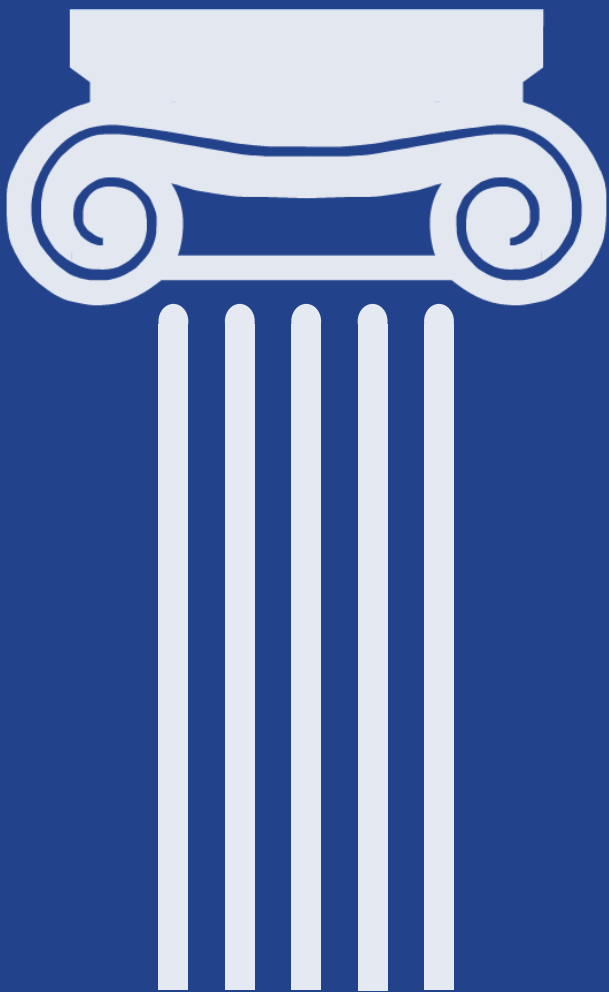


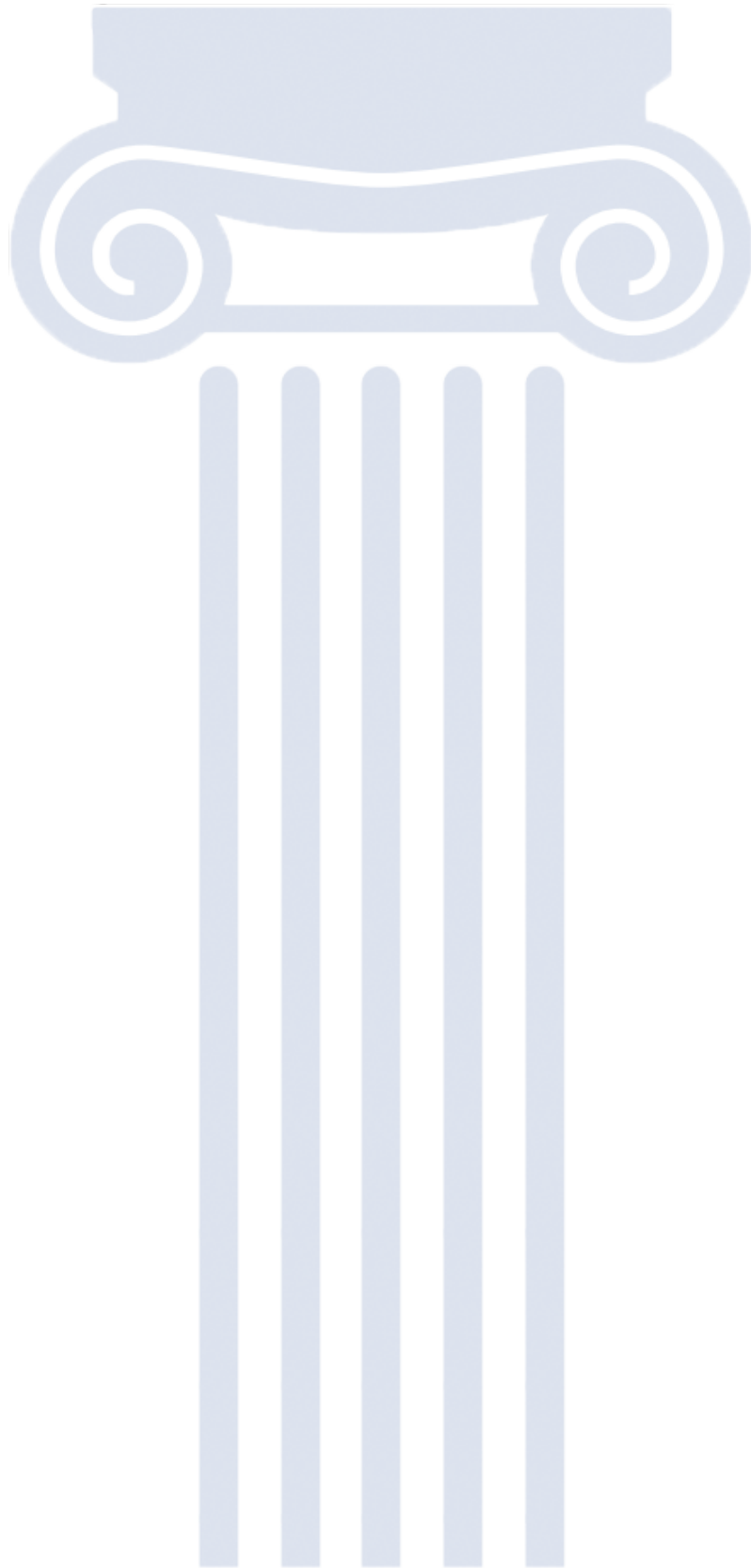
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**Volume 7 • No. 4**



# Letter from the Editor-in-Chief

Dear Reader,

I am humbled to welcome you to Volume 7, Number 4 of the *Claremont Journal of Law and Public Policy*. This is a special edition, prepared amidst the coronavirus pandemic and the protests sparked by the murder of George Floyd. Given such events, we set aside our normal publication process to allow our staff to focus on more pressing concerns. They persisted with this edition, and I am so excited to publish this excellent set of pieces about Brazilian constitutionalism, lobbyists and the American military, California's new law regulating collegiate athletics, and public housing in America. We also had the privilege of interviewing Professor Rick Hasen about his new book on the 2020 elections. And as always, we continue to publish on our website: [www.5clpp.com](http://www.5clpp.com).

At the end of every publication cycle, I am grateful to our entire staff. Each print edition is the fruit of the labor of dozens of people. But I am especially moved by this edition, where staff members rose to the task despite their challenging circumstances. Staff members, including graduating seniors, worked into the summer to finish these pieces; they were sent home from abroad, assuming they'd take the semester off from the Journal, but dutifully returned to lend a hand; and they made space for this academic enterprise in addition to fulfilling their obligations to their families and communities. As we continue in these unprecedented times, I am hopeful that the Journal will stay the resilient and supportive community that I had the privilege to be a part of for three-and-a-half years.

That community is imperfect, however, and I do want to make a few (self-)critical observations. First, as an organization devoted to law and public policy — and predominantly *American* law and public policy — racism is an indubitably important issue to be studying. While the Journal has put out wonderful work analyzing these issues,<sup>1</sup> I and previous leadership in the Journal have failed to adequately elevate anti-racist scholarship. As Bryce Wachtell and Daisy Ni take over as Editor-in-Chief and Managing Editor respectively, they have already been keen to rectify this wrong,<sup>2</sup> and I am confident in their commitment to addressing our organization's previous deficiencies. Second, as an organization, we are not reflective of the diversity of our institutions. This was an issue I and other leadership recognized early on, yet we clearly did not do enough to address the issue. But as with regard to elevating anti-racist scholarship, I believe Bryce and Daisy are dedicated to addressing these shortcomings. The Journal, I think, will be entering a tumultuous few semesters as we grapple with these important issues (within the context of an ongoing pandemic!). I am confident that Bryce and Daisy will successfully navigate those difficulties with their characteristic prudence, open-mindedness, and collaborative spirit.

It is a bittersweet deed to write my last Letter from the Editor-in-Chief. But let me end on a positive note. To the staff of the Journal: working, and editing, and writing, and arguing, and thinking, and learning with all of you was one of the great privileges of my time in college. It has been an honor to serve as your Editor-in-Chief.

Yours in law and policy,

Isaac Cui  
Editor-in-Chief

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1 See, e.g., Michaela Shelton, *A Black Feminist Critique on the Handling of Self-Defense in Cases of Domestic Violence in the United States*, 6(2) CLAREMONT J.L. & PUB. POL'Y 12 (2019); Lea Kayali, *The Danger of Discretion: Implicit Sanctioning of Discrimination in Surveillance Courts*, 6(1) CLAREMONT J.L. & PUB. POL'Y 10 (2018); Rowan McGarry-Williams, *School Desegregation Law: How the Supreme Court Went Colorblind*, CLAREMONT J.L. & PUB. POL'Y (Oct. 28, 2019), <https://5clpp.com/2019/10/28/school-desegregation-law-how-the-supreme-court-went-colorblind/> (last visited July 18, 2020).

2 For example, they have begun a summer digital content series on anti-Blackness and racial justice. See, e.g., Haidee Clauer, *How Police Get Away with It: An Evaluation of Police Contracts, Internal Investigations, Qualified Immunity, and Indemnification*, CLAREMONT J.L. & PUB. POL'Y (July 7, 2020), <https://5clpp.com/2020/07/07/how-police-get-away-with-it-an-evaluation-of-police-contracts-internal-investigations-qualified-immunity-and-indemnification/> (last visited July 18, 2020).

# About

*The Claremont Journal of Law and Public Policy* is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The *CJLPP* is also proud to spearhead the Intercollegiate Law Journal project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

# Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to [info.5clpp@gmail.com](mailto:info.5clpp@gmail.com). We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

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# In This Issue

|   |           |
|---|-----------|
| <b>The Merits of the California NCAA Fair Pay Law</b><br>Delaney Hewitt (SCR '20)                                 | <b>4</b>  |
| <b>Public Housing in the Age of Moving to Opportunity</b><br>Elias van Emmerick (PO '21)                          | <b>8</b>  |
| <b>“They Simply Kill”: The Military-industrial Complex and a Potential Path Forward</b><br>Matthew Fisch (PO '23) | <b>19</b> |
| <b>The 2020 Elections: A Conversation with Rick Hasen</b><br>Conducted by Matthew Fisch (PO '23)                  | <b>24</b> |
| <b>The Failure of Brazilian Presidentialism</b><br>Dave Ruiz (PO '23)   | <b>28</b> |

# The Merits of the California NCAA Fair Pay Law

Delaney Hewitt (SCR '20)  
Staff Writer

After Louisiana State University (LSU) won the National Collegiate Athletic Association (NCAA) Division I Football Subdivision Championship, its football team was invited to the White House for a celebration, as every Division I college football championship team is. From the Blue Room of the White House, the LSU players posted a video of them doing a viral dance challenge called “Get the Gat.”<sup>1</sup> The scene of the players in the house of the President of the United States was deemed “unprofessional” by some social media users.<sup>2</sup> To this accusation, one Twitter user replied, “can’t be professional if you’re not getting paid.”<sup>3</sup> Many other Twitter users joined in with this sentiment.<sup>4</sup>

As the players get criticized for their dancing and actions in the White House, the key takeaway is that they are *not* professionals. Despite hours committed to practice, training, team meetings, and games, football is not their job. Although the students do not make money, Division I college football is a huge money-maker for schools. In the 2017-2018 school year, Louisiana State University made a total of \$145 million from its athletic programs.<sup>5</sup> In fact, LSU’s football program alone made fifty-five million dollars that year, which was around one million dollars less than it did in the previous season.<sup>6</sup>

Ticket sales, merchandise, outside contributions, and so much else make up the millions of dollars that come from athletic revenue each year. In a study that examined 117 Division I basketball and football programs over eleven years, Doug J. Chung found that winning one more game each season can lead to three million dollars in increased revenue.<sup>7</sup> Chung went on to say, “specifically, in football, we find that regular season wins account for most of the increase in revenue for established

schools,” including LSU.<sup>8</sup> More wins means more money for the school, and LSU won the NCAA Division I Football Subdivision Championship in 2020; its quarterback further won the Heisman Trophy for the most outstanding player in NCAA football that year, compounding revenue gains for the school. At Baylor, Robert Griffin III won the Heisman Trophy, and the school “estimates the Heisman win was worth \$250 million in extra donations, increased ticket sales, licensing fees, sponsorship deals, an expanded deal with Fox Sports Southwest, and higher corn dog sales.”<sup>9</sup> The championship win for the LSU Tigers this year also resulted in a \$500,000 bonus for Head Coach Ed Orgeron, making his takeaway from this season a hefty four million dollars.<sup>10</sup> This was a small sum compared to the second-place team, Clemson, whose head coach made \$9.3 million this season.<sup>11</sup>

However, while coaches are making millions, student athletes are not allowed to make a penny for being a National Collegiate Athletic Association (NCAA) Division I athlete.<sup>12</sup> In California, however, this will change. California passed Senate Bill 206 to allow NCAA athletes to profit off of their name, likeness, and endorsement deals.<sup>13</sup> While schools make millions off of their successful athletic programs, NCAA athletes whose skills lead to that success should be able to profit too, and the California policy is a step in the right direction.

## I. Senate Bill 206

In September 2019, California Governor Gavin Newsom signed into law Senate Bill 206.<sup>14</sup> This law allows NCAA athletes to profit off of their name, image, likeness, and endorsement deals. The bill passed unanimously in the Assembly and the Senate.<sup>15</sup> Student athletes in California can now financially benefit from their skills. For example, athletes like Katelyn

1 Davy Rocks, *LSU Tigers Do The Get The Gat Challenge At The White House*, YouTube (Jan. 18, 2020), <https://www.youtube.com/watch?v=sU8f-goBM3X4> (last visited May 29, 2020).

2 @cfbquotes, TWITTER (Jan. 17, 2020, 11:39 AM), [https://twitter.com/willdevon\\_4/status/1218268883661938689](https://twitter.com/willdevon_4/status/1218268883661938689) (last visited May 29, 2020).

3 @badboysremix, TWITTER (Jan. 17, 2020, 3:16 PM), <https://twitter.com/badboysremix/status/1218311113487650819> (last visited May 29, 2020).

4 @Dani\_Knope, TWITTER (Jan. 18, 2020, 11:05 AM), [https://twitter.com/Dani\\_Knope/status/1218610392672456706](https://twitter.com/Dani_Knope/status/1218610392672456706) (last visited May 29, 2020).

5 Brooks Kubena, *LSU Athletics Brought in \$145 Million in 2017-18; See Details of Annual Budget*, Advocate (Jan. 31, 2019), [https://www.theadvocate.com/baton\\_rouge/sports/lsu/article\\_4c0d3428-2594-11e9-a68a-476082c07cb9.html](https://www.theadvocate.com/baton_rouge/sports/lsu/article_4c0d3428-2594-11e9-a68a-476082c07cb9.html) (last visited May 29, 2020).

6 *Id.*

7 Doug J. Chung, *How Much Is a Win Worth? An Application to Intercollegiate Athletics*, 63 MGMT. SCI. 548, 564 n.19 (2017) (“For major schools . . . the monetary value of a football win would be close to \$3 million.”).

8 *Id.* at 562.

9 Michele Steele, *How Much Is Winning Heisman Worth?*, ESPN (Dec. 7, 2012), [https://www.espn.com/blog/playbook/dollars/post/\\_id/2537/how-much-is-winning-heisman-worth](https://www.espn.com/blog/playbook/dollars/post/_id/2537/how-much-is-winning-heisman-worth) (last visited May 29, 2020).

10 Andy Nesbitt, *Opinion: Ed Orgeron Got an Extra \$500K for Winning the National Title, Which Is Kind of Ridiculous*, USA TODAY (Jan. 14, 2020), <https://www.usatoday.com/story/sports/ftw/2020/01/14/ed-orgeron-500-k-bonus-lsu-clemson/40996653/> (last visited May 29, 2020).

11 *Id.*

12 See Memorandum for Student-athletes re: Summary of NCAA Regulations – NCAA Division I, at 2–4 (2011), [http://fs.ncaa.org/Docs/AMA/compliance\\_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf](http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf)

13 S.B. 206, 2019 Sess. (Cal.).

14 *Id.*

15 Sean Gregory, *California’s NCAA Fair Play Law Will Change College Sports for the Better*, TIME (Oct. 1, 2019), <https://time.com/5689548/california-ncaa-law/> (last visited May 29, 2020).

Ohashi, a UCLA gymnast whose perfect floor routine went viral,<sup>16</sup> could make money off of that earned celebrity status. California State Senator Nancy Skinner stated, “For decades, college sports [have] generated billions for all involved except the very people most responsible for creating the wealth. That’s wrong.”<sup>17</sup> She continued, S.B. 206 means that “a student athlete like Katelyn Ohashi will no longer be the only person on the planet denied the right to monetize 60 million YouTube followers.”<sup>18</sup> If an athlete is particularly talented at a Division I school, they likely will gain name recognition which can lead to endorsements, merchandise sales, and so much more. Therefore, when a particular athlete gains media attention, they could make and sell their own hats with their number on them, or they could do a Subaru commercial and get paid for it, opening up more doors to economic opportunities. The bill prohibits schools in California from penalizing students for monetizing their name and also prevents the NCAA from banning California schools for allowing such monetization. The only major caveat is that endorsements cannot undermine the school’s existing contracts.<sup>19</sup>

## II. The NCAA’s Arguments

The NCAA opposes California’s new law, and it very much fears the law’s expansion to other states.<sup>20</sup> There are four main arguments against this policy: (1) it creates inequality between states and colleges; (2) it creates inequality between athletes who are able to profit off of themselves and those that cannot; (3) it promotes professionalism and devalues the educational value of college; and (4) it is allegedly unconstitutional. This section considers each argument in turn.

### A. Inequality Between States and Colleges

The NCAA is concerned that California, and states that make law changes like California, will have an easier time recruiting. The president of the NCAA, Mark Emmert, explained his perspective in his statement, “The whole notion of trying to maintain as fair a playing field as you can is really central to all this. And using sponsorship arrangements, in one way or another, as recruiting inducements is something everybody is deeply concerned about.”<sup>21</sup> This is a genuine concern because if states selectively choose to allow students to profit off their name, image, and likeness, then schools in those states will have an easier time recruiting. If an athlete receives a full scholarship

16 See UCLA Athletics, *Katelyn Ohashi – 10.0 Floor* (1-12-19), YouTube (Jan. 12, 2019), <https://www.youtube.com/watch?v=4ic7RNS4Dfo> (last visited May 29, 2020).

17 Gov. Newsom Signs SB 206, the ‘Fair Pay to Play Act’, SENATOR NANCY SKINNER (Sept. 30, 2019), <https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%9999> (last visited May 29, 2020).

18 *Id.*

19 See S.B. 206 § 3, 2019 Sess. (Cal.) (codified at Cal. Educ. Code § 67456(e)(1)) (“A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete’s name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete’s team contract.”).

20 Gregory, *supra* note 15.

21 Ralph D. Russo, *NCAA Board Approves Athlete Compensation for Image, Likeness*, AP NEWS (Oct. 29, 2019), <https://apnews.com/70081cee-181a447ebe97727441b5e509> (last visited May 29, 2020).

to a California university, and a full scholarship to a university in a state that follows NCAA rules, then what is to stop them from picking the school where they can play *and* make money? That means that California schools would be more likely to recruit the best talent coming out of high school because they have more opportunities to offer the student.

Therefore, for the fairest recruiting, something like California’s S.B. 206, should be a national standard, either as law instituted by Congress or as a rule change from the NCAA. However, there is also a concern that even if it became a national rule, it will create a deep inequality in college athletics in relation to an athlete’s choice of school; students will be more driven to attend the Division I schools that get the most airtime, have the most name recognition, and will therefore make them the most money.

However, students are more likely to pick schools based on name recognition, high-end facilities, and television airtime if they want to be drafted anyway. If a football player wanted the National Football League to notice him, he logically should play for a team whose games get the most viewership on television. The ability to make money from these schools will not change that. The bottom line is that the NCAA’s mission is that “all member schools operate under a common set of rights and obligations. The fact that every member must adhere to those rules is intended to create a level playing field.”<sup>22</sup> Those in favor of the NCAA continuing to prevent college athletes from making money overlook the fact that if the law applies to every school, it will not change the level of the playing field.

### B. Inequality Between Athletes

The NCAA also fears that allowing athletes to profit off of their sport will create an unequal playing field, not just for states, but also for college athletes.<sup>23</sup> This, however, begs the question if college athletics has ever been on an equal platform. Some athletes have larger scholarships, maintain a greater following, and are drafted into professional athletics, while others do not. High school students hoping to get recruited by college football teams are chosen based on rankings compiled by various sports sites and trackers.<sup>24</sup> The reality remains that the top recruit and the one-hundredth recruit do not stand on an equal playing field. There is no such thing as equality in sports when the idea of sports is to be the best. Some athletes will be better and more successful than others; that does not make college athletics unfair.

