a property tax for any purpose without a vote of the electorate,” with the largest such city being Mesa, Arizona. *Id.* at 6.

233. See *id.* at 17 tbl.1B (noting that in 42% of states, municipal governments rely on property taxes as their only source of tax authority).

234. *What Are the Sources of Revenue for State and Local Governments?*, TAX POL’Y CTR., <https://perma.cc/RW45-VPSY> (archived Mar. 23, 2025).

235. Scharff, *supra* note 230, at 304. Common examples include fees to use government-owned facilities, assessments for locale-specific capital improvements, regulatory fees designed to offset the negative impact of private sector activity, and charges based on consumption of government-provided services and utilities. Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373, 381 (2004).

they often do not require local governments to receive authorization from state governments and are subject to fewer restrictions.²³⁶ In 2021, these charges and fees provided 16% of local government general revenues.²³⁷ Although still less than property taxes, fees and charges have been the “fastest growing component of local government revenues” since the 1970s.²³⁸ Lastly, local governments also rely on intergovernmental transfers—redistributive grant programs from state and federal governments. While important, most local governments primarily rely on their own-source capacity (taxes and fees) to fund the provision of local goods and services.²³⁹

In addition to formal legal constraints on municipal finances, cities must also confront economic incentives that limit their ability to tax mobile residents.²⁴⁰ Conventional public choice models suggest that cities will struggle to impose progressive taxation regimes even where legally available because “[r]esidents and firms that bear the burden of local redistribution can too easily exit to neighboring jurisdictions that impose only benefit-based taxes of the sort that underwrite goods and services for taxpayers themselves.”²⁴¹ When coupled with jurisdictional fragmentation, local fiscal responsibility, and mobile capital, “even if the members of [a] municipality unanimously desire to fund public investments . . . through progressive taxes on wealth, they *cannot do so*.”²⁴² This means that local governments are largely constrained in their “ability to provide public goods or achieve redistribution, absent centrally-coordinated fiscal transfers.”²⁴³

236. Scharff, *supra* note 230, at 304.

237. *What Are the Sources of Revenue for State and Local Governments?*, *supra* note 234.

238. J. RICHARD ARONSON & JOHN L. HILLEY, FINANCING STATE AND LOCAL GOVERNMENTS 7 (1986).

239. Compare MCFARLAND & HOENE, *supra* note 232, at 19 tbl.2B (showing that U.S. municipalities derive approximately 71% of their general fund revenues from own-source revenues on average), with *id.* at 21 tbl.3B. (showing that U.S. municipalities derive approximately 17% of their general revenues from state grants on average).

240. For the classic articulation of the theory that residents will choose to live in communities that match their economic preferences for the provision of public goods, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418, 422 (1956).

241. Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 Nw. U. L. REV. 1057, 1058 (2007) (summarizing the conventional public choice view); see also Brian Highsmith, *The Implications of Inequality for Fiscal Federalism (Or Why the Federal Government Should Pay for Local Public Schools)*, 67 BUFF. L. REV. 407, 428-43 (2019) (discussing how the public finance literature has considered the viability of local governments’ efforts to redistribute wealth).

242. Brian Highsmith, *The Bondholders’ Veto: Fiscal Federalism and Local Democracy*, LPE PROJECT (Sept. 9, 2021), <https://perma.cc/ZE69-3AVG>.

243. Highsmith, *supra* note 241, at 448-49.

These legal and economic restraints on local government finances have significant economic, political, and social ramifications. As scholars have shown, property taxes and user fees tend to be more regressive than other revenue-generating methods, exacerbating inequality within and across local jurisdictions.²⁴⁴ It also has important political ramifications for how people think about the purpose of local government. In terms of fees, dues, and special assessments, Laurie Reynolds has argued that the “get what you pay for” model of local government finance has a privatizing effect on government services and erodes the redistributive function that local governments may play.²⁴⁵ In a similar vein, Gerald Frug and David Barron have noted that the “fee-for-service mentality” has the power to transform how communities think about the purpose of local government, what services the city provides, and whom the city exists to serve.²⁴⁶ Finally, the way we finance local governments can have large social costs. Reliance on police fines and fees to generate revenues for cash-strapped local governments has had disastrous effects on local communities, especially communities of color, as the U.S. Department of Justice’s investigation into the Ferguson Police Department found.²⁴⁷

Municipal public banks can provide more generalized financial support to local governments outside of their limited taxing power. Since at least the nineteenth century, local governments in the United States have relied on for-profit ventures to curb their dependence on taxation while also providing services.²⁴⁸ Many cities own and operate businesses that are infrastructural-

244. INST. ON TAXATION & ECON. POL’Y, WHO PAYS?: A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 12 (6th ed. 2018) (noting that “low-income families pay 4.2 percent of their incomes, middle-income families pay 3.0 percent of their incomes, and the top 1 percent pay 1.7 percent” in property taxes). While property taxes are regressive, the report also notes that sales and excises taxes tend to be even more regressive. “Poor families pay almost eight times more as a share of their incomes in these taxes than the best-off families, and middle-income families pay more than five times the rate of the wealthy.” *Id.* In the same way, user fees tend to be more regressive as well. See GOV’T FIN. OFFICERS ASS’N, RETHINKING LOCAL GOVERNMENT REVENUE SYSTEMS: WHY IS IT NECESSARY? 7 (2021); Paul Gertler, Luis Locay & Warren Sanderson, *Are User Fees Regressive?: The Welfare Implications of Health Care Financing Proposals in Peru*, 36 J. ECONOMETRICS 67 (1987). For example, a study on land use exactions and impact fees found that user fees tend to be more regressive than property taxes. See ALAN A. ALTSHULER, JOSE A. GOMEZ-IBANEZ & ARNOLD M. HOWITT, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 135-36 (1993).

245. Reynolds, *supra* note 235, at 376-77.

246. See GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 87-89 (1st ed. 2008).

247. See U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015); see also Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1403-05 (2018) (discussing how profit-driven police tactics have permeated the criminal law system).

248. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1150 (1980).

style utilities—like electricity, natural gas, water, and sewage services.²⁴⁹ Cities also own and operate businesses that provide transportation—like public transit networks, parking garages, and airports.²⁵⁰ But cities also engage in other ventures that may seem more private/proprietary in nature, by operating businesses like liquor stores,²⁵¹ grocery stores,²⁵² and public markets.²⁵³ Municipal public banks provide a way for cities to increase revenues based on profits from their lending activities without raising taxes. There are already examples in the United States of public banks being profitable. The BND, America's oldest continually operating public bank, generated \$191.2 million in net income in 2022, resulting in a 19% return on investment for the state.²⁵⁴

B. Allocating Public Capital to Policy Priorities

Municipal public banking advocates have also highlighted the important role these institutions can play in meeting pressing policy challenges faced by cities—including investing in affordable housing, financing green public infrastructure, and making loans to local small businesses to support community development.²⁵⁵ As discussed in Part II.A, private financial institutions have not been a useful tool for reinvesting local government funds back into the local communities they serve.

Today, activism on the part of local residents has played an important role in shaping how city finances are managed. Take for instance the municipal divestment movement that sprang up in response to Wells Fargo's financing of the Dakota Access Pipeline. Wells Fargo invested \$120 million in the project, one that has drawn criticism from Native rights and environmental groups.²⁵⁶ In response, the Seattle City Council voted to cut ties with Wells Fargo,

249. 12 MCQUILLIN, *supra* note 213, § 35:3.

250. *Id.*

251. *Why Does Minnesota Have Municipal Liquor Stores?*, STAR TRIBUNE (Mar. 24, 2023, 7:30 AM), <https://perma.cc/KL2A-3E7T>.

252. Sydney Vasquez, *Madison's First Municipally-Owned Grocery Store*, MADISON COMMONS (Feb. 15, 2024), <https://perma.cc/P8BT-3WMK>.

253. Perhaps the most famous is Pike Place Market in Seattle, which is owned and operated by the city through a public corporation. See CHARTER OF PIKE PLACE MARKET PRESERVATION AND DEVELOPMENT AUTHORITY, art. II, § 1 (2004).

254. BANK OF N.D., 2022 ANNUAL REPORT 4 (2022).

255. See S.F. REINVESTMENT WORKING GRP., SAN FRANCISCO MUNICIPAL FINANCE CORPORATION: BUSINESS AND GOVERNANCE PLAN AND VIABILITY STUDY 7-12 (2023).

