

PROHIBITION CONSTITUTIONALISM

THE CONSTITUTION OF THE WAR ON DRUGS. New York: Oxford University Press. David Pozen.* 2024. Pp. 304. \$27.95 (hardcover).

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ABSTRACT

This Review describes and applauds David Pozen's book, *The Constitution of the War on Drugs*, and offers its own intervention. Scholars have traced the failed addiction policies exemplified by the "war on drugs" to underlying root causes including racism, politics, and moral stigma. The core contribution of *The Constitution of the War on Drugs* is to show that constitutional law is an additional such root cause. The book does so by unearthing ways the Constitution has accepted and abetted carceral addiction policy. In pointing to constitutional law as a root cause of the drug war and, so, as a potential site for contestation against carceral drug policy, the book connects criminal law, health law, and constitutional law in ways that should enrich all three fields.

For all the book's strengths, however, *The Constitution of the War on Drugs* does not go far enough in mapping the interaction of constitutional law and addiction policy that it uncovers. In surveying "near misses" during the twentieth century when constitutional litigation came close to invalidating prohibitionist drug policies, the book limits its study to constitutional law's negative potential to impede carceral drug policies. This

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prohibitory approach to constitutionalism leaves unaddressed and unrecognized important ways that constitutional law shapes which addiction policies are enacted in the first place—ways constitutional law influences the repeated choice of carceral drug policy over more effective evidence-based policies such as investments in treatment, housing, and social supports. Doing so misses promising contemporary sites of contestation and risks playing into President Nixon’s brilliantly pernicious conceptual framing of addiction policy as a punitive war on drugs. The book’s approach also risks bolstering contemporary anti-regulatory trends illustrated by ongoing attacks on the administrative state. In further developing the interaction of constitutional law and addiction policy that *The Constitution of the War on Drugs* uncovers, future scholars should consider thick, affirmative conceptions such as Dorothy Roberts’s freedom constitutionalism or Parmet’s public health constitutionalism.

These things are results, not causes.
Results, not causes; results, not causes.

—John Steinbeck²

INTRODUCTION

Twenty-four-year-old Chris Malcolm was addicted to opioids. So was his twenty-two-year-old brother Michael.³ Opioid addiction is a disease for which there are effective medicines,⁴ but Chris and Michael could not afford treatment. They overdosed together from a batch of fentanyl-laced counterfeit pills that Chris bought unwittingly on the dark web. Chris survived, his brother did not. The police came and arrested Chris for buying the drugs that had poisoned him and his brother. At state expense, Chris

2. JOHN STEINBECK, *THE GRAPES OF WRATH* 204 (Compass Books ed., 1958) (1939).

3. *Breckenridge Man Sentenced to Five Years for Role in Two Fentanyl Overdose Deaths*, SUMMIT DAILY NEWS (May 12, 2017), <https://www.summitdaily.com/news/crime/breckenridge-man-sentenced-to-five-years-for-role-in-two-fentanyl-overdose-deaths>.

4. See NATIONAL ACADEMIES OF SCIENCE, ENGINEERING, AND MEDICINE: METHADONE TREATMENT FOR OPIOID USE DISORDER, EXAMINING FEDERAL REGULATIONS AND LAWS (2023), <https://www.nationalacademies.org/our-work/methadone-treatment-for-opioid-use-disorder-examining-federal-regulations-and-laws---a-workshop>.

Malcolm was investigated, prosecuted, sentenced, and incarcerated.

Their father saw the tragic irony in a system that invests in punishing people with substance use disorder but fails to invest in providing them treatment for their disease. Interviewed by the *New York Times* about Chris's prosecution, the elder Malcolm summed up the state's failures with a metaphor: "It's kind of like blaming the leaves on the tree, you know? What about the roots?"⁵

That metaphor pinpoints the fundamental mistake that so often makes punitive prohibition—criminalizing drug use—impotent as a tool of public health. Targeting results (drug use) rather than what public health scholars call "root causes"⁶ (including untreated mental illness, poverty, lack of access to affordable housing, adverse childhood events, and other social and economic determinants of health)⁷ is a recipe for jailing people, not helping them.⁸ This is the stuff of Public Health 101, which also points out that problems are usually much better prevented "upstream" than fixed after they materialize "downstream."⁹ And yet the decision to invest in incarcerating Chris Malcolm, but not in treating his brother, is one that has been repeated again and again throughout the United States during a half-century-long drug war.¹⁰

5. Rosa Goldensohn, *They Used Drugs with Friends, Next Came the Murder Charges*, N.Y. TIMES, May 26, 2018, at A1.

6. See, e.g., LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 15 (3d ed. 2016) (describing the concept and offering environmental, social, and behavioral factors as examples).

7. Nabarun Dasgupta, Leo Beletsky & Daniel Ciccarone, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182 (2018) (discussing root causes of opioid epidemic).

8. See Jennifer D. Oliva & Taleed El-Sabawi, *The "New" Drug War*, 110 VA. L. REV. 1103 (2024) (describing concern that addressing addiction harms through incarceration and policing is problematic and counter-productive); e.g., Scott Burris, Evan Anderson, Corey Davis & Leo Beletsky, *Toward Healthy Drug Policy in the United States—The Case of Safehouse*, 382 NEW ENG. J. MED. 4 (2020) (explaining that more effective legal interventions depend on a positive rather than a negative approach that empowers people, especially people who use drugs).

9. See GOSTIN & WILEY, *supra* note 6, at 15 (describing "a parable in which the residents of a riverside village become so overwhelmed by rescuing people who are drowning that they do not have time to travel upstream to discover why so many people are falling in"); Aila Hoss, *Decriminalization as Substance Use Disorder Prevention*, 51 U. TOL. L. REV. 477, 490 (2020) ("cycle of incarceration and adverse childhood events that lead to SUD [substance use disorder]").

10. See Oliva & El-Sabawi, *supra* note 8, at 1168 ("The War on Drugs has claimed

Why do we keep doubling down on contrary-to-evidence carceral drug policy in lieu of more effective (and more cost-effective) upstream interventions? Scholars studying this profound policy failure have identified several contributing factors, including race,¹¹ politics,¹² the prison-industrial complex,¹³ and moral stigma.¹⁴ The genius of David Pozen's book, *The Constitution of the War on Drugs*, is to bring constitutional law into the conversation as an additional root cause of the drug war.

As this Review elaborates, *The Constitution of the War on Drugs* begins by describing the failures of the war on drugs and uses those failures to pose a crucial but previously overlooked question: How could the drug war be possible given a Constitution that is supposed to protect liberty and equality (p. 3)? The answer, it turns out, is that the failure was not so much in the Constitution in the abstract, but in constitutional adjudication as it played out.¹⁵ Pozen uncovers several forgotten near misses in constitutional litigation, times when bad drug laws were very nearly invalidated on various rights-based theories under the First, Fifth, Tenth, and Fourteenth Amendments.¹⁶ He reminds us that the Constitution is a policy driver even—or perhaps especially—when it seems absent and that the lived

many lives, whether by encouraging the development of a volatile illicit drug supply . . . or facilitating the incarceration of generations of Black people and other persons of color.”).

11. See Andrew D. Black, “*The War on People*”: Reframing “*the War on Drugs*” by Addressing Racism Within American Drug Policy Through Restorative Justice and Community Collaboration, 46 U. LOUISVILLE L. REV. 177, 178 (2007) (“The ‘War on Drugs’ is a war against people, particularly African-Americans.”); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 775 (2020) (“Black women became the face of the criminalization of substance use during pregnancy.”).

12. See DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 10–12 (Roger Donald ed., 1996) (describing politics in formulation of Nixon’s “war on drugs”).

13. See Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965, 1969–70 (2023) (“Across the country, the law enforcement lobby—police unions, correctional officer unions, and prosecutor associations—has played an integral role in shaping criminal justice policy.”).