Another issue of inequality would come from sponsorships. Right now, brands like Nike and Adidas sponsor university teams and have strict rules about showing logos and only wearing clothing of that brand. However, there is a concern that “major brands like Nike would pay top football and bas-

22 Michael McCann, *Could ‘Fair Pay to Play Act’ Pave Way Toward End of Amateurism in Collegiate Athletics?*, SPORTS ILLUSTRATED (May 25, 2019), <https://www.si.com/college/2019/05/25/california-fair-pay-play-act-end-ncaa-amateurism> (last visited May 29, 2020).

23 Gregory, *supra* note 15.

24 See, e.g., *2020 Top Football Recruits*, 247SPORTS, <https://247sports.com/Season/2020-Football/CompositeRecruitRankings/?InstitutionGroup=high-school> (last visited May 29, 2020).



ketball talent at the biggest schools, while student-athletes in other sports or at smaller programs would be ignored.”<sup>25</sup> Today, sponsorships from brands like Nike are distributed to all of the teams at a university, but if they can sponsor just the best athletes, then those that don’t see as much TV airtime may not get any sponsored gear. In reality, though, if Nike is not sponsoring a school, the school will still provide its student athletes with the necessary gear to compete. Smaller schools without athletic apparel sponsorships are able to do it every year. While these are all valid concerns and solving deepening inequalities in college sports remains a challenge, these issues are avoidable.

### C. Professionalism and the Devaluation of the Educational Experience

One of the NCAA’s greatest concerns with the new senate bill is the idea of professionalization. In another statement against Senate Bill 206, the Pac-12 Conference said that the law will “lead to the professionalization of college sports.”<sup>26</sup> Part of the fear of professionalism in college sports is that it will devalue the college education. Student athletes are supposed to receive at the end of their college experience a degree, not a paycheck. However, the idea behind S.B. 206 is that athletes will not succumb to growing financial pressures that force them to go pro before completing their college degrees.<sup>27</sup> The NCAA preaches the ideal that amateurism in college sports maintains athletes’ wellbeing.<sup>28</sup> While the NCAA has fought, in many cases to defend their amateurism, there is no legal definition of amateurism.<sup>29</sup> Additionally, as I will argue later in the paper, the athletes’ lack of ability to earn money from their sport actually harms their wellbeing.

There is also precedent for athletics switching from amateur to professionalism successfully. Olympic teams were originally built with amateur athletes, and there was a fear of transitioning to professional athletes.<sup>30</sup> Today, however, the status of Olympic athletes’ professionalism is never questioned. The Olympics’ reputation was not harmed, and it has successfully operated with professional athletes since then.

In professional sports, time and again athletes appear in advertisements, which does not impact their team at all. As a commentator in Time magazine stated, “The 11 a.m. beer and sausage will still taste good, even if the starting linebacker stars in a Tuscaloosa Toyota ad.”<sup>31</sup> It will not change the way he plays, the outcome of the game, or have any impact on the team. The elusive concept of amateurism is used by the NCAA as a way for it and its member schools to profit without losing some of that money to the student athletes. CBS Sports and Turn-

25 Cody J. McDavis, Opinion, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html> (last visited May 29, 2020).

26 Gregory, *supra* note 15.

27 Isabella Borges, *Fair Pay to Play Act: End of Amateurism?*, GOLDEN GATE U. L. REV. BLOG (Oct. 14, 2019), <https://ggulawreview.com/2019/10/14/fair-pay-to-play-act-end-of-amateurism/> (last visited May 29, 2020).

28 Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (last visited May 29, 2020).

29 *Id.*

30 Gregory, *supra* note 15.

31 *Id.*

er Broadcasting gave nearly three-quarters of a billion dollars to the NCAA for the television rights for the March Madness Tournament.<sup>32</sup> The money the NCAA is making is from people watching college students play, which means that the NCAA is essentially profiting off unpaid labor. A study from Drexel University and the National College Players Association stated that the “[NCAA] uses amateurism as a tool to deny athletes billions of dollars per year in revenue that they would otherwise receive in a fair market.”<sup>33</sup>

### D. Constitutionality

The NCAA, in an open letter to California governor Gavin Newsom, called the bill “unconstitutional,” without explanation.<sup>34</sup> Upon further examination, however, its argument may relate to the Commerce Clause. The United States Constitution states that Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States.”<sup>35</sup> Individual states cannot regulate interstate commerce. The NCAA argued,

It isn’t possible to resolve the challenges of today’s college sports environment in this way — by one state taking unilateral action. With more than 1,100 schools and nearly 500,000 student-athletes across the nation, the rules and policies of college sports must be established through the Association’s collaborative governance system. A national model of collegiate sport requires mutually agreed upon rules.<sup>36</sup>

Technically, there is truth in the NCAA’s claim. In a similar example, California banned the sale of force-fed foie gras, even if it came from outside the state.<sup>37</sup> The court ruled that California could not ban foie gras all together, but it could ban the way foie gras was produced.<sup>38</sup> California now is trying to regulate the way college athletics are “produced.”<sup>39</sup> So while there may be truth in the argument, it is not settled that California’s law is unconstitutional.

## III. The Argument for S.B. 206

The athletes who play at the collegiate level are often those who are most in need of earning more money. Eighty percent of men’s football and basketball players with a full-ride scholarship are living at or below the federal poverty line.<sup>40</sup> Despite their scholarships, the average football player on a full-ride scholarship still ends up paying four thousand dollars a year in college.

32 Branch, *supra* note 28.

33 Borges, *supra* note 27.

34 Gregory, *supra* note 15.

35 U.S. CONST. art. I, § 8, cl. 3.

36 NCAA Responds to California Senate Bill 206, Nat’l Collegiate Athletics Ass’n (Sept. 11, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206> (last visited July 4, 2020).

37 Letter from Chris Sagers, Cleveland State University James A. Thomas Professor of Law, to Gavin Newsom, Governor of California, Re: Constitutionality of the S.B. 206, at 5 (Sept. 24, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3460551](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460551) (last visited July 4, 2020) (citing *Des Eleveurs de Canards et D’Oies v. Harris*, 729 F.3d 937 (9th Cir. 2013)).

38 *Id.*

39 *Id.*

40 NAT’L COLLEGE PLAYERS ASS’N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 4 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.



Many of these students do not have access to basic needs, like food and rent, without their college sports scholarship. Two NCAA athletes in 2010 even sold memorabilia to make money they very much needed and were suspended for four and five games respectively.<sup>41</sup> Students had to break NCAA rules in order to financially support themselves while their university was likely making millions of dollars off of them and their teammates. It is absurd to ask players to commit all their time, make no money for themselves (but millions for the school), and not even cover outside expenses. While some students were struggling to get by, Ohio State and Texas A&M made \$200 million in their 2018 fiscal years.<sup>42</sup> The NCAA alone makes billions of dollars in revenue.<sup>43</sup> Schools, coaches, and TV networks are all making money off of college athletics, but college athletes are not.

A Pennsylvania House member, Representative Ed Gainey, when discussing a bill similar to California's S.B. 206, said that "California gives us hope that there's a level of justice we can get to. At the same time college athletes are helping schools make millions, let them help themselves. Let them make some money."<sup>44</sup> Allowing students to make money off their fame and skill could be beneficial for them. Students who are successful in college, but do not make it to the professional level, could make much-needed money while in their prime in college. California State Senator Steven Bradford stated that "[w]hile our student athletes struggle to get by with basic necessities such as food and clothing, universities and the NCAA make millions off their talent and labor. College coaches are now some of the highest paid employees in the country because of the talented young men and women who play for them."<sup>45</sup>

#### IV. Potential Expansion

California is likely not the only state that will change its laws regarding NCAA athletes making profits. Representatives in Florida, New York, Georgia, Minnesota, and Washington are all considering introducing a bill of this nature.<sup>46</sup> If only California has the ability for NCAA athletes to make money, then the most talented athletes out of high school will likely be more inclined to go to California colleges and universities. To even the playing field, this law would need to spread nationwide, which would undoubtedly upset the NCAA. Congress has had discussions about implementing a nationwide law like Cali-

fornia's, with some of the strongest proponents being Senator Cory Booker and Senator Mitt Romney.<sup>47</sup> With California's S.B. 206 only taking effect starting in 2023, Congress still up in the air, and the NCAA unlikely to officially change any rules until 2021 per its timeline,<sup>48</sup> it appears that for the time being college athletes will continue to train, practice, and play without being able to profit off of their work.

\* \* \* \* \*

During the coronavirus pandemic, quarterback for the Clemson Tigers Trevor Lawrence and Anderson University soccer player Marissa Mowry started a GoFundMe to help people affected by the coronavirus.<sup>49</sup> After raising nearly three thousand dollars, Mowry announced that the NCAA shut down their GoFundMe because "athletes cannot use their name, image, and likeness for crowdfunding."<sup>50</sup> A Clemson official stated that the University Compliance Department asked for the page to be taken down because it went against NCAA policies.<sup>51</sup> In response to the backlash received for taking down the page, the NCAA stated,

The NCAA did not ask Clemson student-athlete Trevor Lawrence to take down his fundraiser for COVID-19 patients and their families. We continue to work with member schools so they have the flexibility to ensure that student-athletes and communities impacted by this illness are supported, and we applaud Trevor for his efforts.<sup>52</sup>

As the NCAA rules stand, these successful student athletes could not crowdfund to help people suffering from the impacts of a pandemic, reflecting the strict and rigid nature of NCAA rules. Hopefully, these incidents will force the NCAA to reassess its treatment of college athletes, because allowing college athletes profiting to profit off their fame could make a profound impact beyond just those participating in athletics.

41 Brennan Thomas, *Pay for Play: Should College Athletes Be Compensated?*, BLEACHER REP. (Apr. 4, 2011), <https://bleacherreport.com/articles/654808-pay-for-play-should-college-athletes-be-compensated> (last visited May 29, 2020).

42 Gregory, *supra* note 15.

43 Alex Johnson, "California's College Sports Pay Law Could Change NCAA as We Know It," NBC (Oct. 1, 2019), <https://www.nbcnews.com/news/sports/california-s-college-sports-pay-law-could-change-ncaa-we-n1060591> (last visited May 29, 2020).

44 Quoted in Gregory, *supra* note 15.

45 Quoted in *Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 17.

46 Alan Blinder, *After California Law, Statehouses Push to Expand Rights of College Athletics*, N.Y. TIMES (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/sports/ncaa-athletes-pay-california.html> (last visited May 29, 2020).

47 Alan Blinder, *Should College Athletes Profit From Their Fame? Here's Where the Debate Stands*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/sports/should-college-athletes-be-paid.html> (last visited May 29, 2020).

48 Alan Blinder & Billy Witz, *The N.C.A.A. Says It's Working to Change. Next Year, at the Soonest*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/sports/ncaa-athlete-pay.html> (last visited May 29, 2020).

49 Matt Connolly, *NCAA to Allow Trevor Lawrence, Other Athletes to Raise Money during COVID-19 Outbreak*, STATE (Mar. 24, 2020), <https://www.thestate.com/sports/college/acc/clemson-university/article241478651.html> (last visited May 29, 2020).

50 *Id.*

51 *Id.*

52 Quoted in *id.*

# Public Housing in the Age of Moving to Opportunity

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The United States is currently facing a housing crisis. Not a single county in the nation has two-bedroom apartments for rent that a person working forty hours per week at minimum wage can afford.<sup>1</sup> Nearly half of all renters are “cost-burdened,” meaning that they spend more than thirty percent of their income on rent each month.<sup>2</sup> Over the years, policy interventions at all levels of government have attempted to alleviate the burden of rising housing prices ranging from public housing units to city-wide rent controls. Today, the majority of federal rental assistance goes to housing vouchers.<sup>3</sup> These vouchers theoretically allow recipients to rent any apartment they wish and pay landlords the average market rent for their property. Vouchers are fast becoming the housing policy tool of choice, replacing formerly popular public housing developments.<sup>4</sup> To test the efficacy of voucher programs, the U.S. Department of Housing and Urban Development (HUD) conducted a large study titled “Moving to Opportunity for Fair Housing” in 1992.<sup>5</sup> Its specific purpose was to determine whether restricting vouchers for use only in low-poverty neighborhoods would improve outcomes for renters. A recent review of the study has found highly significant benefits for the children of the original study’s participants,<sup>6</sup> which spurred even greater interest in the idea of housing vouchers. The case for their widespread implementation, however, is more nuanced than the study makes it out to be. Public housing may well provide a more feasible and ethical solution to the problem these “restricted” vouchers purportedly solve.

Moving to Opportunity for Fair Housing, or MTO, was a rare instance of a randomized experiment designed to test the ef-

ficacy of a proposed housing policy.<sup>7</sup> In an effort to evaluate the benefits of providing housing vouchers rather than offering a number of social housing units, HUD randomly divided a group of social housing residents into three treatments. The first treatment group received housing vouchers that could only be used in areas with a below-average poverty rate, as well as counseling and other support mechanisms to ease the transition into a new area.<sup>8</sup> The second received unrestricted housing vouchers without any counseling, and the third remained in their current social housing (the control treatment). Previous research had shown that residents of low-poverty areas obtained higher salaries later in life, obtained degrees at higher rates, and reported feeling safer and happier in general.<sup>9</sup> However, there is not necessarily a causal relationship between living in low-poverty areas and better life outcomes. Self-selection bias could mean that those who moved to low-poverty areas did so because they were more inclined to pursue better-paying jobs, higher levels of education, etc., such that there could be some unobservable factor between those who moved and those who didn’t.<sup>10</sup> Moving to Opportunity randomly assigned participants to one of the three treatment groups, steering clear of any self-selection bias.

The program commenced in 1992,<sup>11</sup> and participants were recruited from high-poverty public housing projects in Baltimore, Boston, Chicago, Los Angeles, and New York.<sup>12</sup> Participants were required to be low-income families with at least one child.<sup>13</sup> The average poverty rate of a participant’s neighborhood was fifty-six percent.<sup>14</sup> Participants volunteered to participate, but were not guaranteed a housing voucher (be it

1 ANDREW AURAND ET AL., NAT’L LOW INCOME HOUSING COALITION, *OUT OF REACH 2* (2019), [https://reports.nlihc.org/sites/default/files/oor/OOR\\_2019.pdf](https://reports.nlihc.org/sites/default/files/oor/OOR_2019.pdf).

2 JOINT CTR. FOR HOUSING STUD. OF HARVARD UNIVERSITY, *THE STATE OF THE NATION’S HOUSING 5* (2018), [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_State\\_of\\_the\\_Nations\\_Housing\\_2018.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf).

3 CTR. ON BUDGET & POL’Y PRIORITIES, UNITED STATES FEDERAL RENTAL ASSISTANCE FACT SHEET 1 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-19hou-factsheet-us.pdf>.

4 See, e.g., Barbara Sard, *Housing Vouchers Should Be A Major Component of Future Housing Policy For The Lowest Income Families*, 5 *CITYSCAPE* 89, 90 (2001).

5 JEFFREY R. KLING, NAT’L BUREAU OF ECON. RESEARCH, *A SUMMARY OVERVIEW OF MOVING TO OPPORTUNITY: A RANDOM ASSIGNMENT HOUSING MOBILITY STUDY IN FIVE U.S. CITIES* (2008), <https://www.nber.org/mtopublic/MTO%20Overview%20Summary.pdf>.

6 See Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 *AM. ECON. REV.* 855, 856 (2016).

7 KLING, *supra* note 5, at 3 (emphasizing random assignment research design).

8 After the first year, these “restricted” vouchers were no longer restricted to areas with below-average poverty rates, theoretically giving participants the option of moving back to their former neighborhoods. See Chetty et al., *supra* note 6, at 860.

9 See George Glaster et al., *The Influence of Neighborhood Poverty During Childhood on Fertility, Education, and Earnings Outcomes*, 22 *HOUSING STUD.* 723, 736–37 (2007).

10 See generally Lina Bergström & Maarten van Ham, *Understanding Neighbourhood Effects: Selection Bias and Residential Mobility* (Inst. for Stud. of Labor, Discussion Paper No. 5193, 2010), <http://repec.iza.org/dp5193.pdf>.

11 Participants were first given vouchers between 1994 and 1998. See KLING, *supra* note 5, at 2.

12 A minimum poverty rate of forty percent was instituted as a cut-off point. *Id.*

13 Lawrence F. Katz et al., *Moving to Opportunity in Boston: Early Results of a Randomized Mobility Experiment*, 116 *Q.J. ECON.* 607, 610 (2000).

14 KLING, *supra* note 5, at 2.

restricted or unrestricted). Families were then re-contacted four to seven years later (depending on when they had started the program).<sup>15</sup>

HUD found that, four to seven years after the initial experiment, Moving to Opportunity had succeeded in moving people to “less economically distressed communities.”<sup>16</sup> Roughly half of those with restricted vouchers relocated to a low-poverty neighborhood, as did a little over sixty percent of those with unrestricted vouchers. On average, both voucher groups felt safer and more satisfied with their neighborhoods than the control group did, and they had higher indicators of mental health.<sup>17</sup> Surprisingly, the vouchers did not have a significant effect on academic achievement of children, did not improve labor market outcomes of adults, and actually *increased* “risky behavior” of male youths.<sup>18</sup> The press made MTO out to be a failure;<sup>19</sup> neighborhoods clearly did not have as extensive an impact on one’s life trajectory as some economists believed.

The HUD report was released in 2003. Thirteen years later, a team of economists revisited the experiment and analyzed the data on a more granular level. Rather than grouping all “youth” together, they made a distinction based on age of entry into new housing. They were also able to observe the outcomes of some youth who had still been in school by the time the 2003 report was released and had since entered the labor market.<sup>20</sup> The 2016 report drew a wholly different conclusion. It found that moving to a lower-poverty neighborhood, be it through restricted or unrestricted vouchers, improved future earnings by almost thirty percent and college attendance rates by sixteen percent for children who were below the age of thirteen at the time of their moving as compared to those who remained in social housing. Marriage rates went up by almost three percentage points for this group, and the fraction of participants who lived in safe neighborhoods after reaching adulthood was significantly higher for them as well. The younger the children assigned to the first two treatments were, the more rewards they reaped later in life. In contrast, the study confirmed HUD’s finding that older teens were negatively impacted by moving into low-poverty neighborhoods. Adults saw little to no change in their economic circumstances as a result of moving.<sup>21</sup>

Raj Chetty, one of the authors of the new study, has conducted a number of cost-benefit analyses of the MTO experiment both

in the new report and in subsequent research.<sup>22</sup> Participants’ higher incomes meant higher tax revenue, and Chetty argues that this increase significantly exceeded the added cost of providing vouchers and counseling. As such, he projects that a nationwide policy of providing residents of social housing with vouchers for use in low-poverty areas would *save* the government money over time.<sup>23</sup> Chetty recommends that vouchers be designed “so that families are required to move to low-poverty areas,”<sup>24</sup> as the vouchers improve children’s outcomes “much more than existing Section 8 vouchers that give families more flexibility in choosing where to live.”<sup>25</sup> In sum, he has repeatedly expressed his conviction that the Moving to Opportunity experiment should be implemented as government policy. His think tank, Opportunity Insights, even describes the experiment as having an “infinite” return on investment for the government.<sup>26</sup>

It is hard to overstate the potential influence of MTO. It is uncommon to see a randomized controlled trial used to test the efficacy of a policy before its implementation. Economists around the globe have called for governments to look at its findings and employ restricted vouchers on a large scale.<sup>27</sup> MTO has even been cited as a way to end generational poverty.<sup>28</sup> Indeed, the experiment has extensive implications for policymaking, but it also raises serious ethical and normative concerns that need to be addressed before it becomes the model for law.

This paper will proceed by first tracing the implications of MTO’s findings for past housing policy, and then examining some of the issues associated with vouchers. It argues that restricted vouchers are at best a symptomatic treatment for a larger structural problem, concluding that government-provided public housing presents an alternate solution that compares favorably to vouchers in many respects.

## I. Rethinking the Impact of Historical Housing Policies

The history of America’s residential development is one of segregation along racial and class lines, both intentional and

15 *Id.* at 3.

16 *Id.*

17 *Id.* at 4.

18 *Id.* Such behavior included marijuana or other drug use, “aggressive behaviors,” and property crimes.

19 See, e.g., Richard Rothstein, *LESSONS: Offering Poor An Alternative to Vouchers*, N.Y. TIMES (Oct. 18, 2000), <https://www.nytimes.com/2000/10/18/us/lessons-offering-poor-an-alternative-to-vouchers.html> (last visited May 29, 2020).

20 Chetty et al., *supra* note 6, at 892–93.

21 *Id.* at 858.

22 See Nathaniel Hendren & Ben Sprung-Keyser, *A Unified Welfare Analysis of Government Policies*, Q.J. ECON. (forthcoming 2020) (manuscript at 69 tabl. 1) (available at <https://academic.oup.com/qje/advance-article/doi/10.1093/qje/qjaa006/5781614>).

23 *Id.* (manuscript at 48).