256. CARLA F. FREDERICKS, MARK MEANEY, NICHOLAS PELOSI & KATE R. FINN, UNIV. OF COLO. BOULDER FIRST PEOPLES WORLDWIDE, SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE 38 (2018).

pulling its more than \$3 billion in annual cash flow from the bank.²⁵⁷ In California, Santa Monica and Davis followed suit, and other divestment campaigns “took place in San Francisco, Los Angeles, New York, Bellingham, Raleigh, and Albuquerque, among other cities.”²⁵⁸

Other cities like Philadelphia, Chicago, and New Haven as well as the state governments of Illinois and California divested from Wells Fargo in response to its fake account scandal, where the bank fraudulently created more than three million accounts without customers’ knowledge to meet sales goals.²⁵⁹ These local campaigns driving divestment are partially responsible for Wells Fargo’s portfolio of state and municipal deposits declining by 17% between 2016 and 2018.²⁶⁰ A slew of other scandals involving Wells Fargo, including racial discrimination in mortgage refinancing applications,²⁶¹ its heavy investment in the private prison industry,²⁶² and its backing of the gun industry and lobby,²⁶³ have brought into stark relief the divergence between some cities’ interests and that of their banks. Rather than investing in local communities who deposit their funds with the bank, large financial institutions focus on shareholder value and increasing returns.²⁶⁴

257. Bill Chappell, *2 Cities to Pull More Than \$3 Billion From Wells Fargo Over Dakota Access Pipeline*, NPR (Feb. 8, 2017, 2:18 PM ET), <https://perma.cc/SVE5-NDJV>.

258. FREDERICKS ET AL., *supra* note 256, at 39.

259. Laura Alix, *Seattle Finds Breaking up with Wells Fargo Is Hard to Do*, AM. BANKER (June 6, 2018, 11:31 AM EDT), <https://perma.cc/6E9B-2T9V>.

260. *See id.*

261. *See* Emily Flitter, *A Black Homeowner Is Suing Wells Fargo, Claiming Discrimination*, N.Y. TIMES (Mar. 21, 2022), <https://perma.cc/J6NA-6KKY> (citing a Bloomberg report that found that Wells Fargo “had accepted just 47 percent of all Black borrowers’ applications, while other lenders had approved a combined 71 percent of their Black customers’ applications”).

262. *See* Katie Lobosco, *Immigrant Advocates Attack Banks for Financing Private Prisons*, CNN (July 26, 2018, 9:47 AM EDT), <https://perma.cc/TT2D-SD82> (detailing how Wells Fargo and other large financial institutions “have lent money to two big private prison companies, CoreCivic and GEO Group, and held millions of dollars of their debt as of March 2018”).

263. *See* Shahien Nasiripour, Polly Mosendz & Brandon Kochkodin, *Wells Fargo Is the Go-To Bank for Gunmakers and the NRA*, BLOOMBERG (Mar. 7, 2018, 2:05 PM EST), <https://perma.cc/4DQD-Q26U> (detailing how Wells Fargo has “helped two of the biggest U.S. firearm and ammunition companies access \$431.1 million in loans and bonds since December 2012” and provides a “\$28 million line of credit for the NRA”).

264. The duty of corporate officers to maximize shareholder profits was famously articulated in *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”). But some have argued that this conception of fiduciary duties does not apply to banks. *See, e.g.*, David Min, *Federalizing Bank Governance*, 51 LOY. U. CHI. L.J. 833, 849 (2020) (arguing “that bank fiduciary duties are broader, with bank directors also owing a general fiduciary duty to depositors, to the federal government, and/or to the general principle of safety and soundness”). For a general discussion of the goals of corporate

footnote continued on next page

This is where municipal public banks can step in for cities as a policy tool. As Gerald Frug has noted, municipal public banks can modulate local credit conditions to “significantly affect the growth and nature of the city economy” by changing lending criteria.²⁶⁵ Take for instance San Francisco’s supply of affordable housing. There is a large shortage of affordable housing in San Francisco, where construction has not kept pace with population growth.²⁶⁶ But the production of market-rate housing has surpassed targets while there has been a noted underproduction of affordable housing.²⁶⁷ Conditioning lending on certain criteria provides a powerful policy tool for local governments. Through municipal public banks, cities like San Francisco could set a policy for affordable housing loans that condition the loans on borrowers’ willingness to provide “stable long-term tenancy to low- to medium-income residents.”²⁶⁸ Loan policies could also give preferences to housing suppliers being organized as nonprofits willing to “buy and manage these properties, subject to covenants that stipulate long-term affordability requirements.”²⁶⁹ In addition to providing financing for new developments, municipal public banks could enable cities to fund acquisitions of housing stock.²⁷⁰ As some policy experts have observed, “[t]he overarching objective of a City-supported acquisition program is to remove elements of the residential stock from the speculative market and to create a supply of housing in which rents are tethered to median income growth.”²⁷¹ Taking an ownership interest will enable the city, through the municipal public bank, to ensure that rent controls are implemented in a way that preserves housing affordability in line with local policy objectives.²⁷²

Municipal public banks are also well positioned to invest in green infrastructure that aids in climate change objectives. They can prioritize lending to both housing and infrastructure borrowers who install “electric appliances, solar power, energy storage, weatherization and insulation, and

law and the debate between shareholderism and stakeholderism, see John Armour, Henry Hansmann, Reiner Kraakman & Mariana Pargendler, *What Is Corporate Law?*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 22-24 (Reinier Kraakman et al. eds., 3d ed. 2017).

265. Frug, *supra* note 248, at 1150.

266. S.F. REINVESTMENT WORKING GRP., *supra* note 255, at 16.

267. *Id.*

268. KARL BEITEL, ROOSEVELT INST., *THE MUNICIPAL BANK: REGULATORY COMPLIANCE, CAPITALIZATION, LIQUIDITY, AND RISK* 9 (2016).

269. *Id.*

270. See PAUL KATZ ET AL., JAIN FAMILY INST., *WHAT A MUNICIPAL PUBLIC BANK CAN DO FOR LOS ANGELES AND ITS PEOPLE* 11 (2023).

271. BEITEL, *supra* note 2, at 18.

272. *Id.*

other green technologies” that help mitigate the huge costs climate change poses to cities and their residents.²⁷³

A similar logic applies to investing in small business and local communities. Cities continue to grapple with racial inequalities created by discrimination in the commercial lending markets. For example, in San Francisco, Black- and Hispanic-owned small businesses had significantly lower business ownership rates compared to the national average due to low access to financial services and discriminatory underwriting criteria in the private banking market.²⁷⁴ Through loans to local small businesses, nonprofits, and cooperatives based on equal access criteria, municipal public banks can “strengthen the viability of local small businesses and nurture entrepreneurship, specifically for women, people of color, and LGBTQIA+ people” who are traditionally denied access in the private lending markets.²⁷⁵

C. Facilitating Financial Inclusion

While municipal public banking proposals have generally focused on the benefits of wholesale models where the advantages accrue to the municipality itself,²⁷⁶ municipal public banks may also create an opportunity for cities to provide retail banking services to underserved communities. According to data from a 2021 FDIC survey, 4.5% of U.S. households (approximately 5.9 million households) were unbanked, meaning no one in the household had a checking or savings account at a bank or credit union.²⁷⁷ In addition, another 14.1% of all U.S. households (approximately 18.7 million households) are underbanked, meaning they have access to a bank account but still used non-bank alternative financial services providers such as payday lenders, check cashing services, money order services, and pawn shop lenders for their financial needs.²⁷⁸ As Mehrsa Baradaran has observed, “These lenders are often usurious, sometimes predatory, and almost always much worse for low-income individuals than the services offered by traditional banks to their customers.”²⁷⁹

273. S.F. REINVESTMENT WORKING GRP., *supra* note 255, at 11. This is increasingly important as the largest financial institutions have turned against climate initiatives. See Eshe Nelson, *Big Banks Quit Climate Change Groups Ahead of Trump’s Term*, N.Y. TIMES (Jan. 20, 2025), <https://perma.cc/Y8XA-NXQ9>.

274. See S.F. REINVESTMENT WORKING GRP., *supra* note 255, at 10.

275. *Id.* at 12.

276. See, e.g., CISNEROS, *supra* note 51, at 33.

277. FDIC, 2021 NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 75, tbl.11.1 (2021).

278. *Id.* at 75.

279. Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 485-86 (2013).