14. See GEORGE FISHER, *BEWARE EUPHORIA: THE MORAL ROOTS AND RACIAL MYTHS OF AMERICA’S WAR ON DRUGS* 12 (2024) (describing role of morality and stigma in drug policy).

15. See generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019) (stating legal texts “do not have a fully determined meaning” and legal indeterminacies can “and would be settled by subsequent practice”).

16. See p. 6 (“The possibility of constitutional drug rights moved from the mainstream to the margins in less than a generation, even as the drug laws themselves became more and more punitive.”).

reality of constitutional law depends on the choices of advocates, lawyers, and jurists, among others.¹⁷ Constitutional law's failure to prevent the drug war was *our* failure. With the question it poses and with that rueful yet empowering answer, *The Constitution of the War on Drugs* develops previously missing connections between criminal law, health law, and constitutional law with the potential to enrich all three fields. It also makes possible a future constitutional *praxis* capable of breaking a 50-year cycle of addiction policy failure marked by mass death and mass incarceration.

This Review situates and applauds this contribution, but also offers an important (albeit friendly) amendment. Even while calling on us to explore the interaction of the Constitution and the war on drugs, *The Constitution of the War on Drugs* takes a narrow view of that interaction that obscures significant and promising impacts of constitutional law on addiction policy. The stories of missed opportunities for constitutional law to invalidate punitive drug laws that Pozen unearths are important ones, but they relegate the Constitution's potential role to the prohibitory one of policy police, stepping in to invalidate unconstitutional laws once passed—to regulating policy results, not causes. Obscured on Pozen's account are a rich variety of other constitutional controversies, from *Estelle v. Gamble*¹⁸ to *NFIB v. Sebelius*,¹⁹ in which constitutional law has shaped federal and state decisions whether to address addiction through punitive prohibition or through affirmative, evidence-based policies (like expanded access to treatment or investment in housing and job supports) in the first place.²⁰

Thus, insofar as it centers a prohibitory understanding of the role of the Constitution—in exploring constitutional law as a tool for invalidating carceral drug policies—*The Constitution of the War on Drugs* invites a conceptual error analogous to that underlying drug prohibition itself. The book focuses on what role constitutional law might play in directly negating bad policies once adopted by policymakers, leaving underexplored the

17. See Melissa S. Cleary, *Bounded Justice and the Limits of Health Equity*, 49 J.L. MED. & ETH. 241, 253 (2021) (“[P]raxis means moving back and forth in a critical way between reflecting and acting on the world.”) (internal quotations omitted).

18. 429 U.S. 97 (1976).

19. 567 U.S. 519 (2012).

20. See *infra* Part II.

Constitution's role in establishing and shaping the upstream structural determinants that lead policymakers to adopt bad policy responses to addiction rather than good ones in the first place.²¹

Yet as this Review explains, exploring the Constitution's role in shaping upstream drivers of addiction policy is both necessary to fully understand constitutional law's potential to impede carceral drug policies and essential for conceptualizing and advancing an anti-carceral (and pro-public health) constitutional *praxis* going forward. While attempts to stop "bad" results (be they human behaviors or state policies) by simply making them illegal (or unconstitutional) without attempting to address their upstream causes might work, they are prone to backfire. To fully exploit the new constitutional front for addiction policy that Pozen gives us, legal scholars must remember the central insight of public health law as reflected in the "roots" metaphor: the best way to change results is often to change causes. That conceptual shift—call it from leaves to roots, results to causes, downstream to upstream, or behaviors to systems—sums up this Review's intervention for Pozen's book and for future scholarship exploring the interaction of criminal law, health law, and constitutional law.

Like Dorothy Roberts's interrogation of abolition constitutionalism (to which I return in Part III), this Review highlights two senses of prohibition constitutionalism.²² The first sense is the interaction of constitutional law and the war on drugs that Pozen shows us is an important root cause of the nation's failed addiction policies, i.e., missed opportunities for anti-prohibition constitutionalism. The second sense is the intervention for the study of that interaction that this Review develops, which highlights how Pozen's own analysis employs the negative understanding of the Constitution's role in addiction policy that, while it flows naturally from the cases he studies, leaves underexplored important, upstream ways constitutional law drives carceral addiction policy in the first place. In light of

21. To be clear, Pozen does acknowledge the potential for constitutional law or statutory rights to "help drug users more" by reference to positive rights claims developed in other countries (pp. 175–77), and the book's otherwise prohibitionist focus is surely a byproduct of the historical cases at its center.

22. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9 (2019) [hereinafter Roberts, *Abolition*].

that intervention, Pozen's contribution in *The Constitution of the War on Drugs* is more significant, the untilled ground for future work exploring the interaction of the Constitution and addiction policy is wider, and the hope for constitutional *praxis* to promote public health and prevent incarceration is greater than even Pozen makes them out to be.

The Review proceeds in three parts. Part I describes *The Constitution of the War on Drugs* and its empowering linkage of constitutional law, criminal law, and health law. Part II highlights aspects of the interaction of the Constitution and the war on drugs missed by the book's prohibitory approach to constitutionalism, explaining three ways constitutional law structures drug policy choices to encourage punitive prohibition and touching on several others. Part III argues that a broader, affirmative approach to constitutionalism will be essential to effective constitutional *praxis* going forward and offers freedom constitutionalism and public health constitutionalism as two possibilities. A brief conclusion summarizes the Review.

I. DRUG WRONGS AND DRUG RIGHTS

For decades, there has been something approaching an academic consensus that, from a consequentialist standpoint, carceral prohibition has failed as the centerpiece of United States drug policy.²³ As Pozen points out, there is a widespread view that the "drug war" has driven racially disparate mass incarceration and over-policing and that the racially disparate harms of these state-imposed injustices rival or even exceed those of the addiction problem they are ostensibly intended to address.²⁴ Meanwhile, rising death from overdose rates (which now exceed 100,000 annually) evidence that punitive prohibition has not succeeded in reducing the harms of addiction, and there is substantial doubt that punitive prohibition has even curbed their growth—though reasonable people may disagree on that point for

23. See ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, & PLACES* (2001).

24. See Aliza Cohen et al., *How the War on Drugs Impacts Social Determinants of Health Beyond the Criminal Legal System*, 54 *ANNALS MED.* 2024, 2025 (2022) ("[D]rug war logic defies and contradicts widely accepted understandings of addiction as a health issue and has, in many cases, made a public health approach more challenging to implement.").

some substances.²⁵

The contradiction between this academic view, that punitive prohibition has at most a limited role to play in addiction policy, and the policy reality of prohibition's continued primacy has led scholars to search for underlying explanations. Why, despite all evidence, has the nation's primary response to drug addiction for the past fifty years remained a carceral one?²⁶

Scholars have plausibly identified a range of explanations for the stubborn persistence of carceral drug policy. Khiara Bridges shows the role of racism—of subordination of Black people and protection of Whiteness—in driving using-while-pregnant prosecutions.²⁷ Roberts shows in such prosecutions an underlying, intersectional subordination.²⁸ More broadly, Roberts, Amna Akbar, and other prison abolitionists point to the potent political influence of the prison-industrial complex.²⁹ Liza Vertinsky points to the law and political economy of controlled substances and the role of pharmaceutical manufacturers in driving opioid over-prescribing to fuel the opioid epidemic.³⁰ George Fisher points to moral forces stigmatizing drug use and drug users as the central driving factor.³¹

In *The Constitution of the War on Drugs*, Pozen demonstrates that we should add constitutional law to this list of root causes of the war on drugs. His argument is unexpected, rueful, and empowering. It is unexpected because, as criminal law and drug

25. See, e.g., ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES* 39–40 (Charles Wolf, Jr., ed., 2001) (describing this debate).

