

HINCKLEY JOURNAL — *of* — POLITICS



HINCKLEY
INSTITUTE
UNIVERSITY OF UTAH

2023 | VOLUME 24

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A WORD FROM THE DIRECTOR

As director of the Hinckley Institute of Politics, it is my honor to present the 2023 *Hinckley Journal of Politics*. This marks the 24th edition of the *Journal*, showcasing the Hinckley Institute's continued pursuit of publishing exceptional academic research papers written by students at the University of Utah and community leaders.

The 2022-23 academic year was a welcome return to normal. Campus thrived with student energy and momentum. As we navigate further away from a global pandemic, the effects continue to be studied and felt. A topic the University of Utah is paying particular attention to is mental health. Efforts to support students and provide them with resources have never been more critical. Additionally, students and community alike have participated passionately in discussions over healthcare access, diversity of thought, environmental concerns, support for marginalized communities, and civic engagement. The following publication reflects these ranging interests and showcases the scholarly expertise of our skilled students.

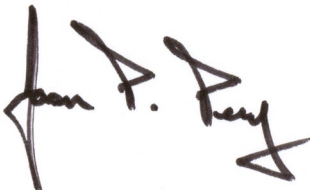
This edition also features an article written by distinguished members of our community: Representative Steve Eliason, Dr. Mark Rapaport, CEO Huntsman Mental Health Institute at the University of Utah School of Medicine, and Ben Abbey, Marketing and Communications Specialist at Huntsman Mental Health Institute. Their article celebrating the launch of a nationwide three-digit number for the National Suicide and Crisis Lifeline explores the commitment the University of Utah community has made to mental health. We are grateful to Representative Eliason, Dr. Rapaport, and Mr. Abbey for their thoughtful contribution and impactful work.

This publication was made possible through the diligence of the 2023 Journal co-editors Aya Hibben and Julia Martin and their student editorial board members. We also recognize the University of Utah Political Science Department and the important contributions of our faculty editors and advisors Professor Jim Curry and Professor Phil Singer. I would also like to express my gratitude to the dedicated staff of the Hinckley Institute, particularly Brooke Doner, director of marketing, Alex MacFarlane, program coordinator, and Morgan Lyon Cotti, associate director, for their commitment and supervision of the publication.

Through the Hinckley Institute of Politics, University of Utah students are able to apply the principles they learn in the classroom to real world experiences. To date, the Hinckley Institute has placed and supported over 9,000 interns, from every major, in offices throughout Utah, in Washington, D.C., and throughout the world.

The 2022-2023 academic year was distinct. The challenges and opportunities it presented were unlike any other in recent history. Through this lens, we hope you enjoy the work of our best and brightest students featured in this publication.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jason P. Perry". The signature is stylized with a large initial "J" and a long, sweeping underline.

Jason P. Perry
Director, Hinckley Institute of Politics
Vice President, Government Relations

A LETTER FROM THE EDITORS

Dear Reader,

As the end of the 2022-2023 school year comes to a close, we remember the strength and resilience of students, faculty, and staff who returned to in-person classes. Despite some of the looming concerns about COVID-19, we emerged as a more connected, compassionate campus overall. This year, we witnessed students becoming the fiery fuel of political action. Through amazing wins and disappointing losses, students leaned on each other for support and kindness. Whether it was observing the Supreme Court decision overturning *Roe v. Wade*, or students mobilizing to protest for the protection of the Great Salt Lake, students became an unstoppable force in Utah politics. In this issue, we aimed to focus on the wide range of diverse issues that continue to affect our campus, Utah, and the nation as a whole.

As we graduate and say our goodbyes to this university, we would like to note the incredible work and effort that our Editorial Board, faculty advisors, student authors, Hinckley Institute staff, and the Huntsman Mental Health Institute contributed to this edition of the Hinckley Journal of Politics. Our board of intelligent and capable student editors was not only a source of guidance, but also a group where friendships were made and strengthened. Our incredible faculty advisors, Professor James Curry and Professor Phillip Singer guided our process and provided invaluable advice for the Journal. Our student authors truly deserve the spotlight given to them in the Journal, for their tireless effort to bring attention to these important issues, and their work through the Journal's rigorous editing process. The Hinckley Institute of Politics, which brings numerous life-changing opportunities to students on campus, truly impacted our student authors by giving them a rare opportunity to be published in an academic journal.

Finally, we would like to thank the students who inspired the Journal's selection of papers. With topics ranging from mental health to affirmative action, we hope that these papers represent some of the issues that you feel passion for, and we would not have been able to complete this journey without you in mind.

After four years at the University of Utah, we are proud to graduate knowing the students of this university are leaving a long legacy behind them. The chance to edit and publish these papers to create this collection of work is an experience we will never forget. We are incredibly grateful for this transformative experience as co-editors of the Hinckley Journal of Politics, and we look forward to returning to this campus soon to see the progress students, faculty, and staff have made.

Sincerely,

A stylized, handwritten signature in black ink, featuring a large, sweeping initial 'A' and a long, horizontal flourish extending to the right.

Aya Hibben
Co-Editor

A stylized, handwritten signature in black ink, featuring a large, sweeping initial 'J' and a long, horizontal flourish extending to the right.

Julia Martin
Co-Editor

EDITORS' NOTES

HINCKLEY JOURNAL OF POLITICS' MISSION STATEMENT

The *Hinckley Journal of Politics* is one of the only undergraduate-run journals of politics in the nation and strives to publish scholarly papers of exceptional caliber from University of Utah students in the fields of politics and public policy as well as opinion essays from local, state, and national public officials. Contributing research articles and opinion essays should address relevant issues by explaining key problems and potential solutions. Student research papers should adhere to the highest standards of research and analysis. The *Journal* covers local, national, and global issues and embraces diverse political perspectives. With this publication, the Hinckley Institute hopes to encourage reader involvement in the world of politics.

STUDENT RESEARCH PAPER SUBMISSION GUIDELINES

The *Hinckley Journal of Politics* welcomes research paper submissions from University of Utah students of all academic disciplines, as well as opinion essays from Utah's public officials. Any political topic is acceptable. The scope can range from University issues to international issues. Research papers should adhere to submission guidelines found on the *Hinckley Journal* website: hinckley.utah.edu/journal.

STUDENT RESEARCH PAPER REVIEW AND NOTIFICATION PROCEDURES

Research paper submissions will be reviewed by the *Journal* editors, members of the editorial board, and faculty advisors. Submission of a research paper does not guarantee publication. Papers that do not adhere to submission and style guidelines will not be considered for publication. Acceptance to the *Journal* is competitive. The co-editors will notify potential authors when the decision has been made regarding which papers have been selected for publication.

SUBMISSION GUIDELINES FOR PUBLIC OFFICIAL OPINION ESSAYS

The *Journal* will consider for publication opinion essays written by national, state, and local public officials and community leaders. The opinions expressed by public officials are not necessarily those of the University of Utah, the Hinckley Institute of Politics, the Student Media Council, the editors, faculty advisor, or the Editorial Board. Officials should contact the *Journal* editors for additional information.

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ABOUT THE HINCKLEY INSTITUTE OF POLITICS

The Hinckley Institute of Politics at the University of Utah is a nonpartisan institute dedicated to engaging students in governmental, civic, and political processes; promoting a better understanding and appreciation of politics; and training ethical and visionary students for service in the political system. Robert H. Hinckley founded the Hinckley Institute of Politics in 1965 with the vision to “teach students respect for practical politics and the principle of citizen involvement in government.” Since its founding, the Hinckley Institute has provided a wide range of programs for students, public school teachers, and the general public including: internships, courses, forums, scholarships, and mentoring. The Hinckley Institute places emphasis on providing opportunities for practical experience in politics.

INTERNSHIP PROGRAM

A nationally recognized program and the heart of the Hinckley Institute, the Hinckley internship program places more than 300 students every year in government offices, non-profits, campaigns, and businesses. The Institute provides internship opportunities to students from all majors for academic credit in Utah, Washington, D.C., and in more than 50 countries.

CAMPAIGN MANAGEMENT MINOR

The Hinckley Institute of Politics is proud to offer one of the nation’s only minors in Campaign Management. The program is designed to provide undergraduate students the opportunity to learn the theory and practices that will allow them to be effective participants in election and advocacy campaigns. Students are required to complete a political internship and an interdisciplinary series of courses in areas such as campaign management, interest groups, lobbying, voting, elections, and public opinion, media, and other practical politics.

PUBLIC FORUMS AND EVENTS

The Hinckley Institute hosts weekly Hinckley Forums where politicians, policy makers, activists, academics, and influencers address public audiences in the Hinckley Caucus Room. Hinckley Forums enable students, faculty, and community members to gain insight into

and discuss a broad range of concepts on local, national, and international levels. Past guests include Presidents Bill Clinton and Gerald Ford; Senators Orrin Hatch, John McCain, Harry Reid, and Mitt Romney; Utah Governors Jon Huntsman, Jr., and Gary Herbert; Nobel Peace Prize Winner Suzi Snyder; Civil Rights Activist Dolores Huerta, and many other notable politicians and professionals. The forums are rebroadcast on KCPW 88.3 FM and video recordings are archived on the Hinckley Institute website.

SCHOLARSHIPS

The Hinckley Institute provides more than \$600,000 in financial support to students annually. The Hinckley Institute is also the University of Utah’s representative for the Harry S. Truman Congressional Scholarship – one of America’s most prestigious scholarships.

HUNTSMAN SEMINAR FOR TEACHERS

The Huntsman Seminar in Constitutional Government for Teachers is a week-long seminar sponsored by the Huntsman Corporation. The primary focus of the seminar is to improve the quality of civic education in Utah schools by bringing Utah educators together with political experts and visiting politicians to discuss current events in Utah and American politics. The Huntsman Seminar is truly a unique opportunity for teachers to gain an in-depth understanding of local and national political issues.

DEPARTMENT OF POLITICAL SCIENCE

The Hinckley Institute values its relationship with the Department of Political Science. The Institute’s programs provide students the opportunity to enrich their academic studies with experiences in practical politics, which complement the academic offerings of the Political Science Department. Courses are available in five subfields of the discipline: American Politics, International Relations, Comparative Politics, Political Theory, and Public Administration. If you have questions about the Department and its programs, please visit poli-sci.utah.edu or call (801) 581-7031.

ROBERT H. HINCKLEY



A man of vision and foresight, a 20th-century pioneer, a philanthropist, an entrepreneur, and an untiring champion of education and of the American political system—all are apt descriptions of Robert H. Hinckley, a Utah native and tireless public servant. Robert H. Hinckley began his political career as a state legislator from Sanpete County and a mayor of Mount Pleasant. Hinckley then rose to serve as the Utah director for the New Deal program under President Franklin D. Roosevelt.

Hinckley went on to serve in various capacities in Washington, DC, from 1938 to 1946 and again in 1948. During those years he established and directed the Civilian Pilot Training Program, served as Assistant Secretary of Commerce for Air, and directed the Office

of Contract Settlement after WWII. In these positions, Hinckley proved to be, as one of his colleagues stated, “One of the real heroes of the Second World War.” Also in 1946, Hinckley and Edward Noble jointly founded the American Broadcasting Company (ABC), and over the next two decades helped to build this company into the major television network it is today.

Spurred by the adverse political climate of the ’40s, ’50s, and ’60s, Hinckley recognized the need to demonstrate that politics was “honorable, decent, and necessary,” and to encourage young people to get involved in the political process. After viewing programs at Harvard, Rutgers, and the University of Mississippi, Hinckley believed the time was right for an institute of politics at the University of Utah. So in 1965, through a major contribution of his own and a generous bequest from the Noble Foundation, Robert H. Hinckley established the Hinckley Institute of Politics to promote respect for practical politics and to teach the principle of citizen involvement in government.

Hinckley’s dream was to make “Every student a politician.” The Hinckley Institute of Politics strives to fulfill that dream by sponsoring internships, scholarships forums, mentoring, and a minor in Campaign Management. Today, over 55 years later, Hinckley’s dream is a reality. More than 8,800 students have participated in programs he made possible through the Hinckley Institute of Politics. Many of these students have gone on to serve as legislators, members of Congress, government staffers, local officials, and judges. All participants have, in some measure, become informed, active citizens. Reflecting on all of his accomplishments, Robert H. Hinckley said, “The Hinckley Institute is one of the most important things I will have ever done.”

STUDENT RESEARCH PAPERS

Addressing the Voter Turnout Gap Between Disabled and Non-Disabled Voters

By Sydney Kincart

University of Utah

Abstract:

There is a historically significant voter turnout gap between disabled and non-disabled voters in the United States. Current legislation targeting disability and voting mainly focuses on in-person voting, but even with this legislation in effect there are substantial disparities. Vote-by-mail policies tend to be preferred by disabled voters; further, disabled voters are more likely to use mail-in voting methods than nondisabled voters. This paper highlights accessibility barriers to voting processes by analyzing previously published research and examining stories of disabled voters shared online. This paper also suggests a variety of policy solutions that can be addressed across the nation and in Utah to make voting more accessible in efforts to close the turnout gap between disabled and nondisabled voters.

Introduction

In the 2020 election, there was a 5.7-point gap between disabled and non-disabled voter turnout (Schur & Kruse, 2021b). In Utah specifically, there was 8 percent difference between disabled and non-disabled voter turnout in the same election (Schur & Kruse, 2021b). This is a slight decrease from the 6.3-point gap Schur and Kruse found in the 2016 election (2021b). But, despite a disparity between disabled and non-disabled voter turnout, disabled people are just as likely to engage in other modes of civic engagement like donating to campaigns, displaying signage, and advocating for causes (Powell & Johnson, 2019). Additionally, in the 2020 election, one in nine disabled voters ran into difficulties while voting, which is double the rate of non-disabled voters (Schur & Kruse, 2021a).

Clearly, there are barriers to barriers to voting that prevent disabled people from utilizing it as a form of political participation. Voting is a critical form of civic engagement as it is the

determining factor for what candidates are elected to office. Due to the inaccessibility of status quo voting measures, mail-in voting policies must be expanded and made more accessible as a key to addressing the disparity between disabled and non-disabled voter turnout rates.

People with disabilities constitute the nation's largest minority group (Powell & Johnson, 2019). This group continues to compromise a larger portion of the electorate than in years past (Johnson & Powell, 2020). If the disparity between disabled and non-disabled voters of similar demographics was eliminated, the U.S. would see an increase of 1.75 million voters (Schur & Kruse, 2021b). In Utah specifically, the CDC estimates that over 538 thousand adults have a disability; in other words, 24 percent or 1 in 4 Utah adults are disabled (Disability & Health, 2021). Voter turnout rates can be used to measure the health of American democracy (Johnson & Powell, 2020). Turnout gaps, like Schur and Kruse (2021b) found in the 2020 election, point to flaws in the U.S. democratic system. Thus, the U.S. needs policies that work to reduce the disparity

between disabled and non-disabled voter turnout.

The Problem

Miller and Powell find that reforms designed to increase polling place accessibility, like the Help America Vote Act, have a minimal effect on increasing the voter turnout rate of disabled people (2016). This is likely because these laws don't solve issues of inaccessibility. There is an innumerable amount of stories shared online about the inaccessibility experienced by disabled voters, both in the past and recently. Because disability itself is a broad category that cannot be treated as a monolith—multiple reforms to improve accessibility are needed. For example, a voter with a physical disability needs to be able to access polling places, enter the building, and use a machine. Voters who fit into other disability categories, like neurodivergence or mental illness, can benefit from accessibility features that explain, step-by-step what the voting experience entails.

The story of Betsy Gimbel exemplifies a scenario where physical accessibility needs are not being met. Although an amendment passed in 1980 to the New York State Election Law required that all polling places have at least one wheelchair-accessible entrance by 1990, it was clear that the law was being ignored since little progress had been made by the mid-80s (Fleischer & Zames, 2011). Gimbel, who uses a wheelchair, arrived at her polling site for a 1985 election at 6:30 in the morning and found that every entrance to the building had steps (Fleischer & Zames, 2011). She spent the day traveling to City Hall, the Board of Elections, and back to Brooklyn—just as the Board of Elections recommended (Fleischer & Zames, 2011). She finally voted 12 hours later at a polling location “less accessible than her own” (Fleischer & Zames, 2011, p. 75). A few years prior to this instance, DIA Member Olga Hill publicly told the mayor that less than one-third of polling locations in New York City were wheelchair-accessible (Fleischer & Zames, 2011).

Although Gimbel's story occurred 37 years ago, polling places today still prove to be inaccessible. Gian Pedulla encountered obstacles related to voting machine accessibility in the 2020 election and shared his story with the New York Daily News. He went to his polling place in Brooklyn which he learned only had one accessible voting machine (Pedulla, 2020). The machine would not take his ballot, and although the polling location was supposed to have a tech person available, this one did not (Pedulla, 2020). In the end, Pedulla called a family member to come and help him vote because he did not trust anyone else to fill out his ballot for him (Pedulla, 2020). Although the law mandates an accessible voting machine, Pedulla's polling location was unprepared for him. Pedulla

endured these obstacles and called a trusted family member—but no one should have to go through these additional steps. Obstacles like this can deter disabled people from voting.

Catherine Wicker (@c_hwicker) shared that officials asked her to provide them with a doctor's note that listed her disability and explained that she cannot wait in line to vote. Her Tweet not only brought attention to the fact that election lines make voting inaccessible, but also demonstrates another barrier as Wicker must prove her disability. The act of “proving” a disability is all too familiar to those with chronic illnesses and other invisible disabilities. Holly Blossom (2021), an invisibly disabled writer, explained how her mom urged her to “play up” her disability when going to vote so she would not be met with questions. She was questioned as she used the disability entrance to the building and although she could use the polling booth, it did not fully meet her needs (Blossom, 2021). In the case of Blossom, just simply having a seat available for her to sit in as she voted would have mitigated a lot of the pain she experienced as she voted (Blossom, 2021). These extra steps to voting are time-consuming, exhausting, and can inhibit people from engaging with the electoral process.

The COVID-19 pandemic compounds already prevalent barriers to voting in person. Rebecca Cokley (@RebeccaCokley) pointed out on Twitter that although having arenas and stadiums as locations for early voting seems like a good idea, COVID-19 precautions shut down and reduced public transit to those locations. In this case, disabled people who rely on public transit are disenfranchised (Cokley, 2020). Not being transparent about closures to public transit leading to polling locations is yet another example of inaccessibility surrounding elections.

The latter portion of the instances above took place in 2020 and 2021, so they fall under modern legislation intended to promote polling place accessibility. The Americans with Disabilities Act of 1990 (ADA) does not specifically list accessibility requirements for polling places but mandates that state and local governments provide full and equal voting opportunities to disabled people (Pendo, 2020). Years later, the Help America Vote Act of 2002 (HAVA) specified that voting must be accessible to those with disabilities, including blind voters (Pendo, 2020). HAVA deems an accessible voting system as one that allows voters with disabilities to have the chance to vote privately and independently—just as non-disabled voters do (Pendo, 2020).