Unbanked and underbanked households pay higher fees to access basic financial services and spend more time making payments, accessing their money, and cashing checks.²⁸⁰ Studies have found that the unbanked pay four times more in fees to access their money than those with bank accounts.²⁸¹ These communities are also more likely to be excluded from saving, investing, and borrowing services.²⁸² And if they do have access to these services, they often must pay more and take on more financial risk to access them than their banked counterparts.²⁸³

In addition to the direct financial costs that come from higher fees and lost time, unbanked and underbanked households also bear indirect costs. One crucial service banks provide that fringe finance institutions do not is a credit history. Low-income individuals may be “excluded from mainstream lending due to low, incorrect, or even nonexistent credit scores, which are calculated in part from transactions involving bank accounts.”²⁸⁴ This negative impact on credit history ripples across other aspects of people’s lives because credit histories may be accessed by employers, landlords, insurers, and utility companies who make decisions on whom to hire, rent to, insure, and provide services to without a deposit.²⁸⁵

These burdens and costs are not evenly distributed. Lack of access to the banking system disproportionately affects marginalized communities, particularly low-income households, people of color, and those with disabilities.²⁸⁶ Indeed, 94.8% of unbanked households and 72.4% of underbanked households earn less than \$75,000 per year.²⁸⁷ The racial disparities are equally stark. Whereas only 2.1% of white households are unbanked, that rate rises to 9.3% for Hispanic households and 11.3% for Black households.²⁸⁸ And about one in four Black, Hispanic, and American Indian or Alaska Native households were underbanked, compared with about one in ten white households.²⁸⁹ Finally, working-age households with a disability comprised 8.2% of the

280. See Bhaskar Chakravorti, *The Hidden Costs of Cash*, HARV. BUS. REV. (June 26, 2014), <https://perma.cc/PHL4-VG99>.

281. *Id.*

282. BARR ET AL., *supra* note 183, at 826-27.

283. *Id.*

284. *Id.* at 827.

285. Emily Guy Birken, *The Costs of Being Unbanked or Underbanked*, FORBES ADVISOR (Dec. 2, 2022, 10:31 AM), <https://perma.cc/H9RG-E7YD>.

286. BD. OF GOVERNORS OF THE FED. RESRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2022, at 39 tbl.16 (2023).

287. FDIC, *supra* note 277, at 77-78 tbl.11.3.

288. *Id.* at 75-76 tbl.11.1.

289. *Id.*

overall household population but 27.3% of the unbanked and 11.9% of the underbanked population.²⁹⁰

Given the high costs of fringe finance (the market solution),²⁹¹ why don't consumers use the banking system? According to FDIC survey data, consumers felt that they didn't have enough money to meet minimum balance requirements, didn't trust banks, and had concerns about bank account fees being high or unpredictable.²⁹² And banks have little interest in providing accounts to low-income households. "Maintaining checking accounts costs banks money, somewhere between \$50 and \$400 per account."²⁹³ Given these costs, banks are incentivized "to charge a wide range of expected and unexpected fees to households least able to pay them."²⁹⁴

Municipal public banking provides an opportunity to expand access to retail financial services. Through a municipal public bank, cities could provide their residents a public option for bank accounts.²⁹⁵ "Throughout most of United States history, the credit needs of the poor were met by banking institutions specifically created and designed to appeal to them."²⁹⁶ A municipal public bank could fulfill this role.

III. Structuring A Municipal Public Bank

The previous Part outlined the problems cities face and the costs and benefits that could be derived from municipal public banking. This Part dives into the practical legal issues. It begins with the foundational legal question—under what authority can local governments establish municipal public banks? It next considers two important questions related to the operation of municipal public banks: capitalization and governance.

290. *Id.* at 77-78 tbl.11.3.

291. *See, e.g.,* Baradaran, *supra* note 279, at 486 (noting that "fringe banks have high costs for the poor and further dislocate them from traditional banking institutions by preventing them from building up a credit history").

292. FDIC, *supra* note 277, at 19 fig.3.5.

293. LEV MENAND, ROOSEVELT INST., *MONEY AND BANKING IN THE UNITED STATES: A GUIDE TO THE POLICY LANDSCAPE* 25 (2024).

294. *Id.*

295. *Id.*

296. Baradaran, *supra* note 279, at 486, 498-525 (analyzing the development of credit unions, savings and loan associations, and Morris Banks and industrial loan companies). But as Baradaran explains, since the 1980s, all of these institutions have abandoned their primary mission of providing credit to the poor due to changing market forces, market deregulation, and changes in community needs and banking philosophies. *Id.* at 526.

A. Legal Structure

This Part lays out three possibilities for establishing municipal public banks. The clearest path is to gain express authorization from the state legislature. This method is illustrated by the case of California. Part III.A.1 describes how local agencies in California can create municipal public banks under a state legislative framework. Another route, available in jurisdictions with broad home rule authority, is for the city to create a municipal public bank itself. Absent authorizing state legislation, there are two potential ways for cities to create their own municipal public banks. The first method is for a home rule municipality to apply for a bank charter within existing chartering frameworks. The second method is for a home rule municipality to establish a municipal public bank on its own initiative pursuant to a charter amendment or an enabling ordinance. Part III.A.2 examines these methods. Each approach has its own benefits and costs. While many jurisdictions give local governments broad powers to pursue municipal public banking in a way most suitable to local conditions, there are legal limits that public banking advocates will have to address. Depending on those limits, pursuing a statewide approach may be advantageous or even necessary.

1. Statewide enabling legislation

The most straightforward path to establishing a municipal public bank is enabling state legislation, which creates a unified process for chartering and operating such institutions. While North Dakota has state legislation establishing the BND, the bank operates at a statewide level and is thus different from the concept of municipal public banks discussed in this Note.²⁹⁷ State legislation enabling such local government action has only been adopted in California.²⁹⁸ In 2019, the California State Legislature passed, and Governor Gavin Newsom signed, A.B. 857 into law.²⁹⁹ The law enables cities, counties, and joint powers authorities to establish their own public banks. The purpose of municipal public banking in the A.B. 857 framework is “achieving cost savings, strengthening local economies, supporting community economic

297. See N.D. CENT. CODE § 6-09-01 (2025) (“[T]he state of North Dakota shall engage in the business of banking, and for that purpose shall maintain a system of banking owned, controlled, and operated by it, under the name of the Bank of North Dakota.”).

298. See *Legislation by State*, PUB. BANKING INST., <https://perma.cc/Y7UY-TXV2> (archived Mar. 23, 2025).

299. Assemb. B. 857, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at scattered sections of Cal. Corp. Code; Cal. Fin. Code; Cal. Gov’t Code; and Cal. Rev. & Tax’n Code).

development, and addressing infrastructure and housing needs for localities.”³⁰⁰

Under A.B. 857, a public bank is a corporation, organized as either a nonprofit public benefit corporation³⁰¹ or a nonprofit mutual benefit corporation³⁰² “for the purpose of engaging in the commercial banking business or industrial banking business, that is wholly owned by a local agency, local agencies, or a joint powers authority.”³⁰³ These municipal public banks have some powers to engage in the business of banking, though they also have some restrictions. Their key functions are to provide banking services to local governments in California by receiving deposits and extending credit to local government agencies,³⁰⁴ making public infrastructure loans to local government agencies,³⁰⁵ making wholesale loans to local financial institutions,³⁰⁶ and buying loans originated by or selling loans to local financial institutions.³⁰⁷

To form a municipal public bank, local governments in California must complete several steps. First, local agencies must conduct a feasibility study, which includes a discussion of the bank’s public purpose; a fiscal analysis of costs, capital requirements, financial projections; and an analysis of the legality of its governance structure.³⁰⁸ The feasibility study must also contain a legal analysis of whether the bank fulfills the public purpose requirements under the California Constitution.³⁰⁹ Then, local agencies are required to present their feasibility study to the public and get the application approved by the relevant legislative body.³¹⁰ In general, the local agency is required to receive voter approval to move forward with the application for a public banking charter,³¹¹

300. *Id.* at § 1.

301. *See* CAL. CORP. CODE § 5130(b)(2) (2025); CAL. GOV’T CODE § 57601(b) (2025).

302. *See* CAL. CORP. CODE § 7130(b)(3) (2025); CAL. GOV’T CODE § 57601(b) (2025).

303. CAL. GOV’T CODE § 57600(b)(1) (2025).

304. *See id.* § 57604(c)(1)(A) (granting public banks the power to engage in local agency banking); *id.* § 57604(a)(3) (defining local agency banking).

305. *See id.* § 57604(c)(1)(B) (granting public banks the power to engage in infrastructure lending); *id.* § 57604(a)(2) (defining infrastructure lending).