26. See Taleed El-Sabawi & Jennifer Oliva, *The Influence of White Exceptionalism on Drug War Discourse*, 94 TEMP. L. REV. 649, 649–50 (2021) (tracing persistence of punitive drug policy to “heuristics, recycled narratives othering persons who use drugs, stereotypes, and racist beliefs about minoritized populations”).

27. See Bridges, *supra* note 11, at 820 (describing historical roots).

28. See Dorothy E. Roberts, *Review: Creating and Solving the Problem of Drug Use During Pregnancy*, 90 J. CRIM. L. & CRIMINOLOGY 1353, 1364 (2000) (book review) (describing “racialized discovery of prenatal drug exposure” that “translated into racially discriminatory policies”).

29. See Roberts, *Abolition*, *supra* note 22, at 14 (“[P]risons are part of a larger system of carceral punishment that legitimizes state violence against the nation’s most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.”) (citations omitted); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1841 (2020).

30. Liza Vertinsky, *Pharmaceutical (Re)Capture*, 20 YALE J. HEALTH POL’Y L. & ETHICS 146, 223 (2021) (describing role of market actors in constructing opioid epidemic).

31. See FISHER, *supra* note 14, at 448 (developing this argument).

policy scholars know all too well, the Constitution has been missing in action in the drug war. Constitutional law has been notable not for its presence but for its decades of seeming absence in the imposition and operation of unjust, racist, subordinating, and ineffective prohibitory policies. But until now that absence, notable though it truly is, has gone unremarked.

Pozen begins by asking how a constitution that is supposed to secure liberty and promote the general welfare can abide and enable a doomed-to-failure policy of punitive prohibition that “undermines core tenets of liberalism,” “fuels mass incarceration and racial subordination,” has “jailed tens of millions,” and “cost billions,” all while failing to achieve its goal of combatting “drug addiction, drug overdose, and drug-associated violence” (p. 1)?³² It is a great question, one which reminds us not to allow the illusory action/inaction distinction, or other false sources of salience,³³ to obscure constitutional law’s role as a contributor to decades of failed addiction policy. Pozen’s question reminds us that constitutional law can *enable* through inaction (as in *Plessy*³⁴) just as much as it can *disable* through action (as in *Brown*).³⁵

By way of answer, Pozen uncovers a series of near misses—forgotten pushes for recognition of limited drug rights that very nearly invalidated punitive prohibition in full or in part. While from our contemporary vantage point, the idea of constitutional rights limiting drug prohibition may be outlandish, Pozen unearths the story of legal theories that might have impeded carceral drug laws based on liberty, privacy, federalism, equality, cruel and unusual punishment, speech, and expression that were “credible at the time they were brought” (p. 146). Pozen thus shows that the causes of carceral addiction policy include not just facilitators with the potential to encourage such policy (like racism and stigma) but barriers with the potential to impede it—and that constitution law could have been such a barrier.

32. See also p. 3 (“Constitutional law not only failed to head off one of the most obviously defective and destructive policies in modern American history; it also helped to validate and entrench that policy at critical junctures in its evolution.”).

33. Cf. Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. REG. 253, 262 (2011) (“[S]alience is used to describe the degree to which a tax or a tax provision is visible or prominent to the public.”).

34. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (allowing racial segregation despite the Fourteenth Amendment).

35. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1952) (overturning *Plessy* and prohibiting racial segregation in the public schools).

In its focus on the contingency of constitutional law's failure to intervene in the drug war, the book is rueful. It shows that constitutional law could well have stopped or mitigated punitive prohibition if jurists, lawyers, and professional elites had made different choices. Anti-prohibition constitutional law had a chance. The theories Pozen unearths failed to gain traction, not for want of plausibility but, as he documents in arresting detail, because of decisions made and not made by jurists, lawyers, and professional elites.³⁶ In *State v. Kanter*, for example, recognition of a "fundamental constitutional right to smoke marijuana" failed to gain a majority in the Supreme Court of Hawaii because the plaintiffs' attorney did not press it explicitly enough in the briefs.³⁷

While there is regret in these stories, there is also something empowering. Other explanations scholars have developed for the stubborn persistence of carceral drug policy like racism, politics, and moral stigma point to root causes that law and lawyers can do relatively little about (which is not to say we shouldn't try.)³⁸ On Pozen's account, though, the lived, often human contingencies of constitutional litigation, advocacy, scholarship, and understanding turned out to be incredibly important. Constitutional law might well have intervened in the drug war, and its failure came down to choices made and not made by litigators, jurists, and professional elites. Lawyering mattered.

That is a hopeful thought. While constitutional law didn't stop the last drug war, maybe it can stop the next one. We lawyers have tools—litigation, amicus briefs, policy advocacy, teaching, and writing—by which we can shape constitutional law. Perhaps we might develop new constitutional doctrines to prohibit prohibition. We might have fallen short for the last fifty years of the drug war, but "that's no matter—tomorrow we will run faster, stretch our arms farther . . . And one fine morning— —So we beat on, boats against the current, born back ceaselessly into the past."³⁹

36. *E.g.*, p. 10 (describing failed nomination of Douglas Ginsburg to Supreme Court); *cf.* pp. 48 & 211 n.223 (noting Justice Stevens's opposition to marijuana prohibition during his Supreme Court tenure and, after his retirement, his support for marijuana legislation).

37. *See* p. 32 (describing how Justice Abe concurred in judgment for the state because he felt "the appellants had failed to raise the winning constitutional claim").

38. *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L.J.* 2497, 2563 (2023) [hereinafter, Akbar, *Reforms*] ("[I]f one fallacy is that law is apolitical or above politics, it is equally untrue that law is all of politics, or that it sets the terms of politics altogether.").

39. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 141 (Matthew J. Burccoli ed., Cambridge Univ. Press 1991) (1925).

Pardon the reverie and the cringey Gatsby reference, but it perfectly captures how the hopefulness that one might find in Pozen's account of the interaction of the Constitution and the war on drugs is illusory, tempting though it might be.⁴⁰ In the book's concluding chapters Pozen himself articulates reasons it is so hard to put faith in drug rights to fix drug policy (pp. 159–70). Contributors to a blog symposium on his book elaborate on those concerns. The arguments are mainstays of the “critique of rights” literature.⁴¹ The counter-majoritarian difficulty is at its apex when a court is asked to invalidate legislative action after the policy process is complete, so it is doubtful that courts would intervene except in the most extreme cases.⁴² More fundamentally, even when courts do intervene, they may not do so in desirable ways. Negative rights empower jurists to veto legislation, and jurists so empowered might well use that ability not (or not only) to invalidate “bad” laws, but to invalidate many good ones. As Barkow points out, the “echoes of *Lochner*” haunts any dream of fixing the legislative process by broadly empowering courts to invalidate carceral drug legislation.⁴³ That concern seems heightened with the current judiciary.⁴⁴

In other words, empowering courts through rights litigation to invalidate carceral drug policies once enacted is a tenuous and potentially counter-productive means of improving policy outputs. Like prohibiting behaviors without addressing their root causes, prohibiting policies without addressing the decision-making structures that yield them can be ineffective or worse. While this thinking about roots and causes brings a sense of pessimism to any effort to find solutions to the “drug war” in constitutional rights, it also points the way toward a fuller and

40. Cf. Matthew B. Lawrence, *Addiction and Liberty*, 108 CORNELL L. REV. 259 (2023) [hereinafter Lawrence, *Addiction*] (developing legal case for a new, previously unrecognized but plausible drug right and arguing lawyers and jurists should employ it to set aside problematic punitive drug policies).

41. See, e.g., Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1994); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

42. See generally Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*, 52 VAND. J. TRANSNAT'L L. 1135 (2019).

43. Rachel E. Barkow, *Constitutional Withdrawal*, BALKINIZATION (May 1, 2024), <https://balkin.blogspot.com/2024/05/constitutional-withdrawal.html>.