24 Chetty et al., *supra* note 6, at 897.

25 *Id.*

26 Hendren & Sprung-Keyser, *supra* note 22 (manuscript at 48).

27 See, e.g., Jonathan Rothwell, *Sociology’s Revenge: Moving to Opportunity (MTO) Revisited*, BROOKINGS INST. (May 6, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/05/06/sociologys-revenge-moving-to-opportunity-mto-revisited/> (last visited May 29, 2020).

28 See Jeffrey Liebman, et al., *Evaluating the Impact of Moving to Opportunity in the United States*, ABDUL LATIF JAMEEL POVERTY ACTION LAB (2010), <https://www.povertyactionlab.org/evaluation/evaluating-impact-moving-opportunity-united-states> (last visited May 29, 2020).

unintentional. Housing segregation became visible in the early twentieth century, when African Americans increasingly moved to urban centers in search of industrial jobs. In response to rising racial tensions, urban planners began utilizing social housing programs to accommodate segregation. Social housing was a convenient way of concentrating African Americans in a few locations, which were often known as “urban ghettos.”<sup>29</sup> Zoning laws provided further effect: in Atlanta, for example, residential areas were divided into “white, colored, and undetermined.”<sup>30</sup> Robert Whitten, a prominent city planner in the 1920s, noted that “home neighborhoods had to be protected from any further damage to values resulting from the encroachment of the colored race,”<sup>31</sup> and he argued that segregation through zoning was an effective way of doing so. Racially restrictive covenants, which prohibited homeowners from selling their properties to Jews or African Americans, helped maintain this system of separation. Today, segregation persists due to a host of socioeconomic factors. The wealthy increasingly surround themselves with others like them, and the poor cluster as well. Concentrations of affluence and poverty have both risen by over fifty percent since 1970. Racial segregation has improved somewhat over that time period, but as of today over seventy percent of African Americans would have to move to predominantly white neighborhoods to achieve perfect integration.<sup>32</sup>

Extensive research has shown the negative effects of residential segregation. Poor neighborhoods have less access to nutritious food, host fewer green spaces, and have higher levels of crime. Research has shown that “living in disadvantaged neighborhoods is positively associated with increased disease morbidity, mortality, and mental illness, independent of other individual-level factors.”<sup>33</sup>

Moving to Opportunity adds two important findings to this existing body of research. For one, it finds that the impact of growing up in a poor area has likely been underestimated. MTO shows that such areas not only negatively impact children while they are there, but they also reduce the likelihood of someone moving to a more affluent neighborhood later in life. Much of the research has focused on the impacts of *staying* in a poor area — few papers have recognized that growing up in a poor area makes it more difficult to leave. This has serious

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29 Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 FLA. ST. U. J. LAND USE ENVTL. L. 89, 91 (1998).

30 DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 23 (1993).

31 Quoted in RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 46 (2017).

32 *Segregation in America*, *ECONOMIST* (Apr. 4, 2018), <https://www.economist.com/graphic-detail/2018/04/04/segregation-in-america> (last visited May 29, 2020).

33 Sacoby Wilson et al., *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice*, 1 ENVTL. JUST. 211, 213 (2008).

implications for both the urgency of the current housing crisis and the significance of past housing policy. Those in favor of reparations, for example, might view MTO as evidence that government-led residential segregation hurt generations of African Americans even more than previously thought. By applying its findings to the past, one could argue that segregation is likely to have caused lower lifetime earnings, educational achievement, and mental health in poorer neighborhoods for generations. Secondly, MTO goes some way toward disproving the idea that poor areas produce worse outcomes because of self-selection — the idea that people choose to live there because they are less inclined to work hard, more inclined to partake in criminality, and so on. MTO showed that, given the chance, most residents would choose to move to more prosperous areas. Furthermore, it showed that a random sample found better outcomes in such areas, as compared to those growing up in communities marked by poverty. As such, the study provides evidence against the theory of self-selection into poor neighborhoods.

Moving to Opportunity raises serious questions about historical housing policy in general, as well. Concentrating poverty in just a few areas, as seen in the “projects” of New York or Baltimore, is likely to have set residents up for failure, both economically and socially. Prior research had already found that residential segregation by way of social housing perpetuated poverty and led to lower individual-level outcomes.<sup>34</sup> Moving to Opportunity solidifies this evidence. The question thus becomes: what now?

## II. Restricted Vouchers: A Solution?

Chetty et al. argue that results from the Moving to Opportunity experiment demonstrate that “vouchers targeted at families with young children are likely to yield net gains, [so] such a policy is likely to reduce government expenditure while increasing children’s future earnings substantially.”<sup>35</sup> This statement has two qualifiers: vouchers should be targeted toward families with young children, and vouchers should be *restricted*.<sup>36</sup> Empirical evidence has shown that a majority of families currently prefer to use unrestricted vouchers to rent better housing in their current neighborhood rather than equal or worse housing in better neighborhoods, which the authors hope to prevent.<sup>37</sup> Neither the paper nor Chetty’s subsequent work hides a preference for housing vouchers over other forms of housing subsidies, such as government-built social housing. Policymakers are also increasingly willing to offer restricted vouchers or otherwise incentiv-

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34 See, e.g., Douglas S. Massey et al., *Segregation, the Concentration of Poverty, and the Life Chances of Individuals*, 20 SOC. SCI. RES. 397, 21 (1991).

35 Chetty et al., *supra* note 6, at 897.

36 As in, vouchers should be usable only in low-poverty areas.

37 See Brian A. Jacob et al., *The Impact of Housing Assistance on Child Outcomes: Evidence from a Randomized Housing Lottery*, Q. J. ECON. 465, 493 (2014).



ize households to move out of poor neighborhoods.<sup>38</sup> There are no current policies that explicitly cite Chetty's work, but the study will likely influence housing policy in the future. For example, Mayor Pete Buttigieg cited Chetty a number of times while running for the Democratic nomination in the 2020 U.S. presidential election.<sup>39</sup> Where we go from here seems simple: move away from social housing and move toward restricted vouchers. However, this approach raises a number of concerns. The need for housing may be difficult to fulfill solely through a voucher program, and a solution based on moving people out of poor communities could have significant spillover effects for those areas. It is also questionable whether prioritizing families with young children, as proponents of MTO are eager to do, is legal under current housing law. Relying solely on private housing could disproportionately benefit landlords and property developers. Finally, the system of restricted vouchers raises serious questions about government paternalism.

### A. Feasibility

Housing vouchers are not a new concept. About 2.2 million households were granted Housing Choice Vouchers<sup>40</sup> (HCVs) in 2018, as compared to just under a million that lived in public housing.<sup>41</sup> Vouchers work: they give recipients more access to diverse and low-poverty neighborhoods than public housing projects do,<sup>42</sup> disproportionately benefit vulnerable population groups, and are generally seen as more flexible and efficient than public housing projects.<sup>43</sup> They are, however, imperfect. Three out of four low-income renters that qualify for vouchers do not receive them due to funding limitations, partly because the government directs a majority of housing resources toward subsidies for home ownership, which in turn tends to favor higher-income households.<sup>44</sup>

38 See, e.g., Zafar Zafari & Peter Muennig, *The Cost-Effectiveness of Limiting Federal Housing Vouchers to Use in Low-Poverty Neighborhoods in the United States*, 178 PUB. HEALTH 159, 160 (2020).

39 See Pete Buttigieg, *An Economic Agenda for American Families*, PETE FOR AM., <http://web.archive.org/ccl.idm.oclc.org/web/20200106174536/https://peteforamerica.com/policies/economic-agenda/> (archived Jan. 6, 2020).

40 These, in comparison to project-based vouchers, are meant for use on the private market. Project-based vouchers are only usable in state-owned public housing developments.

41 CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 3, at 1. This figure excludes those who live in public housing but employ project-based vouchers to do so. Together, these add up to about two million households living in public housing.

42 MARGERY AUSTIN TURNER, URB. INST., *STRENGTHS AND WEAKNESS OF THE HOUSING VOUCHER PROGRAM \*1-2* (2003), <https://www.urban.org/sites/default/files/publication/64536/900635-Strengths-and-Weaknesses-of-the-Housing-Voucher-Program.pdf>.

43 CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 3, at 2.

44 Dylan Matthews, *76 Percent of People Who Qualify for Housing Aid Don't Get It*, VOX (May 31, 2014), <https://www.vox.com/2014/5/31/5764262/76-percent-of-people-who-qualify-for-housing-aid-dont-get-it> (last visited May 29, 2020); Will Fischer & Barbara Sard, *Chart Book: Federal Housing Spending Is Poorly Matched to Need*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 8, 2017), <https://www.cbpp.org/research/housing/chart-book-federal-housing-spending-is-poorly-matched-to-need> (last visited May 29, 2020).

This lack of funding has led to long waitlists. The National Low Income Housing Coalition found that more than half of all HCV waitlists were closed due to over-enrollment.<sup>45</sup> Sixty-five percent of these had been closed for more than a year. The median waiting time for a voucher after being on a waitlist is one and a half years.<sup>46</sup> Three million families are currently waiting for a voucher, and that number is projected to be as high as nine million when taking into account those that could not apply due to waitlist closures.<sup>47</sup>

Those who have received vouchers are not always able to use them. Discrimination against voucher-holders is widespread in the private market, with denial rates reaching as high as seventy-eight percent in some metro areas.<sup>48</sup> Many cities and states have made it illegal to overtly discriminate against those who apply with a voucher, but such laws have bumped up acceptances by as little as four percent, suggesting that legislation may be inadequate to deal with the issue.<sup>49</sup> Similar anti-discrimination laws have not yet been passed at the federal level, giving cities and states wide discretion in the extent to which they protect low-income renters' rights. Attitudinal problems are present elsewhere as well; many wealthy citizens are vehemently opposed to low-income voucher recipients moving into their neighborhood and use a variety of techniques to prevent this from happening.<sup>50</sup> Voucher recipients have a limited time to find housing — typically between thirty and ninety days — after which their voucher gets passed on to the next applicant on the waitlist. This system ensures that many recipients “settle” for housing in poor neighborhoods, where they are less likely to be shunned by landlords.<sup>51</sup>

Existing voucher programs offer tremendous benefits to a significant number of families across the United States. That being said, discrimination, underfunding, endless waitlists, and strict

45 ANDREW AURAND ET AL., NAT'L LOW INCOME HOUSING COALITION, *THE LONG WAIT FOR A HOME 3* (2016), [https://nlihc.org/sites/default/files/HousingSpotlight\\_6-1\\_int.pdf](https://nlihc.org/sites/default/files/HousingSpotlight_6-1_int.pdf).

46 *Id.*

47 PUB. & AFFORDABLE HOUSING RESEARCH CORP., *HOUSING AGENCY WAITING LISTS AND THE DEMAND FOR HOUSING ASSISTANCE 11* (2016), <https://www.housingcenter.com/wp-content/uploads/2017/11/waiting-list-spotlight.pdf>.

48 MARY K. CUNNINGHAM ET AL., URB. INST., *A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHERS xi* (2018), <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>.

49 Stephanie Wykstra, *Vouchers Can Help the Poor Find Homes. But Landlords Often Won't Accept Them*, VOX (Dec. 10, 2019), <https://www.vox.com/future-perfect/2019/12/10/21001692/housing-vouchers-discrimination-racism-landlords> (last visited May 29, 2020).

50 Jacqueline Rabe Thomas, *How Wealthy Towns Keep People with Housing Vouchers Out*, MOTHER JONES (Jan. 10, 2020), <https://www.motherjones.com/politics/2020/01/how-wealthy-towns-keep-people-with-housing-vouchers-out/>.

51 Stefanie Deluca, *Why Don't More Voucher Holders Escape Poor Neighborhoods?*, N.Y.U. FURMAN CTR. (Oct. 2014), <https://furmancenter.org/research/iri/essay/why-dont-more-voucher-holders-escape-poor-neighborhoods> (last visited May 29, 2020).

regulations prevent the program from reaching its full potential. If lawmakers adopt the recommendations set out by Chetty and his coauthors, the underfunding of voucher programs may well end. However, restricting housing vouchers to low-poverty areas may well increase the denial rate of voucher-holders even more, leaving many of them unable to find housing. A strong legal framework preventing such discrimination needs to be in place at the federal level before voucher programs can be a viable replacement for social housing. In places where such laws are in place, enforcement has been difficult. Vulnerable renters often find the process of filing a discrimination lawsuit overly complex and let landlords off the hook. In other cases, renters are simply unaware of the laws protecting them.<sup>52</sup> The counseling system included in MTO, which was originally designed to help participants acclimate to their new surroundings, may also act as an enforcement mechanism of non-discrimination laws. New York City, for example, formed a unit in 2018 designed to help fight income discrimination and received about eight hundred complaints in one year by actively reaching out to vulnerable renters and organizing educational workshops.<sup>53</sup> Counselors could similarly inform renters of their rights, as well as bring lawsuits to offending landlords, removing one hurdle for participants of a voucher program.

### B. Spillover Effects

Vouchers are increasingly seen as the most effective solution to the contemporary affordable housing shortage. Public housing, in contrast, is seen as a relic of a discriminatory past. Chicago, for instance, launched its “Plan for Transformation” at the turn of the millenium. The plan called for the demolition of seventeen thousand units of public housing and the relocation of residents to more economically diverse neighborhoods.<sup>54</sup> A significant number of residents were given vouchers for use in the private market. In a way, this is a highly American solution to the problem of housing. Public housing’s reputation as being “mismanaged” echoes a common sentiment about government programs in general; vouchers offer a private, free-market solution that is seen as more efficient.<sup>55</sup> Today, more than two million people still reside in public housing nationwide.<sup>56</sup> These developments often have crime and drug use rates far above the national average<sup>57</sup> and offer substandard living conditions.<sup>58</sup>

<sup>52</sup> Wykstra, *supra* note 49.

<sup>53</sup> *Id.*

<sup>54</sup> See generally SUSAN J. POPKIN ET AL., URB. INST., CHA RESIDENTS AND THE PLAN FOR TRANSFORMATION (2013), <https://www.urban.org/research/publication/cha-residents-and-plan-transformation>.

<sup>55</sup> Karen Narefsky, *In Defense of Public Housing*, JACOBIN (Nov. 28, 2015), <https://jacobinmag.com/2015/11/public-housing-social-welfare-crisis-affordable-gentrification> (last visited May 29, 2020).

<sup>56</sup> NAT’L CTR. FOR HEALTH IN PUB. HOUSING, DEMOGRAPHIC FACTS: RESIDENTS LIVING IN PUBLIC HOUSING 1 (2016), <https://nchph.org/wp-content/uploads/2016/07/Demographics-Fact-Sheet-2016.pdf>

<sup>57</sup> TERENCE DUNWORTH & AARON SAIGER, NAT’L INST. OF JUST., DRUGS AND CRIME IN PUBLIC HOUSING: A THREE-CITY ANALYSIS vi–viii (1994), <https://www.ncjrs.gov/pdffiles1/Digitization/145329NCJRS.pdf>.

<sup>58</sup> See generally Jan Weesep & Hugo Priemus, *The Dismantling of Public*

The existence of voucher programs, however, has made investment in public housing a far lower priority. The poor quality of public housing is at least partly the result of a self-fulfilling prophecy: vouchers are more effective because public housing is subpar, so more money is directed toward vouchers, further reducing the quality of public housing, and so on.<sup>59</sup> The impact of this mindset is already visible: between 2000 and 2016, funding for public housing maintenance fell by fifty percent,<sup>60</sup> and overall funding for public housing programs fell by \$1.6 billion between 2010 and 2016 alone, constituting the largest budget cut to any HUD program.<sup>61</sup> If we adopt the recommendations set forth in *Moving to Opportunity*, public housing (and its thirty-five billion dollars in maintenance backlog) is almost certain to see further reductions in funding.<sup>62</sup> Residents will face ever-worsening living conditions until they are able to obtain a voucher and move out. The underfunding of public housing is a necessary consequence of the rise of vouchers, but, as I argue later, not necessarily an acceptable one.

### C. Legality

MTO proponents see housing choice vouchers favorably but are generally less charmed by the structure of their associated waitlists. Currently, vouchers are distributed on either a first-come, first-served basis or through a lottery system.<sup>63</sup> Applications are not sorted by need or vulnerability, nor is priority given to families over single applicants. Chetty et al. believe this leads to inefficient allocation. They note that it is “important to target such housing vouchers to families with young children — perhaps even at birth — to maximize the benefits.”<sup>64</sup> Furthermore, they write, “[t]he common practice of putting families on waitlists to receive a housing voucher may be particularly inefficient, as this effectively allows many families to move to better neighborhoods only when their children grow older.”<sup>65</sup> The legality of prioritizing families, however, is questionable.

There are a number of laws and executive orders designed to

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*Housing in the USA*, 14 NETH. J. HOUSING & BUILT ENV’T 3 (1999).

<sup>59</sup> Narefsky, *supra* note 55.

<sup>60</sup> *Cuts in Federal Assistance Have Exacerbated Families’ Struggles to Afford Housing*, CTR. ON BUDGET & POL’Y PRIORITIES (2016), <https://www.cbpp.org/research/housing/chart-book-cuts-in-federal-assistance-have-exacerbated-families-struggles-to-afford> (last visited June 4, 2020).

<sup>61</sup> *Public Housing and HOME Grants Have Seen Deepest Funding Cuts*, CTR. ON BUDGET & POL’Y PRIORITIES (2016), <https://www.cbpp.org/public-housing-and-home-grants-have-seen-deepest-funding-cuts> (last visited May 30, 2020).

<sup>62</sup> Jake Bittle, *Public Housing Is Going Private, and It’s Congress’s Fault*, AM. PROSPECT (Nov. 1, 2019), <https://prospect.org/infrastructure/housing/public-housing-is-going-private-and-its-congress-fault-HUD/> (last visited May 30, 2020).

<sup>63</sup> See, e.g., M. Kathleen Moore, *Lists and Lotteries: Rationing in the Housing Choice Voucher Program*, 26 HOUSING POL’Y DEBATE 474 (2016).

<sup>64</sup> Chetty et al., *supra* note 6, at 900.

<sup>65</sup> *Id.* at 898.



combat housing discrimination. The most salient to MTO is the Fair Housing Act of 1968, which prohibits discrimination in the sale, rental, and financing of housing-related transactions “because of race, color, religion, sex, *familial status*, or national origin.”<sup>66</sup> It also requires that all federal programs relating to housing and urban development be administered “in a manner affirmatively to further” fair housing.<sup>67</sup> This statute would seriously hinder any attempt to prioritize families with young children over other voucher applicants.

The only basis on which preferential treatment can be justified is need.<sup>68</sup> For example, priority in voucher allocations can be given to families in especially dire financial situations, whereas those without children in similar situations would not have the same privilege. According to HUD, “each public housing agency has the discretion to establish local preferences to reflect the housing needs and priorities of its particular community.”<sup>69</sup> Since there is no precedent of giving families with younger children priority, it is hard to say whether such a policy would be seen as discriminatory. That being said, there is a case to be made that it would constitute discrimination based on familial status.

#### *D. Enriching the Private Market*

Housing benefits, at their core, are designed to be a redistributive policy. They use progressive tax revenue to benefit the worst off in our society. In practice, however, housing vouchers help landlords about as much as the poor. To understand why, a look at housing market dynamics proves instructive. Housing supply is generally inelastic in most urban locations, and it has become increasingly so over the past two decades.<sup>70</sup> Vouchers effectively act to increase demand at any price point — they pay “market rent” to landlords, while requiring tenants to pay at most thirty percent of their income. Neither tenants nor landlords are particularly concerned with keeping rent costs down — as long as the rent of an individual unit is in line with the average rent for similar units in a certain location, the government will pay for it. When voucher programs are expanded, landlords can simply raise rents without losing tenants.

There is strong empirical evidence supporting the claim that vouchers increase average rent prices. In France, for example, average rents went up by seventy-eight cents for every euro increase in average housing benefits.<sup>71</sup> In the United Kingdom,

about half of the gains in housing benefits accrue to landlords.<sup>72</sup> A study in Baltimore further found that landlords actively selected voucher holders to occupy hard-to-rent units, while still charging them high rents. According to Eva Rosen, this “result[s] in a strategic balkanization of the rental housing market that retains voucher holders where they can be most profitable — in the very neighborhoods policymakers would like to provide them with the opportunity to leave.”<sup>73</sup>

Housing vouchers can cause significant harm to those who do not receive them. Families just above the threshold for receiving vouchers, or still on the waitlist to receive them, will still be impacted by the rent increases vouchers cause, which tend to be concentrated in the poorest neighborhoods.<sup>74</sup> It is difficult to conceptualize a way of implementing vouchers that would avoid this problem. Choosing to only attach a fixed monetary award to a voucher, rather than a “fair market rent,” could place an undue burden on recipients and may allow landlords to discriminate against voucher-holders by setting rents above the fixed award. At the same time, the current system places a burden on those who were not fortunate enough to receive a voucher in the first place. This results in a voucher system that disproportionately benefits landlords and is less progressive than policymakers intend it to be.

#### *E. Freedom of Choice and the Nanny State*

Moving to Opportunity has effectively shifted the debate around housing vouchers. It is encouraging to see that economic research is being used to develop policy. In this case, however, public officials should exercise caution. Other considerations aside, restricted vouchers raise serious moral questions about the role of government in organizing citizens’ lives.