306. *See id.* § 57604(c)(1)(C) (granting public banks the power to engage in wholesale lending); *id.* § 57604(a)(7) (defining wholesale lending).

307. *See id.* § 57604(c)(1)(D) (granting public banks the power to engage in participation lending); *id.* § 57604(a)(4) (defining participation lending).

308. *See id.* § 57606(a)(1)-(5).

309. *See* CAL. CONST. art. XIV, § 6 (public purpose requirement); CAL. GOV’T CODE § 57606(a)(5) (2025) (requiring a legal analysis of compliance with this constitutional provision).

310. *See* CAL. GOV’T CODE § 57606(c)(1) (2025).

311. *See id.* § 57606(c)(2).

but charter cities are exempt from this requirement.³¹² The local agency can then submit its feasibility study and application to the Commissioner of Financial Protection and Innovation.³¹³ After the application it submitted, the municipal public bank must receive a public bank license, a certificate of authorization to transact business as a bank from the Commissioner of Financial Protection and Innovation—California’s state banking regulator.³¹⁴ San Francisco,³¹⁵ the East Bay,³¹⁶ and Los Angeles³¹⁷ are spearheading the charge to make applications. But the process is still in its early stages, and no municipal public banks have been set up at this point.

While A.B. 857 generally enables local governments to create municipal public banks, it also places important restrictions on their powers. For one, this law limits the number of local governments that can pursue municipal public banking solutions by prescribing that the Commissioner of Financial Protection and Innovation issue a maximum of two licenses per year for up to a total of ten licenses over a seven-year period.³¹⁸ Another important restriction on the powers of municipal public banks is the partnership requirement imposed by A.B. 857. As previously noted, municipal public banks have powers to provide banking services to local governments in California.³¹⁹ But they are much more restricted in their ability to conduct retail banking activities. The law requires that municipal public banks “conduct retail activities in partnership with local financial institutions” and prohibits municipal public banks from “compet[ing] with local financial institutions.”³²⁰ This means, for example, municipal public banks cannot facilitate access to financial services as discussed above in Part II.C without partnering with local financial institutions, unless “those retail activities are not offered or provided by local financial institutions in the jurisdiction of the local agency or agencies

312. *See id.* § 57606(c)(4).

313. *See id.* § 57606(c)(1); *see also* CAL. FIN. CODE § 1020 (2025) (“The request for authority to organize and establish a corporation to engage in the banking or trust business shall be set forth in an application in such form and containing such information as the commissioner may require and shall be accompanied by a fee of five thousand dollars.”).

314. *See* CAL. GOV’T CODE § 57600(c) (2025); CAL. FIN. CODE § 1042 (2025).

315. CISNEROS, *supra* note 51, at 3.

316. The proposed Public Bank East Bay is “a cooperative venture among the cities of Oakland, Berkeley, and Richmond and Alameda County.” TOM SGOUROS, PUBLIC BANK EAST BAY VIABILITY STUDY 3 (2022).

317. Charlotte Kramon, *After Years of Ups and Downs, Los Angeles Moves Forward on Creation of a Public Bank* (July 6, 2023, 5:00 AM PT), <https://perma.cc/Q62N-XE88>.

318. *See* CAL. GOV’T CODE § 57607(a)-(d) (2025).

319. *See supra* notes 304-07 and accompanying text.

320. CAL. GOV’T CODE § 57604(b) (2025).

that own the public bank.”³²¹ Although this restricts direct provision, municipal public banks can still use the city’s financial resources to amplify financial inclusion through relationships with community banks, local credit unions, and certified community development financial institutions (“CDFIs”)—mission-driven lenders that focus on underserved communities.³²² Municipal public banks can make loans to CDFIs to fund the expansion of consumer and small business loans at below market rates.³²³

In sum, while there are important limits on local government powers inherent in the state legislative approach, this framework creates a path for local governments to establish municipal public banks. California’s A.B. 857 will likely serve as a model to other jurisdictions considering a statewide legislative solution that prioritizes a decentralized approach to public banking.

2. Direct municipal action

While the clearest path to municipal public banking is state legislation, it may also be possible for cities in states with broad home rule authority to establish and operate a municipal public bank, either by applying for a bank charter within existing state and federal legal frameworks or establishing a municipal public bank on its own initiative pursuant to a charter amendment or an enabling ordinance. The crucial question for local governments seeking to pursue this path is the scope of home rule in their jurisdiction and the limits of state law.

In general, home rule gives local governments greater autonomy to engage in policymaking (initiative power) and limits the power of state governments to interfere in local affairs (immunity power).³²⁴ Many states have adopted some form of home rule,³²⁵ although there is a large degree of variation from state to state.³²⁶

Some states, like Colorado, follow the *imperio* home rule model,³²⁷ which grants local governments both initiative and immunity powers.³²⁸ This broad

321. *Id.* § 57604(c)(2).

322. See Trinity Tran, *In California, a Movement for Locally Controlled Finance Gains Ground*, NONPROFIT Q. (Jan. 8, 2025), <https://perma.cc/HN4V-T3XU> (“By partnering with local CDFIs, community banks, and credit unions, public banks share risk, expand lending power, and support small businesses often ignored by big banks.”).

323. See CISNEROS, *supra* note 51, at 21.

324. See NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 11 (2020).

325. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2011 (2018).

326. NAT’L LEAGUE OF CITIES, *supra* note 324, at 13.

327. *Id.* at 11.

framework means that home rule cities “are constitutionally granted every power possessed by the General Assembly as, to local and municipal matters, unless restricted by the terms of the city’s charter.”³²⁹ In effect, they have “plenary power over local and municipal matters.”³³⁰ It is likely that in such jurisdictions local governments would have broad authority to establish and operate a municipal public bank. And it would be difficult for state legislatures in such jurisdictions to preempt or curb local power without running afoul of the home rule amendment.

Other states, like Pennsylvania, follow the American Municipal Association home rule model,³³¹ which grants local governments broad initiative powers but denies immunity powers.³³² This means that local governments do “not require an ‘express statutory warrant for each new ordinance’ that is passes” but its powers only extend to areas “‘not denied’ by the General Assembly.”³³³ The broad grant of initiative power means that cities in these jurisdictions would be able to establish and operate municipal public banks, but they would be at a higher risk of preemption by a hostile state legislature.³³⁴

Finally, some states, like North Carolina, deny local governments home rule altogether.³³⁵ These states only allow local governments to exercise those powers granted by the state legislature. In this constitutional framework, local governments are “a mere creature of the legislature” and “have no inherent powers.”³³⁶ This means that “municipalities are limited to exercising those powers ‘expressly conferred’ or ‘necessarily implied’ from enabling legislation

328. See COLO. CONST. art. 20, § 6 (“The people of each city or town of this state . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.”); *id.* (“Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.”).

329. *Veterans of Foreign Wars v. City of Steamboat Springs*, 575 P.2d 835, 840 (Colo. 1978).

330. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 166 (Colo. 2008).

331. NAT’L LEAGUE OF CITIES, *supra* note 324, at 12.

332. See PA. CONST. art. 9, § 2 (“A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.”).

333. *Siger v. City of Chester*, 309 A.3d 698, 721-22 (Pa. 2024) (first quoting Pa. Rest. & Lodging Ass’n v. City of Pittsburgh, 211 A.3d 810, 816 (Pa. 2019); and then quoting *City of Philadelphia v. Schweiker*, 858 A.2d 75, 84 (2004)).

334. See *infra* Part IV.A.

335. See N.C. CONST. art. VII, § 1 (“The General Assembly . . . may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.”).

336. *King v. Town of Chapel Hill*, 758 S.E.2d 364, 369 (N.C. 2014).

passed by the General Assembly.”³³⁷ In addition to North Carolina, Alabama, Delaware, Indiana, Kentucky, Mississippi, Nevada, Vermont, and Virginia, “have constitutions that do not directly delegate (or direct their legislatures to delegate) police power to local governments, leaving the scope of local authority to their state legislatures.”³³⁸ Establishing and operating a municipal public bank in these jurisdictions would likely be difficult if not impossible absent enabling state legislation like that adopted in California.³³⁹ Indeed, according to data from the Public Banking Institute, no localities in these states have explored the possibility of chartering municipal public banks on their own.³⁴⁰ Those states that have explored the concept have legislative committees considering public banking focused on developing a state-level institution.³⁴¹

A few sets of questions emerge from the home rule framework. The first concerns doctrinal limits on home rule to matters of local concern. The second concerns constitutional provisions that might limit public banking. And the third concerns the preemptory effect of state general banking laws. I address each in turn.

a. Home rule and local concerns

The first set of questions that municipal public banking advocates would need to address relates to whether municipal public banking constitutes a matter of local concern. Many state home rule amendments constrain local power to “municipal affairs,”³⁴² “local and municipal matters,”³⁴³ or “powers of local self-government.”³⁴⁴ Even states like Colorado, which allows municipal charters and ordinances to supersede state laws that conflict, place limits. Courts are often willing to preempt local action in matters of “statewide or mixed state and local concern.”³⁴⁵ In those cases, any preemptive state statute would take “precedence over the conflicting home rule [charter or] ordinance unless the [charter or] ordinance is authorized by statute or by the constitution.”³⁴⁶

337. *Id.* (quoting *High Point Surplus Co. v. Pleasants*, 142 S.E.2d 697, 701 (N.C. 1965)).