44. See Louis Michael Seidman, *Pozen and the Puzzle of Counterfactuals*, BALKINIZATION (May 2, 2024), <https://balkin.blogspot.com/2024/05/pozen-and-puzzle-of-counterfactuals.html> (“We enter our culture wars with the judiciary that we have, not the one that we would like to have.”).

more optimistic understanding of the interaction of constitutional law and the war on drugs.

II. THE CONSTITUTION AND ADDICTION POLICY

To fully harness the potential for constitutional law to address the drug war we need to look beyond prohibitory constitutional provisions (like negative rights) or structures (like federalism) that might have stopped carceral drug laws from being passed or operating as they did. We must instead consider a broader range of constitutional provisions (like positive rights and election rules) and structures (like fiscal federalism) that shape which laws are passed in the first place. In seeking to stem the harms of addiction, what constitutional features pushed federal and state governments toward counter-productive prohibitory laws and away from more effective, evidence-based interventions, such as mental-health treatment, social services, and harm reduction?⁴⁵ Could constitutional law explain or do something about addiction policy's tendency to focus on downstream results rather than upstream causes?

During the decades Pozen covers, litigators unsuccessfully pressed numerous viable constitutional theories that might have required or encouraged states to pursue more effective, upstream investments in promoting mental health and mental health care, including addiction treatment and harm reduction. At the same time, structural fixtures of federal and state constitutional law developed in ways that tended to push against non-punitive addiction policy, biasing lawmaking away from investment in mental health and mental health care. Consider three examples:

1. TREATMENT AND THE EIGHTH AMENDMENT

Public health law scholars agree that lack of access to evidence-based treatment is one of the most substantial drivers of addiction harm in the United States.⁴⁶ Interventions such as

45. Nabarun Dasgupta, Leo Beletsky & Daniel Ciccarone, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182 (2018) (discussing root causes of opioid epidemic and varieties of responses).

46. See, e.g., Stacey A. Tovino, *All Illnesses Are (Not) Created Equal: Reforming Federal Mental Health Insurance Law*, 49 HARV. J. ON LEGIS. 1, 22 (2012) (“[T]reating alcohol and drug abuse can yield significant clinical and economic returns.”); Jun Ma et al., *Effects of Medication-Assisted Treatment on Mortality Among Opioids Users: A Systematic Review and Meta-analysis*, 24 MOLECULAR PSYCHIATRY 1868, 1869 (2019)

medication-assisted treatment for opioid use disorder with methadone or buprenorphine have been shown to substantially reduce morbidity (along with other beneficial impacts, including reducing criminality).⁴⁷ Yet due to arbitrary regulatory barriers, lack of access to adequate insurance coverage, care costs, and provider shortages, fewer than 1 in 5 Americans who need evidence-based addiction treatment are able to obtain it.⁴⁸

The state's failure to adopt evidence-based addiction policies such as expanding access to treatment is itself a driver of punitive prohibition. The most powerful argument in favor of prohibition—pretextual and misguided though it may often be—has been that it is necessary to address or prevent public health harms and public safety associated with addiction (p. 37). Concern for addiction-related harms is a driving force behind support for punitive prohibition.⁴⁹ Racism, politics, and stigma steer that genuine concern toward carceral responses, but it is the very real concern itself that puts wind in prohibition's sails and gives it a veneer (whether pretextual or not) of good faith.

Constitutional law could have played—and indeed has begun to play—a constructive role in promoting access to evidence-based addiction treatment. To be sure, the United States Constitution ordinarily protects only “negative rights,” not “positive rights,” so it is not plausible to assert a general entitlement to state provision of addiction treatment grounded in federal constitutional law.⁵⁰ But the Supreme Court has long

(“Studies have shown that MAT is effective in reducing mortality in patients with OUD.” (citations omitted)).

47. *See supra* note 46.

48. NAT'L ACADS. OF SCIS., ENG'G, & MED., *MEDICATIONS FOR OPIOID USE DISORDER SAVE LIVES* 9–10 (2019).

49. For example, protecting the public from addiction harms is the express purpose of the Controlled Substances Act, the federal centerpiece of punitive prohibition. *See, e.g.*, 21 U.S.C. § 801(2). For other illustrations, see, for example, President Nixon, Exec. Order No. 11641, 37 Fed. Reg. 2421 (Feb. 1, 1972) (“The menace of drug abuse threatens to sap our Nation's strength and destroy our Nation's character. It must be combatted in a variety of ways—through international measures, through domestic law enforcement, through programs dealing with prevention, education, treatment and rehabilitation. As one critical part of this balanced and comprehensive program, we must now give special emphasis to improving law enforcement activities at all levels of government.”); President Reagan, Remarks on Signing H.R. 5484 Into Law 1986, 22 WEEKLY COMP. OF PRES. DOCS. 1458 (Oct. 27, 1986) (“[T]he vaccine that's going to end the epidemic is a combination of tough laws—like the one we sign today—and a dramatic change in public attitude. . . . We must be intolerant of drugs not because we want to punish drug users, but because we care about them and want to help them.”).

50. *See* p. 7 (“Relative to its counterparts abroad, U.S. constitutional law is an outlier

recognized that the Eighth Amendment does impose affirmative obligations on the state when it comes to persons in custody. In *Estelle v. Gamble*, for example, the Court held that a state violates the prohibition on “cruel and unusual” punishment when it denies medically necessary care to an inmate.⁵¹

This limited positive constitutional “right to health care”⁵² for incarcerated persons is particularly important when it comes to addiction treatment, because a high proportion of people suffering from drug addiction encounter the criminal justice system.⁵³ Recognizing this, scholars and advocates have in recent years looked to Eighth Amendment litigation as a key front on which to fight for policy promoting access to addiction treatment.⁵⁴

In these emerging fights, the Constitution has come to play a positive role in promoting evidence-based addiction policy. Litigators have made headway in establishing new, limited rights to treatment in jail, with the compound effect of facilitating access for incarcerated persons who benefit from such rulings and—in a social movement feedback loop anticipated by Jack Balkin and Reva Siegel⁵⁵—strengthening a broader movement to expand access to treatment in prisons and beyond.⁵⁶ That same movement

in the degree to which it fixates on ‘negative’ rights to be spared state interference rather than ‘positive’ rights to be given state support.”).

51. See 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)) (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ . . . proscribed by the Eighth Amendment.”).

52. NICOLE HUBERFELD ET AL., *THE LAW OF AMERICAN HEALTH CARE* (3d ed. 2022) (describing *Estelle*); Nicole Huberfeld, *Federalism in Health Care Reform*, in *HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY* 197, 214 n.74 (Ezra Rosser ed., 2019) (citing *Estelle* and stating “[n]o constitutional right to health care exists except for prisoners due to the Eighth Amendment’s prohibition on cruel and unusual punishment”).

53. Mirko Bagaric & Sandeep Gopalan, *A Sober Assessment of the Link Between Substance Abuse and Crime—Eliminating Drug and Alcohol Use from the Sentencing Calculus*, 56 SANTA CLARA L. REV. 243 (2016); Sara Gordon, *About a Revolution: Toward Integrated Treatment in Drug and Mental Health Courts*, 97 N.C. L. REV. 355, 359 (2019).

54. See generally Claire E. Scavone, *Battleground of the Opioid Crisis: The Eighth Amendment Right to Medication-Assisted Treatment in Prisons and Jails, and Upon Release*, 71 EMORY L.J. 1273 (2022).

55. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006) (“[P]olitical contestation can change popular and professional intuitions about the proper application of constitutional principles.”).