But even with these laws in place, disabled voters still face obstacles to voting. The aforementioned stories and personal experiences of disabled people highlight status quo barriers; and these barriers prevent disabled people from voting at the same rate as non-disabled people. These stories validate the findings of Miller and Powell (2016) who wrote, “reforms designed to increase the accessibility of the polling place for

voters with disabilities (e.g., HAVA) will have a minimal effect on turnout among people with disabilities” (p. 48). Because disability is a broad category and different disabled voters have different accessibility needs, this policy proposal seeks to highlight a few, but not all, different ways to reduce the disparity between disabled and non-disabled voter turnout across the nation.

Proposed Solutions

Expanding Vote by Mail Policies

Miller and Powell (2016) find that voters with disabilities overwhelmingly cast ballots via mail. This finding is validated by the 2020 election statistic that finds that 74% of voters with disabilities voted by mail or early in-person (Schur & Kruse, 2021a). Thus, these processes need to be expanded.

There are three categories that group mail-in ballot processes: no-excuse absentee voting, permanent absentee voting, and Vote-By-Mail (VBM) (Miller & Powell, 2016). These three categories approach mail-in voting differently but are all categorized as convenience voting reforms (Miller & Powell, 2016).

No-excuse Absentee Voting.

No-excuse absentee voting is when a voter is required to submit an application with their intent to vote absentee (Miller & Powell, 2016). This request then prompts an absentee ballot to be sent to the voter (Miller & Powell, 2016). No-excuse absentee voting requires that a voter submit an application every election stating that they intend to vote absentee (Miller & Powell, 2016). This form of voting increases the likelihood that a voter will cast an absentee ballot by roughly 13% and voters with disabilities “are significantly more likely to use an absentee ballot than the general population” (Miller & Powell, 2016, p. 46). According to the National Conference of State Legislators (2022), 26 states and Washington, DC offer no-excuse absentee voting.

Permanent Absentee Voting.

Permanent absentee voting gets rid of the requirement for voters to reapply since the initial request lasts the duration of the voter’s time on the voting roll (Miller & Powell, 2016). It is likely that the same benefits of no-excuse absentee voting apply to permanent absentee voting. This occurs since permanent absentee voting simply extends the efficacy of no-excuse absentee voting by eliminating the need to reapply every year.

Vote-By-Mail (VBM).

As classified by Miller & Powell (2016), VBM processes eliminate polling places and instead, each registered voter is mailed a ballot. Utah’s voting system is classified by the National Conference of State Legislatures (2022) as “all-mail voting.” However, in an interview with NPR, then Lieutenant Governor Spencer Cox explained that Utah mails “ballots to every active voter in the state of Utah” while still holding in-person voting options (Kelly, 2020). Thus, it seems that Miller and Powell’s three categories do not accurately characterize Utah’s voting process.

Any of the aforementioned three reforms “increase the likelihood of mail voting across the electorate” (Miller & Powell, 2016). Miller and Powell (2016) write the following:

Voters with a disability in a state that provides for any of these reforms are more likely to cast a mail ballot than similar voters with a disability in a state requiring a voter to satisfy some criteria for access to an absentee ballot and that the voter reapply for an absentee ballot in each election (p.46).

Because the category of no-excuse absentee voting requires voters to reapply every election they wish to vote via mail ballot, it poses more obstacles to voters than the other two alternatives. Permanent absentee voting requires one absentee request, but this is in addition to the voter registration process. VBM uses voter registration information to mail ballots automatically, thus is the most accessible type of reform.

Increasing the Accessibility of Mail-In Ballots

Still, mail-in ballot expansion isn’t the sole solution to solving the disparity between disabled and non-disabled voter turnout rates. During the 2020 election, 5% of voters with disabilities found difficulty with using a mail ballot, whereas only 2% of voters without disabilities experience these problems (Schur & Kruse, 2021a). Further, 14% of disabled voters who used a mail ballot needed help or came across problems while only 3% of voters without disabilities (Schur & Kruse, 2021a). These disparities indicate that focus must be shifted to making mail-in ballot processes more accessible.

Last year, New York took strides toward improving mail-in ballot accessibility. The New York State Board of Elections (NYSBOE) is now required to create “a statewide remote accessible vote-by-mail (RAVBM) system which would use HTML ballots compatible with screen reader software” (Evelly, 2022, para. 6). Although the NYSBOE offered email-accessible ballots to voters with disabilities who requested them, these PDFs were not accessible with all screen reader technology (Evelly, 2022). This new required software is specifically designed for screen reader software since HTML websites are coded for

screen readers (Evelly, 2022). This is a huge step towards improving the independence of disabled voters in the electoral process.

Document inaccessibility is also prevalent in absentee ballot applications, a critical step in voting by mail. In September 2020, every one of the 43 states' absentee ballots studied by Deque Systems was found to have at least one issue that would make filling out the ballot incredibly difficult for assistive technology users (Abrams, 2020). On average, states had 10 critical accessibility problems with their online absentee ballot applications (Abrams, 2020). Accessibility is needed throughout the entire voting process, not just the ballot. Because Utah automatically sends voters a mail-in ballot each election, they were not included in the study (Abrams, 2020). Thus, Utah maintains a reasonably accessible method of voting that must be protected despite attempts to get rid of the system.

Another barrier to ballot accessibility is signature matching. 31 states, including Utah, use signature matching, the process of matching signatures on voter registration and mail-in ballots, to prevent fraud (Graham, 2020). However, 97% of signatures that are thrown out end up being authentic (Graham, 2020). Signature matching policies disproportionately impact disabled people because impairment can create inconsistent signatures (Graham, 2020). During the 2023 Utah Legislative Session, Representative Steve Eliason proposed H.B. 37, Voter Signature Verification Amendments. This bill provided a path for disabled people to sign an affidavit if their ballot would be rejected due to inconsistent signatures. This bill passed in the 2023 session despite its lack of success in the 2022 session, illustrating how Utah remains committed to improving voter accessibility, despite sometimes being a lengthy process.

Because voting is such a critical part of democracy, disabled people must have the chance to vote without barriers. Status quo voting processes are inaccessible to disabled voters, resulting in alarmingly low turnout rates. There are policies that could make voting more accessible, but states need to act on these ideas. Without improvements to voting accessibility, disabled people will continue to be left behind.

Counterarguments and Barriers to Implementation

Because the category of no-excuse absentee voting requires a voter to reapply every election they wish to vote via mail ballot, it poses more obstacles to voters than the other two alternatives. Permanent absentee voting requires one absentee request, but this is in addition to the voter registration process. VBM uses voter registration information to mail ballots automatically, thus being the most convenient type of reform.

However, switching to a VBM system that eliminates polling locations could inadvertently suppress disabled voters. Disabled people are at an increased risk of homelessness (Homelessness and Disabilities, 2018). Conducting elections entirely by mail disenfranchises disabled voters without a permanent address during the election. Thus, Utah's approach of automatically sending ballots to registered voters while providing an in-person voting opportunity seems to be the most effective middle ground.

Because election administration and reform are handled at the state and local levels, there can be policy variations that might be difficult for voters to comprehend. This especially works to the disadvantage of voters with cognitive disabilities who likely will not receive this information explained in a way that meets their needs. Additionally, since reforms are usually implemented at state and local levels, it is likely that more conservative states will have trouble making sweeping reforms. For example, Utah usually has multiple bills in the Legislative Session advocating for limiting mail-in voting. In the 2023 General Session, H.B. 537, Voting Amendments, sought to only require election officers to send mail-in ballots to voters who explicitly requested them. If this were to pass, Utah would be subject to the same inaccessibility of absentee ballot request forms that other states experience. Additionally, S.B. 189, Voting Changes, which failed in the 2023 General Session, proposed annual address verification for elections conducted by mail and created a mechanism for election officials to conduct elections primarily by mail. When the very system is still being questioned, it is difficult to pass more ambitious improvements to it.

Further, the largest implementation challenges with any changes to voting result from the current rhetoric about convenience voting measures. Former President Trump was known for casting doubt on mail-in voting systems, and this rhetoric has become a major conservative talking point. Despite doubt coming from various leaders, it is clear that convenience voting measures that reduce voting barriers tend to increase disabled voters' participation (Schur & Kruse, 2021c). Nonetheless, current rhetoric can make these changes harder and make voters wary of this policy. However, because disability is seldom discussed in relation to convenience voting reforms, it has the potential to overcome this narrative. Looking at voting reforms through the lens of disability, especially focusing on veterans' affairs (a cause that conservatives tend to be more sympathetic to) could aid arguments amidst adverse rhetoric.

Conclusion

Utah's approach to mail-in voting is a good example of how states can adopt relatively accessible voting systems. However,

even mail-in voting can still be reformed to better address disabled people's accessibility needs. Further, Utah's status quo voting systems need to be protected despite rising pressures to limit convenience voting measures. To best fulfil the ideals of democracy, voting systems across the nation must continue to make strides toward increasing accessibility.

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Expanding Contraceptive Access in the State of Utah

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Abstract:

Access to reproductive health care varies widely depending on state and demographics. In Utah, there are major barriers to accessing these services due to state laws and gaps in Medicaid. This paper discusses the current landscape of reproductive rights in Utah, including access to contraception, sexual education policies, and the harms of the divisive pro-choice versus pro-life debate. Additionally, this paper discusses prior Utah-based contraceptive access demonstration projects that have shown the need for an expansion of equitable access to these services. These projects include HER Salt Lake Contraceptive Initiative and the Family Planning Elevated Contraceptive Access Program, both conducted by the University of Utah Family Planning Division and the Planned Parenthood Association of Utah. Finally, this paper offers recommendations for the improvement of access to contraception based on the literature review and demonstration projects.

Introduction

The state of Utah has countless barriers in place preventing people from receiving vital reproductive healthcare. A prime and highly publicized example of this is HB 467, Abortion Changes, which bans the operation of abortion clinics in the state of Utah after December 31st, 2023 (Family Planning Elevated, 2023). Under this bill, any abortions must take place in a hospital and only under the circumstances of rape, incest, or when the pregnant person experiences a “life threatening physical condition.” In stark contrast, a 2022 population-based reproductive health survey conducted in Utah found that 61% of respondents agree that abortion bans interfere with medical decisions (Family Planning Elevated & Cicero Group, 2022). However, these restrictions extend further beyond abortion. There is a large contraceptive access gap due to health disparities such as inaccessibility to Medicaid or another form of affordable insurance and lack of comprehensive sexual education in all schools (Sanders et al., 2022). Consequentially,

one in five Utahns had barriers to their preferred method of contraception, the most common being because it was too expensive (Cicero Group, 2022). Additionally, a Utah statute allows for nothing more than “abstinence-based” sexual education at schools, resulting in many young people lacking proper education on sexuality, contraceptives, and sexually transmitted infections (STIs) (Parker, 2022). To bridge these gaps in access for marginalized communities, Utah must continue to expand access to reproductive and, more specifically, contraceptive care through the codification of the Affordable Care Act’s contraceptive coverage requirement, further Medicaid expansion, and the continued incorporation of community health workers.

Literature Review

Current State of Reproductive Rights in Utah

Contraceptive Access

There is extreme variation from state to state on access to contraception. Currently, the Family Planning Division within the University of Utah School of Medicine is creating a white paper on the current state of contraceptive access in Utah. According to this white paper, in Utah, there is no dedicated family planning program for those ineligible for traditional Medicaid and those who cannot pay for family planning services out of pocket (Sanders et al., 2022). Other states have implemented such programs through Medicaid 1115 waivers, state-allocated funds, or State Plan Amendments. However, without such a program, at least 200,000 Utahns do not have access to affordable contraception. In other words, these people are uninsured or underinsured for contraceptive services or live in contraceptive deserts where there are few or no health clinics in the area that offer the full range of contraceptive services (Sanders et al., 2022).

This contraceptive access gap has severe implications for unintended pregnancy rates. One in five Utah mothers report their pregnancy was unintended, and one in three uninsured Utah women likewise report the same (Sanders et al., 2022). Unplanned pregnancies and births have many adverse health effects on mothers and their children (Sanders et al., 2022). In 2020, about 9.28% of births in Utah occurred prematurely, which can be incredibly dangerous for babies and mothers (Centers for Disease Control and Prevention, 2020b). Additionally, a study conducted at the University of Oxford found that mothers with unplanned pregnancies had a “significantly increased risk of psychological distress at 9 months postpartum.” This psychological distress can be characterized by depression, anxiety, and low mood and has negative effects on child and family relationships (Barton et al., 2017). Consequentially, 75% of Utah’s pregnancy-related deaths were associated with a prior or current mental health condition, and 92% were deemed preventable (Lesser & Archuleta, 2023).

The contraceptive access gap also has consequences for the spread of STIs. When people have limited access to or knowledge about contraceptives and how to use them effectively, they are less likely to use them properly or at all. In 2020, Utah had 10,466 reported cases of chlamydia, 3,112 reported cases of gonorrhea, and 131 reported cases of primary and secondary syphilis (Centers for Disease Control and Prevention, 2020a). Reducing the spread of these infections goes hand in hand with closing the contraceptive access gap through greater accessibility and education.

In recent years, there have been some advancements in expanding contraceptive access for those in the coverage gap. During this most recent legislative session, Senator Harper introduced SB 133, Modifications to Medicaid Coverage, which expands family planning services under Medicaid to those earning up to 185% of the Federal Poverty Level (FPL)

(Harper, 2023). The 2023 Utah Legislature passed this bill, and Governor Cox signed it on March 15th, 2023. However, there is still work to be done; Utahns with incomes between 186% and 250% FPL still do not have access to affordable contraceptive services (Sanders et al., 2022). Without proper coverage for these women, many Utahns will continue to be affected by unintended pregnancies, STIs, premature births, and postpartum health issues.

Sexual Education

Abstinence-only sexual education is an immensely popular concept in many conservative states like Utah. Abstinence-only “teaches abstinence from sexual activity outside marriage as the expected standard for all school age children” (Kim & Rector, 2010). Yet research has shown that comprehensive sexual education reduces teen pregnancies and the initiation of teen sexual activity more than abstinence education. Comprehensive sexual education encourages discussion of sexuality, instruction on pregnancy prevention, the use of contraceptives, and abstinence (Williams, 2011).

The Heritage Foundation, a highly influential conservative think tank based in D.C., champions abstinence education to reduce teen sexual activity. In support of this argument, they cite a 2010 report in the medical journal *Archives of Pediatrics and Adolescent Medicine*, which concludes that “abstinence-only intervention reduced sexual initiation” among a group of African American adolescents. In the 2 years after attending an eight-hour abstinence program, one-third of participants initiated sexual activity while one-half of those enrolled in a general health program engaged in sexual activity. In other words, the abstinence education program reduced the rate of initiation of sexual activity by one-third (Kim & Rector, 2010).

This report confirmed the idea for many parents, educators, and legislators in and out of Utah that abstinence education is the best way to keep young people from engaging in sex. However, this ideology did not come without pushbacks. Jean Calterone Williams, a political science professor from California Polytechnic State University, argues that the use of this study as evidence to support the abstinence movement is flawed. While fewer students who received abstinence education reported having sexual intercourse in the months after completing the program than those who did not, the author of the study also noted that his abstinence education program, “was not designed to meet federal criteria for abstinence-only programs” (Williams, 2011). According to the U.S. government’s funding requirements, abstinence education programs must withhold information on contraception and other intricacies of sexual activity (Braeken & Cardinal, 2008). In this study:

The intervention did not contain inaccurate information, portray sex in a negative light, or use a moralistic tone.

The training and curriculum manual explicitly instructed the facilitators not to disparage the efficacy of condoms or allow the view that condoms are ineffective... (Williams, 2011)

In other words, the Heritage Foundation uses evidence to support abstinence-only education that is not comparable to real abstinence programs such as the one in Utah.

According to the Utah State Board of Education, sexual education in Utah is “abstinence based.” This means that teachers must stress the importance of abstinence for all sexual activity before marriage, but they may also teach about contraception and the prevention of STIs. However, this instruction on contraception “stresses effectiveness, limitations, risks, and information on state law applicable to minors obtaining contraceptive methods or devices” (Parker, 2022). More specifically, SB 196, Health Education Amendments, prohibits “the advocacy or encouragement of the use of contraceptive methods or devices” (Adams, 2017). In other words, teachers may mention contraceptives but may not advocate for their use to prevent pregnancy or STIs. Under these provisions, they also may not instruct students on using different forms of contraception like condoms or the birth control pill (Sponaugle, 2019). Consequently, students living in Utah may be aware of specific contraceptive methods, but their knowledge is limited. They may only know of a few available methods, and information about what could go wrong dominates their attention. Additionally, they have no information on how to use the limited contraceptives their schools inform them of. This could potentially lead to misuse, defeating the purpose of using contraceptives at all.

To further complicate matters, a Utah statute mandates that local education agencies adopt their own curriculum for schools that may include less than what the law allows but not more (Parker, 2022). This results in wide variation depending on where a student receives sexual education, including education surrounding contraceptives. Additionally, Utah is one of two states with a parental opt-in program for their children’s sexual education program. This means that parents can decide whether or not their child gets to participate in sexual education classes by signing or not signing a written consent form (Sponaugle, 2019). Without comprehensive education on contraceptives starting in adolescence, some students may grow into adulthood without the proper knowledge to make informed decisions regarding their sexual health. This phenomenon contributes to the contraceptive access gap since a lack of adequate information on how contraceptives work and the options available to young people leads to less overall use. leads to less overall use.

Harms of Pro-Life vs. Pro-Choice Binary

The issue of abortion tends to dominate any discussion over reproductive rights. It is an incredibly divisive, complex, and

emotional issue for many; yet people often boil down this issue to a simple binary of either pro-choice, for legal abortion, or pro-life, against legal abortion.

An article published in the National Women’s Studies Association Journal in 2005 critiqued this paradigm of pro-choice or pro-life as harmful to advancing reproductive rights. The author argues that “the concept of choice is connected to possession of resources, thus creating a hierarchy among women based on who is capable of making legitimate choices” (Smith, 2005). In other words, women who do not have adequate resources within American society do not have a “choice” in their reproductive destiny.

An example of this lack of “choice” for underprivileged women is the Hyde Amendment, a 1976 law which blocks federal Medicaid funding for abortion services except when the pregnancy will endanger the patient’s life or in cases of rape or incest (Planned Parenthood, 2022). According to the Kaiser Family Foundation, “Women of color are more likely than white women to be insured by Medicaid...” (Salganicoff et al., 2021). In turn, the Hyde Amendment makes it incredibly difficult for many women of color to access abortion services, meaning they never have a “choice” in their reproductive health regardless of whether abortion is legal or illegal.