338. NAT’L LEAGUE OF CITIES, *supra* note 324, at 13.

339. *See supra* Part III.A.1.

340. *See Legislation by State*, *supra* note 298.

341. *Id.*

342. *See, e.g.*, W. VA. CONST. art. VI, § 39(a).

343. *See, e.g.*, COLO. CONST. art. 20, § 6.

344. *See, e.g.*, OHIO CONST. art. XVIII, § 3.

345. *See, e.g.*, *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 169 (Colo. 2008).

346. *Id.*

To establish a municipal public bank, local governments would need to argue that municipal public banking clearly relates to local concerns. There are several arguments that support this proposition. First, municipal public banks are directly responsive to issues of local government finance.³⁴⁷ Public banking models offer local governments new and innovative ways to manage municipal assets and finances. It would also enable municipalities to allocate credit to facilitate local economic development.³⁴⁸ City funds could be used to invest in affordable housing, public infrastructure, and local small businesses—all matters of local concern. Finally, municipal public banks that focus on retail services could provide lower-cost financial products and services to local residents.³⁴⁹

On the other hand, some courts have been skeptical of local involvement in the regulation of financial services, and the rationale may bear on local provision. For example, in *American Financial Services Ass'n v. City of Oakland*, the California Supreme Court preempted Oakland's anti-predatory-lending ordinance.³⁵⁰ In reaching this conclusion, the court relied heavily on the idea that local governments do not have "a license to regulate a highly complex financial area comprehensively addressed by state law."³⁵¹ The court observed that the connection between local financial assets to the broader financial markets means that local financial activities would have effects beyond the local market.³⁵² Because the financial markets are so interconnected, "securities based on home loans in [the Oakland] market are sold not only on a statewide, but on a national level."³⁵³ If courts adopted this capacious interpretation, then it is possible that state intervention would curb local power in this area.³⁵⁴

That said, the strength of this criticism is weakened by the important distinction between local government structure and regulation. Municipal public banks do not purport to regulate local financial activities. Instead, they are part of the structure of the municipal government itself. Some state

347. See *supra* Part II.A.

348. See *supra* Part II.B.

349. See *supra* Part II.C.

350. 104 P.3d 813, 815 (Cal. 2005).

351. *Id.* at 825.

352. See *id.* at 823.

353. *Id.*

354. For example, states with broad home rule powers may include language in their state banking law to prohibit local governments from regulating financial institutions. See, e.g., COLO. REV. STAT. § 11-101-301(2)(a)(I) (2024) ("The regulation of banking is a matter of statewide concern, and in order to maintain a uniform statewide system of banking and bank regulatory policy in Colorado, the regulation by a political subdivision of deposits, lending, or other services or products provided by banks in accordance with applicable state or federal law shall be prohibited.").

constitutions give broad leeway to local governments in structuring their local agencies and institutions.³⁵⁵ For example, the Louisiana Constitution provides that home rule cities have the power to “provide the structure and organization, powers, and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution.”³⁵⁶ In this structural view, a municipal public bank should be treated the same as any other local government agency.

The regulatory argument is also weakened by the distinction between the governmental and proprietary activities of local governments. Many state courts draw a distinction between governmental regulatory powers and market-based proprietary powers.³⁵⁷ Proprietary powers are those that give “local government’s power to act as a property owner, employer, market participant, and contracting party.”³⁵⁸ Some state constitutions expressly protect the propriety interests of local governments. For example, the Arizona and Oklahoma Constitutions grant every municipal corporation “the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation.”³⁵⁹ This would almost certainly include banking. But even in jurisdictions without such express provisions, it is possible that the establishment and operation of a municipal public bank would fall into the proprietary category. For example, in *Apodaca v. Wilson*, the New Mexico Supreme Court held that the City of Albuquerque was acting in a “proprietary capacity in operating its sewage and water systems” and thus was not required to adhere to state laws governing the rates of a municipally-owned water and sewer system.³⁶⁰ Following this logic, the types of activities municipal public banks would engage in are more similar to the provision of governments services than the exercise of the coercive regulatory power of the state, which strengthens the proprietary functions rationale.³⁶¹

355. See NAT’L LEAGUE OF CITIES, *supra* note 324, at 62-63.

356. LA. CONST. art. VI, § 5(E).

357. See generally 2A MCQUILLIN, *supra* note 213, § 10:5 (summarizing the governmental and proprietary distinction and noting that there is “considerable conflict in the decisions of the courts respecting the class to which certain functions or powers belong”).

358. NAT’L LEAGUE OF CITIES, *supra* note 324, at 63.

359. ARIZ. CONST. art. 13, § 5; OKLA. CONST. art. 18, § 6.

360. 525 P.2d 876, 879, 882, 887 (N.M. 1974).

361. See Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 180 (2016) (redrawing the governmental/proprietary distinction as instead a distinction between governmental sovereign powers, which
footnote continued on next page

b. State constitutional provisions

The second set of questions municipal public banking advocates would need to address relates to whether there are other state constitutional limits that would curb home rule authority to establish a municipal public bank.

Some state constitutions have outright prohibitions on state involvement in the banking franchise. Most state constitutions with anti-public banking provisions circumscribe the power of the state legislature or the state writ-large to establish a public bank without making any specific provision for local governments. States like Indiana, Kansas, Missouri, and Tennessee take this approach.³⁶² These provisions may apply to municipalities within the jurisdiction even with home rule powers. For example, the Missouri Constitution grants home rule municipalities “all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution.”³⁶³ But if the state lacks the power to engage in such activities, it is unlikely that it could confer such power upon a home rule municipality. The most extreme anti-banking provision is contained in the Oregon Constitution, which states that “[t]he Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company.”³⁶⁴ On its face, this provision seems to prohibit all forms of banking, whether public or private. But the Oregon Supreme Court quickly clarified that the people of Oregon “are permitted to establish banking corporations in Oregon, having all the rights and privileges usually exercised by banks.”³⁶⁵ This provision thus does not bar public banking in Oregon, as some have shown.³⁶⁶

Other state constitutions expressly apply these restrictions to local governments as well. The Alabama Constitution provides that “[n]either the state, nor any political subdivision thereof, shall be a stockholder in any

involve coercion and regulation, and *general governmental services*, which involve the provision of public and private goods).

362. See IND. CONST. art. XI, § 12 (“The State shall not be a stockholder in any bank”); KAN. CONST. art. XIII, § 2 (“The state shall not be a stockholder in any banking institution”); MO. CONST. art. XI, § 13 (“No state bank shall be created, nor shall the state own or be liable for any stock in any corporation, joint stock company, or association for banking purposes.”); TENN. CONST. art. II, § 31 (prohibiting the state from becoming “the owner in whole or in part of any bank”).

363. MO. CONST. art. VI, § 19(a).

364. OR. CONST. art. XI, § 1.

365. Oregon *ex rel.* Caples v. Hibernian Sav. & Loan Ass’n, 8 Or. 396, 402 (1880).

366. For a thorough discussion of this provision and its interpretation, see Joshua R. Hall, Ken Johnson & Julia Ricciardi, *Public Banking and the Oregon Constitution*, 59 WILLAMETTE L. REV. 413, 415 (2023) (concluding that “a state-chartered public bank is permissible under the Oregon Constitution”).

bank.”³⁶⁷ Iowa’s Constitution contains a similar provision that bans municipalities from owning stock in any banking corporation.³⁶⁸

Local governments in states with constitutional anti-public banking provisions would need to develop a strategy to address these limits, which may require constitutional amendment or extensive litigation.

c. State general banking laws

The final set of questions that municipal public banking advocates would need to address relates to whether the state has any general laws that would preempt the ability of local governments to establish a municipal public bank. The legislation most likely to preempt municipal banking actions would be the general banking laws adopted for the incorporation private banks.