Government paternalism has seen a resurgence in recent years. The discovery of systematic biases in human decision-making (such as loss aversion or status-quo bias) by behavioral economists has provided some justification for nudging citizens toward the “right” choice, and policymakers have gladly taken this opportunity.<sup>75</sup> “Nudging” has become common practice, thanks to projects such as the United Kingdom’s Behavioural Insights Team<sup>76</sup> or the Obama administration’s Social and

66 42 U.S.C. § 3604(a)–(b) (1974) (emphasis added).

67 *Id.* § 3608(d) (1978).

68 U.S. DEP’T OF HOUSING & URB. DEV., HOUSING CHOICE VOUCHERS FACT SHEET (2018), [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/about/fact\\_sheet](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet).

69 *Id.*

70 See Knut Aastveit et al., *The Declining Elasticity of US Housing Supply*, VOXEU (Feb. 25, 2020), <https://voxeu.org/article/declining-elasticity-us-housing-supply> (last visited May 30, 2020).

71 Gabrielle Fack, *Are Housing Benefit an Effective Way to Redistribute Income? Evidence from A Natural Experiment in France*, 13 LAB. ECON. 747, 747 (2006).

72 *Governments Are Rethinking the provision of Public Housing*, ECONOMIST (Jan. 16, 2020), <https://www.economist.com/special-report/2020/01/16/governments-are-rethinking-the-provision-of-public-housing> (last visited May 30, 2020).

73 Eva Rosen, *Rigging the Rules of the Game: How Landlords Geographically Sort Low-Income Renters*, 13 CITY & COMMUNITY 310, 310 (Dec. 23, 2014).

74 *Id.*

75 See generally JULIAN LE GRAND & BILL NEW, GOVERNMENT PATERNALISM: NANNY STATE OR HELPFUL FRIEND? (2015); RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT WEALTH, HEALTH, AND HAPPINESS (2008).

76 See generally BEHAVIOURAL INSIGHTS TEAM (2020), <https://www.bi.team/> (last visited May 30, 2020).

Behavioral Sciences Team.<sup>77</sup> Governments intervene for the populace's "own good" in a variety of areas, such as by taxing cigarettes or mandating the use of seatbelts. Limiting citizens' freedom of choice, however, is generally seen as a last resort; it should be done sparingly and only where absolutely necessary.<sup>78</sup> John Stuart Mill wrote that "[n]either one person, nor any number of persons is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it."<sup>79</sup> Requiring voucher recipients to move to low-poverty neighborhoods is a policy that clearly interferes with the freedom of choice. Chetty himself recognizes this in a 2015 paper, stating,

This issue lies at the heart of the common concern that behavioral economics can lead to paternalism, as policy makers' perceptions of individuals' experienced utility could be given priority over individuals' own choices. Why do policy makers necessarily have a better sense of where families should live than they themselves do?<sup>80</sup>

He quickly dismisses this issue, however, by citing economists' ability to accurately measure people's true preferences. In the context of MTO, this was done by surveying participants about their welfare pre- and post-move. Here, "adults who received an experimental voucher to move to a lower-poverty area report[ed] significantly higher subjective well-being after moving."<sup>81</sup> However, as Chetty points out, measuring subjective well-being is notoriously difficult due to the presence of choice-supportive<sup>82</sup> and selective memory<sup>83</sup> biases. Whether or not people subjectively prefer moving to more well-off areas is difficult to determine.

Clearly, moving people to low-poverty neighborhoods has demonstrably positive effects. At the same time, one's neighborhood partly determines one's identity and social network.<sup>84</sup> In practice, most voucher recipients choose to stay in poorer areas.<sup>85</sup> Ascribing this solely to voucher discrimination and difficulty of moving to a new area might be constructing the issue

77 See generally SBST (2017), <https://sbst.gov/> (last visited May 30, 2020).

78 See Matthew Thomas & Luke Buckmaster, *Paternalism in Social Policy: When Is It Justifiable?* (Austl. parliamentary libr., Research Paper No. 8, Dec. 15, 2010), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1011/11rp08](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp08); LE GRAND & NEW, *supra* note 75.

79 JOHN STUART MILL, *ON LIBERTY* 44–45 (1st ed. 1859).

80 Raj Chetty, *Behavioral Economics and Public Policy: A Pragmatic Perspective*, 105 AM. ECON. REV. 1, 23 (2015).

81 *Id.* at 30.

82 See generally Mara Mather & Marcia K. Johnson, *Choice-supportive Source Monitoring: Do Our Decisions Seem Better to Us As We Age?*, 15 PSYCHOL. AGING 596 (Jan. 2001).

83 See generally Marc T. Kiviniemi & Alexander J. Rothman, *Selective Memory Biases in Individuals' Memory for Health-related Information and Behavior Recommendations*, 21 PSYCHOL. HEALTH 247 (2006).

84 See, e.g., Leanne G. Rivlin, *The Neighborhood, Personal Identity, and Group Affiliations*, in NEIGHBORHOOD AND COMMUNITY ENVIRONMENT 1 (Irwin Altman & Abraham Wandersman eds., 1987).

85 ALICIA MAZARRA & BRIAN KNUDSEN, *CTR. ON BUDGET & POL'Y PRIORITIES, WHERE FAMILIES WITH CHILDREN USE HOUSING VOUCHERS 7–12* (2019), <https://www.cbpp.org/sites/default/files/atoms/files/1-3-19hou.pdf>.

too narrowly. There are real downsides to moving out of one's known neighborhood. Families who move to low-poverty areas often report feeling out of place and discriminated against,<sup>86</sup> and moving has generally been tied to losing friends.<sup>87</sup> There is evidence of these difficulties in the original MTO experiment: "male youth in the [restricted voucher] group were slightly more likely to report using marijuana, scored higher on an index of behavioral problems (which includes acting out and aggressive behaviors), and were more likely to be arrested for property crime."<sup>88</sup> Research on mixed-income areas suggests that residents' social interactions remain segregated by socio-economic class. In a study of mixed-income communities in Chicago, for example, Chaskin and Joseph found that "about a third [of residents] framed the tenor of relations as interactions taking place within a broader context of mistrust" and "that race . . . plays an explicit role in particular instances of conflict, adding to this tension."<sup>89</sup> Forcing people to move to neighborhoods where they feel unwelcome is not ideal. Proponents of the MTO program, however, seem to believe that the benefits — especially those for future generations — outweigh the costs.

Merits and demerits of restricted vouchers aside, it is worth noting that the discussion around housing policy has been dominated by a false dichotomy: either we employ vouchers or we move back toward the public housing of yore, along with all its negative attributes. In reality, conceptions of public housing have evolved since the 1930s. Europe and Asia have demonstrated that public housing need not be unsafe, poorly maintained, or marked by de facto segregation. It can provide a solution to many of the housing crisis' underlying issues, and it avoids the moral quagmire of restricting voucher recipients' choice.

### III. Public Housing: An Alternate Solution

Moving to Opportunity holds important implications for future housing policy, and this paper does not aim to discount the importance of its findings in any way. It does argue, however, that the recommendations set forth in Chetty's discussion of MTO fail to address the root causes of inequality and housing insecurity. Restricted vouchers can at best be a symptomatic treatment but are unlikely to be a cure. Implementing the paper's recommendations will not cause housing prices to fall, nor will it end housing segregation for those who are not lucky

86 See Jillian Weinberger, *Leaving Segregated Baltimore: How a Housing Program Is Tackling Inequality*, Vox (Nov. 30, 2018), <https://www.vox.com/the-impact/2018/11/30/18116513/baltimore-the-impact-income-inequality-race-housing-segregation> (last visited May 30, 2020).

87 Julie Beck, *Study: How Moving Is Linked to Losing Friends*, ATLANTIC (Feb. 24, 2016), <https://www.theatlantic.com/health/archive/2016/02/disposable-friendships-in-a-mobile-world/470718/>.

88 KLING, *supra* note 5, at 4.

89 Robert J. Chaskin & Mark L. Joseph, *Social Interaction in Mixed-Income Developments: Relational Expectations and Emerging Reality*, 33 J. URB. AFF. 209, 227 (2011).

enough to receive a voucher. Restricted vouchers are not a solution to wider structural problems. Public housing can succeed where vouchers cannot. The reputation of public housing has been tarnished in the United States due to decades of mismanagement and neglect,<sup>90</sup> but other countries have managed to develop highly successful public housing models. This section will evaluate this alternative in detail and compare it with the benefits and costs of a restricted voucher model.

### A. Housing Prices

The national average rent, adjusted for inflation, has risen sixty-six percent in just forty years.<sup>91</sup> Almost 550,000 people are homeless today.<sup>92</sup> Research shows that 35.5% of adults in the United States experience housing insecurity on a daily basis.<sup>93</sup> A major driver of these inflated rents is a shortage in the housing supply. Between 1975 and 2000, more than forty million new housing units were built, an average of 1.63 million per year. Between 2010 and 2018, however, less than eight million units were added, an average of less than a million per year.<sup>94</sup> Most of this growth was concentrated in non-coastal areas of the Sun Belt, where rents were already reasonable and lack of housing stock had not historically been an issue.<sup>95</sup> Zoning laws, lack of housing density, and a sheer shortage of space all contributed to increasing rent prices in urban areas during this time.<sup>96</sup>

Whether or not an increase in supply would actually lower rent prices is a contentious issue. In 2018, the Federal Reserve published a paper investigating the effect of supply-side changes on housing prices.<sup>97</sup> Due to a lack of reliable empirical data, the paper employed a theoretical model with the following assumptions:

- i. The vacancy rate is assumed to be zero.
- ii. For every additional housing unit, there is an addi-

90 See Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 501–08 (1993).

91 U.S. CENSUS BUREAU, SURVEY OF MARKET ABSORPTION OF NEW MULTIFAMILY UNITS (2018), <https://www2.census.gov/programs-surveys/somatables/2018/2018-q1ly-absorption/qtr218/q218tab3.xlsx>.

92 Esteban Ortiz-Ospina & Max Roser, *Homelessness*, OUR WORLD IN DATA, <https://ourworldindata.org/homelessness> (last visited May 30, 2020).

93 See Robynn Cox et al., *Measuring Population Estimates of Housing Insecurity in the United States: A Comprehensive Approach* 18 (CESR-SCHAEFFER Working Paper No. 2017–012, Dec. 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3086243](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086243) (Housing insecurity is based on measures of housing affordability, stability, and homelessness.).

94 U.S. CENSUS BUREAU, NUMBER OF U.S. HOUSING UNITS (2019), <https://www.census.gov/housing/hvs/data/histtab7.xlsx>.

95 *The South Is Home to 10 of the 15 Fastest-Growing Large Cities*, U.S. CENSUS BUREAU (May 25, 2017), <https://www.census.gov/newsroom/press-releases/2017/cb17-81-population-estimates-subcounty.html> (last visited May 30, 2020).

96 José Niño, *Zoning: The Nemesis of Housing Affordability*, AM. INST. FOR ECON. RESEARCH (Nov. 7, 2017), <https://www.aier.org/article/zoning-the-nemesis-of-housing-affordability/> (last visited May 30, 2020).

97 Elliot Anenberg & Edward Kung, *Can More Housing Supply Solve the Affordability Crisis? Evidence from a Neighborhood Choice Model* (Fed. Reserve Bd. Fin. & Econ. Discussion Series 2018–035, Apr. 17, 2018), <https://www.federalreserve.gov/econres/feds/files/2018035pap.pdf>.

tional household that requires housing.

iii. Characteristics of all households are equal.

The authors found that “the rent elasticity is likely to be low, and thus marginal reductions in supply constraints alone are unlikely to meaningfully reduce rental burdens.”<sup>98</sup> Advocates for rent control or other forms of housing regulation regularly cite this finding as evidence that supply-side policies would not significantly decrease rents.<sup>99</sup> However, this study comes with two important caveats. For one, it is not based on actual data, but rather a purely theoretical model. More importantly, assumption (ii) does not hold empirically. There isn’t unlimited demand for housing in large cities — there is certainly a current shortage, but nothing indicates that every increase in supply will be followed by an equal increase in demand. If we follow the logic set out in this paper, no increase in the housing supply would ever alleviate the demand burden that currently exists. While the increase in housing stock would certainly need to be substantial in certain metro areas to have a discernible effect, it is highly unlikely that demand will never be satiated. The practical relevance of the paper is thus questionable at best. It does, however, tell us that we are unlikely to see rents go down until the housing shortage seen in large metropolitan areas today is alleviated somewhat.

Subsequent research by Been et al. employing both theoretical and empirical evidence arrives at a wholly different conclusion: “[A]dding new homes moderates price increases and therefore makes housing more affordable to low- and moderate-income families.”<sup>100</sup> Importantly, they find that “[g]overnment intervention is *critical* to ensure that supply is added at prices affordable to a range of incomes.”<sup>101</sup> A December 2019 paper comparing rents in twelve major urban areas largely confirms this finding: each new market rate building development in a low-income neighborhood was responsible for a decrease of “nearby rents by 5 to 7 percent relative to trend” and actually “increase[d] low-income in-migration, implying that this improved affordability can foster more integrated, economically diverse neighborhoods that may provide low-income residents with greater economic mobility.”<sup>102</sup> Although not wholly conclusive, scholars lean toward agreeing that an increase in supply is essential to control rising rent prices, and there is little current evidence that the private market will have an incentive to

98 *Id.* at 17.

99 See, e.g., Erik Sherman, *Additional Building Won’t Make City Housing More Affordable*, *Says Fed Study*, FORBES (Aug. 7, 2018), <https://www.forbes.com/sites/eriksherman/2018/08/03/additional-building-wont-make-city-housing-more-affordable-says-fed-study/#39421ca7218b> (last visited May 30, 2020).

100 Vicky Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUSING POL’Y DEBATE 25, 25 (2019).

101 *Id.* (emphasis added).

102 Brian Asquith et al., *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas* 22 (Upjohn Inst. Working Paper No. 19–316, Dec. 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3507532](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507532). The authors looked at developments with an average of 100–150 living units.



provide it. Building public housing would provide this supply and thus skirt important issues facing vouchers: their tendency to benefit landlords and property-owners in addition to recipients and their effect on local rents.

### *B. Autonomy and Well-Being*

Public housing is not a straightforward answer to the autonomy concerns raised by Chetty's proposal. Moving to Opportunity asks that participants move to a specific neighborhood but gives them the freedom to select their own dwelling. At first sight, public housing does not compare favorably to this proposal. It requires tenants to go to a specific neighborhood (namely, wherever there is public housing) and assigns them a residence, rather than offering them a semblance of choice. Historically, public housing in the United States has contributed to segregation along racial and class lines for similar reasons. Housing was built in poor neighborhoods, away from employment opportunities and quality public schools.<sup>103</sup> This issue is not inherent to public housing, but rather it is symptomatic of poor housing policy in mid-twentieth-century America. Other countries have demonstrated that public housing need not lead to segregation and with enough investment can offer a wider variety of housing options than would be the case under Chetty's proposal.

Take Vienna, for example. Median household income in Austria is equivalent to \$32,496, roughly half of that of the United States.<sup>104</sup> Vienna, the capital city, provides subsidized public housing for anyone who earns below \$53,225 *after taxes*. In other words, public housing is available to a wide variety of individuals, rather than being housing of last resort. As a result, more than sixty percent of Vienna's residents live in government housing, at an average rent of \$470 per month.<sup>105</sup> But collaboration with the private sector isn't entirely shunned. The city indirectly controls about two hundred thousand housing units managed by private developers which benefit from favorable government loans, and in return it guarantees "to rent half of the new apartments to lower-income residents" at regulated rates.<sup>106</sup> Together, these public housing projects account for forty-six percent of total housing stock. Another feature of Vienna's model is that families do not need to move out if their income exceeds the limit subsequent to moving in. This ensures both that families do not have an incentive to stay below a certain income threshold, and that public housing developments are home to people from a wide range of socio-

economic backgrounds.<sup>107</sup> Public housing is spread throughout the city rather than being concentrated in a few select areas. In an American context, the removal of income thresholds may lead to a shortage of housing. A sliding scale could be instituted in this case, in which rent is proportional to one's income and no one disproportionately benefits from subsidized housing.

As the success of Vienna's housing model shows, public housing need not be synonymous with restriction of choice. As long as investment in these projects is sufficient, tenants have the choice between a variety of developments in a number of locations. Public housing can provide a solution to autonomy concerns but only if enough of it is built. A halfway solution would not give tenants enough choice and may well lead to further de facto segregation.

### *C. Feasibility*

Perhaps the greatest question surrounding public housing is its feasibility. Voucher-based solutions are comparatively easier because they do not require the massive up-front investments that housing projects do, and they offload the burden of finding housing to the recipient of the voucher rather than the government. Public housing carries a significant cost, but proponents argue that this is outweighed by the potential benefit.

A 2019 study found that a yearly \$125 billion investment over ten years would allow for the creation and maintenance of ten million housing units, increasing the number of public housing units by almost a thousand percent. Fifty billion dollars of this amount could be earned by increasing "the estate tax thresholds to their levels at the end of the George W. Bush administration and institut[ing] more progressive rates above those thresholds."<sup>108</sup> An additional thirty-five billion dollars could be generated by eliminating the capital gains tax exclusion for home sales, and the final forty billion dollars by rolling back the corporate tax cuts set out in the Tax Cuts and Jobs Act of 2017.<sup>109</sup>

Senator Bernie Sanders had largely adopted this plan as part of his 2020 presidential campaign platform. His proposal calls for invest[ing] \$1.48 trillion over 10 years in the National Affordable Housing Trust Fund to build, rehabilitate, and preserve the 7.4 million quality, affordable and accessible housing units necessary to eliminate the affordable housing gap, which will remain affordable in perpetuity[,] . . . [and investing] an additional \$400 billion to build 2 million mixed-income social housing units to be

103 Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, AM. PROSPECT (Oct. 11, 2012), <https://prospect.org/article/public-housing-government-sponsored-segregation/> (last visited May 30, 2020).

104 OECD, INCOME DISTRIBUTION DATABASE (2020), <https://stats.oecd.org/Index.aspx?DataSetCode=IDD> (last visited May 30, 2020).

105 Adam Forrest, *Vienna's Affordable Housing Paradise*, HUFFPOST (Feb. 25, 2019), [https://www.huffpost.com/entry/vienna-affordable-housing-paradise\\_n\\_5b4e0b12e4b0b15aba88c7b0?](https://www.huffpost.com/entry/vienna-affordable-housing-paradise_n_5b4e0b12e4b0b15aba88c7b0?) (last visited May 30, 2020).

106 *Vienna's Unique Social Housing Program*, PD&R EDGE (2013), [https://www.huduser.gov/portal/pdredge/pdr\\_edge\\_featd\\_article\\_011314.html](https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_011314.html) (last visited May 30, 2020).

107 Brian Peteritas, *Vienna Offers Affordable and Luxurious Housing*, GOVERNING (Feb. 2013), <https://www.governing.com/topics/health-human-services/gov-affordable-luxurious-housing-in-vienna.html> (last visited May 30, 2020).

108 Algernon Austin, *Affordable Housing For All*, DEMOS (2019), <https://www.demos.org/policy-briefs/affordable-housing-all> (quoting a press release from Senator Warren's campaign) (alteration original).

109 *Id.*

administered through the National Affordable Housing Trust Fund, which will help desegregate and integrate communities. This plan will guarantee equity in social housing units, ensuring no inequality of services or conditions within units.<sup>110</sup>

The senator would pay for this using revenue from a wealth tax.<sup>111</sup> Senator Elizabeth Warren has called for a more modest 3.2 million new housing units in the American Housing and Economic Mobility Act she introduced in 2019.<sup>112</sup> These units would be paid for by an increase in the estate tax.

This section has attempted to show that, while a significant challenge, the provision of public housing is attainable through tax increases on the wealthy and corporations. Public housing is not cheap, but its construction would reduce the crippling burden of rent for millions of vulnerable families.<sup>113</sup> Additionally, Senator Warren's plan estimates that its implementation would lead to the creation of 1.5 million new jobs, which could expand the redistributive impact of providing affordable housing.<sup>114</sup>

#### D. Spillover Effects

Public housing has been portrayed as a creator of negative externalities for its surroundings. Mismanaged and deteriorated housing projects in Chicago, St. Louis, and Los Angeles have become synonymous with crime, drugs, and gang activity.<sup>115</sup> Empirical evidence has shown that crime “decreases by 8.8%” in nearby neighborhoods after the demolition of a public housing project in Chicago.<sup>116</sup> Scholars have further suggested that public housing “discourag[es] private investment and undermin[es] property values.”<sup>117</sup> A deteriorating housing project is

more of a liability than an asset for its neighborhood. However, these effects are only found for *deteriorating* projects — no similar work has been done on newly built housing projects in the United States. We could look to foreign examples of public housing to determine whether or not its provision has negative spillover effects, but evidence is similarly inconclusive. In cities where tenants of state-owned housing are socioeconomically diverse, such as Vienna or Singapore,<sup>118</sup> there is no evidence of negative externalities whatsoever. In places where the tenant population is overwhelmingly poor and uneducated, such as the United Kingdom or France, public housing is *associated* with crime and violence, but statistics are difficult to come by. In France specifically, some scholars have pointed to right-wing discourse as being a contributing cause to this association.<sup>119</sup> More generally, the question remains (1) whether negative externalities are a result of public housing or symptomatic of its population, and (2) whether public housing exacerbates negative externalities by concentrating them in one place. In the absence of stronger evidence, it is difficult to say that negative externalities are caused by public housing. Rather, it may well be the extensive set of issues facing its population that leads to a correlation between the presence of public housing and negative externalities.