This dichotomy also creates unnecessary polarization. Often, people only work with those who agree with their position and consider those who disagree a political enemy. Smith describes how this watered-down version of political ideologies, particularly on abortion, “does not actually do justice to the complex political positions people inhabit” (Smith, 2005). Additionally, she states that “we often lose opportunities to work with people with whom we may have sharp disagreements, but who may, with different political framings and organizing strategies, shift their positions” (Smith, 2005).

By using divisive rhetoric when discussing an issue such as abortion, people with opposing viewpoints are bound to disagree and make no progress in advancing reproductive rights for anyone. In Utah, there is a strong sentiment of opposition to abortion rights due to the conservative political majority, stemming from the presence of the LDS Church. As a result, many may assume that most conservative Utahns who may identify as “pro-life” would be in favor of statewide abortion bans and government mandates around reproductive healthcare. In contrast, the 2022 Utah population study found that 50% of Utahns identifying as conservative agreed or strongly agreed that government mandates around healthcare choices could potentially put individual or personal choices at risk (Family Planning Elevated & Cicero Group, 2022). The study also found that 49% of Utahns identifying as conservative felt that a statewide abortion ban interfered with personal medical decision-making (Family Planning Elevated & Cicero Group, 2022).

These statistics paint a much more complicated picture of how Utahns view abortion and reveal how a simplistic binary for an incredibly complex issue is ineffective. Additionally, it creates unnecessary animosity that detracts from progress in advancing other parts of reproductive health, such as contraceptive access. Instead, activists and lawmakers should work to reframe the issue around something more people can agree on like expanding healthcare for mothers and children to promote healthy families.

Reproductive Justice Framework

Many conversations around reproductive issues ignore the greater intersectionality between these rights and other social justice issues that affect communities of color at a disproportionate rate. In response to this, twelve black women in 1994 coined the term, “Reproductive Justice,” and named themselves Women of African Descent for Reproductive Justice (Ross, 2017). Over the next three years, this organization became what is now known as SisterSong Women of Color Reproductive Health Collective (SisterSong, n.d.). SisterSong formulated the Reproductive Justice Briefing Book. This novel, intersectional, seminal feminist theory pushed the conversation around reproductive rights toward an understanding of how the social reality of inequality affects the ability of marginalized communities to control their reproductive destiny.

This document seeks to create a new “framework” or path forward for equity in reproductive and sexual healthcare. The Briefing Book sets forth three fundamental rights for all people with uteruses: the right to have a child, the right to not have a child, and the right to parent the children one has in a safe and healthy environment. This gives the movement a clear direction and shifts away from the toxicity of the modern abortion debate. In Loretta Ross’s words, “the Reproductive Justice analysis focuses on the ends: better lives for women, healthier families, and sustainable communities” (Santelli et al., 1994). The fight for every individual to have a family when and with whom they choose in a safe and healthy environment is important within the Utah family-based social culture; this document shifts a controversial issue into something that more people are willing to support and fight for.

This document is critical to consider when discussing any recommendations for change in Utah’s contraceptive policy. While Utah, as of the 2020 Census, is 77.2% white, it has a 14.8% Hispanic population. Additionally, 8.6% of Utahns live in poverty (U.S. Census Bureau, 2021). These are not the only marginalized communities in Utah, merely examples of people who many overlook in the fight for reproductive rights. By using a Reproductive Justice lens when considering contraceptive access, one can be sure to include these marginalized

groups and consider the intersectional oppression they face.

Utah-Based Contraceptive Demonstration Projects

HER Salt Lake Contraceptive Initiative

The University of Utah Family Planning Division with Planned Parenthood of Utah introduced the HER Salt Lake Contraceptive Initiative in March 2016. This demonstration project lasted a year and provided free contraception with no out-of-pocket costs to 7,402 women (Sanders et al., 2022). At participating clinics, HER Salt Lake delivered same-day IUD and implant insertion, ensured that all methods were stocked, and standardized contraceptive counseling practices were implemented (Sanders et al., 2022).

There are many significant results of this project in addition to providing free contraceptive services. The project demonstrated that without cost barriers, women were twice as likely to choose a long-acting reversible contraceptive (LARC) like an IUD or implant, compared to the pill, patch, or ring (Sanders et al., 2022). The data from HER Salt Lake was also used to develop HB 12, Family Planning Services Amendments. In 2018, HB 12 expanded Medicaid coverage for contraceptive services to those with incomes under 100% of the FPL, a major step in closing the contraceptive coverage gap (Sanders et al., 2022). More recently in January 2023, data from HER Salt Lake was used in advocacy efforts for SB 133, which expanded Medicaid coverage for family planning services even more to 185% FPL (Harper, 2023). Finally, this program emphasized the importance of contraceptive counseling and a commitment to complete funding and stocking of all methods, the fact that fewer barriers to access decrease unplanned pregnancies, and the importance of the ability to switch and discontinue methods (Sanders et al., 2022).

Family Planning Elevated Contraceptive Access Program

Following the completion of HER Salt Lake, the University of Utah Family Planning Division partnered with the Sorenson Impact Center and the Planned Parenthood Association of Utah to create a sister program, Family Planning Elevated Contraceptive Access Program (FPE CAP). This new program partnered with county health departments, rural clinics, and federally qualified health centers across Utah to provide contraceptive access to those still in the access gap or those with incomes between 101%-250% FPL. From 2019-2022, FPE CAP provided 18,308 women with free contraceptive care across 28 clinics and eight affiliate clinical sites (Family Planning Elevated, 2022).

Discussion

Increasing the Contraceptive Coverage Standard

One important aspect of strengthening contraceptive coverage in Utah, revealed by the HER Salt Lake Contraceptive Initiative and FPE CAP, is for the Utah Legislature to codify the Affordable Care Act's (ACA) contraceptive coverage requirement into state law. Codifying this aspect of the ACA means that those insurance plans regulated by the state would have to fully cover all FDA-approved birth control methods with no out-of-pocket costs (Sanders et al., 2022). Additionally, public and private insurance would be required to cover and dispense one full year of birth control, which promotes consistency and effectiveness of use. This provision may help decrease pregnancy by 30% and the odds of abortion by 46% (Sanders et al., 2022). Private and public insurance companies would also be required to cover over-the-counter methods of birth control without requiring a prescription or cost sharing. Finally, codifying this aspect of the ACA would enable fair pharmacy coverage, meaning women would have the right to receive prescribed contraceptives at all pharmacies or referral to another provider if one does not cover those services (Sanders et al., 2022).

Within the Reproductive Justice Framework, the state government can strengthen contraceptive coverage for all Utahns in many other ways. For minors, it is important to ensure they can access confidential contraceptive care without mandated parental notification or consent (Committee on Health Care for Underserved Women, 2015). Under Utah Code Ann. § 76-7-322, "no funds of the state or its political subdivisions shall be used to provide contraceptive or abortion services to an unmarried minor without the prior written consent of the minor's parent or guardian" (Kimball, 2020). This current law blocks many young people from receiving the contraceptive care they need and should be reversed.

Another important recommendation is collaboration between public and private state insurance agencies to improve provider reimbursement and patient coverage of immediate postpartum IUD insertions. Many women are fertile and sexually active before the six-week postpartum exam, putting them at risk of pregnancy again. To mediate this, IUDs are incredibly important in the postpartum period as they are long-term and more effective than oral contraception and condoms (Nichols, n.d.). This requires further education and training of providers on postpartum IUD insertions, particularly in rural areas. Coverage of postpartum IUD insertions would protect postpartum women from unplanned pregnancies and potential abortions.

Finally, Title X should be expanded to provide access to all

contraceptive methods, including LARCs. Title X, established in 1970, is a federal program that provides funding to ensure low-cost access to birth control and reproductive health services to uninsured and underinsured people (Planned Parenthood, 2021). However, the Title X budget has not increased since 2015, meaning that clinics relying on Title X funding often have a difficult time providing a full range of contraceptive options for their patients (Sexsmith et al., 2021). Clinics have a particularly difficult time funding LARCs as these methods tend to be more costly; yet an estimated 25-29% of women would select a LARC in the absence of cost barriers (Sexsmith et al., 2021). In order to ensure that women with low incomes have the full range of options in a state without a Medicaid family planning waiver, Title X needs to receive greater federal government funding.

Medicaid Family Planning Expansion

Medicaid coverage for contraceptive care is currently available in Utah for women at or below 185% FPL. The next step is to continue expanding coverage for those between 186% and 250% FPL as these women still cannot afford to pay out-of-pocket for contraception or cannot afford insurance (Sanders et al., 2022). A potential solution is to expand Medicaid eligibility for contraceptive and family planning services for those ineligible for Medicaid. For example, California has a program called the Family Planning Access Care & Treatment Program (FPACT) which provides family planning services for those at or below 200% FPL who have no other health care plan, including California Medicaid, that covers family planning needs. This program covers all birth control methods including LARCs as well as family planning counseling, STI testing and treatment, cervical cancer screening, and some fertility services (California Department of Health and Human Services, 2022). This program is a vital safety net for low-income people in California, and Utah could greatly benefit from a similar program to bridge the contraceptive access gap as 23.5% of the Utah population was at or below 200% FPL in 2021 (Kaiser Family Foundation, 2021).

Community Health Worker Incorporation

Community health workers (CHWs) are vital to connecting marginalized communities with healthcare providers and expanding contraceptive access. Historically, there has been a lack of trust between communities of color and American healthcare institutions due to lived experiences of discrimination and racism. To mediate this, CHWs build trust and understanding, connect and share experiences, recognize barriers, connect resources, offer individual support, understand

the community, advocate for the community, and address social needs (Burdick et al., 2021). However, without formal billing and reimbursement processes codified into Utah state law, many CHWs have a difficult time integrating themselves into the traditional Utah healthcare system.

It is important to acknowledge the passage of SB 104, Community Health Worker Certification Process, in March of 2022, which created a certification process for CHWs in Utah through the Department of Health (Escamilla, 2022). The passage of this bill represents an important step in validating the significance of CHWs in advancing health equity. The establishment of a certification process gives CHWs a unified professional identity, which increases their ability to reach and connect with members of marginalized communities. It also allows for more seamless collaboration between providers and CHWs as certification clearly defines the abilities of CHWs.

The Utah state government could work to sufficiently fund CHWs in a few ways. One strategy would be to incorporate CHWs into the Medicaid-managed care delivery system. The Texas State Legislature considered the potential incorporation of CHWs through a 2012 report. This report found that adding a new provider type to Texas Medicaid would cost \$700,000 to \$1 million in federal and state revenue, meaning that incorporating CHWs into managed care organizations (MCOs) might be more feasible (Department of State Health Services & Health and Human Services Commission, 2012). Managed care through Medicaid provides a capitated rate to MCOs to cover services. In turn, this allows MCOs to incorporate CHWs at little to no extra cost.

While adding CHWs in any form to Utah Medicaid may face resistance, a demonstration at the University of Arkansas Medical Sciences showed that incorporating CHWs into Medicaid results in financial savings. In 2005, they initiated a three-year Medicaid 1115 waiver with CHWs working in community-based organizations in three Arkansas counties. As a result of the demonstration, Arkansas Medicaid had a 24% reduction in annual spending per waiver participant and a net savings of \$2.6 million across the three years, attributed to high minority participation (Department of State Health Services & Health and Human Services Commission, 2012). This demonstration reveals how important CHWs are to helping marginalized communities enroll in and navigate the healthcare system. When marginalized individuals have less difficulty navigating and using the healthcare system, they do not need as many costly services. By incorporating them into Utah Medicaid managed care delivery system, Utah Medicaid could save money while also increasing health equity for minority populations.

Another potential method for funding CHWs would be through private-sector funding. In a 2021 report from the Rhode Island Department of Health on CHWs, they found that most

funding came from grant funding from government sources and grant funding from private philanthropy (Dunklee, 2021). Additionally, in the 2012 report from Texas, they discussed multiple private health centers that employ CHWs through grant funding. One of these clinics, Gateway Community Health Center in Laredo, employs CHWs to assist in education, outreach, and chronic disease management. Staff at Gateway Community Health Center found that CHWs are “cost-effective as they assist patients to increase control of their health conditions through positive lifestyle changes”, and they “reported that improved self-management of health conditions resulted in reduced utilization of high-cost services” (Department of State Health Services & Health and Human Services Commission, 2012). Promoting the utilization of CHWs through grant funding may be a good way to introduce CHWs and demonstrate their effectiveness to the greater Utah community.

Conclusion

Barriers to access of affordable contraception, meaningful gaps in the sexual education taught in schools, and a divisive and ineffective debate on abortion contribute to high levels of unplanned pregnancies, STIs, maternal deaths, and premature births in Utah. As a result, the Family Planning Division at the University of Utah ran two separate contraceptive demonstration projects, HER Salt Lake and Family Planning Elevated, to show the need for greater contraceptive access to combat the negative implications of unplanned pregnancies. With data from these demonstrations in mind, it is clear that in order to bridge the access gap, aspects of the Affordable Care Act must be codified, Medicaid must be expanded, and CHWs must be properly funded. Contraceptive access is a vital part of reproductive health care; without broad access and acknowledgment of the institutional barriers that people face to gaining these services, many Utahns will continue to fall through the cracks without the health care they need and deserve as human beings.

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Affirmed and Reversed: A Critical Race Theory Analysis of the Grutter Precedent and Its Imminent Demise

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Abstract:

In 2003, the United States Supreme Court handed down the Grutter v. Bollinger decision. This decision established that the use of race-based affirmative action in the university admissions process is constitutional, provided that it meets certain criteria. However, Students for Fair Admissions (SFFA) has brought two lawsuits before the Court that threaten to overturn Grutter and outlaw race-based affirmative action. Using a Critical Race Theory (CRT) lens, this paper explains why interest convergence is a central weakness of the Grutter precedent. In turn, this CRT analysis illuminates how SFFA has exploited the model minority myth and racial triangulation to frame affirmative action as anti-Asian American. SFFA is thereby trying to use Grutter's reliance on interest convergence to overturn it. Finally, the paper discusses potential repercussions if the Court does overturn Grutter and calls for a new, more racially equitable doctrinal basis for affirmative action.

Introduction

In certain respects, affirmative action in university admissions is revolutionary. It unabashedly confronts the racist inequalities that have always been a part of American society (Harris, 1993). Many critical race theorists have analyzed affirmative action because of the ways it demonstrates both the pervasiveness of racism, as well as the ways in which white people tend to vehemently resist antiracist policies (Carbado, 2013; Harris, 1993; Patton, 2016). This paper uses a Critical Race Theory (CRT) lens to evaluate race-based affirmative action, the Grutter v. Bollinger precedent which established it, and the upcoming Supreme Court decisions that threaten to render it unconstitutional. In particular, this CRT analysis reveals the inherent weaknesses of the Grutter v. Bollinger precedent that have made it vulnerable to recent legal attacks.

First, a definition of CRT is necessary given the widespread misinformation that surrounds it (Conway, 2022). CRT is an analytical and scholarly framework which maintains that racism against people of color pervades all aspects of American society, including its legal system, economic hierarchies, and educational institutions (Capper, 2015; Patton, 2016). This systemic racism is the result of centuries of racial oppression and discrimination. Additionally, CRT operates with the understanding that white Americans inevitably possess unique privilege and power as a result of their race (Harris, 1993). Thus, white privilege and racism are not simply individual acts of bigotry or hatred. Instead, they are widespread forces that permeate all societal structures. CRT scholars do not simply highlight and criticize systemic racism, but they also advocate for solutions that will uproot this racism and thereby transform society for the better (Harris, 1993; Knaus, 2009).

Affirmative action is one of these solutions. This system redistributes the privileges that whiteness affords by giving students of color greater access to the life-changing opportunities that a college education provides. In this regard, affirmative action has made significant progress (Lee, 2021). Its success is best illustrated by the consequences of its absence. In the nine states (Ax, 2023) that have banned race-based affirmative action in their public universities, the enrollment of underrepresented students of color—in particular, black, Latine, and Native American students—has declined. The percentage of students of color in public universities in these states experienced an average decline of 0.4 percentage points from 1999 to 2017 (Liu, 2022). This decline has been even steeper at more selective universities. Within the top 50 public universities in the US News & World Report's rankings, those that legally cannot use race-based affirmative action experienced “a decrease in black enrollment of roughly 1.74 percentage points, a decrease in Hispanic enrollment of roughly 2.03 percentage points, and a decrease in Native American enrollment of roughly .47 percentage points” (Hinrichs, 2012, p. 717) from 1995 to 2003. Similar decreases have occurred in American medical schools (Garces & Mickey-Pabello, 2015). These figures may appear to be miniscule. However, within Hinrichs's (2012) study, “the shares of students at these universities who are black, Hispanic, and Native American are 5.79%, 7.38%, and .51%” (p. 717), respectively. Thus, relatively speaking, the removal of affirmative action has severe and visible impacts on the enrollment of students of color. These statistics represent students who have lost access to the invaluable connections and knowledge that they otherwise may have gained at these universities.

Many white people have taken issue with the redistributive benefits which affirmative action provides, and they have unsuccessfully attempted to federally ban affirmative action through the Supreme Court on multiple occasions (Fisher v. University of Texas, 2016; Grutter v. Bollinger et al., 2003; Regents of the University of California v. Bakke, 1978). In 1978, the Court decided *Regents of the University of California v. Bakke* (hereafter *Bakke*). In this ruling, no Justice's opinion commanded a majority. However, Justice Lewis Powell's opinion found race-based affirmative action to be constitutional, as long as it met certain criteria (Grutter v. Bollinger et al., 2003, p. 307; *Regents of the University of California v. Bakke*, 1978). Because *Bakke* was a split decision, its precedent and implications remained unclear for decades. The Court's 2003 decision in the case *Grutter v. Bollinger* (hereafter *Grutter*), however, shared Powell's opinion and unambiguously upheld the constitutionality of affirmative action. This decision remains the law of the land today. Public universities are free to consider race in their admissions process, provided that this consideration meets certain criteria that the Court has established (Grutter v. Bollinger et al., 2003) and that this paper will

explain below.

At this moment, however, affirmative action is under threat. Two cases that the Supreme Court will likely decide in June 2023 have the potential to overturn *Grutter* and thereby prohibit the use of race-based affirmative action nationwide (Liptack & Hartocollis, 2022)¹. The impacts of such a decision would be detrimental for racial equity in America. Analyzing the *Grutter* precedent through a CRT lens will help to explain, in part, why it has become more vulnerable to the legal efforts to overturn it.