Some states expressly prohibit the incorporation of any banking institution outside the framework of its general banking law. For example, the Alabama and Kansas Constitutions state that “[n]o bank shall be established otherwise than under a general banking law.”³⁶⁹ Other states, like Pennsylvania, do so by statute, restricting the business of banking to institutions chartered through its general banking law.³⁷⁰ These types of provisions do not necessarily prohibit municipalities from forming municipal public banks. Rather, these provisions mean that the bank must be chartered through state processes and cannot be formed through charter amendment or city ordinance alone.

Because most banking statutes contemplate incorporation by natural persons, the statutory language might also make it difficult for municipal governments to incorporate a bank through the general banking law. For example, Washington requires “one or more natural persons, citizens of the United States”³⁷¹ to incorporate a bank, whereas Pennsylvania requires three people,³⁷² and New Mexico requires five people to incorporate a bank.³⁷³ To get around this, municipal governments could follow the example of tribal governments and form bank holdings companies that lack these incorporation

367. ALA. CONST. art. XIII, § 247(c).

368. IOWA CONST. art. VIII, § 4 (“No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.”).

369. ALA. CONST. art. XIII, § 247(a); KAN. CONST. art. 13, § 1.

370. 7 PA. STAT. & CONSOL. STAT. ANN. § 105(a) (West 2024) (“No person may lawfully engage in this Commonwealth in the business of receiving money for deposit or transmission ... except a bank.”).

371. WASH. REV. CODE § 30A.08.010 (2024).

372. 7 PA. STAT. & CONSOL. STAT. ANN. § 1002(a)(ii) (West 2024).

373. N.M. STAT. ANN. § 58-1-52 (2024).

restrictions.³⁷⁴ New Mexico, for example, allows for a bank to be organized through a bank holding company,³⁷⁵ which does not have these requirements.³⁷⁶ Colorado has a similar provision that would allow a municipal government to establish a municipal public bank as a limited liability company, which could in turn obtain a bank charter.³⁷⁷

Each of these questions shape the option set available to home rule municipalities in establishing municipal public banks. While a thorough and state-specific evaluation is beyond the scope of this Note, this Subpart aims to highlight some of the important powers and limits that affect the feasibility of municipal public banking in different jurisdictions. In states with broad home rule authority for local governments and limited constitutional or statutory restrictions, direct municipal action through a charter amendment and ordinance may be sufficient to establish a public bank. But in states with more restrictive constitutional provisions or banking laws, a statewide strategy like that pursued in California may be desirable or even necessary.

B. Capital Structure

Having considered the power of cities to establish municipal public banks, the next question that naturally arises is how to fund the activities envisioned in Part II.B. This is the essence of a bank's capital structure. Whether public or private, a bank funds its lending activities through its capital structure, which is determined by its mix of debt and equity.³⁷⁸

For a bank to remain solvent, its assets must cover its liabilities.³⁷⁹ The bank's assets consist of its lending and investment portfolio as well as cash reserves that it maintains to meet withdrawals. Its liabilities consist of deposits and other debts. The difference between the bank's assets and liabilities is referred to as capital—essentially the bank's net worth or equity.³⁸⁰

374. See *supra* notes 30-39 and accompanying text.

375. See N.M. STAT. ANN. § 58-1-52 (2024) (allowing New Mexican state banks to be “organized by five or more individual incorporators or a bank holding company”).

376. Though it would make the entity subject to registration with and regulation by the Federal Reserve. See 12 U.S.C. § 1844(a)-(b).

377. See COLO. REV. STAT. § 7-80-203(1) (2025) (allowing “[o]ne or more persons may form a limited liability company” and noting that they need not be a natural person); *id.* § 11-102-104(5.5)(a) (allowing the state to “issue a state bank charter to a limited liability company . . . so long as the limited liability company meets the requirements of” the banking code).

378. See CARNELLE ET AL., *supra* note 99, at 4.

379. See *id.* at 7 (“Because equity is the difference between assets and debt, this implies that when an economic agent is insolvent, its equity will be less than zero.”).

380. *Id.* at 64 (“Capital is the bank regulatory version of equity.”).

Equity capital represents the ownership interest of the local government. Equity capital is important because this initial contribution is used to fund the operating expenses of the bank until it achieves profitability and is available to absorb losses if loans or investments default.³⁸¹ In general, a bank with less capital is higher risk for creditors and depositors because a small drop in asset value can lead to distress or failure.³⁸² Of course, the amount of capital required to start a municipal public bank will depend on the anticipated lending portfolio, the stability of deposits, and other operational expenses.³⁸³

Current municipal public banking models see initial capitalization coming from a nonrecurrent line-item budgetary appropriation from the municipality's general fund.³⁸⁴ But there could be other sources. Karl Beitel, an expert on municipal banking, has suggested that local governments who have accumulated significant cash reserves and surpluses can also make a "time-limited dedication of annual interest earnings from [an] investment pool" to capitalize a bank.³⁸⁵ This could be done by one or a combination of: (1) establishing a supplemental reserve account within the investment pool to divert interest earnings into a capitalization account; (2) making a one-time, line-item appropriation of general fund revenues as a part of the annual budget approval process; or (3) making a supplemental appropriation of funds from the general fund portion of the investment pool.³⁸⁶ Cities have also considered using general obligation (GO) bonds to fund the initial capitalization of a municipal public bank.³⁸⁷ GO bonds are debt securities issued by a municipality backed solely by the credit and taxing power of the issuing jurisdiction as opposed to future revenues generated by a given project—i.e., revenue bonds.³⁸⁸

But this capitalization source may run into state constitutional or statutory restrictions depending on the jurisdiction. For example, California's

381. See Memorandum from Davis Polk & Wardwell LLP to the Laws. Comm. for C.R. of the San Francisco Bay Area 10-11 (Nov. 18, 2017), <https://perma.cc/6RSE-D3GD> [hereinafter Davis Polk Memo].

382. Cf. David Wessell, *What Is Bank Capital? What Is the Basel III Endgame?*, BROOKINGS INST. (Mar. 7, 2024), <https://perma.cc/9W78-GEA4> (noting that higher levels of capital help protect a bank from insolvency).

383. Davis Polk Memo, *supra* note 381, at 11.

384. See, e.g., CISNEROS, *supra* note 51, at 35; D.C. DEP'T OF INS., SEC. & BANKING, PUBLIC BANKING FEASIBILITY STUDY FOR THE GOVERNMENT OF THE DISTRICT OF COLUMBIA 32 (2020); see also BEITEL, *supra* note 268, at 3.

385. BEITEL, *supra* note 268, at 3.

386. S.F. Budget & Legis. Analyst's Off., *Municipal Bank for San Francisco: Issues and Options for Consideration* 25-26 (2020).

387. See, e.g., D.C. DEP'T OF INS., SEC. & BANKING, *supra* note 384, at 31-32.

388. *General Obligation (GO) Bond: Definition, Types, Vs. Revenue Bond*, INVESTOPEDIA, <https://perma.cc/NR8M-RZ2G> (archived Mar. 23, 2025).

1978 Proposition 13 famously restricted the ability of local governments to make unlimited pledges on GO bonds by limiting the property tax rate to 1%.³⁸⁹ The powers of local governments were expanded by California's 1986 Proposition 46, which allowed, with two-thirds voter approval, the issuance of GO bonds to finance the acquisition of and improvements to real property.³⁹⁰ Nevertheless, California's constitutional amendment means GO bonds could not be used to capitalize a municipal public bank.

On the debt side of the balance sheet, municipal public banking models envision receiving deposits of local government funds. These funds are not just limited to the city. They could include the funds of different agencies, departments, and districts, as well as funds of local utilities like the water authority or the airport. Deposits would be the primary source of funding for the municipal public bank³⁹¹ and would enable the bank to perform depository and cash management services for the city and other local agencies.

An important limit here is that state law often requires that government deposits be collateralized.³⁹² These collateralization laws typically require banks accepting government deposits to collateralize deposits not covered by deposit insurance³⁹³ by setting aside high-quality securities at a rate of 102 to 110% of total deposits.³⁹⁴ This would substantially tie up funds and limit the local government's ability to engage in important lending operations. A potential solution is for a municipal public bank to collateralize government deposits through the Federal Home Loan Bank system, which could provide

389. See CAL. CONST. art. XIII A, § 1(a) (limiting the "maximum amount of any ad valorem tax on real property" to 1%). This affects the ability of local governments to use their taxing powers to issue GO bonds because the bonds are backed by the credit and taxing power of the issuing jurisdiction.