That being said, public housing also has the potential to enact significant positive externalities on its surrounding community. HUD has begun to see public housing developments as opportunities for wider urban revitalization through its HOPE VI program, which redesigned public housing projects as mixed-income communities. A Brookings study found that “[h]ousehold incomes in each of these case study projects grew at a faster pace than that of their city or region after redevelopment. Unemployment and workforce participation rates have improved. Crime levels have dropped dramatically, as much as 93 percent,” and “property values and new investments have also soared.”<sup>120</sup> The redevelopment projects were also associated with a significant improvement in public school quality and were successful in creating a socioeconomically diverse neighborhood, both in and around the housing projects. It is important to note that the four projects that were part of the HOPE VI program were all located in relatively poor areas. A Stanford study found that similar findings may not hold true for a housing project in a more well-off neighborhood:

110 *Affordable Housing for All*, BERNIE SANDERS (2020), <https://berniesanders.com/issues/housing-all/> (last visited May 30, 2020).

111 *How Does Bernie Pay for His Major Plans*, BERNIE SANDERS (2020), <https://berniesanders.com/issues/how-does-bernie-pay-his-major-plans/> (last visited May 30, 2020).

112 *Warren and Colleagues Reintroduce Historic Legislation to Confront America's Housing Crisis*, SENATOR ELIZABETH WARREN (Mar. 13, 2019), <https://www.warren.senate.gov/newsroom/press-releases/warren-and-colleagues-reintroduce-historic-legislation-to-confront-americas-housing-crisis> (last visited May 30, 2020).

113 Senator Warren's plan, for example, is expected to lower rents *in the aggregate* by ten percent over the next ten years, while immediately providing relief for those who become tenants of the new developments.

114 Team Warren, *My Housing Plan for America*, MEDIUM (Mar. 16, 2019), <https://medium.com/@teamwarren/my-housing-plan-for-america-20038e19dc26> (last visited May 30, 2020).

115 Lisa Feng, *Do the Poor Bring Crime with Them?*, UCLA BLUEPRINT (2018), <https://blueprint.ucla.edu/feature/do-the-poor-bring-crime-with-them/> (last visited May 30, 2020).

116 Danielle H. Sandler, *Externalities of Public Housing: The Effect of Public Housing Demolitions on Local Crime* 14 (U.S. Census Bureau Ctr. for Econ. Stud. Paper No. CES-WP-16-16, Mar. 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2749322](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749322).

117 MARGERY TURNER ET AL., URB. INST., DISTRESSED PUBLIC HOUSING—WHAT IT COSTS TO DO NOTHING 12 (2005), <https://www.urban.org/sites/default/files/publication/51801/411159-Distressed-Public-Housing.PDF>.

118 See, e.g., JESSICA KRAMER, (FEAR)-LESS: A CASE STUDY ON HIGH-RISE HOUSING ESTATES IN VIENNA AND BERLIN (2011), [https://www.4cities.eu/wp-content/uploads/2016/06/MAThesis\\_4CITIES\\_KRAMER\\_JESSICA\\_Cohort2.pdf](https://www.4cities.eu/wp-content/uploads/2016/06/MAThesis_4CITIES_KRAMER_JESSICA_Cohort2.pdf); Naomi Rovnick, *What the World Can Learn from Singapore's Safe and Squeaky-clean High-rise Housing Projects*, QUARTZ (Nov. 21, 2012), <https://qz.com/30159/what-the-world-can-learn-from-singapores-safe-and-squeaky-clean-high-rise-housing-projects/> (last visited May 30, 2020).

119 See Alec G. Hargreaves, *A Deviant Construction: The French Media and the 'Banlieues'*, 22 J. ETHNIC & MIGR. STUD. 607 (1996).

120 MINDY TURBOV & VALERIE PIPER, BROOKINGS INST., HOPE VI AND MIXED-FINANCE REDEVELOPMENTS: A CATALYST FOR NEIGHBORHOOD RENEWAL 1, 5 (2005), [https://www.brookings.edu/wp-content/uploads/2016/06/20050913\\_hopevi.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/20050913_hopevi.pdf).

In low-income neighborhoods, where median incomes fell below \$26,000, the researchers saw home values appreciate 6.5% within a tenth of a mile of a [housing] project. Crime rates also fell . . . In higher-income neighborhoods, those with median incomes above \$54,000, housing prices declined approximately 2.5% within a tenth of a mile of a project, and segregation increased (the researchers noticed no crime impact).<sup>121</sup>

Price effects in the well-off neighborhoods, the study found, persisted for over ten years. The evidence for public housing externalities thus remains unclear. In poor neighborhoods, there are likely to be positive spillover effects. In richer neighborhoods, the spillover effects may be more negative. That being said, this research holds for the current form of mixed-income state-sponsored housing, whose tenants still skew poor.<sup>122</sup> If public housing is positioned as a sufficiently attractive alternative to private solutions for members of all socioeconomic classes, as it is in Vienna and Singapore, it is unlikely that any negative externalities will remain.

#### IV. Moving Forward: Public Housing in the Contemporary United States

The Democratic field of 2020 presidential candidates was perhaps more progressive than any in recent history, and housing policy was no exception. Hillary Clinton in 2016 campaigned on “increasing incentives for new affordable housing developments,”<sup>123</sup> signaling a reliance on private markets rather than proposing expansive public programs. But in 2020, Senator Sanders and Senator Warren proposed significant public housing developments that may well have been unthinkable in 2016. Perhaps more surprisingly, more moderate candidates spoke out in favor of public housing as well. Mayor Buttigieg’s housing plan, for example, called for the “[provision of] over \$150 billion in new National Housing Trust funds plus an additional state or local match to support over 1.4 million new affordable housing units.”<sup>124</sup> There was still room for a private market in his plan: he wanted to “[increase] investment in the Low-Income Housing Tax Credit” to stimulate private development of affordable housing units.<sup>125</sup> Mayor Michael Bloomberg, whose campaign released merchandise proclaiming he’s “Not a Social-

ist,”<sup>126</sup> built a plan around “[getting] to work building millions of affordable housing units.”<sup>127</sup> Presumed Democratic nominee and ex-Vice President Joe Biden’s housing policy promises to “[e]stablish a \$100 billion Affordable Housing Fund to construct and upgrade affordable housing,” while also “[providing] Section 8 housing vouchers to every eligible family.”<sup>128</sup>

The expansion of public housing has become — at least in the Democratic field — a mainstream idea, with debates centering around “how” rather than “if.” Whether or not these proposals become reality remains to be seen, but it is an interesting sign of how the housing debate has moved away from private market solutions to some extent. Ultimately, a mix of vouchers and public housing is likely to continue for the foreseeable future. As this paper has argued, it is in our best interest that this mix not skew too far toward vouchers. Public housing has the potential to revitalize communities and lower rents without running into some of the moral quandaries associated with restricted vouchers. Moving to Opportunity has been construed as a paper about housing vouchers, but in reality, it merely shows the impact of one’s neighborhood on life outcomes. Rather than moving a number of families into affluent neighborhoods, as restricted vouchers would do, public housing has the potential to provide a safe home in a prosperous community for all. This does come with an important caveat, though: international housing success stories originate in places that invest sufficient resources into housing solutions. Underinvestment means deterioration and a repeat of former housing failures, which is in everyone’s interest to avoid.

121 Shana Lynch, *Is Affordable Housing Good for the Neighborhood?*, STAN. GRADUATE SCH. BUS. (Sept. 15, 2015), <https://www.gsb.stanford.edu/insights/affordable-housing-good-neighborhood> (last visited May 30, 2020).

122 See *HOPE VI Data Compilation and Analysis*, PD&R EDGE (2017), <https://www.huduser.gov/portal/pdredge/pdr-edge-research-032017.html> (last visited May 30, 2020).

123 *Housing*, HILLARY FOR AM. (2016), <https://www.hillaryclinton.com/issues/housing/> (last visited May 30, 2020).

124 See Pete Buttigieg, *Coming Home: An Agenda for Housing Justice in America*, PETE FOR AM., <http://web.archive.org/web/20200223010036/https://peteforamerica.com/policies/housing/> (archived Jan 6, 2020).

125 *Housing*, PETE FOR AM. (website no longer available).

126 “*Not a Socialist*” Hat, MIKE BLOOMBERG 2020, <https://shop.mike-bloomberg.com/collections/featured/products/not-a-socialist-hat?variant=32414698766380>.

127 *Affordable Housing Plan*, MIKE BLOOMBERG 2020, <https://content.mikebloomberg.com/Mike-Bloomberg-2020-Affordable-Housing-plan.pdf>. Like many of Bloomberg’s plans, this one is not fleshed out beyond the promise to “build” more units.

128 *Housing*, BIDEN FOR PRESIDENT (2020), <https://joebiden.com/housing/> (last visited May 30, 2020).



# “They Simply Kill”: The Military-industrial Complex and a Potential Path Forward

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In his 1961 farewell address, President Dwight D. Eisenhower famously warned against the potentially corrupting influence of corporate power in the military: “In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”<sup>1</sup>

Since then, the United States has not heeded his words. The U.S. military relies on private military contractors (PMCs) in active combat zones in places like Afghanistan and Syria where they are involved in intelligence gathering, developing strategies, and training foreign fighters.<sup>2</sup> The military’s reliance on PMCs is growing rapidly. In 2009, the ratio of contractors-to-troops was one-to-one; currently, it is three-to-one.<sup>3</sup> At the same time, military spending remains incredibly high. The United States’ spending levels — 750 billion dollars — are triple China’s and tenfold greater than Russia’s,<sup>4</sup> making the United States military the costliest in the world by a wide margin.

This paper argues that these two trends are inextricably linked: understanding the influence of the defense industry both domestically and in conflict zones exposes some of the underlying factors behind exorbitant military spending. In the domestic sphere, direct lobbying and the permeation of private interests distort spending levels beyond what is necessary. Abroad, the profit-seeking motives of PMCs and their lack of accountability undermine both the humanitarian and economic interests of the United States, exacerbating conflict and straining its budget. Further, current regulations are clearly inadequate, necessitating the need for federal legislation to address these twin drivers of military reliance.

## I. The Revolving Door and the Military-industrial Complex

From a political perspective, there are three primary avenues through which the defense industry exercises influence in the

political process: the revolving door, the reverse revolving door, and direct lobbying, which is partially enabled by the first two factors.

Broadly, officials often move freely between public and private sector defense positions, known as the “revolving door.”<sup>5</sup> Officials involved in the appropriation of military funds, such as Members of Congress and Senators on relevant committees as well as senior Pentagon administrators, often secure employment in the defense industry, which sees their past expertise as an avenue to landing lucrative contracts and arms sales deals.<sup>6</sup>

Recent evidence from the Project on Government Oversight (POGO) confirms these risks of preferential treatment as reality. In 2016 alone, the twenty largest defense contractors hired former government officials and senior employees 645 times.<sup>7</sup> Ninety percent of these hires were employed as lobbyists “where the operational skill is influence-peddling,” meaning the primary task was to utilize their government connections.<sup>8</sup> In a different analysis completed in 2004, POGO concluded that “[a]t least two-thirds of the former Members of Congress who are lobbying or have lobbied for the top 20 government contractors served on the Authorization or Appropriations Committees that approved programs or funds for their future employer or client while they served in Congress.”<sup>9</sup>

There is also the “reverse revolving door,” by which defense contractor executives leave their private sector posts for short periods of time to join the Department of Defense (DOD), therefore creating the risk that they may reward their previous employers with favorable treatment via lucrative government contracts.<sup>10</sup> The same comprehensive analysis does not exist for the reverse revolving door as it does for the revolving door. However, *The Nation* conducted an analysis of employment agreements and found many instances of corporate employees receiving six-figure exit packages when leaving for jobs on con-

1 Dwight G. Eisenhower, Military-Industrial Complex Speech (1961), [avalon.law.yale.edu/20th\\_century/eisenhower001.asp](http://avalon.law.yale.edu/20th_century/eisenhower001.asp) (last visited May 28, 2020).

2 Sean McFate, *America’s Addiction to Mercenaries*, ATLANTIC (Aug. 12, 2016), [www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/](http://www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/) (last visited May 28, 2020).

3 *Id.*

4 Michael E. O’Hanlon, *Is US Defense Spending Too High, Too Low, or Just Right?*, BROOKINGS INST.: POL’Y 2020 (Oct. 15, 2019), [www.brookings.edu/policy2020/votervital/is-us-defense-spending-too-high-too-low-or-just-right/](http://www.brookings.edu/policy2020/votervital/is-us-defense-spending-too-high-too-low-or-just-right/) (last visited May 28, 2020).

5 See generally PROJECT ON GOV’T OVERSIGHT, BRASS PARACHUTES: DEFENSE CONTRACTORS’ CAPTURE OF PENTAGON OFFICIALS THROUGH THE REVOLVING DOOR (Nov. 5, 2018), [docs.pogo.org/report/2018/POGO\\_Brass\\_Parachutes\\_DoD\\_Revolving\\_Door\\_Report\\_2018-11-05.pdf](https://docs.pogo.org/report/2018/POGO_Brass_Parachutes_DoD_Revolving_Door_Report_2018-11-05.pdf) [hereinafter POGO, BRASS PARACHUTES].

6 *Id.* at 2.

7 *Id.* at 9.

8 *Id.*

9 PROJECT ON GOV’T OVERSIGHT, THE POLITICS OF CONTRACTING 10 (June 29, 2004), [https://docs.pogo.org/report/2004/POGO-Report-Politics-of-Contracting-all-appendices\\_2004.pdf?mtime=20180807160628](https://docs.pogo.org/report/2004/POGO-Report-Politics-of-Contracting-all-appendices_2004.pdf?mtime=20180807160628) [hereinafter POGO, CONTRACTING].

10 POGO, BRASS PARACHUTES, *supra* note 5, at 5.

gressional staffs.<sup>11</sup> In the last year, current Secretary of Defense Mark Esper drew scrutiny during his confirmation hearing when it was highlighted that he signed a compensation package with his former employer, Raytheon, that would begin in 2022.<sup>12</sup>

Further academic research underscores the prevalence of lobbying in the legislative process. In a controlled study, researchers at the University of Exeter compared language used in letters from lobbyists to legislators with legislative amendments. They discovered many instances of identical language. In particular, the degree of similarity to lobbyists' language was associated with whether the lobbying group hosted a fundraiser for the legislator.<sup>13</sup> In the case of military spending, contractors send hundreds of lobbyists each year when the National Defense Authorization Act (NDAA) is being reauthorized in order to sway lawmakers to undo spending caps; forty of the fifty-three largest contractors say the NDAA is a primary target of their lobbying efforts.<sup>14</sup> Thus, direct lobbying may result in higher levels of military spending.

This lobbying is not just on behalf of corporate interests in the United States, but rather encompasses the political interests of other countries as well. Although former government officials are technically barred from receiving payment from foreign governments, they may seek exemptions from the Secretary of Defense, which historically have been granted.<sup>15</sup> These officials may then be hired to lobby using their connections on behalf of foreign governments. Given a lack of oversight, the exact frequency of these cases is difficult to determine, but salient examples provoke concern. For example, Saudi Arabia spent eleven million dollars lobbying against the Iran Nuclear Deal by giving funds to lobbyists registered as foreign agents via the Foreign Agents Registration Act.<sup>16</sup> By arguing against diplomatic solutions to conflict, foreign lobbying such as Saudi Arabia's makes peaceful resolutions less likely, therefore undermining U.S. interests.

While the influence of the defense industry is clear, existing remedies are inadequate. For example, current statutory law establishes a "cooling off period" of one year where officials who were involved in awarding a federal contract cannot accept em-

ployment from the contractor that was selected.<sup>17</sup> Nevertheless, the law explicitly exempts officials who accept "compensation from a division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract . . ." <sup>18</sup>

In practice, therefore, the same risk of favorable treatment still exists, as the contractor can evade the ethics law by merely hiring the official in a department ostensibly unrelated to the one involved in awarding the contract. For example, a rocket engine supplier called Aerojet Rocketdyne hired Roger Correll, an Air Force official, as its Vice President of Government Acquisition and Policy; shortly thereafter, the government awarded a contract to the "United Launch Alliance," for which Aerojet Rocketdyne supplies its engines.<sup>19</sup> By rewarding contracts to the most well-connected rather than to the most worthy, the United States sacrifices both economic efficiency and military efficacy.

Another inadequate anti-lobbying measure, the Byrd Amendment,<sup>20</sup> was passed to prevent contractors from lobbying using taxpayer money.<sup>21</sup> However, the definition of what qualifies as a "lobbying activity" remains too narrow. Federal law defines "lobbying activit[ies]" in relation to a "lobbying contact,"<sup>22</sup> which refers to "any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official" in regards to a specific statute, regulation, policy, or nomination.<sup>23</sup> This leaves the door open for actions such as those on the part of individuals not technically registered as lobbyists, as well as those that simply avoid wading too far into specifics. Consequently, a *Politico* report on analogous legislation for former members of Congress found that de facto lobbyists join the private sector in many industries instead in a hodgepodge array of lobbying-adjacent roles such as "policy advisors," where the title differs but the function of the job is functionally identical.<sup>24</sup> The result, it concludes, is an uncountable contingent of "professional influencers" who are above scrutiny because they are shielded from lobbying regulation.<sup>25</sup>

11 Lee Fang, *The Reverse Revolving Door: How Corporate Insiders Are Rewarded Upon Leaving Firms for Congress*, NATION (May 4, 2013), [www.thenation.com/article/archive/reverse-revolving-door-how-corporate-insiders-are-rewarded-upon-leaving-firms-congress/](http://www.thenation.com/article/archive/reverse-revolving-door-how-corporate-insiders-are-rewarded-upon-leaving-firms-congress/) (last visited May 28, 2020).

12 Ryan Bort, *Trump's Pick for Defense Secretary Is as Swampy as You'd Expect*, ROLLING STONE (July 17, 2019), [www.rollingstone.com/politics/politics-news/trump-defense-secretary-mark-esper-859988/](http://www.rollingstone.com/politics/politics-news/trump-defense-secretary-mark-esper-859988/) (last visited May 28, 2020).

13 Amy Melissa McKay, *Fundraising for Favors? Linking Lobbyist-Hosted Fundraisers to Legislative Benefits*, 71 POL. RES. Q. 869, 869 (2018).

14 Ctr. for Pub. Integrity & Alexander Cohen, *Defense Contractors Spend Millions to Undo Military Budget Caps*, TIME (Aug. 5, 2015), [time.com/3984453/defense-contractors-lobbying/](http://time.com/3984453/defense-contractors-lobbying/) (last visited May 28, 2020).

15 POGO, BRASS PARACHUTES, *supra* note 5, at 28.

16 William D. Hartung, *The Saudi Lobby's Scheme to Destroy the Iran Deal*, AM. CONSERVATIVE (May 23, 2018), [www.theamericanconservative.com/articles/the-saudi-lobbys-scheme-to-destroy-the-iran-deal/](http://www.theamericanconservative.com/articles/the-saudi-lobbys-scheme-to-destroy-the-iran-deal/) (last visited May 28, 2020).

17 See 41 U.S.C. § 2104(a) (2011).

18 *Id.* § 2104(b); see also 48 C.F.R. § 2.104-3(d)(3) (Westlaw current through 85 Fed. Reg. 30852) (same). See generally JACK MASKELL, CONG. RESEARCH SERV., R42728, POST-EMPLOYMENT, "REVOLVING DOOR," LAWS FOR FEDERAL PERSONNEL 7 (2014), <https://fas.org/sgp/crs/misc/R42728.pdf> (summarizing procurement integrity laws).

19 Matthew Barakat, *Contracting Official's New Job Raises Questions*, AP NEWS (May 23, 2013), [apnews.com/04dbfdee73f7436eb95c3740fb0800a3](http://apnews.com/04dbfdee73f7436eb95c3740fb0800a3) (last visited May 28, 2020).

20 31 U.S.C. § 1352(a)-(b) (1996).

21 See generally L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL31126, LOBBYING CONGRESS: AN OVERVIEW OF LEGAL PROVISIONS AND CONGRESSIONAL ETHICS RULES 11 (2010), <https://www.hsdl.org/?view&did=805656> (discussing provisions of the Byrd Amendment); JACOB R. STRAUS, CONG. RESEARCH SERV., R44292, THE LOBBYING DISCLOSURE ACT AT 20: ANALYSIS AND ISSUES FOR CONGRESS 10-12 (2015), <https://fas.org/sgp/crs/misc/R44292.pdf> (providing history of Lobbying Disclosure Act of 1995 and the relevant statutory framework, including the Byrd Amendment).

22 2 U.S.C. § 1602(7) (2007).

23 *Id.* § 1602(8)(A).