56. See, e.g., Alex Burness, *Drug Treatment Crisis Grows in West Virginia, but State Just Looks Toward More Punishment*, BOLTS MAG. (Mar. 7, 2024), <https://boltsmag.org/west-virginia-drug-treatment-medicaid-drug-criminalization> (describing person in recovery participating in advocacy group challenging carceral drug

is an important voice against prohibition, evidencing that increased awareness of the possibility of effective treatment for substance use disorder is consistent with reduced support for prohibitory policies.⁵⁷

These recent developments illustrate how expanding our understanding of the interaction of the Constitution and addiction policy reveals hopeful avenues obscured by a prohibitionist framework. They also raise the question of whether constitutional law might have done more had scholars and advocates developed and pressed Eighth Amendment theories decades ago. While addiction treatment cases have only begun to gain traction in recent years, the underlying theories and supporting evidence are longstanding.⁵⁸

2. STIGMA AND EQUAL PROTECTION

Many casebooks include another example of the interaction between constitutional law and addiction policy, namely, *New York City Transit Authority v. Beazer*.⁵⁹ In that case, the Supreme Court upheld, against an Equal Protection challenge, a New York statute forbidding people taking methadone to treat their opioid use disorder from working for the New York City Transit Authority. The Court upheld the discriminatory ban as having a rational basis, building on an earlier 1970s case (*Marshall v. United States*),⁶⁰ which had refused to apply heightened scrutiny to laws discriminating against people suffering from addiction. Justice White dissented on the ground that, because the law “singled out respondents—unlike ex-offenders, former alcoholics and mental patients, diabetics, epileptics, and those currently using tranquilizers, for example—for sacrifice to this, at best, ethereal and likely nonexistent risk of increased unemployability . . . without justification,” demonstrating an unconstitutional “irrationality and invidiousness.”⁶¹ Justice White’s dissent echoed

policy).

57. Cf. Brittany Kelly et al., *Promoting Expungements to Minimize the Adverse Impact of Substance Use Disorder Criminalization*, 84 ALB. L. REV. 643, 645 (2020).

58. See *Weems v. United States*, 217 U.S. 349, 371–73 (1910) (providing an early history of Eighth Amendment jurisprudence). See generally Sara L. Rose, “Cruel and Unusual Punishment” Need Not Be Cruel, Unusual, or Punishment, 24 CAP. U. L. REV. 827, 828 (1995).

59. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

60. *Marshall v. United States*, 414 U.S. 417 (1974).

61. *Beazer*, 440 U.S. at 610 (White, J., dissenting).

Justice Marshall's in the earlier *Marshall* case, where Marshall emphasized that "this case does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction. . . ."⁶²

The dissents in *Beazer* and *Marshall* illustrate how powerful a weapon for evidence-based addiction policy the Equal Protection Clause might have been. Public Health Law scholars recognize that laws discriminating against people with addiction or in recovery—in housing, in employment, in public benefits, and in a variety of other areas⁶³—are themselves a significant barrier to treatment and recovery and, so, driver of addiction harms. As an acute matter, employment, housing, and other social supports are critical upstream determinants of health, access to which is a major contributor to recovery.⁶⁴ More fundamentally, discrimination against people with addiction or in recovery (like the patients taking methadone in *Beazer*) is a driver of the secrecy and stigma that keeps people suffering from addiction from seeking help⁶⁵ and keeps the general public supportive of punitive addiction policy.⁶⁶ Fear of job repercussions forces people to fight their addictions alone, and the resulting secrecy surrounding addiction fuels stigma and, so, a naively moralistic approach to addiction.⁶⁷

62. *Marshall*, 414 U.S. at 433 (Marshall, J., dissenting).

63. See Dru Stevenson, *Should Addicts Get Welfare? Addiction & SSI/SSDI*, 68 BROOK. L. REV. 185, 223 (2002) (describing the importance of public supports including housing to recovery); cf. Crystal S. Yang, *Does Public Assistance Reduce Recidivism?*, 107 AM. ECON. REV. 551, 554 (2017) ("[E]ligibility for welfare and food stamps significantly decreases recidivism among newly released drug offenders, potentially because public assistance helps ex-offenders make ends meet when other economic prospects are dire."). See generally Maggie McCarthy et al., *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, 8 J. DRUG ADDICTION, EDUC. AND ERADICATION 71 (describing the various drug- and crime-related state and federally imposed restrictions on public assistance programs).

64. Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENTS: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 37, 42 (Marc Mauer & Meda Chensey-Lind eds., 2002) ("Without access to subsistence benefits, treatment, and safe and sober housing, it is much less likely that these [people] will be able to live drug-free in the community and avoid recidivism.").

65. Jenifer Wogen & Maria Teresa Restrepo, *Human Rights, Stigma, and Substance Use*, 22 HEALTH & HUM. RTS. J. 51, 54 (2020) ("[P]ublic stigma creates obstacles for persons with substance use problems when other members of the community prevent their access to basic needs such as housing, food, education, and employment.").

66. Cf. FISHER, *supra* note 14, at 461 (describing concerns).

67. See Leslie Francis, *Illegal Substance Abuse and Protection from Discrimination in Housing and Employment: Reversing the Exclusion of Illegal Substance Abuse as a*

Had White's or Marshall's opinion carried the majority, the Equal Protection Clause could have been a powerful tool for both fighting the stigma that drives addiction harms and for promoting the access to housing, employment, and other social supports that are critical to recovery. Moreover, judicial recognition of a need to protect people suffering from addiction as a marginalized group long subject to subordination⁶⁸ might have bolstered movements to protect drug users⁶⁹ and increased scrutiny on arbitrary punitive drug laws.⁷⁰

3. SPENDING AND SOCIAL PROGRAMS

Last, consider an area in which constitutional law has simultaneously impeded evidence-based addiction policy and pushed toward punitive prohibition: spending and appropriations. Unlike punitive prohibition, which can be imposed by a simple "free" mandate (from an immediate budgetary perspective),⁷¹ interventions to prevent or treat addiction require upfront spending—on education, housing, health care, and social supports.⁷² While incarceration usually costs *more* in the long run than prevention,⁷³ prohibitory laws tend to be "free" from an immediate budgetary perspective; the fact that the state will incur

Disability, 2019 UTAH L. REV. 891, 912 (2019) (describing drug testing regimes); Wogen & Restrepo, *supra* note 65, at 55 ("Much of stigma's impact is a consequence of self-stigma, as it encompasses low self-esteem and alienation of self and has been associated with recovery orientation, empowerment, and perceived devaluation.").

68. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing various areas where a "narrower scope" of constitutional scrutiny may be needed); Lawrence, *Addiction*, *supra* note 40, at 335–41 (discussing the intersection of constitutional law, "freedom from addiction," and antisubordination).

69. Cf. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006) ("When movements succeed in contesting the application of constitutional principles, they can help change the social meaning of constitutional principles and the practices they regulate.").

70. While Pozen discusses missed opportunities for Equal Protection as a check on punitive prohibition, as discussed above, the potential for Equal Protection to contribute to evidence-based addiction policy is broader.

71. E.g., Robinson & Rushin, *supra* note 13, at 1981 (discussing political dynamics).

72. See Matthew B. Lawrence, *COVID-19 Reveals the Fiscal Determinants of Health*, in *COVID-19 AND THE LAW: DISRUPTION, IMPACT AND LEGACY* 167–73 (I. Glenn Cohen et al. eds., 2023) [hereinafter Lawrence, *COVID-19*] ("Any suggestion that more funding is needed for a given project will be met by policymakers with the same question: What should I cut to get the money?").