A Brief Background of *Grutter v. Bollinger*

In 1997, a white woman named Barbara Grutter applied to the University of Michigan Law School, but the board of admissions rejected her application. The law school openly admitted to considering an applicant's race as a factor during its admissions process. Grutter believed that the school had engaged in racial discrimination by rejecting her, since she alleged that the school's affirmative action program had allowed less academically qualified applicants of color to gain admission instead of her. She sued the law school, and her lawsuit eventually made its way to the Supreme Court (*Grutter v. Bollinger et al.*, 2003).

The Supreme Court's role was to determine whether the University of Michigan Law School's consideration of race in its admissions process withstood strict scrutiny. As the 1995 case *Adarand Constructors, Inc. v. Peña* established, “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny’” (*Grutter v. Bollinger et al.*, 2003, p. 326). In other words, when the government, or a government-sponsored entity like a university, actively considers race as a factor in a policy, a court must review that policy using the strictest, most rigorous level of judicial scrutiny. Policies survive strict scrutiny as long as they “are narrowly tailored to further compelling governmental interests” (p. 326). Thus, Grutter required the Court to determine whether universities have a compelling interest to achieve a diverse student body by narrowly considering an applicant's race.

By a slim 5-4 majority, the Court ruled in favor of the law school and found that its system of race-based affirmative action was constitutional. The ruling found that the school's affirmative action served a compelling interest by providing the benefits of a racially diverse campus. Furthermore, the Court ruled that this affirmative action policy was narrowly tailored because it only considered an applicant's race as one of many factors during the admissions process rather than aiming to achieve quotas of each racial group on campus. Additionally, the Court expected that racism would be far less pervasive in American society 25 years after their decision.

Therefore, the fact that the program was supposedly temporary also meant that it was narrowly tailored. Justice Sandra Day O'Connor delivered the opinion of the Court. The four dissenting Justices each wrote separate opinions (*Grutter v. Bollinger et al.*, 2003).

Grutter v. Bollinger Through a CRT Lens

This section will analyze the reasoning behind the *Grutter* decision within a critical race theory (CRT) framework. In particular, two major CRT concepts are relevant to this decision: whiteness as property and interest convergence. These two related concepts help to explain not only the dissent's resistance to affirmative action but also the majority's approval of it.

The Grutter Dissents and White Property Interests

The dissenting opinions in the *Grutter* ruling uphold whiteness as property. Cheryl Harris (1993), a foundational CRT scholar, documented how, throughout American history, white identity has been a valuable source of power and security. In the early days of the nation's history, only white Americans were able to own property. On the other hand, slavery and colonialism deprived black and Native American people of their freedom and property.

According to Harris (1993), American law upholds this property interest in whiteness and "recognize[s] and protect[s] expectations grounded in white privilege" (p. 1731). In other words, the present-day American legal system makes it appear as if the privileges that white people possess are natural, proper, and just. The law allows white people to expect certain privileges for themselves and not for others. Harris (1993) argues that these privileges are a form of property. Whiteness as property has shaped the field of higher education as well. Lori Patton (2016) documented the many ways that universities uphold white supremacy and fail to make students of color feel welcome, from promoting Eurocentric curriculum to participating in the gentrification of predominantly nonwhite neighborhoods. Even in high schools, the enrollment of students of color in Advanced Placement (AP) courses is disproportionately low. In one analysis of Texas public schools, black male students were half as likely as white male students to enroll in an AP course, and black female students only enrolled at 60-70% of the rate of white female students. Latine students experienced similar disparities (Klopfenstein, 2004). These courses boost students' chances of admission into selective universities and prepare them for success once they enroll (Klopfenstein, 2004; Solórzano & Ornelas, 2004; Walker & Pearsall, 2012). These racial disparities in AP participation therefore cause white students' racial identity to serve as an advantage during and after

the college application process.

Affirmative action seeks to challenge this property interest in whiteness within higher education. For much of American history and even today, admission into universities has been out of reach for black students and students of color, and affirmative action seeks to address these disparities (Harris, 1993). Importantly, however, affirmative action does not discriminate against white people by "establishing a property interest in Blackness" (p. 1785). Affirmative action does not attempt to reverse the roles of whites and blacks within America's racial hierarchy. Indeed, such a reversal is not possible because "Black identity is not the functional opposite of whiteness" (Harris, 1993, p. 1785). Blackness and whiteness are not fungible or interchangeable forms of racial identity. Privilege and superiority define the concept of whiteness, while a history of subjugation and inferiority heavily informs blackness. The idea that affirmative action is a form of reverse discrimination is therefore unfounded and ahistorical.

Because affirmative action ensures that people of color have a better chance at securing admission into universities, some white people view it as a threat to their property—their expectation that they deserve admission more than any person of color. Barbara Grutter certainly felt this sense of entitlement (*Grutter v. Bollinger et al.*, 2003). By opposing affirmative action, whites embrace what Harris (1993) calls "white innocence" (p. 1783). These whites may recognize that "Blacks were oppressed by slavery...and its aftermath," but they nonetheless believe that "it is unfair to allocate the burden to innocent whites who were not involved in acts of discrimination" (p. 1767). White critics of affirmative action therefore try to frame the policy as a form of vindictive and personal revenge against white people, rather than a challenge to the systemic white property interests that history and the law have manufactured (Harris, 1993).

These white property interests are highly apparent within Justice Clarence Thomas's and Justice Antonin Scalia's dissenting opinions in *Grutter*. Just as Harris (1993) advises against, Thomas equates whiteness and blackness when he argues that the majority's ruling will allow historically black colleges and universities (HBCUs) to "[reject] white applicants in order to maintain racial homogeneity" (*Grutter v. Bollinger et al.*, 2003, p. 365) and thereby engage in reverse discrimination against white people. What Thomas fails to realize is that black students often feel a far lesser sense of belonging than their white peers on predominantly white college campuses (Johnson et al., 2007; Patton, 2016), while HBCUs actively engage in practices that allow black students to "feel supported, as opposed to racially marginalized" (Williams et al., 2021, p. 736). By contrast, white students attending HBCUs do not report feeling isolated, and while they experience greater exposure to "[u]ncomfortable" conversations about race and racism, many have "expressed appreciation" for these conversations (Mobley et al., 2022, p. 309). Because of white property

interests, black and white college students do not experience being the numerical minority on a college campus in identical ways. Justice Thomas's comparison between these two experiences illustrates that he does not fully understand the status and protection that whiteness uniquely affords (Harris, 1993).

Justice Scalia also frames white people as innocent victims of race-conscious admissions policies. He warns that the *Grutter* ruling will allow employers to practice an "all-American system of racial discrimination" (p. 348) by rejecting white applicants in favor of applicants of color. Like Thomas, Scalia fails to realize that affirmative action does not reversely discriminate against white people. In addition, his sarcastic use of the term "all-American" to describe racial discrimination betrays his lack of understanding that America has a long history of such discrimination. Despite what Scalia's sarcasm may suggest, racial discrimination is a very American practice. Scalia indulges in white innocence by pretending that there is no need to address the systemic oppression of the past (Harris, 1993). Therefore, the dissent endorses many of the misinformed arguments that defenders of whiteness as property commonly employ.

Who Benefits?: The *Grutter* Ruling and Interest Convergence

While the dissent advances arguments that defend whiteness as property, the majority of the Court also upholds the interests of white people in certain respects. In his groundbreaking article on interest convergence, CRT scholar and activist Derrick Bell (1980) explained how significant civil rights advancements for black Americans and people of color often only occur when the interests of white people align with these advancements. Bell argues that the Court primarily ended racial segregation in *Brown v. Board of Education* not out of a love for racial equality, but in order to further white interests (Bell, 1980). For example, many white people anticipated that desegregation would allow the South to industrialize and reap the subsequent economic benefits. In the midst of the Cold War, US officials hoped that once the US abandoned *de jure* segregation, its communist adversaries would be unable to portray the US as a racist country. Bell (1980) adds that many white judges who enforced the *Brown* decision in recalcitrant southern states did so not in order to secure the rights of black schoolchildren, but primarily to punish these states for resisting a judicial ruling and disregarding the rule of law (p. 530). These are examples of how white leaders will enact and enforce policies that benefit people of color only if these policies also serve their own interests in some way.

Justice O'Connor's argument in favor of affirmative action is another example of interest convergence. O'Connor argued that a racially diverse student body serves compelling

governmental interests because of the benefits that this diversity provides to students. However, many of the benefits that O'Connor claims derive from a diverse student body are benefits that mostly white students will enjoy.

For instance, she relies on one brief which argues that a diverse campus "better prepares students for an increasingly diverse workforce and society" (*Grutter v. Bollinger et al.*, 2003, p. 330). Reading between the lines, one can see that O'Connor does not mean that diversity will allow students of color to become better prepared to work alongside white people. Instead, it is white students who will become "better prepared" to work alongside "diverse" students of color as a result of student body diversity.

O'Connor also relied on the US military's *amici curiae* briefs, which military officials submitted to persuade the Court to support affirmative action, in order to draw a connection between racial diversity and white interests. O'Connor highlights the brief's assertion that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle [sic] mission" (p. 331). In other words, racial diversity allows the leaders of the American government, which, as Harris (1993) points out, systematically upholds white property interests, to exercise their power through a more effective military.

Furthermore, O'Connor does not believe that affirmative action needs to make up for the historical discrimination that people of color have faced. She insists that the Court "[has] never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination" (*Grutter v. Bollinger et al.*, 2003, p. 328) and that affirmative action should not centrally serve this purpose. Overall, O'Connor's argument stresses that white students, and not students of color, will primarily benefit from diversity. The law school's program is constitutional, not because it alleviates the historic wrongs which people of color have faced, but because it improves the education of white students. Students of color are merely a tool for enacting these improvements.

This is not to say that affirmative action does not benefit students of color or that the majority of the Court made the wrong decision. Indeed, people of color certainly benefit when diversity reduces the racist stereotypes that white students hold (*Grutter v. Bollinger et al.*, 2003). As mentioned previously, fewer students of color would be able to attend many universities without the presence of affirmative action (Bridges, 2016; Garces & Mickey-Pabello, 2015; Long & Bateman, 2020). However, what's significant is the way in which O'Connor frames the benefits of affirmative action. In order to argue that the law school's affirmative action policy is constitutional, she points out all of the ways it can help white students in particular. Thus, O'Connor and the majority exploit interest convergence.

As multiple CRT scholars have argued, civil rights advancements that rely primarily on interest convergence tend to be less resilient. Bell (1980) rightly feared that Brown would fail once there was a “substantial...divergence in the interests of whites and blacks” (p. 528), or, in other words, once white people no longer supported school integration. He tracked how, “[a]s a result of its change in attitudes, the Court...increasingly erected barriers to achieving the forms of racial balance relief it earlier had approved” (Bell, 1980, p. 527) by making decisions that limited Brown’s scope. Indeed, Brown has not only failed to racially integrate schools (McNeal, 2009), but the decision has mainly benefited white students by offering them incentives and perks to attend high-minority schools while offering students of color no such incentives (Ladson-Billings & Tate, 1995, p. 56). More recent CRT scholars, such as Colleen Capper (2015), have also cautioned that racial progress that relies upon interest convergence is often “short-lived” (p. 814). Interest convergence is clearly not the most sustainable strategy for achieving racial justice.

Just as interest convergence weakened the effectiveness of Brown, it may prove to be the cause of Grutter’s downfall. An analysis of the upcoming legal challenges to Grutter will further illuminate how Grutter’s basis in interest convergence may be its Achilles heel.

Looking Ahead: The SFFA Cases and the End of Race-Conscious Affirmative Action

The Supreme Court will decide two separate cases (Howe, 2022) in the summer of 2023: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard* (hereafter *SFFA v. Harvard*) and *Students for Fair Admissions, Inc. v. University of North Carolina* (hereafter *SFFA v. UNC*). The plaintiff in both cases, *Students for Fair Admissions (SFFA)*, is an interest group that aims to eradicate any consideration of race within the admissions process in the name of racial equality. Legally, their mission is to overturn *Grutter* (Lee, 2021), and *Grutter*’s basis in interest convergence has made this mission easier. This section will analyze SFFA’s arguments, as well as the Court’s response to these arguments and how the Court’s decision may affect the future of diversity in education. Ultimately, *Grutter*’s weaknesses necessitate a new doctrinal basis for affirmative action.

SFFA’s Arguments

In both of these cases, SFFA makes arguments that embrace white property interests and thus resemble the dissenting

opinions in *Grutter*. SFFA alleges that both universities, Harvard and UNC, are providing an unfair advantage to black, Latine, and Native American applicants, thereby discriminating against white applicants. Interestingly, however, SFFA also emphasizes that Asian American applicants experience discrimination alongside whites during the admissions process. In *SFFA v. Harvard*, SFFA alleges that admissions officers at Harvard grade Asian American applicants more harshly on “personal characteristics” because they stereotypically view these applicants as cold and emotionless (Lee, 2021, p. 185). By contrast, these Asian American Harvard applicants tend to receive higher scores on academic criteria like GPA and test scores (Lee, 2021). In *SFFA v. UNC*, SFFA also alleges that UNC’s admissions system jointly discriminates against white and Asian American applicants and is therefore unconstitutional (Liptack & Hartocollis, 2022). Indeed, many Asian Americans have supported SFFA’s efforts to overturn *Grutter* (Lee, 2021).

On the one hand, SFFA’s argument that Harvard’s admissions system discriminates against Asian American applicants raises genuine concerns. There is no disputing that these applicants have consistently received lower personal characteristics scores than white applicants (Arcidiacono et al., 2022; Harpalani, 2022). Some observers have tried to overcome this fact by falsely claiming that the personal characteristics don’t measure an applicant’s personality at all (Lee, 2021) or even by stereotypically suggesting that, through no fault of Harvard’s admissions officers, Asian Americans simply have less appealing personalities and therefore “need to spend less of their scarce time on academics and more on personality development” (Krishnamurthy, 2022). In reality, the fact that Asian American applicants consistently receive lower personal characteristics scores suggests the possibility of unconscious racial stereotyping against these applicants (Harpalani, 2022).

However, SFFA makes several unwarranted extrapolations based on this possible stereotyping. SFFA conflates the potential presence of an anti-Asian American bias in Harvard’s admissions with the system of race-based affirmative action as a whole. They argue that, because Asian Americans consistently receive lower personal characteristics scores, the Court must totally abolish *Grutter* and race-based affirmative action. Based on how affirmative action actually functions, SFFA’s argument is a nonsequitur. Certainly, Harvard’s lower scoring of the average Asian American applicant on the personal characteristics rating is concerning. While lower courts have sided with Harvard, they have also suggested—but not conclusively decided—that admissions officers may hold implicit biases against Asian Americans that disadvantage these applicants during the personal characteristics scoring process (Harpalani, 2022). But even if this were the case, completely eliminating race-based affirmative action would be an overreaction. Affirmative action does not fuel implicit bias; in fact, it corrects for

these biases by giving applicants of color an added benefit that is commensurate with the disadvantages that implicit biases cause. Thus, contrary to what SFFA would have the Court believe, eliminating affirmative action will only allow the implicit biases of admissions officers to more easily influence admissions decisions.

A closer examination of SFFA's leadership reveals that their intentions are not to protect Asian Americans. The leader of SFFA, a white, conservative activist named Edward Blum, has been behind many regressive Supreme Court decisions, including the 2013 *Shelby County v. Holder* decision that wiped out a key portion of the Voting Rights Act of 1965 (Gibson, 2020;

Lee, 2021; *Shelby County v. Holder*, 2013). He also oversaw the lawsuit that led to the 2016 *Fisher v. University of Texas* case, which attempted to overturn *Grutter* on the basis that it discriminated against white applicants (Lee, 2021). After the *Fisher* lawsuit failed, Blum, in his own words, realized that he “‘needed Asian plaintiffs’” in order to successfully destroy affirmative action (Lee, 2021, p. 185). Blum and, by association, SFFA are simply feigning their compassion for Asian Americans in order to disguise yet another racist legal mission.

Furthermore, SFFA's arguments endorse the model minority myth and engage in racial triangulation, two pillars of anti-Asian racism that many CRT scholars have observed. As Harvey Gee (2009) explains, the model minority myth promotes the idea that Asian Americans are a homogenous racial group that does not experience racism because they have worked hard to achieve socioeconomic success. According to this myth, Asian Americans occupy a similarly privileged stratum in society as white people. In turn, white people employ the model minority myth to “insult other people of color” (Gee, 2009, p. 174) for not achieving the same level of prosperity as Asian Americans. This also occurs through a similar process known as racial triangulation, whereby white people “[valorize] [Asian Americans] relative to [blacks] on cultural and/or racial grounds in order to dominate both groups” (Kim, 1999, p. 107). These forces thus pit people of color against each other and sabotage any attempts to collectively challenge white privilege. Racial triangulation also homogenizes all Asian American subgroups—Korean Americans, Chinese Americans, etc.—as a single race with uniform characteristics (Kim, 1999). SFFA embraces these stereotypes. For example, they also portray all Asian Americans as a monolithic group that unanimously opposes affirmative action, even though 65% of Asian Americans supported the program as of 2016 (Lee, 2021). In accordance with the model minority myth, SFFA argues that affirmative action not only discriminates against privileged white people, but also against privileged Asian Americans. By naming both whites and Asian Americans as plaintiffs, SFFA then embraces the notion that Asian Americans should join white people in the subordination of other people of color (Lee,

2021).

SFFA's arguments also exemplify the inherently fickle nature of interest convergence that CRT scholars have warned about. Interestingly, SFFA may be exploiting interest convergence to reverse racial progress. SFFA claims that they are working in the interests of Asian Americans, a racial minority. Perhaps they hope that their efforts will therefore be as successful as previous legal changes, such as *Brown*, that occurred when the interests of white people and people of color converged (Bell, 1980; Lee, 2021). Thus, the SFFA cases once again highlight the unreliability of interest convergence. In 2003, the interests of white people and people of color aligned to uphold affirmative action; in 2023, SFFA hopes that these interests will instead align to destroy it.

The Judiciary's Response to SFFA's Arguments

SFFA's faulty claims have not resonated with lower courts. Both a federal district court and a circuit court have sided with Harvard in its case against SFFA, ruling that Harvard's admissions program conforms with the guidelines that *Grutter* established (“Students for Fair Admissions, Inc.,” 2021). Importantly, the district court judge “found that Harvard did not intentionally discriminate against Asian American applicants” (Harpalani, 2022, pp. 296-297). In November 2020, SFFA brought their case against UNC to trial in a federal district court, which sided with UNC. The Supreme Court granted certiorari before an appeals court could hear the UNC case (*Students for Fair Admissions*, 2022).

Even though lower courts have sided against SFFA, this does not mean that their lawsuit is likely to fail in the Supreme Court, which now has a conservative majority after President Donald Trump managed to appoint three Justices (Liptack & Hartocollis, 2022). These conservative Justices, who have exhibited a distaste for race-based affirmative-action, now hold significant power.