24 Isaac Arnsdorf, *The Lobbying Reform that Enriched Congress*, POLITICO (July 3, 2016), [www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849](http://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849) (last visited May 28, 2020).

25 *Id.*

As a result of direct lobbying, the revolving door, and the reverse revolving door, defense contractors exercise significant influence over both budgetary and bidding processes, ratcheting up spending while undermining strategic interests.

## II. The Rise of Contractors in Active Combat Zones

Over the course of the last five decades, the U.S. military has increasingly relied on PMCs. In World War II, ten percent of U.S. armed forces were contracted; today, the United States contracts about three-quarters of its forces in current operations. Projections suggest future conflict might involve armed forces that are eighty-to-ninety percent contracted.<sup>26</sup>

As contractors wield a significant amount of influence in defense policy, this growing reliance on private military contractors (PMCs) in foreign combat operations has significant implications.

### A. In Domestic Politics

According to a report by the International Peace Research Institute, it is increasingly difficult to know who is in combat and distinguish them from others in strategic, advisory, and logistical roles:

PMC employees usually remain outside the formal chain of command and are not allowed to take part in hostilities because they are regarded as civilians under International Humanitarian Law. However, in most of the military interventions today the distinction between frontline and hinterland blurs, bringing PMCs who are most active in logistics, site and convoy security and weapon maintenance ever closer to theater and to an active participation in hostilities.<sup>27</sup>

The military's growing reliance on contractors coincides with developments in military operations that bring these contracted forces into quasi-combat roles. The blurring of the line between U.S. soldiers and outsourced contractors has several detrimental implications, beginning with a lack of congressional oversight. Historically, the courts have deferred to the executive branch rather than Congress in war powers cases; further, because PMCs do not constitutionally qualify as a part of the U.S. army, Congress has minimal oversight or leverage over PMCs.<sup>28</sup>

In addition to these vague definitions, PMCs may reduce the "audience costs" of military conflict, evading public pressures to shorten the length of combat operations. Today, "more contractors are killed in combat than soldiers," but unlike traditional soldiers, these deaths lack the same reporting mandates, thereby shielding the public from the carnage.<sup>29</sup> Moreover, 2016 evidence from the Department of Defense quantified that 66.5 percent of private forces in Afghanistan are "third

country nationals" or "host country nationals,"<sup>30</sup> creating yet another layer between the facts on the ground and what the American public is able to learn about the conflict due to the more relaxed scrutiny for non-American citizens.<sup>31</sup> These contractors also do not count toward congressional troop caps, allowing the government covert power to expand military involvement beyond the scope of the public's view, as the media merely reports the number of U.S. soldiers.<sup>32</sup>

This lack of accountability allows contractors to charge large sums for their missions. During the Iraqi counterinsurgency, watchdogs uncovered ten billion dollars in "unsupported or questionable costs" that PMCs charged the U.S. government.<sup>33</sup> Without oversight from Congress or the media, profit motives supersede efficiency.

### B. In Undermining U.S. Interests Abroad

Within conflict, due to ineffective regulation and a general lack of oversight, the conduct of PMCs also escapes public scrutiny. Because PMCs exist outside traditional government structures, journalists are unable to use Freedom of Information Act requests to obtain information about their conduct in combat zones. There have been numerous attempts to regulate PMCs in combat zones such as the Military Extraterritorial Jurisdiction Act of 2000.<sup>34</sup> However, many regulations also have loopholes or lack enforcement mechanisms, making effective prosecution of crimes by PMCs challenging.<sup>35</sup> As such, the typical American likely has no idea of this reliance on outsourced forces: just 248 articles in a study of 100,000 pieces written from 2004 to 2007 about the Iraq War discuss the role of PMCs.<sup>36</sup> Without such accountability, PMCs have little incentive to act in the humanitarian and economic incentives of the United States.

Despite proponents of PMC's claims of improving military efficiency, PMCs undermine U.S. interests. First, because contractors have a profit incentive that the government does not, the typical contracted employee costs two-to-three times as much as the average government employee to perform similar work.<sup>37</sup> Moreover, because they profit from conflict, there is some risk

30 U.S. DEP'T OF DEF. DEPUTY SEC'Y OF DEF. PROGRAM SUPPORT, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENCOM AREA OF RESPONSIBILITY 1 (2016), [https://www.acq.osd.mil/log/ps/.CENTCOM\\_reports.html/5A\\_July\\_2016\\_Final.pdf](https://www.acq.osd.mil/log/ps/.CENTCOM_reports.html/5A_July_2016_Final.pdf) (last visited May 28, 2020).

31 McFate, *supra* note 2.

32 *Id.*

33 PETER W. SINGER, BROOKINGS INST., POL'Y PAPER NO. 4, CAN'T WIN WITH 'EM, CAN'T GO TO WAR WITHOUT 'EM: PRIVATE MILITARY CONTRACTORS AND COUNTERINSURGENCY 4 (2007), [www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf).

34 See 18 U.S.C. § 3261-67 (2000) (regulating conduct of people "while employed by or accompanying the Armed Forces outside of the United States" or "while a member of the Armed Forces" generally, *id.* § 3261(a)(1)-(2)).

35 John S. Kemp, *Private Military Firms and Responses to Their Accountability Gap*, 32 WASH. U. J.L. & POL'Y 489, 510 (2010).

36 Habib Moody, *Soldiers for Rent*, 17 NEW ATLANTIS 122, 126 (2007).

37 PROJECT ON GOV'T OVERSIGHT, POGO'S CALCULATIONS COMPARING DoD'S AVERAGE FY 2010 COSTS FOR DoD CIVILIAN AND CONTRACTOR FTEs; CALCULATIONS OF DoD'S FY 2010 EXPENDITURES FOR COMPARING THE CIVILIAN AND CONTRACTOR WORKFORCE 1 (Nov. 30, 2012), <http://www.pogoarchives.org/m/co/enclosure1-20121017.pdf>.

26 McFate, *supra* note 2.

27 DAVID ISENBERG, INT'L PEACE RESEARCH INST., PRIVATE MILITARY CONTRACTORS AND U.S. GRAND STRATEGY 45 (2009), [www.cato.org/sites/cato.org/files/articles/isenberg-private%2520military-contractors-2009.pdf](http://www.cato.org/sites/cato.org/files/articles/isenberg-private%2520military-contractors-2009.pdf).

28 Deborah Avant, *Private Security and Democracy: Lessons from the US in Iraq*, 19 SEC. STUD. 230, 232 (2010).

29 McFate, *supra* note 2.



that PMCs may have incentive to prolong the lengths of combat operations, as their primary motive is monetary rather than strategic or humanitarian.<sup>38</sup> Such an analysis does not exist for American contractors, but in a study of civil wars in Africa, researchers found that without robust competition, contractors with functional monopolies may have “underperformed” to make conflict last longer.<sup>39</sup> This dynamic not only raises humanitarian concerns by extending the occupation of other countries, but acts as a strain on the budget.

In order to accomplish many of their assigned tasks, particularly logistical responsibilities, PMCs often turn to local sub-contractors. In Afghanistan specifically, PMCs sub-contracted to local companies to protect U.S. supply lines in the region.<sup>40</sup> However, a report by the House Committee on Oversight and Government Reform discovered that these sub-contractors “fuel[ed] warlordism” by using violent tactics and bribing government officials to accomplish their assignments.<sup>41</sup> For example, the report details the actions of a warlord named Commander Ruhullah, who employs “600 armed guards” and maintains control over crucial highway supply routes.<sup>42</sup> Ruhullah was sub-contracted to protect the trucks of U.S. forces in the region despite violating U.S. regulations by having more powerful weaponry than AK-47s; he stated that these laws “do not apply to him,” claiming to not be bound by U.S. law.<sup>43</sup>

More broadly, contractors’ lack of interest in establishing the conditions for sustainable peace efforts fosters anti-American sentiment. One account from an Iraqi civilian concerning PMCs in Iraq described their actions as “hated,” with one interview stating that “they simply kill.”<sup>44</sup> The House Committee concluded that: “By fueling government corruption and funding parallel power structures, these logistics arrangements undercut efforts to establish popular confidence in a credible and sustainable Afghan government.”<sup>45</sup> Their actions, therefore, are not only a humanitarian concern, but also a strategic one; the PMC’s synonymy with U.S. forces hinders the willingness among other countries to join the negotiating table.

By prioritizing profit, PMCs have put civilians in harm’s way and undermined U.S. interests abroad.

### III. Conclusion

In both domestic politics and foreign combat missions, defense contractors undermine U.S. interests. In the domestic sphere,

38 Kemp, *supra* note 35, at 499.

39 Seden Akcinaroglu & Elizabeth Radziszewski, *Private Military Companies, Opportunities, and Termination of Civil Wars in Africa*, 57 J. CONFLICT RESOL. 795, 795 (2013).

40 STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM SUBCOMM. ON NAT’L SEC. & FOREIGN AFFS., *WARLORD, INC.: EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN 1* (2010), [www.cbsnews.com/htdocs/pdf/HNT\\_Report.pdf](http://www.cbsnews.com/htdocs/pdf/HNT_Report.pdf) [hereinafter *WARLORD, INC.*].

41 *Id.* at 2.

42 *Id.* at 17.

43 *Id.* at 18.

44 SINGER, *supra* note 33, at 5 (quoting Um Omar, “a Baghdad housewife,” *id.*).

45 *WARLORD, INC.*, *supra* note 40, at 3.

the revolving door creates perverse incentives for government officials to act in favor of corporate interests, thereby distorting defense policy such as military spending. Abroad, PMCs shield conflict from public scrutiny, evade accountability, and proliferate sub-contractors who cultivate brutality, all of which prolong conflict.

By directly lobbying for military spending increases and by indirectly exacerbating conflicts, the defense industry as it stands today is both a strategic and economic burden on the U.S. military. Though recent attempts to rectify this imbalance are promising, they are also not currently feasible. One such effort to ameliorate corruption at the Pentagon goes further than previous efforts at reform and would offer a marked step in the right direction. The Department of Defense Ethics and Anti-corruption Act of 2019,<sup>46</sup> introduced by Senator Elizabeth Warren and Representative Jackie Speier, offers a multi-faceted approach. First, it institutes outright bans on senior DOD officials from accepting employment from defense contracts in any capacity for four years after they leave DOD and on military officials accepting work from foreign entities.<sup>47</sup> Second it allows for FOIA requests regarding the actions of contractors who, currently, are exempted from FOIA’s requirements.<sup>48</sup> However, there is little evidence that this bill seems likely to pass. The bill has not yet made it out of committee, and given the influence of lobbyists on congressional representatives, this is unlikely to change in the near future without more systemic changes to anti-lobbying laws, whose current failure hinders the ability of bills like this one to gain traction.

Similarly, potential solutions regarding PMC in combat zones are likewise unlikely to come to fruition. The Stop Outsourcing Security Act, introduced by Representative Jan Schakowsky and Senator Bernie Sanders, would require all defense and diplomatic duties in significant military operations be carried out by U.S. government personnel exclusively.<sup>49</sup> The bill has failed to make it out of committee in the decade since it was introduced, making legislation of its nature unlikely to be passed in the near future.

Because these bills are not politically feasible, no substantive analysis has been done to assess their merits. However, there is reason to think that if they were somehow able to become law, they would ameliorate the problems diagnosed in this paper. First, the four-year cooling off period in Senator Warren’s bill may be a long enough time frame such that there is turnover in the ranks of the Pentagon, minimizing former officials’ connections. Moreover, the law’s more blanket wording makes it less likely that these officials can find loopholes to exploit. Even if this is not the case, allowing FOIA requests would create a layer of accountability that currently does not exist. Similarly, Senator Sanders’ bill takes PMCs out of combat zones entirely, meaning that their presence would be replaced by U.S. forces, who have more of an incentive to shorten conflict.

Both at home and abroad, the private defense industry has

46 S. 1503, 116th Cong. (2019).

47 *Id.* § 105.

48 *Id.* § 302.

49 H.R. 2665, 112th Cong. (2011).

a deleterious impact on U.S. interests and distorts military spending. In order to address this problem, the United States must adopt bold solutions to limit the influence of lobbying in the political process and ensure that only U.S. forces are carrying out combat operations.

# The 2020 Elections: A Conversation with Rick Hasen

Conducted by Matthew Fisch (PO '23)

Staff Writer

*Richard L. Hasen is a professor of law and political science at the University of California, Irvine and is widely regarded as one of the country's top experts on election law. Professor Hasen's recent book, Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy, analyzes key threats to the integrity of the 2020 presidential election; he has written three previous books touching on various aspects of campaign finance, voting rights, and election legislation. Our staff writer, Matt Fisch, caught up with Professor Hasen in March for a phone interview in which he discusses the current state of our elections and, by extension, our democracy, as well as his own ideas for election reform.*

*This interview has been lightly edited for brevity and clarity.*

**CJLPP:** So, the first thing I want to ask you about was the Democratic primary. So I know in your book, you talk about the implications of incompetence in running elections. And we saw that play out really publicly in Iowa and reporting the results and to a lesser extent in Nevada. So how do you think these incidents impact public trust of the democratic process?

**RH:** Yeah, I think that the caucuses are a major source of people's distrust in the electoral process. And the reason is that these caucuses, unlike your typical primaries or general elections, are typically run by the political parties. They do it only once every four years. And they're not particularly good at it.

It's gotten worse now, because there have been a number of criticisms of the democratic nature of the caucuses. And in order to try to preserve the caucuses, especially in Iowa, where they don't want to fight with New Hampshire over who gets the first primary, they've tried to democratize the caucuses in some ways, for example, by allowing early voting in Nevada. And these additional complications, or in Iowa where they had the additional reporting of the first and second round vote totals — these changes add additional complications and make it even harder for non-professionals like political parties to be able to accurately report results. So even now, weeks after the Iowa caucuses, a number of people are convinced that there remain errors in reporting that could potentially affect the outcome of that race.

**CJLPP:** So, do you think that the federal government should run primaries or is the issue more with caucuses specifically? Is it okay for states to run their own primaries and elections?

**RH:** Well, the caucuses are run not by the government, but by the political parties. I think it would be a great improvement if the states were running primaries rather than the parties running caucuses. Whether we'd want to move to a federalized

election system — that's an interesting, important point. I think in the long term, I would prefer, at the very least, federal standards for voting machines and ballot design and things like that. But yeah, I think the worst situation is having a non-governmental body like a political party running these kinds of things.

**CJLPP:** Next I want to ask you about the impact of voter suppression, and how it might foster suspicion in our institutions as well. So, in recent Supreme Court decisions like *Shelby County v. Holder*,<sup>1</sup> we've seen the Supreme Court granting states broad authority to take actions like purging voter rolls, and other actions that people allege are voter suppression. Do you think if the justices continued to rule as they have, that we can combat voter suppression effectively?

**RH:** So, I do think that the Supreme Court's decision in the 2013 *Shelby County* case is essential in understanding what's going on now. It's an important milestone.

It meant that jurisdictions that had a history of racial discrimination in voting no longer had to get permission from the federal government before they made changes in their voting rules — and states subject to the rule had to demonstrate that those changes would make minority voters worse off. So now states can go ahead and enact laws that could potentially make it harder for racial and ethnic minorities, as well as other people, to register and vote without having to jump through these hoops. And I think that does increase the risk of suppression.

But that's not the whole story. Because even before *Shelby County*, only parts of the country were covered. And, you know, if it were in place now, the Trump Administration would be the federal governmental body that would be able to approve all kinds of suppressive measures. So while I think the loss of Section 5 in the *Shelby County* case is a good part of the explanation, I don't think it's the only explanation for why we see these kinds of patterns. And so it's really going to take not only court cases, under other parts of the Voting Rights Act or under the Constitution, but also political actions to try to prevent jurisdictions from passing laws that make it harder to register to vote without a good reason.

**CJLPP:** Do you think our current laws in the books are sufficient, and it's just about interpreting them the right way to protect minority voters? Or do you think we need new legislation or new constitutional amendments?

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<sup>1</sup> 570 U.S. 529 (2013).



**RH:** I do think that protective federal legislation would be a good way to go. I'm not optimistic that in the short term, you're going to see such legislation — in part because the President has shown no interest in or commitment to voting rights issues, and in part because Republicans generally have been skeptical of electoral reform measures proposed by Democrats. It's hard to see us in an environment where election reform could happen. In the short term, maybe if Democrats take back the presidency and take control over the Senate, it might be more realistic to think about new voting protections being put in place on the federal level.

**CJLPP:** I know that some activists and even some presidential candidates have voiced support for structural reforms to the Supreme Court, such as eliminating lifetime appointments or adding justices to the bench. Which, if any, of these proposed reforms do you think should be adopted? And what unintended consequences do you think they may pose in terms of court packing or getting rid of lifetime appointments?

**RH:** Well, I've long been in favor of eighteen-year, fixed appointments for Supreme Court justices. I think that would take some of the pressure off in terms of the fights over our nominations. I think it would also help in terms of taking away a long hand of history from controlling current events. You know, it seems odd that you could choose someone to help make your decisions and fifty years later, they're still making decisions for you. And it certainly was not what I think was expected by those who designed our Constitution when life expectancy was much shorter.

I do favor term limits for Supreme Court justices. I'd like to see each president in a four-year term get to appoint two justices, and you'll have them rotate on and off. I think that would be a more rational system. I think it's too premature to think about court packing at this point. It will be interesting to watch if there is an emerging Democratic political majority, whether the Supreme Court ends up blocking significant new legislation coming out of there and what the political reaction might be to that.

**CJLPP:** I know that you've voiced concern about the Supreme Court potentially being called upon to effectively decide another presidential election in 2020. Should the court have this power? And if not, how should contested elections like we had in 2000 be decided?

**RH:** In 2000, the Supreme Court was an actor, but you know, there were also state courts as well as the potential for Congress to resolve disputes. And I think that in the event that there is a recount, or something like a recount, in 2020 and the issues get to the courts, it would not be surprising to see Trump's side looking to the Supreme Court for a potential relief. [In both 2000 and now, the Court was divided five conservatives to four liberals. But two of those liberals in 2000 were appointed by Republican presidents.] Now all of the conservatives on the Supreme Court were appointed by Republican presidents, and all of the liberals were appointed by Democratic presidents. And this, I think, makes the Court look like a more partisan institution. Given that, there's going to be a lot of pressure on

the Court to try to not get itself involved. Because it could only harm the legitimacy of the Court at this point if they end up resolving yet another presidential election.

**CJLPP:** I want to turn to the issue of misinformation on social media. I know there has been controversy surrounding companies like Facebook and their decisions to not take down political ads that promote misinformation about candidates for public office. Do you think this poses a threat to the integrity of our elections?

**RH:** Let's start with the idea of Facebook and all of these other social media companies are private actors, so they are not bound by the same rules as a government would face in terms of the First Amendment. I do think that it would be better for America for the companies to flag misinformation and direct voters to more accurate information and to fact checks. I think these are all things that could potentially help but it's difficult, even though the companies have the power, so difficult to have anyone as the arbitrator of truth or falsity. It's difficult to conceive of how a system would work where you have these companies engaging in this kind of truth-telling function. And I think the devil is in the details. I certainly think that they have a role to play in flagging obviously dangerous and manipulated videos and audio files and things like that. But finding the line between a misleading statement and a false statement by campaigns is a really tough thing to do, and maybe too much to expect the companies to be able to do.

**CJLPP:** I know that Twitter just decided to not run political ads at all anymore. So do you think this is the measure that should be taken so that [the companies are] not responsible for deciding between what's true and what's not, like finding where that line is?

**RH:** So again, the devil's in the details in terms of how exactly that's going to work. One big question is, what counts as a political ad? If you're on an ad talking about climate change, for example, is that political? It affects a big issue outside of the election, but it does mention a candidate. So I think we'll have to see in practice what happens and of course, politicians are still out there on Twitter. President Trump has tens of millions of Twitter followers, he can put out whatever misinformation he wants, because that's not subject to any political ad rules. So, you know, I think that what Twitter has suggested gets it into some of the problems it's trying to solve. But it certainly doesn't get the company out of the business of deciding whether to police false or misleading political words or images that are up here on its website.

**CJLPP:** So, I wanted to discuss the issue of campaign finance in the Democratic primary.

In the current primary, we see two candidates self-funding their campaigns, and they're funneling hundreds of millions of dollars into TV ads. This isn't a new development — we've seen this with Ross Perot, and even Donald Trump to some extent. So what threat do you think this poses to our elections? And do you think that billionaires should be able to entirely self-fund their campaigns?

**RH:** First of all, I do think what we're seeing now is different. We've never seen spending on this scale by a candidate using his own funds. Trump certainly didn't do it. Ross Perot didn't do it. In 2020 you've had Michael Bloomberg spend over half a billion dollars already. And we're still relatively early into this current season. So I think it raises different kinds of issues. As we're conducting this interview, Michael Bloomberg is only a serious candidate because he spent all of this money. I think if he had come in as a candidate raising money in the normal way, that there's no way he would get this kind of traction. But instead, he has saturated the airwaves, social media, and even our mailboxes with advertising.