73. See Brandon C. Welch & David Farrington, *The Benefits and Costs of Early Prevention Compared with Imprisonment: Toward Evidence-Based Policy*, 9 PRISON J. 120S, 131S (2011) (arguing that, compared to prison, "early crime prevention can be a sound investment of public resources and an economically viable alternative to prison").

incarceration costs when such laws are violated is a “secondary effect” of the sort usually ignored in scorekeeping.⁷⁴ This pairing of apparently low upfront cost with long-term secondary costs is a classic public choice pathology that leads to over-provision of the “free” (but ultimately more costly) policy and under-provision of the “costly” (but ultimately cheaper) one.⁷⁵ Due to the nature of addiction, which leads sufferers to devote their resources to acquiring the substance on which they are dependent, access to addiction treatment usually requires federal or state funding.⁷⁶

In short, prohibition does not require upfront spending, but evidence-based drug policies do. This means that constitutional provisions and structures that impede policies that depend on upfront investment—like state constitutional debt limits⁷⁷ or the federal separation of powers’ dependence on time-limited appropriations (which I have called the “forced fragility” of spending programs)⁷⁸—push addiction policy toward prohibition and away from more effective interventions.

The damage being done by the Supreme Court’s decision in *NFIB v. Sebelius* to efforts to promote addiction treatment is an ongoing illustration of this interaction between constitutional law and drug policy. At its enactment in 1965, Medicaid provided health care coverage for low-income Americans only if they fit into one of a few discrete categories of “deserving” (in a problematic Elizabethan sense) poor including the “aged, blind, disabled, pregnant women, [and] some children.”⁷⁹ While these

74. Scott Levy, Note, *Spending Money to Make Money: CBO Scoring of Secondary Effects*, 127 YALE L.J. 936 (2018).

75. Robinson & Rushin, *supra* note 13, at 2009–11 (“In some ways, the law enforcement lobby raises many of the traditional lobbying costs identified in other contexts, including the risk of conflicts of interest, regulatory capture, and corruption.”); see also Timothy Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1592 (2007) (describing distorting influence of scorekeeping rules and practices).

76. See Hannah K. Knudsen, Amanda J. Abraham & Carrie B. Oser, *Barriers to the Implementation of Medication-Assisted Treatment for Substance Use Disorders: The Importance of Funding Policies and Medical Infrastructure*, 34 EVALUATION & PROGRAM PLANNING 375, 376 (2011) (“[T]he majority of SUD treatment services are delivered by [] publicly funded agencies.”).

77. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2606 & n.240 (2005) (explaining the historical background of state constitutional adoption of debt limits).

78. See Lawrence, *COVID-19*, *supra* note 72, at 176 (explaining how separation of powers “force[s] fragility even when substantive policy considerations counsel stability”).

79. Nicole Huberfeld & Jessica L. Roberts, *An Empirical Perspective on Medicaid as Social Insurance*, 46 U. TOL. L. REV. 545, 547 (2015) (“[T]he Elizabethan notion of the

categories included people suffering from a disability, addiction was excluded from the statutory definition⁸⁰ (another example of the sort of discrimination in the provision of benefits that might have been rendered unconstitutional had addiction been recognized as a suspect classification, as discussed above). Given the nation's overarching reliance on employer-sponsored insurance to provide health care coverage, this left a disproportionate number of people suffering from substance use disorder entirely uninsured.⁸¹ At a micro-level, lack of coverage means an individual can likely not afford treatment, and at a macro-level, it drives access shortages as medical students choose to pursue other, better reimbursed, and, so, more lucrative specialties.⁸²

The Affordable Care Act sought to address this by expanding Medicaid to all means-eligible individuals nationwide. The law was in that way a significant stride toward more-effective policy responses to addiction and, so, away from punitive prohibition as the centerpiece of United States drug policy.⁸³ But constitutional law stepped in to limit its effect. In *NFIB v. Sebelius*, a narrow majority of the Supreme Court ruled that the law's Medicaid expansion exceeded federalism limits on the spending power because it was too coercive. The Court declared that Medicaid expansion would be optional for states.⁸⁴

While most states opted into the Medicaid expansion, many states, especially in the South, held out for years or are still

'deserving poor' was carried forward from colonial America into Medicaid, and only a limited portion of the poor would receive medical welfare.").

80. Corey S. Davis & Derek H. Carr, *The Law and Policy of Opioids for Pain Management, Addiction Treatment, and Overdose Reversal*, 14 IND. HEALTH L. REV. 1, 16 (2017).

81. See Deborah M. Galvin et al., *Substance Abuse and the Uninsured Worker in the United States*, 28 J. PUB. HEALTH POL'Y 102, 112 (2007) ("[T]he growing ranks of uninsured workers have the greatest need for these services.").

82. Chris Robertson et al., *Structural Sex Discrimination*, 74 EMORY L.J. 43 (2024) (describing connection between reimbursement rates and access).

83. See, e.g., Christina M. Andrews et al., *Medicaid Coverage in Substance Use Disorder Treatment After the Affordable Care Act*, 102 J. SUBSTANCE ABUSE TREATMENT 1, 7 (2019) (discussing beneficial impact of ACA on access to addiction treatment); Amanda Flood, *Substance Use Disorder Parity Under the Patient Protection and Affordable Care Act: Improvements Made, but Further Government Action Needed to Guarantee Full Parity in the Private Insurance Market*, 10 J. HEALTH & BIOMEDICAL L. 363, 402 (2015) (same).

84. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

holding out.⁸⁵ In those states, lack of insurance coverage remains a major barrier to addiction treatment; indeed, former Office of National Drug Control Policy Director Keith Humphreys lists Medicaid non-expansion as the leading major policy barrier to addiction treatment in a recent review.⁸⁶ Peer-reviewed research has found evidence that states' refusal to expand Medicaid substantially impedes access to evidence-based treatment for people with addiction.⁸⁷

* * *

Constitutional law has (or could still) enable punitive prohibition in numerous other ways.⁸⁸ Indeed, Pozen himself is the co-author of a rich description of structural biases in

85. As of January 22, 2025, the following states have not expanded Medicaid: Florida, Georgia, Kansas, Mississippi, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming. *Status of Medicaid Expansion Decisions*, KFF (Feb. 12, 2025), <https://www.kff.org/affordable-care-act/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map>.

86. Keith Humphreys, Christina Andrews & Richard G. Frank, *Progress and Challenges in Medicaid-Financed Care of Substance Use Disorder*, 181 AM. J. PSYCHIATRY 359, 359–60 (2024) (“Refusing states include several with extremely high overdose rates (e.g., Tennessee, South Carolina, Florida).”).

87. Benjamin A.Y. Cher, Nancy E. Morden & Ellen Meara, *Medicaid Expansion and Prescription Trends Opioids, Addiction Therapies, and Other Drugs*, 57 MED. CARE 208, 211 (2019) (“Medicaid expansion increased access to effective, evidence-based medications for opioid addiction”); see also Hannah Cooper et al., *Association of Medicaid Expansion with Health Insurance, Unmet Need for Medical Care and Substance Use Disorder Treatment Among People Who Inject Drugs in 13 US States*, 119 ADDICTION 582, 589 (2024) (“Expanding Medicaid to all US states will be an essential step to help curb drug-related harms among this structurally marginalized population.”).