390. See CAL. CONST. art. XIII A, § 1(b)(2) (lifting the 1% restriction on taxes used "to pay the interest and redemption charges" on "[b]onded indebtedness for the acquisition or improvement of real property").

391. See D.C. DEP'T OF INS., SEC. & BANKING, *supra* note 384, at 31.

392. See, e.g., ARIZ. REV. STAT. ANN. § 35-312 (2024) (requiring Arizona treasury monies deposited in a financial institution above the federal deposit insurance limit to be collateralized at 102%); MINN. STAT. § 118A.03 subd. 3 (2024) (requiring Minnesota public funds above the federal deposit insurance limit deposited in a financial institution to be collateralized at 110%).

393. Federal deposit insurance is an important component of any successful municipal public bank. I will reserve questions on this issue for future work.

394. BEITEL, *supra* note 268, at 6. High quality securities are characterized by their low risk and high liquidity—that is, they tend to be backed by the government and readily marketable or convertible into cash. Common examples used in state public deposit collateralization programs include U.S. Treasuries, U.S. government agency securities, and state and local government obligations. See, e.g., MINN. STAT. § 118A.03, subd. 2 (2024).

collateralized advances, letters of credit, and swap agreements.³⁹⁵ This would be a better arrangement than investing in high-quality securities because it will allow municipal public banks “to accept public deposits without having to invest and hold the full amount of these funds plus some risk premium” in low-yield Treasury securities with no direct financial benefit to the local community.³⁹⁶

Although few municipal public banking models have considered retail services, this could also serve a crucial part of the bank’s funding structure. As discussed above, one major objective of public banking is expanding financial access to those excluded from the private banking system.³⁹⁷ Opening a municipal public bank to receive retail deposits could also attract funding from large institutions with a public service mission like foundations, hospitals, and universities.³⁹⁸ This model would not only create a more diversified and stable deposit base, but also help the bank achieve its financial inclusion goals.

C. Governance Structure

Municipal public banks have important powers over local credit allocation and the use of public resources invested in the bank. Thus, the final question this Note considers is how such a bank should be governed. Governance is a multifaceted issue that covers structure (e.g., the charter, bylaws, mission statement, and lending criteria) and personnel (e.g., the composition of the board of directors, management, and staff).³⁹⁹ This is likely the most difficult question considered in this Note—one that will undoubtedly need to be explored in greater detail in future research. Municipal public banks present unique governance issues. They ultimately exist to serve the city and its residents. Any governance structure must ensure that the bank stays true to its founding mission and is democratically accountable. But it is equally important that municipal public banks operate in a safe and sound manner, insulated from unwarranted political pressures that could cause financial problems down the line. There are many governance structures a municipal public bank could adopt.⁴⁰⁰ At this stage, this Note seeks to describe one model

395. BEITEL, *supra* note 268, at 6.

396. *Id.*

397. *See supra* Part II.C.

398. *See* CISNEROS, *supra* note 51, at 37.

399. *See* D.C. DEP’T OF INS., SEC. & BANKING, *supra* note 384, at 24.

400. *See generally* KATZ ET AL., *supra* note 270, at 36-39 (discussing democratic and deliberative models of public bank governance); Geeta Minocha, *Guarding Public Banks from Political Influence: A Novel Framework*, 59 WILLAMETTE L. REV. 389, 394-406 (2022) (surveying the governance structures of existing public banks in the United States and abroad).

laid out in various proposals put forward by the cities seeking to establish municipal public banks that achieves some balance between the public interest and technical expertise.

Most governance proposals seeking to create a representative institutional framework draw inspiration from the two-tiered model of Germany's Kreditanstalt für Wiederaufbau (KfW)—a state-owned development bank.⁴⁰¹ The highest governing body is the Board of Supervisory Directors, which consists of thirty-seven members drawn from the federal legislature, federal government ministries, the banking industry, the commercial sector, municipalities, and trade unions.⁴⁰² The Board of Supervisory Directors is responsible for supervising and advising the Executive Board, which in turn is responsible for the active management of the KfW.⁴⁰³ The Executive Board has five members and is headed by the bank's CEO.

How this governance framework would apply in the local government context can be seen in the governance proposal put forward by the San Francisco Public Bank Coalition. Their governance model would create a twenty-five-member Bank Oversight Commission (BOC), which would exercise supervisory and advisory powers over a nine-member Board of Directors (BOD).⁴⁰⁴ The BOC would consist of representatives from across civil society with expertise in different areas of the bank's operations. Qualifications for BOC membership might include expertise in affordable housing, renewable energy, city cultural diversity programs, organized labor, minority and women-owned small businesses, local financial institutions, and public health, among other areas.⁴⁰⁵ Appointment and removal powers over the BOC would be split between the city council and the mayor, with appointments skewed towards the city council.⁴⁰⁶ The rationale for giving more seats to the city council than the mayor, as articulated by the San Francisco Public Bank Coalition, "is rooted in the belief that a large body subject to the influence of a variety of elected officials and public hearings would be much harder for corruption to gain a foothold than a small body with disproportionate appointment power concentrated in any one elected office."⁴⁰⁷ Like the KfW, the proposed BOD would be responsible for the daily management of the bank. Directors would be appointed or removed by the

401. For a thorough treatment of the KfW, see generally THOMAS MAROIS, PUBLIC BANKS: DECARBONISATION, DEFINANCIALISATION AND DEMOCRATISATION 194-205 (2021).

402. See *id.* at 201-02.

403. See S.F. PUB. BANK COAL., GOVERNING A SAN FRANCISCO PUBLIC BANK 9-10 (2022).

404. *Id.* at 5.

405. See *id.* at 5-6.

406. *Id.*

407. *Id.* at 7.

BOC.⁴⁰⁸ The BOD would oversee the bank's operations, make initial management personnel decisions, and nominate the CEO with the approval of the BOC.⁴⁰⁹ All directors would have relevant banking experience and report directly to the BOC. The BOC is thus entrusted with the responsibility to make sure the BOD and the bank are "accountable to its core mission and principles."⁴¹⁰

This two-tiered structure has several advantages. The primary one is that it allows for democratic participation in the governance of the municipal public bank. The BOC is accountable to the city's elected officials and is comprised of members representing a diverse set of community interests. But it also leaves room for the operations of the bank to be conducted by banking experts. The banking experts act as fiduciaries of the bank and are accountable to the public mission through its supervision by the BOC. But this design also allows the BOC "to serve as a buffer between elected officials and bank management."⁴¹¹ Finally, it is important to note that this type of governance structure is common at the municipal level. Cities often use two-tiered governance structures when setting up revenue-generating infrastructural corporations like public utilities and airports.⁴¹²

IV. Potential Challenges for the Municipal Public Banking Model

The previous Part outlined the legal authority to establish, capitalize, and govern a municipal public bank. This Part focuses on the challenges posed by the municipal public banking model. Specifically, it considers potential hostility to local initiatives at the state level, the high financial costs of capitalizing a bank, and the risks of corruption or mismanagement that come from the bank's business model. These challenges are real, but they can be overcome.

A. The New Preemption and State Limits on Local Power

Municipal public banks are an innovative idea to democratize finance, but the model is likely to face steep political opposition in some states. Although

408. *Id.* at 8.

409. *Id.* at 5.

410. *See id.* at 7-8.

411. *Id.* at 8.

412. *See, e.g.,* S.F., CAL., CHARTER, art. IV § 4.112, art. VIII B § 8B.121(d) (creating a five-member public utilities commission but vesting management in the General Manager); S.F., CAL., CHARTER, art. IV, § 4.115 (creating a five-member airport commission); S.F., CAL., ADMIN CODE ch. 2A, art. IX, § 2A.171 (vesting management in the Airport Director).

municipalities in home rule jurisdictions generally have broad powers to establish a municipal public bank,⁴¹³ there are political risks to pursuing these efforts at the local level due to what Richard Briffault has termed “the new preemption.”⁴¹⁴ While classical state preemption was aimed at harmonizing “the efforts of different levels of government in areas in which both enjoy regulatory authority” determining “the degree to which state policies could coexist with local additions or variations,” new preemption is different.⁴¹⁵ The new preemption refers to “sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.”⁴¹⁶ This process has taken a distinctly partisan bent in recent years with red states attempting to control blue cities.⁴¹⁷ These preemptive challenges have cropped up across a plethora of policy areas, including local bans of plastic bags, fracking, polystyrene products, expansions over antidiscrimination protections, Civil War memorials, ridesharing platforms, rent controls, minimum wages, inclusionary zoning requirements, and puppy mills.⁴¹⁸ In this political climate, the new preemption poses a distinct challenge to localities hoping to establish and operate municipal public banks in the absence of statewide enabling legislation.