That doesn't mean he's going to win — in fact, I think that lots of these self-funded candidates don't do well, because they never end up having to hone and vet their ideas in front of groups of people, in order to ensure that they have a popular enough message. But what it does do is it gives these ultra-wealthy candidates a chance to make their case to the American people, a chance to be considered seriously by them in a way that many other serious candidates did not have the opportunity. Even taking someone like Kamala Harris or Cory Booker, if they had had the five hundred million dollars to spend on the election, there's a very good chance that they would still be in the race, and they would still be taken much more seriously as presidential candidates than they ever were when they were in. So I do think that in a system of political equality, it's very problematic to have campaigns that are self-funded by billionaires who can have this kind of oversized chance to be able to be successful in that political process.

**CJLPP:** So would you support an effort to eliminate self-funding completely? Or do you think it's okay up to a certain point?

**RH:** Well, as things stand right now, based on Supreme Court decisions going back to 1976,<sup>2</sup> there can be no limits on the amount of money that an individual spends on his or her own campaign to try to get elected. And so it will take either a constitutional amendment or a change in the composition of the Supreme Court for that rule to change. So, while I do think it is troubling, it's part of a problematic set of rules that have been in existence for quite a long time, and are unlikely to change in the short term — and are likely to actually get worse as political actors take maximum advantage of their ability to spend and contribute in the current campaign financial shape.

**CJLPP:** I guess this would apply a little bit less to presidential contests and more so to down-ballot or local races. But what do you think about public financing as a solution to help candidates who are not personally wealthy?

Because I know personally in my district, we have an open Democratic primary right now. And one of the leading contenders is this son of a billionaire, and one of the biggest, biggest advantages he's had is that it's a pretty low-information race, and he's been able to self-fund significantly more than the other candidates. Do you think if other candidates had a public supply of money that they could draw from, would this help

level the playing field a little bit?

**RH:** I've long been a supporter of public financing for campaigns. I would give voters vouchers that they could use to donate to candidates as a way of ensuring that the amount of funding that candidates receive reflects their amount of public support.

There are lots of different ways to do public financing. But I do think that it is a useful way to try to not eliminate, but at least ameliorate, some of the perverse effects of our current system where the very wealthiest have the greatest ability to influence both who we vote for and what policies our elected officials pursue.

**CJLPP:** In a similar vein, I know that presidential candidates, like Elizabeth Warren, have called for stricter anti-lobbying measures. For example, members of Congress wouldn't be able to work for a lobbying firm for a significant amount of time after they leave office. Do you think this would help combat the wealthy controlling our elections, by promising politicians their jobs if they basically write legislation in favor of them?

**RH:** Well, I do favor a cooling-off period after a member of Congress is done serving before they can serve as lobbyists. There is one in place. It has some holes in it in terms of the definition of who counts as a lobbyist. But even if we had a lifetime ban, I still don't think we would make much of a dent in the influence that the wealthy have. That would not stop the wealthy from being able to use both campaign contributions directly to candidates as well as contributions to outside groups as a way to try to curry favor with those in office. And the social science shows us that if you're wealthy, you're much more likely to see your political views reflected in the public policy that's pursued by Congress than if you were poor or middle class.

**CJLPP:** Is that reality due to the influence of money in our elections? Or do you think that perhaps our elected officials aren't coming from diverse enough backgrounds — or is it perhaps a combination of the two?

**RH:** Well, I think that the role of money and politics influences both who is a serious candidate that could get elected, as well as the policies that elected officials pursue once they are elected. And so it is true that money affects politics in multiple different ways.

When you think about the kinds of solutions like public financing, you need to ask whether it would increase the diversity of the pool of people who are considering running for office or are actually successful running for office. If you look at some of the public financing plans on the state levels, in places like Arizona, the evidence does seem to show that it increases the diversity of the candidate pool, which I think helps to diversify the views of those who actually serve as legislative bodies.

**CJLPP:** I know you touched on this in a couple of your answers already — but we've seen a couple of different ways to publicly finance. Seattle tried out the democracy voucher program, and states like Arizona and Maine tried more of a match-

<sup>2</sup> Buckley v. Valeo, 424 U.S. 1 (1976).

ing contribution system. Do you think one of these systems is better than the other? And do you think these systems becoming more widespread might have any unintended consequences in terms of campaign finance?

**RH:** I like the idea that we're starting with vouchers in a place like Seattle. It's a medium-sized city. We can see how things go there, and social scientists are already studying that. Another program is the multiple matches for small contributions, which they do in New York City. I think they've just raised the multiple match from four to one to six to one.

There are different ways of trying to figure out how you can create the right incentives, especially in the era of large spending through super PACs, where candidates will still be able to get meaningful contributions through public financing so that they do not have to rely on or be part of a system of large campaign contributions. But I do think more experimentation on the state and local levels is important before we would roll out any kind of plan on a national basis to apply to, for example, congressional elections.

**CJLPP:** Okay, so the last topic I wanted to touch on was about felon voting. [Recently], a federal appeals court blocked a Florida law that would require former felons to pay fees before registering to vote,<sup>3</sup> a right that was recently restored to them under Amendment 4.

However, some activists have pressed states to push further, and Bernie Sanders suggested at a debate earlier this year that inmates currently serving their sentence be allowed to vote. Do you think this is a viable option to combat voter suppression tactics and prison gerrymandering? Or, from a policy and legal perspective, do you think it's the bridge too far?

**RH:** Well, first of all, we give this power to each state. So I think that this is the kind of thing that can be done on a state-by-state basis. And so as political opinions change, then things can shift within states. I think there's much more support now, for campaigns to try to get felons re-enfranchised, whether that's through a ballot initiative in Florida, sometimes through legislation or even as we're about to see in Kentucky, [through re-enfranchisement for former felons] granted by the state's governor.

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<sup>3</sup> *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020). The Eleventh Circuit, in *Jones*, had affirmed the preliminary injunction ordered by the district court in late 2019, holding that the plaintiffs would likely succeed on the merits of their claim. *See id.* at 817. After this interview took place, the district court conducted a bench trial and entered a permanent injunction against the Florida law on May 24, 2020. *Jones v. DeSantis*, No. 4:19cv300-RH/MJF, 2020 WL 2618062 (N.D. Fla. May 24, 2020). The Eleventh Circuit stayed the permanent injunction while deciding to hear the appeal of the case en banc on July 1, 2020. *Jones v. DeSantis*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020). The Supreme Court of the United States declined to vacate the stay of the injunction pending the appeal. *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868 (U.S. July 16, 2020). The outcome of the litigation as of the time of the publication of this piece, therefore, is that the Florida law requiring former felons to pay all outstanding fees is still enforced.

I think there's much less of an emerging consensus in favor of re-enfranchisement of those who are currently serving time in prison. Although some other countries do allow prisoners to vote, I think that's something that would probably not be politically palatable in a bunch of countries [including the United States]. And so I would think that efforts being put into trying to re-enfranchise those who completed their sentences are likely to be more politically effective. That's somewhat different from the question about prison gerrymandering, which is about where you count someone for purposes of drawing their districts. I certainly think that people should be represented as to where they last lived voluntarily, rather than using a place where they're incarcerated.

**CJLPP:** Okay, so if states were to grant former felons the right to vote through ballot initiative, as we saw in Florida, do you think this is a sustainable way to grant them this right? Because we saw the governor of Florida enact a lot of legislation to undercut this right. So if a case like this went to the Supreme Court, there's a high likelihood they would rule in favor of the restrictions on voting. Do you think there are other measures besides ballot initiatives or legislation, on the state level, that the federal government could undertake under a Democratic administration that would help address this issue?

**RH:** Well, this has typically been a state issue, and attempts to try to argue that there's a constitutional right of felons who complete their sentences to be able to vote have failed. I think it'd be unlikely that something like the fight over Florida's amendment would end up in the hands of the Supreme Court.

There are some Democrats who support legislation like this, including H.R.1, a big election reform bill that Democrats passed at the beginning of 2019. [H.R.1] included a provision that would have re-enfranchised felons in federal elections. But I think there's a real question as to whether the federal government under the Constitution has the power to do that, or whether that is really an issue on a state-by-state basis. And if that legislation ever passed and got to the Supreme Court, I'm quite skeptical that the current Supreme Court would believe that Congress would have the power to re-enfranchise felons across the country. I think this is actually much more likely to be a state-by-state kind of dispute.

**CJLPP:** Thank you so much for taking the time. I really enjoyed our conversation.

**RH:** Sure. Happy to talk to you. I'm glad that worked out.



# The Failure of Brazilian Presidentialism

Dave Ruiz (PO '23)

Staff Writer

On August 31, 2016, Brazil was shaken to its core as the final act in a long, highly divisive,<sup>1</sup> complex political saga ended.<sup>2</sup> The nation's Senate voted 61-20 to convict Brazil's first female president, Dilma Rousseff, of *crimes de responsabilidade fiscal* (crimes of fiscal responsibility) and to remove her from the presidency.<sup>3</sup> However, the legislative procedure itself, culminating in Rousseff's removal from office, came with swift condemnation by members of the international community, such as the UN bloc of South American nations and the Organization of American States (OAS). The OAS Secretary-General, Luis Almagro, commented that the process was a "dangerous criminalization of governance."<sup>4</sup> Going further, he added, "without [having] certainty in the process, a positive resolution of the impeachment is flagrantly illegal."<sup>5</sup> At the same time, this regime crisis came at the fourth year of growing public discontent — which had manifested in cacophonous, impassioned street demonstrations — along with increasingly explosive revelations by the sweeping Lava Jato anticorruption investigation and a sharpening economic downturn which had further fueled popular outrage at the presiding government.<sup>6</sup> For Brazil, a democracy nearing its thirtieth anniversary, the bubbling maelstrom of instability that surrounded the 2016 impeachment was an unwelcome development whose effects continue to echo into the present.<sup>7</sup> At the time of this paper's writing, a political crisis combined with a slow response to COVID-19 threatens to sink Jair Bolsonaro's presidency with whispers of impeachment rippling across Brasília.<sup>8</sup>

1 Andrea Scoseria Katz, *Making Brazil Work? Brazilian Coalitional Presidentialism at 30 and Its Post-Lava Jato Prospects*, J. CONST. RES. 77, 85 (2018).

2 Luisa Leme & Pablo Medina Uribe, *Timeline: Brazil's Political Crisis*, AMS. Soc'y: COUNCIL OF AMS. (Apr. 13, 2016), <https://www.as-coa.org/articles/timeline-brazils-political-crisis> (last visited Apr. 16, 2020).

3 SIDNEY CHALHOUB ET AL., LATIN AM. STUD. ASS'N, REPORT OF THE LASA FACT-FINDING DELEGATION ON THE IMPEACHMENT OF BRAZILIAN PRESIDENT DILMA ROUSSEFF 30 (2017), <https://lasaweb.org/uploads/reports/brazildelegationreport-2017.pdf>.

4 *Statement of OAS Secretary General Luis Almagro after Meeting with the Constitutional President of Brazil, Dilma Rousseff*, ORG. OF AM. STATES (Apr. 15, 2016), [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-044/16](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-044/16) (last visited Apr. 14, 2020) (quoting the Union of South American Nations).

5 *Id.* (quoting "a letter signed by 130 members of the public prosecutor's office of Brazil[.]" *id.*).

6 CHALHOUB ET AL., *supra* note 3, at [30]; Marcus André Melo, *Latin America's New Turbulence: Crisis and Integrity in Brazil*, 27 J. DEMOCRACY 50, 50-55 (2016); SERGIO FAUSTO, RICE U. BAKER INST. FOR PUB. POL'Y, THE LENGTHY BRAZILIAN CRISIS IS NOT YET OVER 7 (2017), [https://www.bakerinstitute.org/media/files/research\\_document/5377c509/BI-Brief-021717-LAI\\_Brazil.pdf](https://www.bakerinstitute.org/media/files/research_document/5377c509/BI-Brief-021717-LAI_Brazil.pdf).

7 Philip Reeves, *Amid Pandemic, Brazil's Jair Bolsonaro Faces Political Crisis*, NPR (Apr. 29, 2020), <https://www.npr.org/2020/04/29/847732065/amid-pandemic-brazils-jair-bolsonar-faces-political-crisis> (last visited May 25, 2020).

8 Redação Jornal de Brasília, *Partidos se juntam e protocolam pedido de*

2016 is often described in terms of political disruption, with the shocks of Brexit and the election of Donald Trump in the United States. These events often feature in analyses of spreading populist sentiment in Western democracies.<sup>9</sup> However, I argue in this essay that the 2016 impeachment in Brazil, while a significant political discontinuation of the status quo, was reflective not of global trends but of the limits of a system taxed by inadequate political flexibility and scant constitutional options for extra-electoral regime change (e.g., through a vote of no-confidence).<sup>10</sup> First, I present the political and constitutional context in which the impeachment process was executed. Second, I illustrate the wider economic, social, and political implications of the use of impeachment as occurred in 2016. Third, I discuss the substantial limitations of the coalition-dependent Brazilian presidential system and an inherently political legislative branch to impartially examine and adjudicate charges of wrongdoing. Last, I present two viable constitutional avenues for reform beginning with the addition of a no-confidence motion to the powers of the Brazilian Congress. I then examine the addition of the latter alongside the potential addition of a Prime Minister position.

Throughout my analysis, I do my best to illustrate the primary goals of these reforms as: (1) to remedy the absence of a political recall process, and (2) to create a stabilizing division between a head of government and head of state, which would better function in the volatile environment of Brazilian coalition politics.

This paper basically seeks to analyze some of the weak points at the intersection of the legislative and executive in the Brazilian political system through the lenses of the 2016 impeachment crisis and the early years of the 1988 Constitution. And, in the last section of this article, I suggest reforms to mitigate the harmful social and political consequences wrought by the recent stresses placed on a system that was not designed to adequately address political conflict between the legislative and executive branches. A major democracy must not be hostage to a tenuous executive branch which receives its legitimacy from a poorly disciplined party system, rendering meaningful governance moot in times of crisis as legislators flee from the cratering popularity of presidents and into the arms of impeachment.<sup>11</sup>

*impeachment de Bolsonaro*, JORNAL DE BRASÍLIA (May 21, 2020), <https://jornaldebrasil.com.br/politica-e-poder/partidos-se-juntam-e-protocolam-pedido-de-impeachment-de-bolsonaro/> (last visited May 25, 2020).a

9 See, e.g., Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harv. Kennedy Sch., Working Paper No. RWP16-026, 2016), <https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash> (last visited Apr. 16, 2020).

10 Katz, *supra* note 1, at 79.

11 Scott Mainwaring, *Multipartism, Robust Federalism, and Presidentialism*

## I. Brazil as an Emerging Democracy: Constitutional Roots and Systematic Fragility

The present Brazilian Constitution is the product of a negotiated transition from military dictatorship to representative democracy. The process began in 1974 and continued gradually for over a decade culminating in the election of a civilian president in 1985 and the adoption of the presently-effective Constitution of 1988.<sup>12</sup> Due to the gradual nature of the political transition to democracy and the fractious, diverse nature of Brazilian party politics, the development of the 1988 Constitution was a delicate process with few principal driving forces and countless actors fighting to preserve their interests.<sup>13</sup> Foremost among these actors shaping the constitution were the then-incumbent civilian President, José Sarney, the military, business elites, and conservative and progressive factions in the Congress and civil society.<sup>14</sup> In an attempt to limit the potential politicization of the drafting process and the final document as much as possible, President Sarney ordered the creation of a nonpartisan commission led by prominent jurist Alfonso Arinos in 1986 to essentially write a “pre-constitution.”<sup>15</sup> This document would guide the Constituent Assembly’s development of the eventually adopted constitution.<sup>16</sup> At its conclusion, the Arinos Commission made several significant recommendations, with the call for a parliamentary system featuring most prominently among them.<sup>17</sup> Upon the reception of the Commission’s report, the newly convened National Constituent Assembly (ANC) was tasked with drafting the actual constitution.<sup>18</sup> Many members were largely in favor of the move to a parliamentary system which would have resulted in the weakening of the Presidency thanks to effective maneuvering by the significant parliamentarist and miniscule monarchist factions to push for a plebiscite on presidentialism scheduled for 1993.<sup>19</sup>

How successful were the supporters of parliamentarism and monarchism in the ANC? Well, they did succeed in tabling a referendum on the course of Brazilian democracy in the Constitution of 1988. This referendum was a choice between the implementation of a parliamentary system or the maintenance of the existing semi-presidential system, and thus, a choice be-

tween the status quo and further change. After 1988, though, the parliamentarist successes would go no further.<sup>20</sup>

Back in 1988, President Sarney made no effort to hide his disdain for the parliamentary effort. He effectively archived the Arinos Report and worked with military and business elites to push (via aggressive patronage of delegates and intimidation) ambivalent ANC members into favoring a presidential system. Ultimately, he managed to contain the parliamentary sentiment within the Assembly and even extended his term in office.<sup>21</sup>

After twenty months of deliberation, the ANC produced to an expectant nation a document of 245 articles which was officially adopted as the Constitution of 1988 and which has presided over more than thirty years of stable, albeit imperfect democratic government.<sup>22</sup> Although the parliamentary question lingered until 1993, the stipulated plebiscite eventually yielded a resounding victory for presidentialism to continue its century-long experiment in Brazilian politics: fifty-five percent of voters favored the existing institutional makeup and twenty-five percent favored a parliamentary system.<sup>23</sup>

Essentially, what the people of Brazil had voted to preserve was its unique coalitional presidency. The political system in many ways makes the President of Brazil its most active legislator, in an open-circuited legislative cycle which can begin even from the Palácio de Planalto (the executive mansion).<sup>24</sup> The Brazilian president is, in constitutional terms, among the most powerful of the presidents in the Americas when it comes to legislative authority.<sup>25</sup> Brazilian presidents have extensive veto power (though override determined by the 1988 Constitution is triggered by only a simple majority of Congress), including the ability to use a line-item veto,<sup>26</sup> and they also enjoy a consequential set of areas of legislation where they alone are constitutionally empowered to introduce bills (e.g. on military affairs or expansion of bureaucracy).<sup>27</sup> Finally, they may also issue temporary “provisional measures” which have the force of law for thirty days without the approval of Congress.<sup>28</sup>

*in Brazil*, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 55, [56]

(Scott Mainwaring & Matthew Soberg Shugart eds., 1st ed. 1997)

12 Carlos Pio, Expert Brief, *Brazil*, COUNCIL ON FOREIGN REL. (May 31, 2013), <https://www.cfr.org/expert-brief/brazil> (last visited Apr. 17, 2020);

Frances Hagopian & Scott Mainwaring, Democracy in Brazil: Origins, Problems, Prospects \*4 (Kellogg Inst., Working Paper No. 100, 1987), [https://kellogg.nd.edu/sites/default/files/old\\_files/documents/100\\_0.pdf](https://kellogg.nd.edu/sites/default/files/old_files/documents/100_0.pdf).

13 Gary M. Reich, *The 1988 Constitution a Decade Later: Ugly Compromises Reconsidered*, 40 J. INTERAM. STUD. & WORLD AFF. 5, 8 (1998).

14 *Id.* at 12.

15 *Id.*

16 *Id.*

17 Timothy J. Power, *Politicized Democracy: Competition, Institutions, and “Civic Fatigue” in Brazil*, 33 J. INTERAM. STUD. & WORLD AFF. 75, 79 (1991) [hereinafter Power, *Politicized Democracy*].

18 *Id.*

19 *Presidencialismo nasceu com a República e foi confirmado por plebiscito em 1993*, SENADO FEDERAL DO BRASIL (Aug. 13, 2012), <http://www.senado.gov.br/noticias/Especiais/eleicoes2010/historia/presidencialismo-nasceu-com-a-republica-e-foi-confirmado-por-plebiscito-em-1993.aspx> (last visited May 25, 2020).

20 *Id.*; see also Timothy J. Power, *Why Brazil Slept: The Search for Political Institutions, 1985-1997*, at 5 (1997) (unpublished manuscript delivered at 1997 meeting of the Latin Am. Stud. Ass’n) (available at <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=8EB0CDF790E4AF0FD65C-D78A158F1786?doi=10.1.1.575.5106&rep=rep1&type=pdf>) [hereinafter Power, *Why Brazil Slept*].

21 Power, *Politicized Democracy*, *supra* note 17 at 78–79.

22 Leslie Bethell, *The Long Road to Democracy in Brazil*, in BRAZIL: ESSAYS ON HISTORY AND POLITICS 147, 161–63 (2018)

23 Power, *Why Brazil Slept*, *supra* note 20, at 3.

24 ARGELINA CHEIBUB FIGUEIREDO & FERNANDO DE MAGALHAES PAPATERA LIMONG, EXECUTIVO E LEGISLATIVO NA NOVA ORDEM CONSTITUCIONAL (1st ed. 1999); Katz, *supra* note 1, at 83.

25 Mainwaring, *supra* note 11, at 65.

26 Constituição Federal [C.F.] [Constitution] art. 84 (Braz.), translated in *Brazil - Constitution*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/legal-advocacy/international-disability-rights/international-laws/brazil-constitution/> (last visited May 26, 2020).