Recent case law foreshadows how this conservative majority will rule. The plaintiffs in *Fisher v. University of Texas* (2016) also tried to overturn *Grutter*, but the majority of the Court decided to keep it in place. In his dissenting opinion in *Fisher*, Thomas openly called for the overturning of *Grutter* on the very first page. In his lengthy dissent, which Chief Justice John Roberts joined, Justice Samuel Alito also expressed extreme wariness of race-conscious admissions programs, and he argued that race should be a factor in admissions “‘only as a last resort’ when all else has failed” (*Fisher v. University of Texas*, 2016, p. 13 of Alito's opinion).

As the October 2022 oral arguments for the SFFA cases illustrate, the three new Justices seem to oppose affirmative action just as much as their more seasoned colleagues. Justice

Neil Gorsuch questioned whether a university could possibly achieve diversity without using unconstitutional quotas (SFFA v. UNC oral arguments, 2022, p. 76). Justice Amy Coney Barrett also mischaracterized the Grutter precedent by claiming that “Grutter says [race-based affirmative action] is dangerous” (SFFA v. UNC oral arguments, 2022, p. 80), ignoring the many benefits of affirmative action that the Grutter Court found. Justice Brett Kavanaugh claimed that race-neutral affirmative action programs “produce significant numbers of minority students on campuses” (SFFA v. UNC oral arguments, 2022, p. 87). However, numerous studies have clearly shown that race-neutral policies, such those that consider only an applicant’s income but not their race, do not achieve the same levels of minority students (Bridges, 2016; Garces & Mickey-Pabello, 2015; Hinrichs, 2012; Liu, 2022; Long & Bateman, 2020). Kavanaugh also expressed confusion about the meaning of “diversity goals” (SFFA v. Harvard oral arguments, 2022, p. 106), suggesting that he does not view these goals as compelling. Even Chief Justice Roberts, who has tended to be more moderately conservative than his peers (Pomerance, 2020), explicitly called the granting of an advantage to African American applicants “very stereotypical” (SFFA v. Harvard oral arguments, 2022, p. 62). Exchanges between Harvard and UNC’s lawyers and the conservative Justices became tense at times and were rife with interruptions and disagreements (SFFA v. Harvard oral arguments, 2022; SFFA v. UNC oral arguments, 2022). Thus, the fact that six Justices have all expressed skepticism or contempt for race-based affirmative action indicates that Grutter’s demise may be imminent. Coupled with the fact that Justice Ketanji Brown Jackson, a Biden appointee, has recused herself from the SFFA v. Harvard case (Howe, 2022; Jimenez, 2023), there is a high probability that SFFA will succeed in overturning Grutter.

The conservative Justices may also be receptive to SFFA’s argument that affirmative action discriminates against Asian Americans. Justice Thomas, for example, subscribes to the model minority myth. He has claimed that Asian Americans have, in his own words, “‘transcended the ravages caused... by... legal and social discrimination’” (Gee, 2009, p. 174). Throughout the oral arguments, the conservative Justices repeatedly advanced SFFA’s claim that affirmative action discriminates against Asian Americans (SFFA v. Harvard oral arguments, 2022; SFFA v. UNC oral arguments, 2022). Just as the conservative Justices believe that white people experience reverse discrimination as a result of affirmative action, they may also believe that Asian Americans, with all of their supposed privilege, experience this kind of discrimination as well.

Interest convergence is also at the heart of the conservative majority’s opposition toward affirmative action. Grutter relied on the assumption that racial diversity in universities provides benefits to students, and to white students in particular. Indeed, during oral arguments for the SFFA cases, the universities’

lawyers continued to stress the importance of these benefits, with UNC’s lawyer arguing that “seeking the educational benefits of diversity is a compelling interest of the highest order” (SFFA v. UNC oral arguments, 2022, p. 70). This rhetorical basis has made Grutter vulnerable to SFFA’s attacks. If Grutter’s constitutionality hinges on the benefits that it provides to white people, then white plaintiffs arguing against the Grutter precedent can easily challenge the existence of these benefits and question why Grutter needs to exist. Indeed, as the oral arguments indicate, many members of the Court readily accept this reasoning. Alternatively, by arguing that affirmative action harms Asian Americans, a nonwhite group, perhaps SFFA will convince the Court that overturning affirmative action aligns with the interests of people of color. Just as the Court took action when white people’s interests converged with black people’s interests in *Brown*, they may overturn affirmative action if doing so appears to converge with Asian American people’s interests. Thus, Grutter is in danger in part because interest convergence can easily fall apart once interests and loyalties change.

This negotiation of interests constantly sidelines the needs of black, Latine, and Native American students. Thus, a new legal basis for affirmative action is necessary. Courts should not allow affirmative action to exist only if it benefits white people in some way. Instead, courts must view affirmative action as a tool for advancing racial equity by righting historical wrongs against people of color. Unfortunately, however, this doctrinal change is highly unlikely. This is not only because of the conservative makeup of the Supreme Court, but also because, within the Grutter opinion itself, Justice O’Connor explicitly dispelled the notion that affirmative action should be a tool for “remedying past discrimination” (*Grutter v. Bollinger*, 2003, p. 328). Affirmative action is constitutionally not supposed to remedy past wrongs. However, given the flimsiness of interest convergence, this remedial purpose would be far sturdier and more conducive to true racial justice.

It bears repeating that, in states without affirmative action, the number of students of color at public universities will likely fall significantly (Bridges, 2016; Garces & Mickey-Pabello, 2015; Liu, 2022; Long & Bateman, 2020). One can only imagine the disastrous impacts that students of color will experience if no state can legally consider race in its university admissions process. Indeed, even in states where race-based affirmative action within universities is already illegal, state lawmakers appear poised to enact even greater restrictions on diversity efforts within higher education. Utah is one such state. During the 2023 session, legislators introduced radically regressive bills like Senate Bill 283, which initially sought to completely outlaw Diversity, Equity, and Inclusion offices within universities (Woodruff, 2023). Another Utah bill bans most employers from asking job applicants to describe a time when they have promoted diversity efforts, since doing so would supposedly

require applicants to express support for affirmative action (Aerts, 2023; “State Entity Restrictions,” 2023). While neither of these bills have succeeded, they signal a growing trend among conservative lawmakers to suppress diversity in education. Nationally, as of February 2022, fourteen states, including Utah, have banned teachers from discussing race and antiracism in “potentially divisive manners” in the classroom (Krebs, 2022, p. 1927). The Supreme Court’s ruling in June may therefore fan the flames of an ongoing anti-diversity movement.

Conclusion

Twenty years after the Grutter decision, it is naive to think, as many of the majority Justices in Grutter predicted, that racism in America is becoming a thing of the past. With the rise of a conservative majority on the Supreme Court, affirmative action and the success of students of color are under threat. A CRT analysis reveals that interest convergence is partially to blame. Many white opponents of affirmative action feel that it no longer aligns with their interests. Simultaneously, these opponents pretend to oppose affirmative action out of support for Asian Americans. Thus, white people who wish to eliminate race-conscious affirmative action can claim that they are acting with the interests of people of color in mind, thereby exploiting interest convergence. White people must realize that the benefits that affirmative action provides to people of color more than justify its continued existence. Courts must not approve of affirmative action only if the diversity it generates benefits white people in some way. Instead, judges should recognize that repairing centuries of racism is a noble pursuit in and of itself. After all, it is this reparation that will finally allow “the dream of one Nation, indivisible, ...to be realized” (Grutter v. Bollinger et al., 2003, p. 332).

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Spatial Patterning of Alcohol Abuse and Auto-Pedestrian Incidents on the Navajo Nation Native American Reservation

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Abstract:

Diné people on the Navajo Nation experience elevated rates of suicide, mental illness, fetal alcohol syndrome, and traffic fatalities as a result of alcohol use and abuse, which itself stems from poor mental health.^{1,2} Alcohol use and abuse can stem from feelings of depression, anxiety, and loneliness, leading experts to identify substance abuse as a result of poor mental health as one of the leading public health concerns among the Diné. Excessive alcohol consumption not only contributes to rising levels of ischemic heart disease among Indigenous groups, but it also leads to an increase in fatal auto-pedestrian incidents. The purpose of this research is to focus on one aspect of this national problem and to make visible the extent to which alcohol use affects fatal auto-pedestrian incidents on the Navajo Nation using geospatial data. This research will also analyze the effectiveness of Evidence-Based Treatments in Diné and other Indigenous communities as well as where this system fails to address this pressing epidemic. Personal interviews asking both Diné and healthcare providers about their firsthand experiences and professional opinions were also conducted to further emphasize the devastating effects of alcohol abuse and its effects on the Diné community.

1 “Alcohol use/ abuse” was chosen instead of “substance use/ abuse” due to the nature of the report specifically focusing on data recording severe alcohol misuse as opposed to other substances. The term abuse is not indicative of abusive behavior among Diné, rather it is used to denote alcohol use disorders and severe use.

2 Diné vs Navajo? - The term “Navajo” comes from their pre-colonial rivalry with Puebloan people and is not indicative of their cultural practices or values; the Spanish also chose to use Navajo as opposed to Diné due to the correlation between the word “Navajo” and the Spanish word “navaje” (meaning razor) labeling these people as warring and violent as opposed to peaceful. The name Navajo is emblematic of the racism the Diné have faced at the hands of colonization. Because of this, Diné will be the term used to refer to this group throughout the remainder of the report because it means The People and is closely tied to their creation story, although the word “Navajo” is still tied to the name of the reservation area and used by some government officials (Sahagún, 1993).

Introduction

Alcohol abuse as a result of poor mental health – evident by feelings of depression, anxiety, and loneliness – has been identified as one of the leading public health concerns among the Diné especially in regard to pedestrian safety and automobile fatalities (Kunitz et al., 1999). Vehicle crashes (along with ischemic heart disease) are identified as the leading causes of alcohol-related fatalities among Indigenous groups in the United States and account for 500,000 years of potential life lost (Foley, 2020).

Between 2001 and 2005, vehicle crashes in which either the driver or victim had a BAC 0.08 accounted for a total of 18,798 years of potential life lost (YPLLs) among Alaskan Natives and Native Americans. These YPLLs account for 34.4% of the total acute alcohol-related deaths among Indigenous groups in this 4-year period, followed by suicide and alcohol poisoning (8.1% and 6.3%, respectively; Naimi, 2008).

These trends are mirrored among the Diné living on the Navajo Nation, with alcohol use being a major contributor to fatal vehicle collisions, especially in auto-pedestrian incidents. Data collected by the Navajo Epidemiology Center found that pedestrians were 8.2 times more likely to be under the influence of alcohol and killed as opposed to the driver of the vehicle (Foley, 2020). While consuming alcohol and walking with a BAC 0.08 is not illegal, impaired pedestrians have a “greater risk of being involved in a pedestrian-vehicle crash resulting in a fatality” due to impaired judgment and motor skills (Heinonen & Eck, 2007). Being an impaired pedestrian can be just as fatal as being an impaired driver.

While many groups within and outside of the Diné community have identified alcohol abuse issues among this population, the focus on drinking problems has led to negative stereotyping of Indigenous alcohol use as many people see these issues as being “uniquely Indian” based on the preconceived notions of past studies (Szalavitz, 2015; Venner & Miller, 2001). While prior drinking experience, as well as metabolic

and psychiatric genetic factors, play into the effects that alcohol has on an individual, neither the liver structure nor liver phenotypes differ between Native and European populations (Goedde et al., 1993; May, 1996). Despite the evidence that there is no “alcohol gene” that makes one ethnicity unusual in the ways that they metabolize alcohol, it is argued that the continuation of stereotypes and labeling Native drinking patterns as “Other” has led to the further disregard of this pressing concern among the Diné. It is this lack of representation compounded by the geographic isolation of the reservation that worsens mental health among reservation residents and incentivizes alcohol consumption.

Geographic isolation can lead to feelings of loneliness, anxiety, and depression among Navajo Nation residents due to unequal access to and lack of basic necessities such as food, running water, and healthcare (Hudson & Doogan, 2019)¹. The systematic geographic isolation of many Native American reservations increases the difficulty of addressing alcohol abuse issues as there exists differential access to healthcare services and competent providers. Personal interviews conducted with Diné people reveal that it can take upwards of 3 hours to drive to a clinic, many of which do not have the facilities or the staff to assist in alcohol remission.²

A medical breakthrough in providing alcohol abuse services came with the introduction of Evidence-Based-Treatment programs (EBTs) among Diné patients. EBTs target both the psychological and medicinal aspects of substance abuse. This treatment program places emphasis on identifying behavioral risk factors within an individual and then using medication to treat substance dependency, and it combines clinical experience and external research to find the most effective, specialized solutions for people struggling with alcohol addiction (Novins et al., 2011; Turnbridge, n.d.). EBTs emphasize that the first step to alcohol abuse intervention treatments is identifying the at-risk population and crafting a program that will target their individual needs.

Within Diné community, the introduction of EBTs to the healthcare system of the Navajo Nation has proved inefficient despite the evidence that these treatment programs are effective in reducing the prevalence and severity of alcohol abuse in white communities (Novins et al., 2011). Experts at the Centers for American Indian and Alaska Native Health's Substance Abuse Treatment Advisory Board believe that implementing EBT programs among Indigenous healthcare systems has failed

because of concerns about protecting the sovereignty of their healthcare, and incorporating a Western healthcare intervention that may devalue Indigenous voices and traditional practices (Kim & Kwok, 1998; Novins et al., 2011).

The apprehension to incorporate EBT among the Diné community and with Medicine Men has also aided in the ineffectiveness of such programs (Novins et al., 2011).³ With distrust in the system and previous failures to provide substantial and effective treatment to Diné people, the health of the Navajo Nation continues to deteriorate as alcohol abuse rates increase.

While EBT has been proven to work in some instances in mitigating the effects and prevalence of alcohol abuse, this model is not enough to address the pressing mental and physical health issues that influence substance abuse disorders, primarily alcohol, on the Navajo Nation (Novins et al., 2011). To contextualize why these mental health and substance abuse issues are so prominent and difficult to address, understanding the social, cultural, and geographical context in which these issues exist is the first step to creating more equitable and inclusive health services on the reservation. The health statistics presented in this report are not intended to shame, intimidate, or dishearten readers; instead, the intent of introducing these other factors is to show how geographic isolation and a lack of healthcare and pedestrian infrastructure influence health inequality on the reservation as it pertains to physical and mental health.

Purpose Statement

The purpose of this research is to expose how a lack of Indigenous representation, valorization, and voices in the healthcare world is directly contributing to the substance abuse epidemic facing the Diné on the Navajo Nation. This research will visualize geospatial data to determine the extent to which alcohol use affects fatal auto-pedestrian incidents on the Navajo Nation. Further, this research is interested in exposing the roads that innervate the reservation that pose the greatest risk for pedestrian fatalities. After exposing the geographical trends and examining alcohol's effect on auto-pedestrian collisions, a discussion regarding the effectiveness of EBT and its ability to identify at-risk individuals will offer future directions in which to address pedestrian safety and alcohol abuse on the

1 Along with low socioeconomic status and lack of formal mental health services, geographic isolation has a unique effect on the increase in mental disorders and disabilities as it limits the social relationships between people that can help minimize the development and longevity of such disorders. Such isolation also makes accessing mental health care/services more difficult. Unequal access to food, water, healthcare and transportation has been linked to the worsening of the obesity epidemic and COVID-19 pandemic on the reservation (Linskey, 2022; Zhou, 2020)

2 Personal communication with a Diné man who would like to be referred to as Mr. Begay, 2023

3 Medicine Men are frequently called upon to heal medical conditions ranging from a broken arm to seizures using crystal gazing, hand tremblers, herbs, and healing ceremonies. These healers use their connection to Mother Earth, Father Sky and their guiding ancestors – The Holy People – to restore balance to a patient that has had their harmony disturbed by illness (Kim, 1998). Traditionally and currently, Diné Medicine Men are sources of healing

Navajo Nation.

Methods

This research combines geospatial and statistical data to create visuals that expose geographic and contextual trends. Maps and bar graphs were chosen to visualize the trends to make the data more accessible for, and interpretable by, a wide variety of readers. The sections below indicate where the geospatial data was gathered from, and which sources were referenced in each aspect of the literature review.

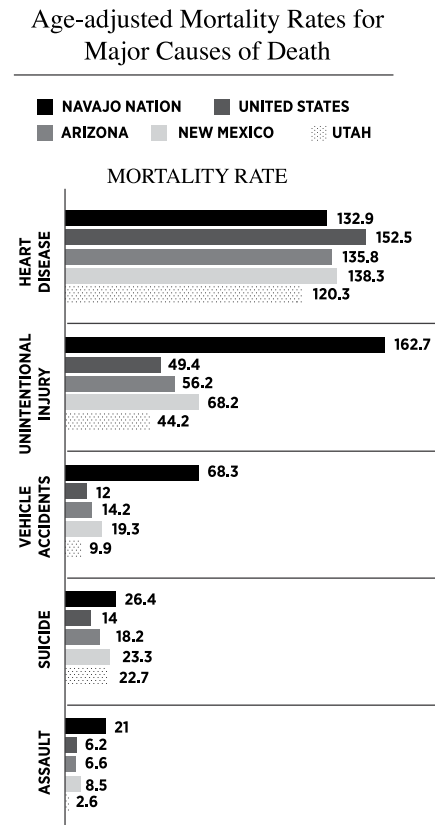
Creating Visuals

Data for the maps were gathered either using personal collection, querying, or open data sources that can be found in the “References” section of this report. Data was implemented into ArcGIS Pro Esri software and spatial analysis was done in the program. Graphs were produced using Microsoft Excel using data gathered from online open data sources and previous studies.

Boundaries for the Navajo nation and census tracts were downloaded as a shapefile from SFWMD_Geospatial_Services, 2022 and UGRC and the Utah Department of Health, n.d. in the WGS84 Web Mercator projection. The shapefile was added as a folder to ArcGIS Pro and transparency layers were adjusted for the visuals. Road and interstate polyline layers were generated manually in ArcGIS Pro. A satellite base map was chosen and the “Create” tool was used to trace US 491, US 64, I-40, US 191, SR 264, SR 118/US66, US 160, and Navajo Routes 12, 36 and 15 from that base map payer in the WGS84 projection. A spatial join was performed to join these new polyline features to a CSV with the data in Table 1 using the Road chart field, and graduated symbology was used to have each feature correspond to the percent of all pedestrian incidences that it was responsible for. Interviews with medical specialists and Diné community members about their expert opinions on these topics were conducted and recorded using an iPhone, and they were included with participant approval. This section is not reflective of a human subject data collection and was rather an optional inquiry in which Diné people and healthcare providers could share their firsthand experiences and opinions.