But there is organizing to combat this trend. The National League of Cities in collaboration with state-and-local-government legal scholars has developed “a model home rule constitutional article with provisions that correspond to the principles” to “guide the complex legal issues that define the nature of local autonomy in the modern context.”⁴¹⁹ To secure any efforts to establish a municipal public bank, it might be important for local governments to engage in statewide coalition building. The case of California shows how enabling state legislation can secure the power of local governments to legally establish a municipal public bank.⁴²⁰

B. Steep Financial Costs

Unlike the new preemption, which is largely driven by ideological opposition, the concerns about financial costs are driven by the fiscal realities of local government. These concerns focus on the capitalization costs of

413. *See supra* Part III.A.2.

414. *See* Briffault, *supra* note 325, at 1997.

415. *Id.*

416. *Id.*

417. *See id.* at 1997-98.

418. *See id.* at 1999-2002.

419. NAT’L LEAGUE OF CITIES, *supra* note 324, at 8.

420. *See infra* Part III.A.1.

establishing a municipal public bank.⁴²¹ Critics have argued that the cost of capitalization is simply too high and would drain state and municipal coffers.⁴²²

Of course, these costs are variable. The amount of money required to capitalize a bank depends on the scope of the bank's activities. But it is important to remember that the leveraged gains of the banking model can be substantial. Whereas standard investment vehicles require financing to lend, banks can create money through leverage. This enables the city to multiply its investment power. Using the Basel III capital ratio requirements of 10.5%, for example, "\$100 million in capital becomes \$952 million in loanable funds."⁴²³ Nevertheless, there is a question of economic significance. While a bank's size could be tailored to its local conditions, some estimates suggest that capitalizing a municipal public bank may be cost prohibitive.⁴²⁴ To address these prohibitive startup costs, most cities have considered using a phase-in option, which would allow the municipality to start with a municipal financial corporation and gradually expand its business lines until it can sustainably begin its deposit-taking function.⁴²⁵

C. Governance Risks

Finally, while municipal public banking provides a potential tool to democratize finance and bring banking powers closer to the communities they are meant to serve, it is not without governance risks. Critics of municipal public banking have raised concerns about bureaucratic inefficiency and the government's competency to manage a public bank.⁴²⁶ These concerns are not without merit. But they are also true for all complex organizations, whether public or private. As Mehrsa Baradaran observed in the context of postal banking, "[p]ublic institutions are just as prone to predation, mismanagement, and fraud as are private organizations."⁴²⁷

Crucially, municipal public banks would need to have safeguards built into the two-tiered structure that help mitigate this risk of fraud and corruption. Structurally, the two-tiered governance structure must place some level of separation between daily management and political actors.⁴²⁸ This is the

421. See D.C. DEP'T OF INS., SEC. & BANKING, *supra* note 384, at 13 (summarizing concerns).

422. See N.Y. BANKERS ASS'N, *DISPELLING THE MYTH OF A PUBLIC BANK 2* (2021) (listing talking points for existing private banks to use to argue against public banks).

423. KATZ ET AL., *supra* note 270, at 31.

424. See, e.g., D.C. DEP'T OF INS., SEC. & BANKING, *supra* note 384, at 31 tbl. 4.1.

425. See *id.* at 40.

426. See *id.* at 13 (summarizing concerns).

427. Baradaran, *supra* note 167, at 167.

428. See *supra* notes 404-10 and accompanying text.

purpose of the BOC and the BOD. The BOC will be responsive to the democratic motivations and guide the policy of the public banks while the BOD will use its technical knowledge to ensure that the banks are run in a safe and sound manner. The goal of this structure is to incorporate public input and financial expertise into the bank's function.

Transparency will also play a crucial role in supervising a municipal public bank. As Justice Brandeis famously noted, "Sunlight is said to be the best of disinfectants."⁴²⁹ Unlike shareholder-owned commercial banks, the municipal public banks would be subject to direct public scrutiny. Journalists and community members would have direct oversight of BOC members. All members would be subject to a public hearing and confirmation process.⁴³⁰ BOC and BOD members could also be required to disclose potential conflicts of interest and abstain from voting in any matter in which they are conflicted.⁴³¹ And the bank's financials could be subject to strict auditing requirements.

Conclusion

Many of the most pressing policy issues we face today are local government issues. Cities across the country must find solutions to provide affordable housing,⁴³² curb environmental pollution,⁴³³ invest in infrastructure and local development,⁴³⁴ combat school and housing segregation,⁴³⁵ and many other challenges. Despite this heavy mandate, cities simultaneously face severe financial constraints. Many cities are grappling with precarious budgetary limits as macroeconomic financial conditions have

429. BRANDEIS, *supra* note 161, at 92.

430. *See* S.F. PUB. BANK COAL., *supra* note 403, at 6.

431. *See, e.g., id.* at 7 (describing one proposal for disclosure and abstaining requirements).

432. *Cf.* Christopher J. Brooks, *Homes "Unaffordable" in 99% of Nation for Average American*, CBS NEWS (Sep. 28, 2023, 12:31 PM EDT), <https://perma.cc/TRC8-KDKD> (describing a study based on a survey of 575 U.S. counties that found that home prices in 99% of those areas are beyond the reach of the average income earner who makes \$71,214 a year).

433. *Cf.* Jen Christensen, *A Quarter of Americans Live with Polluted Air, with People of Color and Those in Western States Disproportionately Affected, Report Says*, CNN (Apr. 19, 2023, 12:05 AM EDT), <https://perma.cc/TT2D-SD82> (describing a study that found that "the number of people living in counties with failing grades for daily spikes of particle pollution was the highest it has been in a decade").

434. *Cf.* AM. SOC. OF CIV. ENG'RS, 2021 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 8 (2021) (finding that the United States has an infrastructure investment gap of nearly \$2.6 trillion that could cost the United States \$10 trillion in lost GDP by 2039).

435. *Cf.* Emily Bramhall, *Why Does Segregation Between School Districts Matter for Educational Equity?*, HOUSING MATTERS (May 12, 2021), <https://perma.cc/G5KF-J9EK> (describing the need for local governments to combat residential segregation and school segregation).

continued to strain local government resources. High rates of inflation have increased the costs of public services and diminished purchasing power.⁴³⁶ And local tax bases have been hollowed out in the post-pandemic world.⁴³⁷

But municipal public banks provide the foundation for an alternative financial system that empowers both local governments and residents to think about the banking franchise in a democratic way. Fredric C. Howe, a progressive reformer active from the 1890s through the New Deal, was a staunch advocate for the importance of the city. He argued that the only way to protect democracy in a time of growing corporate power was to increase public power through municipal public ownership.⁴³⁸ In Howe's telling, "the officer of the franchise corporations, the stockholder, the banker, the broker, the lawyer, their friends or business associates" cannot "take an interest in municipal affairs" because "[t]heir pocket is at war with their civic interests."⁴³⁹ But it is not just about conflict of interest. In his view, municipal ownership also plays an important role in cultivating a democratic ethos. It creates "a public sense, a social conscience, a belief in the city and an interest in it."⁴⁴⁰ "An enlarged public spirit will only come with enlarged public activity."⁴⁴¹ As scholars and policymakers continue to consider ways to expand public options and improve democratic access to financial services, municipal public banks provide an understudied possibility. While municipal public banks are unlikely to be a panacea for all that ails American cities and their residents, they can serve as a democratic step in redirecting financial resources into local communities and providing cities with greater freedom to pursue pressing policy priorities.

436. See Farhad Kaab Omeyr, *High Inflation, a Looming Recession, and the Necessity of Federal Assistance*, NAT'L LEAGUE OF CITIES (Apr. 28, 2023), <https://perma.cc/Q2XE-HPU6>.

437. See Anshu Siripurapu & Jonathan Masters, *How COVID-19 Is Harming State and City Budgets*, COUNCIL ON FOREIGN RELS. (Mar. 19, 2021, 11:47 AM EST), <https://perma.cc/7LHN-JSFU>.

438. FREDERIC C. HOWE, *THE CITY: THE HOPE OF DEMOCRACY* 115 (1905).

439. *Id.* at 116.

440. *Id.* at 123.

441. *Id.* at 124.