27 Katz, *supra* note 1, at 83.

28 Constituição Federal art. 84 (Braz.).

Much of what we can understand today about the impeachment of 2016 and the overarching polarization, instability, and disregard for democratic norms which were latent prior but surfaced vengefully after lies in the early years of civilian rule and the character of the democratic transition of the late 1980s. This includes the young democracy's first crisis — the impeachment of President Fernando Collor de Melo, which it survived but which perhaps sparked the first cracks around the periphery of coalitional presidentialism. This semi-presidentialism enshrined in the 1988 Constitution and reaffirmed by the 1993 referendum is completely dependent on coalition-building; the Brazilian presidency is almost exclusively a creature of the coalition—it lives and dies on Congress's terms even though it governs nearly on its own.

Coming off an at-times directionless constitutional convention which was shaped by the outgoing military regime and its civilian allies, progressive legislators, concerned business leaders, and a president intent on maintaining the prominence of his office, the lengthy constitution marked no stark difference from many of its predecessors aside from its symbolism.<sup>29</sup> The 1988 Constitution was a stark deviation from the 1967 Constitution in terms of the powers it restored to Congress (such as the ability to amend/mandatory approval of presidential decrees); but in terms of executive power, it bears greater resemblance to the 1946 Constitution, with the exclusive initiation of legislation and similar veto powers.<sup>30</sup> However, a deeply entrenched cultural disposition toward the patrimonial presidency and an effective, albeit unscrupulously coordinated propaganda campaign on the part of the presidentialists leading up to the referendum managed to secure an overwhelming electoral victory despite a long tradition of authoritarian *caudillismo* (strongman-ism/disregard for the rule of law) stemming from the office of the presidency.<sup>31</sup>

Mainwaring aptly encapsulates the idea of Brazil's coalitional presidency this way:

[P]residents have sweeping constitutional powers (especially under the 1988 constitution) but weak *partisan* powers. By partisan powers, Shugart and I refer to the degree to which presidents can rely on disciplined majorities in Congress . . .

. . . Since 1985, [presidents] have frequently governed by decree, and before 1964, they tried to circumvent Congress by creating bureaucratic agencies responsible for implementing some important policies.

. . . On balance, [this institutional structure] is not an easy one from the perspective of presidents; implementing major reforms in Brazil is more difficult than in many presidential systems. This institutional system has frustrated several democratic presidents. One president (Vargas) committed suicide, another (Quadros) resigned only seven months after winning a landslide victory, and another (Goulart) adopted erratic actions that contributed to the breakdown of democracy in 1964. . . .

In brief, the combination of presidentialism, a fragment-

ed multiparty system, undisciplined parties, and robust federalism is often difficult. Presidents can succeed in this institutional context and several have, but the system makes it difficult for presidents to establish reliable bases of support.<sup>32</sup>

In other words, the Brazilian presidency functions at the mercy of a delicate political and constitutional balance.

Dilma Rousseff, of course, was not the first Brazilian president to be impeached. The impeachment process of Fernando Collor de Melo also occurred as Brazil was mired in dire economic straits, with his reputation facing international humiliation as Brazilians called for his removal by hanging banners in wide view of TV cameras at the 1992 Barcelona Summer Olympics while also filling the streets of cities across the nation by the hundreds of thousands.<sup>33</sup> Likely the final blow to his presidency, Collor's erratic behavior and alienation of his congressional supporters led to the fracture of his coalition and fueled his image as a high-handed, incompetent executive, an image which only added to the economic woes of his angered constituents.<sup>34</sup> While substantive allegations of abuse of office were far easier to level at the relatively unscrupulous Collor than they were at Rousseff, corruption existed within his administration from its first days — as they had in the preceding presidency and in most successors' as well due to the dependency of the presidency on patronage.<sup>35</sup> The fractious and amorphous party system and neopatrimonial nature of Brazilian presidential politics therefore played a significant role in both Collor and Rousseff's impeachment.<sup>36</sup> Beyond impeached presidents, Yale scholar Andrea Katz has noted that even long-serving, successful presidencies such as those of Fernando Henrique Cardoso (1995-2003) and Lula da Silva (2003-2010) sustained allegations of at least minor incidents of the illicit use of cash or other funds to maintain their coalition support.<sup>37</sup>

## II. Consequences of Impeachment “As a Form of Recall”

As Brazilians watched their frail democracy begin a frightening tailspin in 2016, their search for certainty, strength, and pure leadership resulted in the election of the far-right Congressman Jair Bolsonaro to the presidency in October 2018. His election was partially viewed as a response to the failure of the PT to remain above the system's corrupt nature, and a knee-jerk response to the thirteen years of leftist government by the PT on the part of elites and the majority-white middle class.<sup>38</sup> Part of this upheaval, however, may also be traced to the inaccurate perception that wrongdoing occurred in the impeachment of Dilma Rousseff, when a seldom-enforced fiscal requirement was used in a heavily politicized lower chamber investigation to pave the way to regime change.<sup>39</sup>

32 Mainwaring, *supra* note 11, at 56.

33 Daniel Zirker, *The Political Dynamics of Presidential Impeachment in Brazil*, 21 CAN. J. LATIN AM. CARIBBEAN STUD. REV. 9, 21 (1996).

34 Katz, *supra* note 1, at 90; Zirker, *supra* note 33, at 18.

35 Melo, *supra* note 6, at 6; Katz, *supra* note 1, at 90.

36 Melo, *supra* note 6, at 5; Zirker, *supra* note 33, at 11–12.

37 Katz, *supra* note 1, at 92.

38 Leonardo Avritzer, *The Rousseff Impeachment and the Crisis of Democracy in Brazil*, 11 CRITICAL POL'Y STUD. 352, 355 (2017).

39 Alexandra Rattinger, *The Impeachment Process of Brazil: A Comparative*

29 Bethell, *supra* note 22, at 162.

30 Mainwaring, *supra* note 11, at 56.

31 Power, Why Brazil Slept, *supra* note 20, at 6.



Due to the deep history of autocratic or limited democratic rule in Brazil, even the term “impeachment” itself was directly borrowed from English in the Portuguese language when the procedure was codified in the 1988 Constitution.<sup>40</sup>

Impeachment as codified in Law No. 1079/50 requires a president to have committed a so-called “crime of responsibility” of a specific nature to be impeached and further removed. The realm of “impeachable conduct,” which takes after the spirit of due process codified in the U.S. Constitution and English common law, is presented as a procedure of judicial nature which would be carried out by a political institution. The Chamber of Deputies must choose to formally adopt charges to kick the accountability process into action.<sup>41</sup> Of course, given the fact that the Chamber of Deputies is Brazil’s lower house and part of the branch of government with which a president must form a governing coalition, support for the executive must be sufficiently eroded to allow deputies often invested in the success of the incumbent government to pursue charges of impeachment.<sup>42</sup> Additionally, the Senate must then conduct the formal impeachment trial and act as jury, voting to determine the president’s guilt and/or fitness to continue serving in office.<sup>43</sup>

Thus, when the process of impeachment and removal of a president from office enters into deliberation, it has often been born out of a total collapse in congressional support for the president, from the withering patience of Collor’s Cabinet to Eduardo da Cunha’s (2015-2016 Speaker of the Chamber) fickle loyalty.<sup>44</sup> Additionally, Brazil’s inherently weak party system and simultaneously party-dependent presidency require the extensive use of patronage to cobble together governing coalitions of popularity-sensitive but ideologically undefined parties.<sup>45</sup> Due to this, plummeting public opinion has often been a death knell for many an administration. This has been seen to influence congressional behavior, as in 2016 when Dilma Rousseff’s spiraling numbers were widely seen as a significant factor in Cunha’s decision to remove the Brazilian Democratic Movement Party (PMDB) from its coalition with Rousseff and Silva’s Workers’ Party (the PT) — and later, in his refusal to protect the president from impeachment charges.<sup>46</sup>

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*Look at Impeachment in Brazil and the United States*, 49 U. MIAMI INTER-AM. L. REV. 153–54 (2018).

<sup>40</sup> Rebeca de Paula Pires, *A utilização do impeachment como recall político sob a perspectiva do presidencialismo de coalizão brasileiro: aproximações e distanciamentos entre os dois institutos* (2017) (unpublished manuscript) (available at <https://core.ac.uk/reader/84616781>); see generally Lei No. 1.079, de 10 de Abril de 1950, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.4.1950 (Braz.) (available at [http://www.planalto.gov.br/ccivil\\_03/leis/l1079.htm](http://www.planalto.gov.br/ccivil_03/leis/l1079.htm)).

<sup>41</sup> Ricardo Perlingeiro, *Due Process in the Brazilian Presidential Impeachment*, 28 FLA. J. INT’LL. 329, 340 (2016); CHALHOUB ET AL., *supra* note 3, at 21–22.

<sup>42</sup> Katz, *supra* note 1, at 84–85.

<sup>43</sup> Constituição Federal [C.F.] [Constitution] art. 85 (Braz.), translated in *Brazil - Constitution*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/legal-advocacy/international-disability-rights/international-laws/brazil-constitution/> (last visited May 26, 2020).

<sup>44</sup> CHALHOUB ET AL., *supra* note 3, at 14–16.

<sup>45</sup> AMES *supra* note 39, at 139.

<sup>46</sup> CHALHOUB ET AL., *supra* note 3, at 30.

However, across the Brazilian political spectrum, it was widely acknowledged that in the case of President Rousseff, her outstanding record of personal and administrative probity caused even the most ardent proponents of impeachment to flinch.<sup>47</sup> This begs the question: was Rousseff’s impeachment merely an attempt at recalling a President who had lost her ability to form a governing coalition?<sup>48</sup> And if so, was this a sign that Brazilian democracy needed a remedy to this lack of a purely political recall mechanism?

The ensuing national unrest, media firestorm, and alarming resurgence of a desire in some quarters to restore military rule not only did great damage to Dilma Rousseff and the PT, but also to the national psyche as a whole.<sup>49</sup> Coming at the height of the Lava Jato investigation, which resulted in the indictment of hundreds at the pinnacle of wealth and power in the nation, the impeachment process did not occur in a vacuum. Moreover, the Brazilian people were truly led to believe that, as in 1992, their president had engaged in illicit behavior.<sup>50</sup> Given the fact that several leaders of all parties — including Chamber Speaker da Cunha (PMDB), former President da Silva (PT), and future President Temer (PMDB)—as well as a sizeable portion of the legislature were under federal investigation at the time of this trial, it was difficult for many Brazilians to see how their democracy could possibly recover from this “hurricane” of corruption.<sup>51</sup>

Ironically, while the man that accepted the initial petition for impeachment (da Cunha) and the Vice President who turned on Rousseff and succeeded her (Temer) would both be indicted on charges of corruption, Rousseff would never be accused of or investigated for criminal wrongdoing. The Senate would fail to suspend her political privileges (as the Constitution recommends for removed presidents).<sup>52</sup> Furthermore, and far more concerning, the speeches given by the deputies upon the impeachment vote, and even the questions asked in the far more muted Senate, hardly ever grazed the charges of Rousseff allegedly opening an improper credit line and improperly representing the Federal budget and often crossed into the realm of corrosive pro-military, antidemocratic sentiment or blatantly partisan rancor.<sup>53</sup>

While not the only factor in fomenting this overwhelming electoral shift, the exacerbation of existing social tensions and political polarization by a misused impeachment process played a

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<sup>47</sup> *Id.* at 32, 36–37.

<sup>48</sup> Aaron Ansell, *Impeaching Dilma Rousseff: The Double Life of Corruption Allegations on Brazil’s Political Right*, 59 CULTURE, THEORY & CRITIQUE 312, 319 (2018).

<sup>49</sup> Katz, *supra* note 1, at 80; Avritzer, *supra* note 38, at 24.

<sup>50</sup> Katz, *supra* note 1, at 93.

<sup>51</sup> *Id.*

<sup>52</sup> CHALHOUB ET AL., *supra* note 3, at 32–33; Ernesto Londoño & Leticia Casado, *Former President Michel Temer of Brazil Is Arrested in Bribery Probe*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/world/americas/michel-temer-arrested-prisao.html> (last visited Apr. 19, 2020).

<sup>53</sup> Andrew Jacobs, *Brazil’s Lower House of Congress Votes for Impeachment of Dilma Rousseff*, N.Y. TIMES (Apr. 17, 2016), <https://www.nytimes.com/2016/04/18/world/americas/brazil-dilma-rousseff-impeachment-vote.html> (last visited Apr. 19, 2020).

significant part in clearing the way for the victory of an authoritarian candidate such as Jair Bolsonaro, who took advantage of Brazilians' mistrust of most major parties post-Lava Jato to sweep to power.<sup>54</sup>

### III. The Limits of Coalition Presidentialism and a Compromised Congress

Earlier, I mentioned that a substantial portion of the Brazilian legislature was under investigation at the time that articles of impeachment were being considered against President Dilma Rousseff. To be more precise, over a *hundred* members of the Chamber of Deputies out of 513 were under their own investigations at the time, with charges varying in scope and severity.<sup>55</sup> Such a shocking cloud of scandal led many international observers and legal scholars to question the legitimacy and integrity of the process and the body itself.<sup>56</sup>

“God” and “family values” were among the most popular terms used by deputies justifying their decision to vote for impeachment, according to later analyses, and some members of the Senate and Chamber argued that the economic situation demanded Rousseff's removal from office.<sup>57</sup>

Indeed, economic recession coupled with evaporating presidential favorability and a faltering coalition were acknowledged far more broadly by the politicians themselves to be motivators in the decision to impeach rather than patent wrongdoing.<sup>58</sup> With the knowledge of such widespread suspicions of corruption in the Chamber itself, the idea that impeachment was a judicial release from a political impasse is not so far-fetched.<sup>59</sup> Furthermore, if one looks to the nature of Brazil's system — one which has a presidential portfolio rated the second most powerful in the Americas in terms of the ability to introduce legislation, enact binding decrees, and the responsibility of developing cross-branch coalitions<sup>60</sup> — the legislature and executive are deeply dependent on each other and difficult to call “separate.”<sup>61</sup> Usually, when a new president comes into office on a wave of massive popularity, the task of building a coalition is simply a matter of patronage and pork-barreling, since most large parties are highly amorphous in terms of ideology and are geared toward benefiting from cabinet privileges and coalitional power.<sup>62</sup>

54 Wendy Hunter & Timothy J. Power, *Bolsonaro and Brazil's Illiberal Backlash*, 30 J. DEMOCRACY 68, 69 (2019).

55 CHALHOUB ET AL., *supra* note 3, at 27.

56 *Id.* at 27–28.

57 Ansell, *supra* note 48, at 320.

58 Felipe Nunes & Carlos Ranulfo Melo, *Impeachment, Political Crisis, and Democracy in Brazil*, 37 REVISTA DE CIENCIA POLÍTICA 281, 285–88 (2017).

59 Ansell, *supra* note 48, at 313; Katz, *supra* note 1, at 93.

60 *How Government Works*, GOUVERNEMENT, <https://www.gouvernement.fr/en/how-government-works> (last visited May 26, 2020).

61 AMES, *supra* note 39, at 12–15; Gary Reich, *Executive Decree Authority in Brazil: How Reactive Legislators Influence Policy*, 27 LEGIS. STUD. Q. 5, 6–7 (2002); Katz, *supra* note 1, at 83.

62 AMES, *supra* note 39, at 160–61; Katz, *supra* note 1, at 80; CHALHOUB ET AL., *supra* note 3, at 13.

However, the requirement that these two constitutionally separate branches operate in synchronization while somehow maintaining a check on each other, though usually functional, cannot withstand the simultaneous loss of presidential popularity and coalitional support.<sup>63</sup> Without a constitutional political “release” tool to normalize changes at the top of government as they are in parliamentary settings (with presidents or other leaders serving as nominal heads of state), the dismissal of the head of state and government on a regular interval on the disguised presumption of wrongdoing would do irreparable damage to Brazilian democracy and the relationship between the executive and legislative branches.<sup>64</sup> As is, a considerable amount of political capital is required to initiate and execute an impeachment, and it is widely covered by national and foreign media as a crisis or a referendum on wrongdoing, creating an image of presidential failure and not systemic inadequacy.

If, instead, the legislature were to conduct a vote of no-confidence to signal that it wished for the departure of the president or that a majority was no longer able to work confidently with the president and it was viewed a *purely* a political issue and not one of personal character or the integrity of the office, Brazilian society would be spared a great deal of further trauma and division. In the event that a sixty percent majority of both chambers voted in favor of dissolving any legislative coalition with the presiding executive, a precedent could be set where the serving president would either enter into negotiation to attempt to salvage their mandate, or they would step aside and resign, permitting the vice president to succeed and attempt to restore a functioning coalition.

### IV. A Constitutional Alternative: Codified Semi-Presidentialism

The widely cited and lauded critic of presidentialism Juan J. Linz writes in his 1990 piece, “The Perils of Presidentialism,” that among its greatest weaknesses is the “competition” for legitimacy between the legislature and the executive, who, each empowered by a legitimate popular mandate may at points be in direct opposition to each other.<sup>65</sup> This competition for legitimacy has been especially notable in the Brazilian impeachment process: the PMDB-led majority of the Chamber of Deputies, only months before having engaged in coalition, voted to condemn the leader of its prior, popularly elected coalition partner, President Dilma Rousseff.<sup>66</sup> Furthermore, given the already semi-presidential nature of a powerful executive who must govern with broad congressional support, it is wholly inefficient to create a president who, at times, behaves like a prime minister but does not have the accountability, or whose government does not retain the political accountability, of a prime minister.<sup>67</sup>

While in political systems with separate, presidential executives, the legislature and executive are separately elected by the

63 Katz, *supra* note 1, at 80; AMES, *supra* note 39, at 163–67.

64 Katz, *supra* note 1, at 84–85; CHALHOUB ET AL., *supra* note 3, at 28.

65 Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 53 (1990).

66 Ansell, *supra* note 48, at 319; CHALHOUB ET AL., *supra* note 3, at 18–19.

67 CHALHOUB ET AL., *supra* note 3, at 28–29; Katz, *supra* note 1, at 94–95; AMES, *supra* note 39, at 160–61.

people, in a parliamentary system, a prime minister is an individual member of the legislature elected by their colleagues in the chamber in which they serve. In some iterations of semi-presidentialism, as seen in France, a president may also appoint a prime minister who still serves as head of government and primarily acts as the executive link between branches of government. To minimize disruption of the constitution and allow for a less drastic transfer of power between positions, I am calling for a balance a la France between legislative and executive. This comes with a unique difference from the French system in that the legislature would be able to dismiss a prime minister via a vote of no confidence, requiring the Chamber of Deputies to elect another prime minister who would garner enough votes to attain a formal vote of confidence.<sup>68</sup>

The lack of stable parties in the congressional ecosystem must be remedied. While in a presidential arrangement this fractious hodge-podge can flourish, in a parliamentary system cohesive, ideological differences would be encouraged and eventually forced simply by virtue of party consolidation, thus ridding Brazilian democracy of at least a portion of its tenuous, fickle nature.<sup>69</sup> While it is not the sole cause of the nation's corruption woes, the presidential system forces corruption and prodigious behavior to be the glue which solidifies intra-branch support and coalitional loyalty; the introduction of parliamentarism would reduce, in part, a reliance on patronage and encourage accountability given the existence of an opposition in a far more ideal position to monitor executive behavior.<sup>70</sup>

Note that I am not taking the position that the office of the president should be abolished but rather that the levers of government and responsibility of coalition-building and maintenance should go to a prime minister who is elected by the Chamber and is able to be removed via a no-confidence vote in the Chamber of Deputies or at the request of the executive.<sup>71</sup>

At the very least, the introduction of a binding no-confidence vote as a congressional power would add a check on the president and permit political dismissal to occur without the pretext of alleged wrongdoing.<sup>72</sup> Further stabilizing the situation would be the introduction of a technically executive but primarily legislative position: that of prime minister. While the power to elect a prime minister would lie with the parties in the Chamber of Deputies, the prime minister would effectively take on many of the legislative and executive powers presently conferred to the president as head of government, allowing the position of president simply to serve as an elected, mostly symbolic head of state who would additionally be in the position to ask the party leader best able to command a congressional majority to form a government.

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68 *How Government Works*, *supra* note 60.

69 Linz, *supra* note 65, at 62–63; AMES, *supra* note 39, at 185–86.

70 Linz, *supra* note 65, at 63–64; Katz, *supra* note 1, at 96; Melo, *supra* note 6, at 9.

71 Katz, *supra* note 1, at 95.

72 *Id.* at 95–96.

In the divisive wake of the 2016 impeachment and the breakdown in trust in democratic institutions in Brazil, the role that an improper balance between branches of government has played cannot and should not be understated. While the events of the democratic transition unmistakably granted Brazilian presidentialism the upper hand as the codified layout of power post-1988, Brazil's institutions are facing critical tests, and perhaps it is time to reconsider the utility and durability of coalitional presidentialism. Furthermore, it may also be time to consider the introduction of political recall mechanisms to normalize changes in coalitional viability and presidential turnover. Though Brazilian democracy has remained mostly intact over the last three decades, its incongruent and fragile presidential system threatens to further erode its democracy's institutions and its own people's confidence in democracy itself. A movement towards semi-presidentialism in the form of a no-confidence vote by Congress or the latter plus the investiture of a prime minister along with the redefinition of the presidency are among the most viable options available.

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