Figure 1

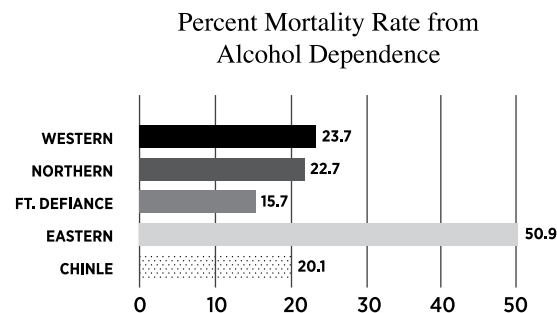
Graph displaying the age-adjusted mortality rates for the leading major causes of death on the Navajo Nation as compared to the US, Arizona, New Mexico, and Utah.



Adapted from “The Navajo Nation Fatality Report” 2020.

Figure 2

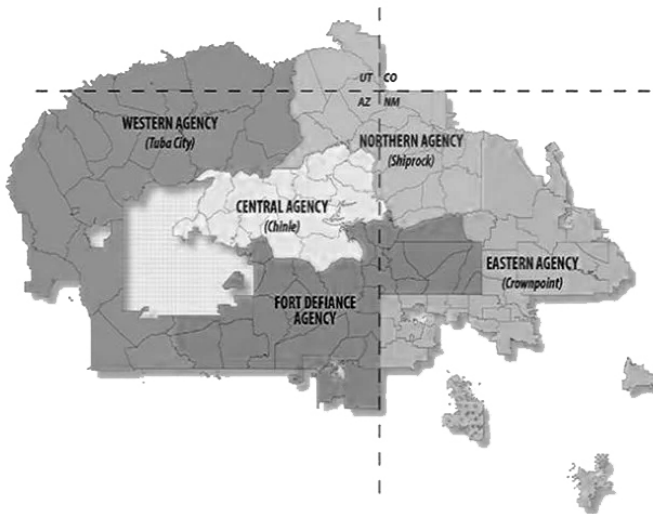
Chart visualizing the percent mortality rate as a result of alcohol dependence for the 5 Bureau of Indian Affairs agencies – Chinle, Northern, Eastern, Western, and Ft. Defiance



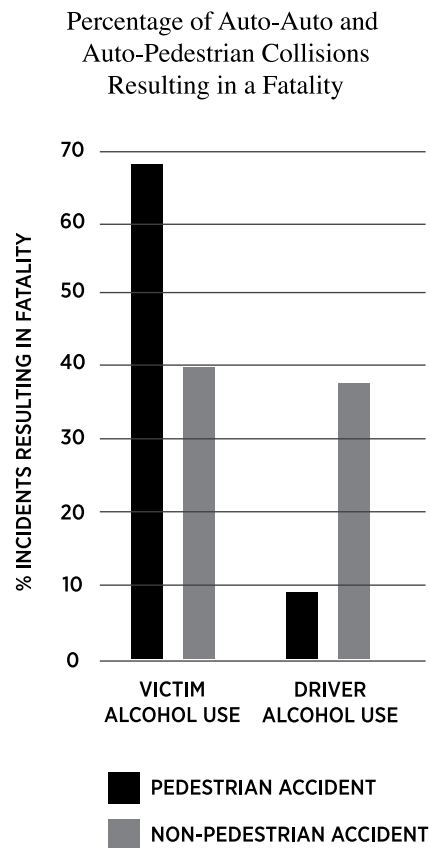
Adapted from the “The Navajo Nation Fatality Report” 2020.

Figure 3

Map indicating the location of each of the 5 BIA Agencies, source map provided by the Dine Nih Keyah Project.

**Figure 4**

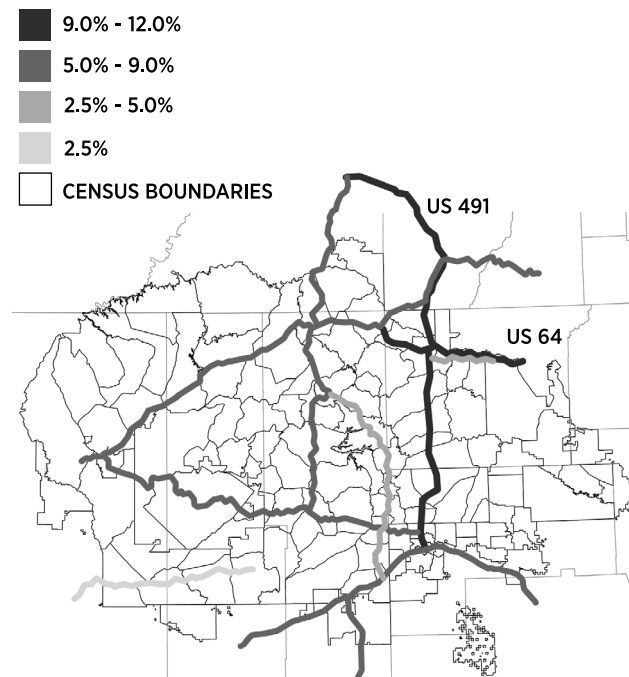
The percentage of incidents resulting in a fatality per 1,000 residents.



Adapted from "A Description of Fatal Car Crashes Occurring Within or Near the Navajo Nation", 2020.

Figure 5

Map displaying the roads that innervate the Navajo Nation with the highest incidences of auto-pedestrian fatalities



Adapted from "A Description of Fatal Car Crashes Occurring Within or Near the Navajo Nation", 2020.

Table 1

Roads reporting the highest rates of pedestrian/ bicycle and vehicle collisions, adapted from "A Description of Fatal Car Crashes Occurring Within or Near the Navajo Nation", 2020.

Road	Count	Percent of all Pedestrian Incidents	Cumulative Percent
US 491	19	11.9	11.9
US 64	17	10.7	22.6
INT 40	14	8.8	31.4
US 191	14	8.8	40.3
SR 264	12	7.5	47.8
SR 118/US 66	12	7.5	55.3
US 160	10	6.3	61.6
Navajo Route 12	5	3.1	64.8
Navajo Route 36	5	3.1	67.9
Navajo Route 15	4	2.5	70.4

Results

A study conducted in 2020 by the Navajo Epidemiology Center found that, of the 2,511 people involved in vehicle crashes on the Navajo Nation between 2010 and 2019, 42.9% of these incidents were fatal and alcohol use was recorded for 36.1% of these collisions (Foley, 2020). According to a statement released from the office of Jonathan Nez, President of the Navajo Nation, “alcohol-related illness and death among tribes was 5.6 times higher than among the U.S. population” with unintentional deaths being the leading cause of death; alone, vehicle crashes account for the largest percentage of unintentional deaths followed by alcohol poisoning, more than alcohol-related assault and suicide combined (Foley, 2020; Nez & Lizer, 2020;). **Figure 1** displays the age-adjusted mortality rate for the major causes of death on the Navajo Nation as compared to the United States and surrounding four corner states. The Navajo Nation has a markedly higher mortality rate for unintentional injury (162.7), most of which are motor vehicle incidents (68.3), as compared to the national rates of 49.4 and 12, respectively.

Of these 1,077 fatal vehicle incidents, 389 were a result of alcohol consumption by either the driver or the victim. It was found that fatalities from alcohol dependence are more prevalent in the Eastern Agency than any other Bureau of Indian Affairs (BIA) agency with it being the leading cause of death for males between the ages of 40 and 49 years old (**Figure 2**). Since both vehicle crashes and alcohol dependence have been identified as leading causes of death among the Diné on the Navajo Nation, **Figure 4** shows the breakdown of auto-auto and auto-pedestrian incidents on the Navajo Nation and the prevalence of alcohol use (Foley, 2020). In fatal auto-auto collisions, 37.1% of drivers and 40% of victims were reported to have a BAC 0.08. In fatal auto-pedestrian accidents, 8.2% of drivers and 67.6% of pedestrians had a BAC 0.08 with the average BAC recorded being 0.12%, meaning that 84% of the time the pedestrian is the one who was under the influence and killed.

Many of the Diné patients admitted to Flagstaff and Tuba City mental health clinics for alcohol detox suffer from frostbite and hypothermia during the winter months, but they cannot feel the cold due to elevated BAC levels (Linskey, Personal Communication, 2020). The majority of these patients are picked up by state troopers after finding them walking along the side of Navajo Nation roads with BAC levels as high as .65% – far above the fatal BAC limit and LD50, this is partly due to a huge lack of public transportation and pedestrian infrastructure.⁴ To determine which roads pose the greatest risk for

auto-pedestrian incidents either due to the location of the road itself or the lack of pedestrian infrastructure (lights, sidewalks, intersection), data from the 2020 publication of “A Description of Fatal Car Crashes Occurring Within or Near the Navajo Nation” was queried and processed in ArcGIS Pro to create **Figure 5**. The figure shows how US 491 and US 64 (red) alone account for 22.6% of total reported auto-pedestrian incidents with the 10 roads pictured on the map – and identified in **Table 1** – accounting for >70% of all vehicle incidents on the Navajo Nation.

Among Navajo Nation residents, alcohol dependence was found to be the 10th leading cause of death with alcohol dependence increasing by 0.8% between 2010 and 2015, being more prevalent in children and young adult populations (Foley, 2020). To explore this phenomenon further, I turned to Doctor Christopher Linskey who is a psychiatrist who works in Coconino County and has been a practicing psychiatrist for 33 years. Dr. Linskey works in the Flagstaff City Jail doing psychiatric court evaluations for the Navajo Nation and has substantial experience working with the Diné community. I asked him to elaborate on the history of alcohol use in his patients within the jail system to better understand the source of the problem. “Many of my patients tell me that they started using as young as eight or nine,” begins Dr. Linskey, “most of them exhibit traits of antisocial personality disorder and attention deficit disorder, too.”⁵ They tell me that their guardians would frequently give them alcohol to calm them down, and this behavior normalized alcohol consumption in the household.” Due to this notion of “normalcy,” alcohol use becomes more frequent and accepted among younger Dine individuals, and the progression of dependency only worsens into their adult life.

As their dependency at a young age began largely as a result of a need to be “calmed down,” the prevalence of ASP and ADHD (attention deficit hyperactivity disorder) in young Diné children may be used as a predictor of severe alcohol-related problems as an adult. A case study conducted by the Department of Community and Preventive Medicine investigates how a history of early childhood and adolescent conduct disorders could lead to alcohol dependence and severe alcohol-related problems in Diné populations. Researchers found that young Diné people are at an “especially high risk of developing the most severe problems” when it comes to alcohol abuse due to the current health intervention programs that treat the entire population instead of assessing individual risks within the population (Kunitz, 1999). This study exemplifies the positive correlation between conduct disorder and heightened risk for alcohol abuse later in life, and these findings subsequently encourage health programs to expand their intervention

⁴ The LD50 describes the limit at which 50% of the population would die from alcohol poisoning, which is 0.40%.

⁵ Antisocial personality disorder cannot be diagnosed until 18 years of age, but many conduct disorders observed in young substance users develop to become diagnosed as ASP later in life.

programs to focus on individual at-risk groups to cultivate healthy interaction and consumption patterns in the initial stages of dependence.

Discussion

Pedestrian infrastructure, safety, and possible conclusions

The statistics presented show how pedestrians in the Eastern and Northern agencies are at the greatest risk of being involved in a fatal auto-pedestrian incident as a result of alcohol use. Vehicle collisions account for the largest percentage of death resulting from unintentional injury on the Navajo Nation, and 36% of fatal auto-pedestrian incidents involved either an impaired driver or victim. US 491 and US 64 account for 22.6% of the total fatal auto-pedestrian collisions recorded between 2010 and 2019, both of which are paved, principal arterial roadways – which is the roadway type that accounts for 49.1% of all pedestrian incidents on the reservation (Foley, 2020)⁶. The 2010 Navajo Nation Population Profile revealed that 53% of the total population of the Navajo Nation live in border towns with Farmington, NM having the largest population of Diné residents (9,522 Diné) followed by Gallup, NM (8,119 Diné) and Flagstaff, AZ (5,504 Diné; Navajo Division of Health, 2013).⁷ US 491 passes directly through Gallup, NM while US 64 does the same in Farmington, NM implying that there may be a spatial relationship between the higher population density of border towns and proximity to principal arterial roads.

Unintentional injuries are the leading cause of death among all Diné ages 1- 59 with alcohol dependence being the 5th leading cause of death for males between 20 and 39 years old; further, 76.2% of all pedestrians involved in a fatal auto-pedestrian incident were male with the average age being 38.1 years old, meaning men are 1.24x more likely to be involved in a fatal auto-pedestrian collision than women (Foley, 2020).⁸ With vehicle incidents accounting for the largest portion of unintentional injuries resulting in death, and both alcohol use and auto-pedestrian fatalities being more prevalent among males, more research is needed to determine if there is a link between this age group and gender and their susceptibility to alcohol use, and whether this susceptibility directly affects rates of auto-pedestrian fatalities among the Diné. Being a Diné male

between the ages of 20 and 39 makes one more likely to be a victim in a fatal auto-pedestrian incident involving alcohol use.

Conclusions and Future Directions

The research conducted and the literature reviewed clearly show that the Diné living on the Navajo Nation experience disproportionate levels of auto-pedestrian fatalities as a result of alcohol consumption due to an inadequate healthcare system that fails to support alcohol remission and rehabilitation. After analyzing the results, it appears that principal arterial roads that innervate the Eastern and Northern agencies – US 491 and US 64 – pose the greatest threat to pedestrian safety, especially in border towns such as Farmington and Gallup, NM. The spatial correlation between population density and larger, paved roads is evident, and it is advocated that pedestrian safety studies be conducted on these roads as well as the other 8 roads identified in **Figure 5** and **Table 1**. The purpose of these studies should be to increase pedestrian safety either through the improvement and/or addition of pedestrian infrastructure or the creation of services – such as public transportation – to reduce auto-pedestrian collisions.

While the model of Evidence-Based-Treatment programs theoretically is a suitable solution to mitigating the frequency and severity of alcohol abuse on the Navajo Nation, the continued disregard of individual patient histories, as well as a lack of recognition of the abuse that they have faced, have proven to be formidable obstacles to the efficacy of this model among the Diné. While this report is not proposing a policy to implement EBT on the reservation, it is concerned with outlining the other dimensions of health that exacerbate the effects and consequences of alcohol abuse, primarily as it relates to acute alcohol-related auto-pedestrian incidents. The potential social determinants of health outlined in the Discussion show how being a Diné male between the ages of 20 and 39 makes one more likely to be a victim in a fatal auto-pedestrian incident involving alcohol use. Identifying this demographic to be more likely to be victims of motor vehicle fatalities – coupled with identifying childhood conduct disorders in young Diné – may prove useful in future studies in which EBT is used to treat patients on an individual level based on the specific risks they face when confronted with alcohol use, abuse, and addiction.

⁶ As described by the New York Department of Transportation, it is “a road which carries the major portion of trips entering and leaving the urban areas and outlying rural and recreation areas” (NYDOT.gov, n.d.).

⁷ Border towns, towns on the border of the reservation, have higher population density than other towns on the Navajo Nation as there is better access to grocery stores, healthcare services, public transportation and employment opportunities. Farmington, NM has a population density of 1,377 /mile² while the Kayena, AZ is 354/mile² 8 A study conducted in 2021 by the Bureau of Women’s and Children’s Health found that the leading cause of death among children ages 1 to 14 years old was motor or non motor vehicle crashes (AZDHS, 2021).

Call to Action

While the intention of this piece is not to propose a policy to address the deteriorating, harmful and inadequate state of healthcare services on the Navajo Nation, it is clear that Indigenous healthcare needs to be approached differently. The current healthcare system that serves the Diné is inadequate and ineffective, and the integration of Western medicinal approaches will never prove effective without the valorization of Native needs and histories within this approach. Equal priority must be placed on the cultural values of the Diné and modern medicine approaches, and this can begin to be done by recognizing the barriers to health – unequal access to grocery stores and healthcare facilities, poor pedestrian infrastructure, lack of substance abuse support – that only reinforce feelings of depression and isolation and continue to propagate the stereotypes of alcohol consumption among the Diné.

Although it is important to recognize these issues, it is equally if not more important to realize that the Diné are not victims: their ancestors have been in the southwestern United States for hundreds of generations and these descendant communities will continue to be. The public health concerns identified within this report are not the narrative, and their tribe is bigger than the data. Western influence and medicine alone cannot fix the healthcare system's shortcomings, but by asking how Western intervention can work together with traditional practices will strengthen the health and sense of global community on the Navajo Nation. As health improves among the Diné, so does the health of the Four Corners, the Southwest, and the United States as a whole. Solutions can begin to form by bringing Diné health concerns to light by coming from a place of empathy and the willingness to learn and grow. It is evident that more research is needed to test the effectiveness of this new healthcare approach, but bringing Diné health concerns to light is the first step to bringing justice to the Diné community as a whole.

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Water Haircuts: A Solution to Drought or an Empty Cup Policy? A Look at the Utah State Engineer's Internal Haircut Policy and Proposals to Strengthen Utah's Prior Appropriation System

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Abstract:

The Office of the Utah State Engineer — the administrative office responsible for tracking and determining water rights in the State — has recently adopted an internal “haircut” policy that runs directly contrary to some of Utah’s long-established water rights principles. The State Engineer’s haircut policy appears to be a reaction to increasingly intense demands to free up water resources in the State. This paper analyzes this haircut policy and argues that the State Engineer should abandon its course of action due to three policy-related concerns: (1) this policy creates legal uncertainty for water right holders; (2) these “haircuts” possibly violate the Takings Clause; and (3) this policy does little to free up water for intended purposes. Instead of undermining Utah’s legal framework for water distribution, as the haircut policy does, the State should adapt and strengthen its prior appropriation system to meet the demands of emerging water-related problems. These adaptations include increasing funding for the State Engineer to administer and enforce water rights, establishing a conservation trust, and providing the State Engineer with water-shepherding powers to ensure that water is conserved and put to its intended use.

Introduction

Utah’s unique geography and climate create an intense need to regulate water distribution (Utah Division of Water Rights, 2009). Most of the Western United States is a mountainous, arid region, and access to sufficient water means life or death to individuals and entire communities. Consequently, many states west of Kansas City adopted the prior appropriation doctrine — a legal system that establishes rights to use water on a first come, first serve basis (Dellapenna, 2011). The prior appropriation system was born out of a need to create an environment of legal security around water diversion that would be conducive to development and wider settlement (Dellapenna, 2011). Utah, being no exception to these circumstances, has strictly adhered to the prior appropriation doctrine for well over a century (Donaldson, 2007; Utah Division of Water Rights, 2009).

Recently, however, the Office of the Utah State Engineer (State Engineer) — the administrative office responsible for

tracking and determining water rights in the State — has adopted an internal policy that runs directly contrary to some of Utah’s long-established water rights principles. The State Engineer has begun requiring water right holders to bear permanent diversion and depletion cuts, also known as “haircuts,” to their water rights during the change application process. The result of this policy is to non-judicially strip individuals and entities of previously established property rights through administrative forfeitures.