88. Possibilities include the fiscal fragmentation of responsibility for mental health harms, see Matthew B. Lawrence, *Fiscal Waivers and State “Innovation” in Health Care*, 62 WM. & MARY L. REV. 1477 (2021) (noting that states pay for incarceration while the federal government pays for about half of mental health treatment, so while affirmative interventions may be cheaper for the nation as a whole, they may nonetheless be unaffordable for particular states); William M. Sage & Timothy Westmoreland, *Following the Money: The ACA’s Fiscal-Political Economy and Lessons for Future Health Care Reform*, 48 J.L. MED. & ETHICS 434 (2020); the Supreme Court’s acceptance of arbitrary or discriminatory limits on federal social services in *Harris v. McRae*, 448 U.S. 297 (1980); its apparent refusal to recognize poverty as a protected class in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); constitutional limits preventing a state from legalizing but tightly limiting advertising for sales of controlled substances, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); campaign finance limits preventing a state from legalizing but preventing lobbying activity by sellers of controlled substances, see *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); and the recent refusal to apply Eighth Amendment protections to homeless individuals. See *Grants Pass v. City of Johnson*, 603 U.S. 520 (2024). See generally Mila Versteeg, Kevin L. Cope & Gaurav Mukherjee, *The New Homelessness*, 113 CALIF. L. REV. 433 (2025).

constitutional law, many of which could be developed as drivers of punitive prohibition insofar as they inhibit the enactment of social programs.⁸⁹ But this is a Review, not a book. My goal by touching on these examples is simply to illustrate and begin to map the dimensions of the interaction between constitutional law and addiction policy that are lost by focusing only on the Constitution's potentially negative role as a check on punitive prohibition.

III. CAUSES AND EFFECTS

The argument so far is incomplete. Any result has many causes. Chris Malcolm's incarceration could theoretically be blamed on prosecutors, on the unregulated dark web, on his own choices, on punitive drug laws, on overseas fentanyl suppliers, on the countries that fail to crack down on them, on the nation's failure to invest in addiction treatment or harm reduction, on the prison lobby, on social stigma surrounding addiction, on the Constitution, and so on. Scholars, students, jurists, advocates, policymakers, voters, or anyone else who sees 100,000 annual deaths due to drug overdoses and millions incarcerated due to punitive prohibition as a problem worth their time and attention must make hard choices about where and how to lend their energies. We can't do everything, everywhere, all at once.

It is not easy to decide which cause or causes to focus on. While invaluable in its context, even Public Health's distinction between "upstream" and "downstream" causes breaks down in complex, recursive processes, in which results change causes which change results. Rachel Barkow suggests that the relationship between drug policy and constitutional law may be just such a recursive interaction in which societal stigma surrounding drug use and subordination of people who use drugs does as much to shape constitutional law as vice versa.⁹⁰

Related, ongoing debates in criminal law about abolition versus reformism,⁹¹ and in health law about confrontational

89. See Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 62 (2022) (identifying structural biases).

90. See Barkow, *supra* note 43.

91. See, e.g., Akbar, *Reforms*, *supra* note 38, at 2536 (explaining the distinctions between, and providing examples of, abolitionist and reformist organizations); Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 254 (2023) ("[A]n abolitionist framing may ultimately produce more

incrementalism⁹² are, among other things, steps toward developing a broader theory of how legal scholars and advocates should focus their agendas—how they should decide which causes or groups of causes to prioritize. But it may be that theory can only get us so far on these agenda-setting questions, which are inevitably personal—a student with a background in health care might most helpfully focus their energies on getting individuals access to treatment through a medical-legal partnership,⁹³ a person in recovery on advocating for policy change, a formerly incarcerated person in fighting for prison abolition,⁹⁴ and so on.

Having made the important contribution of adding constitutional law as a driver of the drug war on which scholars and advocates might focus, Pozen—a constitutional law professor—chooses for himself in *The Constitution of the War on Drugs* to focus on how constitutional law might have blocked punitive prohibition, not other ways the Constitution influences addiction policy. Is it really fair for me—a Health Law professor—to say that that approach is incomplete for lack of focus on upstream interactions between constitutional law and health policy, to say that a shift in focus to a broader understanding of the interaction of the Constitution and addiction policy is “important” and “essential”?

While I do not purport here to offer a comprehensive theory of how scholars and advocates should frame their research agendas and projects, focusing only on the negative potential of constitutional law to interfere with the “war on drugs” is problematic for three reasons. Each stems from the possibility that the way academics and advocates talk—the narratives through which we organize and articulate our work—are themselves an aspect of the constitutional *praxis* that *The Constitution of the War on Drugs* reminds us is so important for

harm than good,” as measured by its effect on incarceration.).

92. See Lindsay F. Wiley et al., *Health Reform Reconstruction*, 55 U.C. DAVIS L. REV. 657, 728 (2021) (“[T]he entrenched fixtures of individualism, fiscal fragmentation, federalism, and privatization sow dysfunction in our health care system and tragically perpetuate inequitable burdens of disease. The health justice ethos—with its commitments to antiracism, equitable distribution of burdens and benefits, and community empowerment—demands confrontation with these fixtures.”).

93. Yael Zakai Cannon, *Medical-Legal Partnership as a Model for Access to Justice*, 75 STAN. L. REV. ONLINE 73, 75 (2023) (“MLPs have been promoted as a unique and promising innovation in healthcare and health justice.”) (footnotes omitted).

94. See generally Rachel Lopez, *Participatory Legal Scholarship*, 123 COLUM. L. REV. 1795 (2023).

constitutional law.⁹⁵ Like it or not, constitutional law scholars are unavoidably part of the thing they study. From this expressive perspective, the prohibitionary approach to exploring the interaction of constitutional law and the war on drugs that Pozen employs is *itself* impactful, and problematically so.

First and most fundamentally, limiting our focus to opportunities for constitutional law to obstruct the “drug war” plays into the underlying socio-political dynamics associated with that framing that have influenced addiction policy since the Nixon Administration. Leveraging legitimate concern about addiction due to, *inter alia*, an actual heroin epidemic among Vietnam veterans, Nixon reportedly framed the concept of the “drug war” intentionally to link heroin addiction to marijuana as a way to marginalize and stigmatize both anti-war sentiment and the civil rights movement.⁹⁶ As his counsel John Ehrlichman later alleged:

We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.⁹⁷

Thus, framing a real addiction crisis as a “drug war” channeled genuine public health concern into broader, racially tinged opposition to cultural revolution within the “silent majority.”⁹⁸

Pozen describes these origins of the “drug war” (p. 12), but he nonetheless hews to the Nixonian framing. In doing so Pozen is in good company: legal scholarship in criminal law and health law routinely centers the “drug war” as an analytical category and concept.⁹⁹ And the contributors to a blog symposium on *The Constitution of the War on Drugs* follow Pozen’s lead in following

95. E.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1341 (2006) (describing interplay of constitutional category and political advocacy in process of “identity formation and deliberation”).

96. Andre Douglas Pond Cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs & The Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 457–72 (2022) (describing war on drugs as “inaugurated by Richard Nixon” and “militarized and nationalized by Ronald Reagan”).

97. Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all>.

98. See *id.*; Edward Carlton, *Richard Nixon’s Drug War: Politics over Pragmatism* (Senior Thesis, Haverford College, 2012); Mark Osler, *What We Got Wrong in the War on Drugs*, 17 U. ST. THOMAS L. J. 968, 971 (2022).

99. See, e.g., Oliva & Sabawi, *supra* note 8; Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016).

Nixon's.¹⁰⁰ But accepting Nixon's conceptualization of addiction policy as a "drug war" carries forward that problematic framing and the political alignments it created. It accepts Nixon's politically motivated conceptual gerrymander. Whether we treat the "drug war" as antagonist or protagonist, we remain trapped in the narrative Nixon constructed. That narrative centers carceral policies as the main character, employs simplistic problem definitions, and feeds racially skewed addiction politics. Given the documented importance of constitutional law concepts in narrative construction and social movement formation¹⁰¹ and the determinative role of problem definition in addiction policy,¹⁰² we should be skeptical that any inquiry that employs the manipulative, carceral, "drug war" framing of addiction policy would ultimately be capable of overcoming the political and conceptual dynamics embedded in that framing.¹⁰³

At the same time, focusing on ways constitutional law might stop punitive prohibition policies also plays into contemporary deregulatory trends, in two senses. First, if we ask only what drug policies the Constitution failed to stop, we invite new doctrines that inevitably make public health law-making more difficult—allowing regret for the drug war to feed into constitutional deregulatory libertarianism and an existential challenge to the administrative state.¹⁰⁴ As Pozen recognizes, courts would by embracing the theories he describes have disempowered legislators, empowered judges, and prevented public health regulation across a range of issues far beyond the drug war—including but not limited to mandatory vaccination, nutrition labeling, gun control, suicide prevention, and so on.¹⁰⁵ From

100. David E. Pozen, *The Constitution of the War on Drugs: Response to Commentators*, BALKINIZATION (May 20, 2024), <https://balkin.blogspot.com/2024/05/the-constitution-of-war-on-drugs.html?m=1>.