The State Engineer’s haircut policy appears to be a reaction to the general water crisis in Utah, which has led to what the Division of Water Rights views as an “over-appropriation” problem. The State is facing extreme drought, and climate change and increases in population are exacerbating the problem. These environmental conditions question the sustainability of Utah’s major population centers. For example, startling evidence suggests that the Great Salt Lake is evaporating faster than previously anticipated due to climate change and an ever-increasing demand for water diversion (Abbott, 2023). Some

reports claim the lake could disappear within five years if Utah does not act, leaving the Wasatch Front susceptible to toxic dust storms laced with arsenic and other heavy metals (Flavelle, 2022). These factors combine to stress State resources and create a water distribution conundrum that has arguably forced the State Engineer to bend the rules to find solutions to a number of competing problems.

Despite these challenges and the fact that the State Engineer does not have the authority to make such haircuts, this paper posits that the State Engineer's policy response is the wrong course of action for three reasons. First, the State Engineer created legal uncertainty surrounding water rights by undermining Utah's water distribution system. This legal uncertainty undercuts the marketplace for water, which will have far-reaching consequences for Utah's economy. Second, the State Engineer's haircut policy likely runs afoul of the constitutional Takings Clause of the Fifth Amendment because it deprives water right holders of property rights without just compensation. Third, if the State Engineer is concerned about "downstream" appropriators or conservation efforts, this policy does little to ensure that water reaches intended recipients or provide any viable solution for the equitable apportionment of water in the future.

Unenviably, the State Engineer is between a rock and a hard place — wedged between a severe water crisis that demands solutions to "free up" water and the legal restraints of the prior appropriation doctrine, the Utah Constitution, and the United States Constitution. Instead of abandoning or undermining Utah's prior appropriation system, however, this paper proposes policy changes that would give the State Engineer new tools to address issues, such as conservation, while adding clarity to the law and security to the property rights the law supports. These proposals include increasing funding for the State Engineer to administer and enforce water rights, establishing a conservation trust, and providing the State Engineer with water-shepherding powers to ensure that water is conserved and put to its intended use.

This paper proceeds in three parts. Part 1 provides a brief background on water law in the United States and lays out the principles and development of the prior appropriation doctrine in Utah as a foundation for subsequent analysis. Part 2 elaborates on the State Engineer's haircut policy by looking at an example of its application in a case involving early priority water rights in Summit County. This section then evaluates the legality of the State Engineer's decision to issue haircuts in this example. Part 3 discusses the problems created by the haircut policy and the utility of the prior appropriation doctrine generally before proposing three policy changes.

Part 1: Legal Background

1. General Background on Water Law

The use, control, and management of water, even in wet climates, have always been essential for development (Getzler, 2006). In the United States, states, rather than the federal government, mainly control the development of water law (Dallapenna, 2009, p. 53). Although water law differs in each state, states have generally adopted one of two general approaches to water distribution: (a) riparianism, which has become dominant in the Eastern United States, or (b) the prior appropriation doctrine, which has become dominant in the West (Dallapenna, 2009, pp. 53-54; Donaldson, 2007; Sprankling, 2017).

a. The Riparian Doctrine

The basic concept of the riparian doctrine is that land "owners whose land adjoins a stream, river, lake, or other water-course" have rights to use the water from that source (Sprankling, 2017, p. 530). For example, suppose that John owns a tract of land that borders the Red River. In a riparian district, John would hold a water right to take water from the river simply based on the location of his property (Sprankling, 2017, p. 530). The roots of this doctrine originated in England and found their way to the early colonies as part of the common law tradition (Dellapenna, 2011, pp. 55-57).

Underpinning riparianism is the basic fact that water is readily available in England and the Eastern United States (Dellapenna, 2011, p. 1; Grossfield, 1984). As a result, these areas often suffer from an annual excess of water flow (Sprankling, 2017, p. 530). To a Westerner born and raised in the high desert, the concept that land in the Eastern United States requires no irrigation is completely foreign. But, in riparian jurisdictions, the primary concern is keeping water off one's property to prevent damage (Rinkenberger, 1984). In other words, excess water is generally seen as a nuisance, and because the land is productive without irrigation, diverting large amounts of water from streams, rivers, and lakes is unnecessary and, in fact, makes little sense apart from special projects.

b. The Prior Appropriation Doctrine

In the Western United States, low annual rainfall requires irrigation of the land through the diversion of water from streams, rivers, lakes, or aquifers that are often located long distances from the place of intended use. These issues of proximity and distance gave rise to the prior appropriation system (Coffin, 1882; Irwin, 1855). Two fundamental conditions or principles underpin the prior appropriation doctrine: (1) the appropriator must respect priority, and (2) the appropriator must put the water to beneficial use (Sprankling, 2017, p. 530-531;

Utah Code Annotated § 73-3-1, 2021). The principle of priority dictates that “senior” water right holders (those that put the water to use first or earlier in time) are entitled to their full water rights before “junior” water right holders (those that appropriate water from a source at a later time) are entitled to any water (Sprankling, 2017, p. 531). Consequently, in a time of water shortage, the junior water right holders can only divert water from a source once the senior holders have taken their full share of allotted water (Sprankling, 2017, p. 370). Therefore, when there is not enough water, which is almost always the case in the Western United States, some water right holders are left with a lesser quantity or no water to divert from surface or underground sources.

The condition or principle of beneficial use means that when someone diverts water, they must use that water in a legally defined and productive manner (Sprankling, 2017; Swenson, Part I, 1984). This principle ensures that appropriators utilize all available water in the “best” way possible (Sprankling, 2017; Smith, 1994). Traditional examples of beneficial uses declared by courts and statutes include irrigation for agricultural purposes, stock watering, or diversion for drinking water, also known as municipal diversion (Donaldson, 2007; Sprankling, 2017). In other words, most commercial or life-sustaining uses would satisfy the beneficial use standard. The beneficial use declared by the appropriator is critical to the scope of that right moving forward. In addition, the use must be “continuously beneficial” (Donaldson, 2007, p. 371). This means that a court may declare an appropriator’s right as abandoned or forfeited if the right holder stops using the water for a statutory period or for the use declared (Donaldson, 2007).

In sum, courts in the Western United States realized that the fundamental assumptions that allowed riparian doctrines to flourish in the Eastern United States ran contrary to the geographical realities of the areas they settled and were trying to develop (Coffin, 1882). The scarcity of water made settlement and development uncertain. Although this system appears rigid or harsh, the prior appropriation doctrine created a favorable legal environment for sustainable development in the Western United States because it provided clear legal protections for water appropriators and their economic investments.

2. Utah’s Approach to Water Distribution

a. Utah’s Climate and the Development of Its System of Water Law

Utah is one of the driest states in the country, ranking second behind Nevada for the lowest average annual precipitation of any state (NOAA National Climatic Data Center, 2020). In addition, Utah’s high average elevation, especially near the State’s population centers, means that most of the State’s annual

precipitation is locked in snowpack and inaccessible for irrigation for much of the year (Busby, 2013). These factors presented a unique challenge to early settlers before the federal government created an extensive reservoir system to capture and store the annual snowmelt in Utah (Weber Basin Water Conservancy District, 2016).

Given these environmental factors, Brigham Young — an early leader of The Church of Jesus Christ of Latter-Day Saints, the first European-descended group to settle the area — rejected riparianism and instituted a top-down approach to water distribution (Swenson, Part I, 1985, p. 166). After incorporating into the Union in 1896, Utah enshrined elements of an appropriation system of water distribution in the State constitution (Utah Constitution, 2023, art. XVII, § 1, art. XI). In fact, the new State constitution confirmed pre-existing water rights (Utah Constitution, art. XVII, § 1). In 1897, the Utah state legislature established a procedure for acquiring new water rights (Swenson, Part I, 1985, p. 173). Subsequently, in 1903, the State passed and adopted an administrative permit system, which is in place in Utah today (Swenson, Part I, 1985, p. 173).

b. Utah’s Legal Framework for Establishing Water Rights

Utah statutes and legal practice define all waters in Utah as property of the public with private rights to the use of water, allocated under an exclusive appropriation process governed by the condition that appropriators put the water to beneficial use (Utah Code Annotated, 2021, § 73; Little Cottonwood Water Co., 1930, pp. 120-121; Moyle, 1947, p. 887; Smith, 1994). If the appropriator meets these conditions and a water right is “perfected,” that water right acquires the status of real property as an incorporeal hereditament. Appropriators may exclusively obtain a new surface water right from a stream, river, or lake (and, since 1935, an underground source water right) by filing an application with the State Engineer (Utah Code Annotated, 2021, § 73-3-1; Utah Division of Water Rights, 2009; Smith, 1994, p. 20). Under statute, the State Engineer is “responsible for the measurement, appropriation, apportionment, and distribution of water” in Utah (Utah Division of Water Rights, 2009). Once an appropriator makes an application, the State Engineer must grant the appropriation if there is a determination of sufficient water in the source and the appropriation does not violate some other principle, such as the beneficial use standard (Swenson, Part II, 1985; Little Cottonwood Water Co., 1930).

Furthermore, an appropriator may file a change application to adapt the use or point of diversion of a water right once the State Engineer has established a right. The State Engineer is also responsible for presiding over any such applications, which frequently occur, as development has increased the demand for new and different water uses (Utah Code Annotated, 2021, § 73-3-1). For example, one catalyst for change

applications is often urbanization, such as in Summit County or Utah County, where irrigators seek to change water uses or points of diversion for domestic and municipal purposes (Perlich, et al., 2017; Smith, 1994, p. 20). The ability to make a change application is essential to meet the underlying goals of the prior appropriation doctrine — to ensure that appropriators always put water to its “best” use — and to maintain the economic value of a given water right.

The change application process requires filling out a form, which asks basic information about the water right the appropriator is seeking to alter, the reason for change, and proof that the change will not impact other’s rights (Utah Code Annotated, 2021, § 73-3-3). Once an appropriator files a change application with the State Engineer, the State Engineer reviews the application under the same criteria for new appropriations under Utah Code Annotated § 73-3-8 (Bonham, 1989). The Utah code requires that the change application be approved unless it “impair[s] any vested right without just compensation” (Utah Code Annotated, 2021, § 73-3-3).

Highlighting the State Engineer’s authority, it is also important to note the State Engineer is only responsible for administering and supervising the appropriation of the waters of Utah to maintain efficiency in the appropriation, distribution, and conservation process (Whitmore, 1944). The State Engineer cannot adjudicate vested rights between parties and, therefore, may not consider non-adjudicated forfeitures when reviewing a change application (Bryan, 2015; Jensen, 2011; Utah Code Annotated, 2021, § 73-1-4 (2)(c)(i)). The code specifically states that: “[a] change of an approved application to appropriate water does not: (a) affect the priority of the original application to appropriate water. . .” or affect the right in any substantive way (Utah Code Annotated, 2021, § 73-3-3 (6)).

c. The Legal Status of Water Rights in Utah

As stated, once a water right is “perfected,” that water right holds the status of real property (Sax, 1990). This feature is essential to Utah’s prior appropriation system because it provides legal security and economic value to water rights. An appropriator can perfect a water right in one of two ways. First, the right may be perfected through an individual statutory process. In Utah, after the State Engineer approves an appropriation application, the appropriator is given time to “develop the source” and put the water to beneficial use (Utah Division of Natural Resources, Water Rights Process). After a development period, the appropriator must show “proof” of completion of the development of the water right and demonstrate that they are using the water as stated (Utah Division of Natural Resources, Water Rights Process). A Utah licensed engineer or a land surveyor must prepare or file such proof documentation (Utah Division of Natural Resources, Water Rights Process). Once proof is demonstrated and accepted, the State Engineer

issues a certificate for the diversion and beneficial use of the water (Utah Division of Natural Resources, Water Rights Process). A certificated water right is then considered “perfected” and acquires the status of real property (Utah Division of Natural Resources, Water Rights Process).

The second way an appropriator may perfect a water right is through a general adjudication or decree. The purpose of a general adjudication “is to record all water claims from a particular source which subsequent appropriators can rely upon before making their investments” (Green River Canal Co., 2004, p. 676; Utah Code Annotated, 2021, § 73-4-1; Utah State Eng’r, 2018, p. 564;). In essence, general adjudications and decrees establish detailed records of existing rights. These records are essential to enforcing water rights in relation to the rights of other appropriators (Smith, 1994, p. 20). When a water right is perfect by a general adjudication, the decree establishes that the water in a given watershed has been appropriated and recorded on the official register. At that point, no one can alter the right, including the State Engineer, unless a court reopens the analysis of the decree or the holder of the right forfeits their right to the water (Swenson, Part I, 1985, pp. 189-196). To establish a general decree, applicants can file for a general adjudication to perfect or fix all the rights in a particular drainage. Utah codified this process under statute (Green River Canal Co., 2004, p. 676; Utah Code Annotated, 2021, § 73-4; Utah State Eng’r, 2018, p. 564;). Such decrees are significant and essential to prevent an over-appropriation of water in a particular watershed.

Part 2: The Haircut Policy and Its Legality

1. The Haircut Policy: The Summit Case Study

Turning to the haircut policy, a change application filed by Summit Water Distribution Company (“Summit”) provides a case study for analysis. On May 26, 2016, Summit made a permanent change application to the State Engineer’s office for some of its vested water rights (Summit Water Distribution Company, Who We Are; Utah Division of Water Rights (Order), 2017;). The purpose of the application was to change “points of diversion, places of use, and uses of 4.73 cubic feet per second” (cfs) of water to some of Summit’s existing early-priority water rights to increase its water usage for municipal purposes (Utah Division of Water Rights (Order), 2017, p. 1). After considering the application, the State Engineer issued a decision order (the “Order”) dated November 22, 2017, approving the application (Utah Division of Water Rights (Order), 2017, p. 1). However, the Order stated that “the volume of water approved to be diverted and used should be limited in a similar manner as other change applications on water rights stemming from Weber Decree Awards on these historical sources . . .”

(Utah Division of Water Rights (Order), 2017, p. 5). Walking through their reasoning, the State Engineer declared that many water right holders filing change applications along the Weber River have been made to bear a cut of 10% of their existing water rights (Utah Division of Water Rights (Order), 2017). Later in the document, the State Engineer stated that they made the haircut “to provide sufficient definition of the right to assure that other vested rights are not impaired by the change” (Utah Division of Water Rights (Order), 2017, p. 5).

In essence, Summit aimed to move the points of diversion from a historical surface source to an underground well (Utah Division of Water Rights (Order), 2017). Intuitively, the reason behind making such a change is to ensure a more secure point of diversion. Generally, the problem with surface diversion from streams, rivers, or lakes is that water levels fluctuate seasonally in such sources. Conversely, aquifers contain a steadier source of water, much like giant underground water tanks (NOAA, n.d.). Therefore, making such a change would be beneficial from Summit’s perspective because it could mean that there is the potential to divert water from the well at times when no water is available at the historical surface source, allowing them to fulfill their entire right each year. However, from the State Engineer’s perspective, this may impact “other vested rights” because Summit would be diverting more water than they historically could because of long-trend water cycles (Utah Division of Water Rights (Order), 2017). Therefore, the State Engineer permanently cut Summit’s vested rights by 10%.

2. The Legality of the Order

Upon review, it is clear that the State Engineer’s actions were impermissible. Utah rules and procedures declare it illegal to alter the point of water diversion without first filing an application with the State Engineer (Utah Code Annotated, 2021, § 73-3-3). If a court perfects a water right through a general decree, as is the case with the rights in this example, the State Engineer must approve the change application and convert the whole right to a new use as long as it does not impact another right holder (Utah Code Annotated, 2021, § 73-3-8).

Given the law, it appears that the State Engineer adjudicated what is essentially a forced forfeiture or reduction of a perfected water right, which is outside of the State Engineer’s statutory mandate (Smith, 1994, p. 20). There was no evidence in the Order that Summit’s change would impact other vested rights. Summit also did not forfeit its rights. According to the Utah code, forfeitures dictate that an individual right holder can lose their water right if they stop using the water for seven years, which is not the case (Utah Code Annotated, 2021, § 73-1-4). Moreover, once the court has decreed a water right, the only way that a forfeiture can be validated is by a court-ordered adjudication (Utah Code Annotated, 2021, § 73-1-4). In essence,

there is no legal basis for the State Engineer’s ordered haircut, especially since the court judicially decreed these rights. According to statutory mandate, the State Engineer should have approved Summit’s change application and left its rights intact (Jensen, 2011).

Part 3: Analysis of the Haircut Policy

1. Is the Haircut Policy a Solution to Various Issues the State Engineer Is Facing?

As stated, drought in Utah, combined with increasing development pressures, has stressed Utah’s hydrological systems, leaving many appropriators with an inadequate supply of water. These conditions have forced the State Engineer to devise solutions to free up water in Utah’s watersheds, and this haircut policy appears to be one attempt at some type of fix to these problems. Despite these pressures, this haircut policy is not a solution to the demands the State Engineer faces. Aside from the fact that the State Engineer does not have the authority to impose haircuts in cases like the Summit example, there are primarily three wider policy and legal issues connected with this internal policy: (a) the policy undercuts Utah’s legal framework for water distribution because it creates legal uncertainty surrounding water rights; (b) the State Engineer’s haircut policy is a possible violation of the constitutional Takings Clause because it deprives water right holders of their property rights without just compensation; and (c) if the State Engineer is concerned about downstream or conservation efforts, for example, this policy does little to ensure that water reaches its intended recipients.

a. The Haircut Policy Undercuts Utah’s Prior Appropriation System

One of the primary goals of the prior appropriation doctrine is to create an environment of legal certainty surrounding water diversion to allow for sustainable development (Coffin, 1882). In contrast to these objectives, the State Engineer’s policy creates legal uncertainty for existing water right holders because right holders can no longer be confident that the State Engineer will not arbitrarily diminish their vested property rights. Creating such legal uncertainty surrounding the security of water rights could have far-reaching impacts on Utah’s economy in general. To one degree or another, almost every sector of Utah’s economy relies on the ability to appropriate water. Therefore, undermining the security of water rights could mean the loss of billions of dollars to the State’s GDP because appropriators can no longer be sure that they can divert the water they need to maintain life or various economic enterprises.