101. E.g., Siegel, *supra* note 95, at 1341 (describing interplay of constitutional category and political advocacy in process of "identity formation and deliberation").

102. See Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Definition*, 48 U. MEM. L. REV. 1357 (2018).

103. Cf. Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 3 (2011) ("[W]e have found it too easy to use militarized rhetoric without examining its consequences.").

104. Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming).

105. See p. 172 ("Perhaps, then, courts and constitutional law are not the best institutions in which to press the case against punitive drug laws. The doctrinal pathways still open to U.S. lawyers are strewn with obstacles; traveling down them too far could lead to any number of unintended deregulatory consequences as well as judicial

addiction policy to gun control to COVID-19, we do not need “more” or “less” state intervention—what we need is an active state with the energy and capacity to assess and implement evidence-based interventions through democratic processes.¹⁰⁶

This leads to a second sense in which focusing only on how the Constitution might have stopped punitive prohibition plays into contemporary deregulatory trends. From recent blockbuster Supreme Court decisions reversing *Chevron* and limiting agency independence¹⁰⁷ to congressional efforts to add new restraints on agency action,¹⁰⁸ today’s successful attacks on the administrative state are both fueled and made possible by an underlying crisis of confidence in the capacity of government to solve hard problems.¹⁰⁹ Examples of government interventions proving fruitless or—as in the drug war—backfiring lead some to attack agency capacity as an affirmative evil, while leaving others indifferent to such attacks. Focusing on the ways constitutional law might impede bad policy simply plays into this overarching narrative of helplessness. Focusing on the ways constitutional law might facilitate effective policy interventions—especially if successful in fostering evidence-based addiction policy that actually works—combats it.

Finally, a prohibitionist framing misses both hopeful opportunities for productive constitutional engagement to improve addiction policy today and looming threats whereby constitutional retrenchment might feed punitive prohibition in the future. Whereas (as Pozen points out (p. 172)) opportunities to use negative constitutional arguments to stop the drug war may now be closed, opportunities to use a more substantive, constructive approach to constitutionalism to encourage more effective alternatives (and vitiate justifications for prohibition)

aggrandizement in other areas of public health and safety.”).

106. See generally WENDY PARMET, CONSTITUTIONAL CONTAGION: COVID, THE COURTS, AND PUBLIC HEALTH (2023); K. SABEEL RAHMAN, BUILDING THE GOVERNMENT WE NEED: A FRAMEWORK FOR DEMOCRATIC STATE CAPACITY 3 (June 2024), https://rooseveltinstitute.org/wp-content/uploads/2024/05/RI_Building-the-Government-We-Need_Report_062024.pdf (describing “the need to build durable and effective state capacity”); *id.* at 14 (discussing the role of constitutional law in constructing and deconstructing forms of state capacity).

107. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

108. See Regulations from the Executive in Need of Scrutiny (REINS) Act, H.R. 277, 118th Cong. (2023).

109. See Emerson, *supra* note 104.

remain open.¹¹⁰ Pozen notes his focus on punitive prohibition rather than its natural result—the biased and intrusive policing of the new Jim Crow—is valuable because “prohibition precedes policing” (p. 14). But public health precedes both.

Anyone hoping to see a weakening rather than a strengthening of punitive prohibition should thus be worried about indications from the most recent term that the Supreme Court may limit the federal spending power¹¹¹ or taxing power.¹¹² It may well be that the upcoming constitutional debates raised by Justice Alito’s dissent in *Moyle* and other recent cases would be the most productive place for reformers to devote their energies. While dreamers may hope for *better* addiction policy in the future, the truth is that it is difficult to identify a time in the last fifty years in which merely *preventing things from getting worse* would not have been a major victory.¹¹³

This description of the ways that studying the interaction of the Constitution and addiction policy by focusing only on the potential for constitutional law to interfere with the “war on drugs” undermines a broader reform agenda leaves unanswered the question how scholars and advocates *should* frame that interaction. We might adopt Roberts’s “Freedom Constitutionalism”—itself an affirmative alternative to abolition constitutionalism—so long as “freedom” is understood in a thick sense, one that emphasizes the (re)constructive side of abolitionism,¹¹⁴ and includes mental health supports that facilitate freedom from addiction.¹¹⁵ Alternatively, we might lean even further into the vision called for by Wendy Parmet in *Constitutional Contagion*.¹¹⁶ On her view, which might be called public health constitutionalism, prohibition (and perhaps much of criminal law) is relegated (as perhaps it should be) to the subsidiary role of mistaken public health intervention; the star of

110. Taleed El-Sabawi, *Death by Withdrawal*, 71 UCLA L. REV. 378 (2024) (raising constitutional arguments for positive right to withdrawal management in prison).

111. *Moyle v. United States*, 603 U.S. 324, 355–56 (2024) (Alito, J., dissenting).

112. *Id.*

113. Elisabeth Beseran et al., *Deaths of Despair: A Scoping Review of the Social Determinants of Drug Overdose, Alcohol-Related Disease and Suicide*, 19 INT’L J. ENV’T RES. & PUB. HEALTH 12395 (2022) (describing increasing death rates over time across range of causes).

114. Roberts, *Abolition*, *supra* note 22, at 13–14.

115. Lawrence, *Addiction*, *supra* note 40.

116. WENDY PARMET, *CONSTITUTIONAL CONTAGION: COVID, THE COURTS, AND PUBLIC HEALTH* (2023).

the show is the need for and role of the state in fostering public health.¹¹⁷ A feminist or vulnerability constitutionalism might lead us to a similar place, focused as it is on the role of the state in fostering resilience in setting its conceptual boundaries.¹¹⁸

These are all viable choices; picking one or elaborating the pros and cons is beyond my scope. The best framing is a difficult choice that each author may need to make for themselves in undertaking to study or describe the interaction of the Constitution and addiction policy in full or in part. But prohibition constitutionalism is not the best framing.

IV. CONCLUSION

The Constitution and the War on Drugs establishes the Constitution as an upstream driver of the war on drugs—and so as a site for contestation toward non-carceral, evidence-based addiction policy—but the book does not go far enough in mapping the interaction of constitutional law with addiction policy in the United States. Constitutional law is not only a potential barrier to carceral drug policies, it is also a facilitator of such policies as well as both a barrier and potential facilitator to more effective, evidence-based addiction policies, including housing supports and addiction treatment.

Problematizing the state's persistent pursuit of ineffective, carceral drug policies while ignoring those harmed by the state's failure to adopt evidence-based policies misses promising opportunities for contestation, plays into the prohibitionary rhetoric that Nixon built into the “drug war,” and bolsters larger contemporary deregulatory trends. We should not ask how the Constitution failed Chris Malcolm without asking how it failed Michael Malcolm as well. Looking beyond prohibition constitutionalism—to freedom constitutionalism, public health constitutionalism, or other alternative conceptual frames we might develop—is both important for understanding the interaction of constitutional law and addiction policy and essential to developing a constitutional addiction *praxis* capable of protecting liberty, equality, and the public's health.

117. Cf. Angela Davis & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2022).

118. Martha Fineman, *Rights, Resilience, and Responsibility*, 71 EMORY L.J. 1435, 1448 (2022) (explaining that state institutions exist “to provide essential resources or assets of resilience to individuals and well-being to society”).