Furthermore, specifically related to the Summit case, the State Engineer also distorted the “pecking order” principle of

the prior appropriation doctrine by cutting earlier priority water rights in favor of the river system, essentially meaning junior appropriators. This legal confusion undermines the economic value of water rights in Utah, which may also hamper development. Economic development in Utah requires secure access to water, and the prior appropriation doctrine gives more diversion security to earlier priority holders (Coffin, 1882). Therefore, those rights with earlier priority dates carry increased economic value because the higher the right holder is in the “pecking order,” the more likely they will have access to water before water from the source is gone due to simple supply issues. These economic underpinnings incentivize the productive use of water. Under this policy of issuing standard haircuts to decreed rights, however, senior priority holders are now in a situation where there is uncertainty surrounding whether the State Engineer will force them to bear a depletion and diversion cut if they make a change application. This internal policy begs the question of why water appropriators would pay more to acquire more valuable water rights with higher priority dates.

b. The Haircuts Are a Potential Takings Violation

As stated, Utah statutes and legal practice define all waters in Utah as property of the public with private rights to the use of water allocated under an exclusive appropriation process under the condition that holders put the water to beneficial use (Utah Code Annotated, 2021 § 73-3-1). If the appropriator meets these conditions, and the water right is “perfected,” that water right acquires the status of real property. Perfected water rights, therefore, are subject to the Takings Clause under the U.S. Constitution, as with any other legally deemed property right (Sax, 1990, pp.3-4). The Takings Clause of the Fifth Amendment provides: “nor shall private property be taken for public use, without just compensation” (U.S. Constitution, V Amendment; Sprankling, 2017, p. 969). In other words, if the government physically invades or diminishes the value of a property right for public use, the government must justly compensate the holder of the property right (Sprankling, 2017, p. 696). In the case of Summit and other potential cases under this haircut policy, the State Engineer took and reverted a portion of Summit's water rights to the public, creating a potential Takings Violation.

From a broader perspective, the Takings Clause provides constitutional assurance for property rights. Taking property without just compensation undermines these legal assurances. At the very least, if a court were to find that the State Engineer, through this haircut policy, did take property without just compensation, this could create an unnecessary burden on Utah taxpayers because they would be required to compensate entities such as Summit. At the same time, this policy would put water back in the system and unjustly enrich downstream users that divert this water.

c. The Haircuts Do Not Aid Potentially Impacted Right Holders

Lastly, it is unclear exactly why the State Engineer has instituted a policy of diversion and depletion cuts, but in the Order, the State Engineer declared that they were enforcing a haircut on Summit to ensure the change application did not impact the vested rights of other appropriators. For one thing, Summit's water rights are senior in priority to all other rights in the subdrainage with the exception of those few rights that share the same priority. Moreover, the State Engineer provided no evidence that the change Summit requested would create a problem for other appropriators. Even if there were a problem, the State Engineer's course of action would do nothing to address it. This action does not guarantee that any potentially “impacted” water appropriators will ever see any newly freed water, as other appropriators might divert it before it reaches them. The same goes for any hypothetical conservation efforts. Therefore, given the system's constraints, although freeing up water in a watershed seems like it could fix several problems, it only creates uncertainty and would, again, likely only unjustly enrich other appropriators.

2. Should Utah Abandon the Prior Appropriation System?

The State Engineer is grasping at straws and bending the rules to address a number of problems stemming from Utah's water crisis. Given the challenges and the tight constraints imposed on the State Engineer by the prior appropriation doctrine, perhaps it is time to consider whether this system still works for Utah. Many scholars have put forth reasonable arguments against the prior appropriation system, suggesting that it is inefficient and a questionable method for allocating such an essential resource (Gaffney, 1969; Johnson, 1971).

For instance, Tarlock argues that “the West has changed from a raw commodity production colony to an urban region fully integrated into the global economy” (Tarlock, 2001; Benson, 2012). As a result, “the perpetual ‘use it or lose it rights’ lock too much water into marginal agriculture and generally encourage inefficient off-stream consumptive uses to the detriment of aquatic ecosystem values and the needs of growing urban areas” (Tarlock, 2001, p. 647). Consequently, many have pronounced the doctrine dysfunctional or “argued that it should be replaced by non-perpetual permit systems that better value consumptive and instream uses” (Benson, 2012; Tarlock, 2001). Wilkinson also pronounced the prior appropriation doctrine as “dead” and not useful over 30 years ago in 1991 (Wilkinson, 1991).

On top of these economic and equity arguments, it is undeniable that demographic and climatic changes are threatening the sustainability of settlement in the West (Cosens, 2016).

Utah's population is growing at a remarkable pace, especially in areas like Summit County. These population demands are putting serious strain on natural resources while the State is already in the midst of possibly the worst drought on record (Culp, Glennon, & Libecap, 2014; Lederman & Koenig, 2022; Winslow, 2021; Woodruff, 2023). These conditions are forcing many western states to violate water rights by limiting the water supply for entire communities to ensure there is "enough to go around" (Benson, 2012; Bryon Bethany Irrigation District, 2021; Carroll, 2021; Groom, 2021; James & Syed, 2021; Lurie, 2015; MyMotherlode, 2021; Siegler, 2017). Some Utah towns are even "pulling the plug on growth" to manage water distribution better (Healy & Kasakove, 2021).

These changes reasonably question the viability of the prior appropriation doctrine. Prior appropriation simply does not permit much administrative flexibility to ensure there is enough water to go around. As a result, it is challenging for state authorities to react to drastic climate shifts and changing precipitation levels. Western states may have to consider changes to water distribution, which will allow for more flexibility and equitable redistribution from the government.

However, while there are arguments against the prior appropriation system, none have put forth truly viable alternative frameworks for western water distribution. For instance, if Utah was to move away from a perpetual permit system to create flexibility in water distribution, this may free up water previously locked up in the agricultural sector, but it could also create a chilling effect on the development of other economic sectors. This chilling effect would result from such a policy because, without the legal protections over water that Utah's prior appropriation system guarantees, few businesses may want to leave the future of their enterprise up to approval from state officials on a continuing basis.

Simply stated, the prior appropriation doctrine establishes a system that reliably works. Living in a desert requires legal protections for water use, and there is no way around it, even as the region becomes more urban and globally integrated. Even if thought to be harsh, the doctrine's rigidity is what makes it so effective. This framework gives state authorities solutions for increasingly dry conditions. It is only when state authorities do not strictly follow the doctrine do problems arise.

Furthermore, in the face of increasing demand for new development and more water, maintaining the prior appropriation doctrine will allow communities to better gauge when to limit development and prevent destructive overuse of resources. It is a supply-first policy, where supply is allowed to dictate demand. Generally, market solutions are far more predictable and sustainable than adopting a centralized water distribution system that might be temporarily more equitable but ultimately subject to political winds. It is impractical and undesirable to return to a time when one central governing authority, such as

in the time of Brigham Young, has sole discretion over water distribution, determining who, when, and how individuals and entities may access water. Ultimately, this framework provides the most sustainable solution for western development.

3. Proposals for Improvement

Given that there are problems with the current system, but also considering that the prior appropriation system is highly effective when put into perspective, the State should not abandon the prior appropriation doctrine. Instead, it should adapt and clarify its current legal framework for water distribution. One method for adaptation would be to take on an approach similar to Australia's framework that is somewhat more focused on sustainability (Fisher, 2006). Similar to the United States, Australian water law has its roots in the English common law system, but the country has modified its approach to water distribution because of geography and climate (Cosens, 2016, p. 376). Australia's example demonstrates that the prior appropriation doctrine is a living doctrine. Its example shows that specific policy shifts and additional funding could give Utah more flexibility to redirect water when necessary to ensure equitable distribution of hydrological resources. At the same time, the State could maintain legal security around water appropriation and keep its distribution system intact.

Some policy initiatives have, in fact, already been put in place to make necessary changes. Recently, the Utah legislature enacted a bill that changed the standard for beneficial use to include conservation efforts (Miller, 2022). This change contemplates new uses for water that have historically not been considered important. For example, this change allows entities to increase instream flows for conservation efforts, such as preserving the Great Salt Lake. The same bill also changes the use it or lose it standard by allowing right holders to lease unused water to the State and leave it in the watershed when the right holder does not need to fulfill their full right in a given year (Miller, 2022).

While these changes are positive because they adapt Utah's prior appropriation system in necessary ways, these bills do not go far enough. The State can do more to address Utah's changing water demands while maintaining its legal framework for water distribution. While by no means an exhaustive list, rather than doling out haircuts, the State should consider at least three policy changes: (a) increase funding for enforcement and distribution of water rights, (b) establish a conservation trust that gives the State Engineer more tools and resources to "water bank" and focus on conservation efforts, and (c) shepherding powers to ensure that instream flows are used for their allotted purpose.

a. Additional Funding for Enforcement and Distribution

Funding is a key issue that hampers the State Engineer's ability to fully and fairly administer and regulate water rights. In the past, enforcement actions have been sporadic and limited due to lack of monetary resources (Utah Governor's Water Strategy Advisory Team, 2017, p. 16). Consequently, the State should target additional money for enforcement and distribution at a few critical issues: (i) studying and establishing additional measurement points by subdrainage in river systems covered by historical decrees and (ii) funding for additional deputy river commissioners to monitor and enforce priority cuts on existing rights and to read meters that the State is gradually installing under existing State Engineer orders. With additional funding in these targeted areas, the State Engineer can better understand local water problems, enforce rights in a way that provides legal certainty for existing right holders, and prevent the overdevelopment of water resources.

i. Additional Priority Cut Monitoring Points

Under many of the historical decrees, measuring points for entire river systems are based on flow measurements made at a single location on a given river. For example, under the Weber River Decree, measurements are made at the Stoddard diversion on the main stem of the Weber River (McCune, 2001; Plain City Irr. Co. (Weber River Decree), 1937; Provo River Water Users' Ass'n, 1993; Utah Clean Waters, 2015). While useful for understanding how much water is flowing in the watershed generally, that single measurement point makes it difficult for the State Engineer to effectively and fairly make priority cuts when necessary or to approve new appropriations if possible because that method of measuring water does not provide information regarding flows in each of the sub drainage areas that make up the Weber River Basin.

The Snyderville Basin provides an example to highlight the problem this approach creates. Appropriators first established water rights in this area in 1860 (Hampshire, Bradley, & Roberts, 1998, pp. 240-261; Plain City Irr. Co. (Weber River Decree), 1937; Summit County, n.d.; Utah Division of Water Rights (Order), 2017). At the time, the water supply was divided by priority amongst the various farmers holding water rights (Hampshire, Bradley, & Roberts, 1998, pp. 240-261; Summit County, n.d.). Priority cuts and appropriation approvals in those early days of settlement in the Snyderville Basin were more localized and depended on the flows of East Canyon Creek and its tributaries, not the Weber River as a whole (Hampshire, Bradley, & Roberts, 1998, pp. 240-261; Summit County, n.d.). Priority cuts and new appropriations made in localized sub-drainages were possible because water levels in the source were plainly visible (Hampshire, Bradley, & Roberts, 1998, pp. 240-261; Summit County, n.d.). This visibility made it easy to determine when water rights should be cut by priority or if the source could support additional diversion for new

appropriators. This localized approach to enforcement was fair, effective, and accurate.

However, as many of the historical early-priority decreed water rights were changed from agricultural to municipal uses in Snyderville Basin, and the points of diversion changed from surface to underground sources, it became harder to administer and enforce water rights in the drainage as there were no additional flow measurement points (Bureau of Reclamation, 2006). This situation essentially forced the State Engineer to blindly administer and regulate water rights in different sub-drainages due to the lack of information on local water conditions. Given this reality, poor administrative decisions, such as in the Order, were inevitable.

This problem is not just localized to the Weber River Basin, however. Poor measurement of water is a problem across the State (Miller, 2022). Despite the challenges this problem creates, there is an easy solution. The State needs to provide additional funding to allow the State Engineer to increase the number of measurement points to gather more information on the quantity and flow of water across Utah. This change would provide additional resources to the State Engineer to clarify, enforce, and equitably distribute water rights in the State.

ii. Additional Deputy Commissioners

Another problem is a lack of enforcement personnel. As stated, additional monitoring and enforcement are critical to ensuring the proper allocation and distribution of water in Utah. Regulation by drainage and subdrainage would help ensure the proper and legal use of water across the State. Obviously, therefore, creating more detailed and intensive water distribution plans will require additional personnel to enforce and monitor water conditions. This additional personnel can come in the form of appointing more deputy river commissioners. These commissioners can act as additional administrators to localize enforcement and tighten the ways in which water is diverted and conserved.

b. A Conservation Trust

In 2022, the Utah legislature passed H.B. 410, The Great Salt Lake Watershed Enhancement Act. This bill created a trust that established new resources for conservation efforts related to preserving the Great Salt Lake. While a positive step, this bill does not go far enough. The State needs to increase resources and establish a trust that will allow it to "water bank," or build up a supply of water, and secure rights for future uses, such as for conservation or emergencies. State authorities need more resources to fairly redistribute water resources when they have been over-allocated in specific sectors and the market fails to correct for such inefficiencies. Giving resources to the State Engineer to enforce existing rights and buy up other water

rights associated with agricultural use, for example, would maintain the integrity of the prior appropriation system and permit justifiable redistribution of water.

c. Shepherding Powers

The most important change that the State must institute is to give the State Engineer additional shepherding powers to ensure that downstream appropriators do not wrongfully capture designated instream flows. As stated above, one current problem the State Engineer faces is an inability to ensure that water is used for a specific purpose because other downstream users may remove water from a source under their existing rights before the State Engineer can divert that water for its designated use. In addition to improved measurements, these powers are critical for general enforcement and water conservation (Emerson, 2023). The Great Salt Lake, for example, is a terminal body of water. If the State Engineer or others have assigned water rights for conservation purposes related to the lake, then in all likelihood, that water may never reach the lake as upstream users could divert that water unless the State Engineer has enforcement power to guide it to its destination.

Conclusion

Utah is an arid region with limited water resources. Consequently, the State adopted the prior appropriation doctrine, creating a strict water distribution and diversion regime. Under this regime, the State Engineer is responsible for administering and establishing water rights in Utah. However, the State Engineer has recently adopted a haircut policy for water rights that undermines Utah's legal framework for water distribution.

Despite some seemingly attractive reasons for implementing water right haircuts, the State Engineer does not have the authority to implement this policy. It should, therefore, abandon its course of action. Moreover, there are at least three policy-related problems with this policy. First, it creates legal uncertainty because it undermines the fundamental presumptions underpinning Utah's water law system. This policy might also violate the taking clause, which would create several problems for the State. Last, such a policy does little to maintain instream flows for designated purposes because other junior right holders may simply extract the water before the State Engineer can guide the water to its intended beneficial use.

This policy is the wrong direction for addressing some of Utah's water distribution problems under its current legal framework. Still, seen through another lens, this policy highlights a potential need for some minor changes. Utah should not abandon the prior appropriation doctrine because it provides the best solutions for sustainable development in the future. However, the State should adapt the system to give Utah

state authorities new tools to address emergency situations and other changes related to the State's economy and population growth.

Ultimately, the prior appropriation doctrine is the foundation of development in the Western United States. It provides legal security around water distribution that enables growth. Again, the system works, and Utah should not abandon it. Nevertheless, as the State moves away from "cowboy economics" — a term used to describe a state of development where achievement is defined by growth in production and consumption — to a state where the central focus related to water use is centered on stretching, reallocating, and preserving water quality, Utah should adapt its legal framework to meet new demands.

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Prioritizing Mental Health: The Rollout of the 988 Nationwide Hotline

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On July 16, 2022, 988 went live as the nationwide three-digit number for the National Suicide and Crisis Lifeline. This critical development was the result of years of effort by Congress and the Federal Communications Commission (FCC) that had its genesis from our efforts in Utah. The goal of moving to a three-digit number was to reduce barriers to those attempting to access crisis mental health resources. While the initial attempt to establish such a program in Utah was not successful, the national rollout has been a resounding success! Our efforts in Utah, and the subsequent federal legislation, have been a powerful example of how public policy innovation can drive meaningful change.

In the first six months subsequent to going live in Utah, 988 received over 160,000 calls. Such calls connect individuals in crisis with trained counselors who are able to de-escalate a crisis episode and provide additional support. As a sponsor of the resolution calling on Congress to designate a three-digit number, I strongly believe in the importance of this resource for those who may not know where to turn in times of crisis. It is crucial for legislators to continue to prioritize crisis intervention, suicide prevention efforts and overall mental health policy reform.

Despite our initial efforts to get a three digit number in Utah it did not become a reality until the passage of the National Suicide Hotline Designation Act. This highlights the ongoing challenges in addressing mental health concerns, even in states with dedicated advocates and a strong network of mental health

organizations. It also emphasizes the critical need for continued attention and action from legislators to ensure that individuals in crisis have access to the resources they need to stay safe.

The legislative process for mental health initiatives can be complex and difficult to navigate. In the lead up to the implementation of 988, the state faced several obstacles in adopting the new dialing code, such as lack of coordination from key stakeholders, limited funding for mental health resources, and competing priorities in the state legislature. While this initial attempt at the state level was not implemented, we are all now able to see the incredible benefits as 988 has now been rolled out nationwide.

The University of Utah Health and The Huntsman Mental Health Institute have been key players in implementing and operating the 988 crisis lifeline in Utah. These organizations have trained hundreds of counselors to handle calls and provide support for individuals in crisis.

The 988 crisis lifeline was met with support from mental health advocacy groups and experts. Dr. John Draper, former director of the National Suicide Prevention Lifeline, stated that the 988 number will make it easier for individuals in crisis to access help and will save lives. He also emphasized the importance of having trained counselors available to provide support and assistance to those in need.

In the months following the bill's implementation, the FCC has worked to implement the new dialing code and ensure that

it was properly coordinated with the existing 911 infrastructure. They also worked with the Substance Abuse and Mental Health Services Administration and the National Suicide Prevention Lifeline to ensure that the new dialing code was effectively promoting and directing individuals in crisis to the appropriate resources.

The successful implementation of 988 is a testament to the impact that passionate legislators can have on addressing critical mental health concerns in our country. The National Suicide Hotline Designation Act represents a crucial step forward in reducing barriers to mental health resources and improving access to life-saving support for individuals in crisis.

This historic accomplishment would not have been possible without the dedicated efforts of State Senator Dan Thatcher, Representatives Chris Stewart and Anna Eshoo, Senators John Cornyn, Jack Reed, Orin Hatch, and many other committed advocates, who brought attention to the critical need for a more accessible and streamlined system for individuals in crisis to access mental health support.

The 988 suicide and crisis lifeline has shown promising results in Utah and has the potential to save lives nationwide. It is important for there to be ongoing attention to the operation and effectiveness of the hotline, as well as addressing potential issues such as call volume, and the current inability to geolocate calls in the way that 911 can. The 988 hotline is just one aspect of a larger effort to reduce suicide, and it is crucial for there to be a multifaceted approach that addresses the root causes of suicide and provides support to individuals in need. As a legislator and advocate for mental health issues, I will continue to prioritize and focus on crisis intervention, suicide prevention and overall mental health reforms.

"There is as much difference between planning and doing as there is between winning and losing. Follow up your plan with action."

-Robert H. Hinckley

