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SIEPR Discussion Paper No. 12-010

Decorrupting Government: The United States Board of Overseers

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Decorrupting Government: The United States Board of Overseers

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January 20, 2013

ABSTRACT

This essay considers whether the organizational arrangements established by the Constitution of the United States remain effective in promoting “life, liberty and the pursuit of happiness,” which are the purposes of government according to Jefferson's Declaration of Independence. I conclude that they are no longer effective, and explore organizational reforms to address this failure. Specifically, the Constitution lacks a provision for substantive review of laws and regulations for consistency with the purposes of government—a function known in the private sector as quality assurance. The judicial power deals with legislative threats to life and liberty, but we need a better way to interdict threats to well-being.

I propose the creation of a new branch, provisionally called the United States Board of Overseers, with responsibilities and powers analogous to those of the Supreme Court, but focused chiefly on the people’s opportunities for well-being rather than protecting life and liberty through the rule of law.

For reasons of political legitimacy the eleven Overseers are chosen by lot from a College consisting of millions of citizens qualified by age, education and (middle) income. In political terms, the proposal is intended to counter the current power of the oligarchy over the legislature and the administrative state with a strongly democratic institution representing the principal victims of oligarchic power, the middle class. Given the difficulty faced by the oligarchy in containing the destabilizing and inefficient excess greed of its members, the proposal is also in the collective interest of the one percent. Protection for the poorest is included in the proposal.

Introduction

Every year numerous popular and academic commentators point out misguided federal policies (or lack of policies) that reduce the welfare of the poor, the middle class, small businesses and even corporations. It is commonplace to hear assertions that Washington's machinery fails to promote the public interest, not just as a result of high-profile partisan animus and gridlock, but in routine matters infected by the corrupting influence of campaign contributions and lobbying. "Corrupting influences" as the term is used here contribute to divergence between ideal and actual legislative or administrative actions, whether or not the influence is lawful. Of course, no government can be perfect. Corrupting influences, like error, are and likely always have plagued every form and level of government, and indeed human organizations of all sorts. Not all influences are corrupting, and not all divergences from the ideal are corrupt. Part of the gap between the actual and the ideal results from error, happenstance, passion and path dependence. Corruption in government conjures images of Swiss bank accounts, theft, bribery and extortion, but the emphasis in this essay is on what Lawrence Lessig calls "lawful type 2 corruption" rather than criminal behavior.¹

Political scientists generally agree that political power in the United States, as in most other countries, is concentrated in the hands of an "elite" oligarchy of influential individuals and interests, with substantial control of the legislative and administrative process. As Senator Robert Byrd explained, "Money! It is money! Money! Money! Not ideas, nor principles, but money that reigns supreme in American politics."² However, there is no evidence that the elite, the oligarchy, or the one percent (terms here used synonymously) engage in a conspiracy or other coordinated action. Indeed, members of the elite may have the opposite problem. Like warring medieval barons, they have no means to modulate the harm to the economy and therefore to themselves that results from the aggregate effects of their collective greed.

¹ Lawrence Lessig, **Republic, Lost: How Money Corrupts Congress—And a Plan to Stop It**. (2011). Richard L. Hasan offers a similar critique of the adverse economic effects of corrupting influences in "Lobbying, Rent-Seeking, and the Constitution," **Stanford Law Review** 64 (2012): 191-253.

² Quoted by Francis X. Cline in "Senators Bemoan Unshakable Habit," **New York Times**, Mar. 20, 1997. <http://www.nytimes.com/1997/03/20/us/senators-bemoan-unshakable-habit.html>

However, there is some evidence that increasing concentration of income and wealth has negative macroeconomic feedback effects on the growth of the economy, not just in poor countries but also in the United States.³ The political power of the elite to influence tax and tax expenditure policies increases with the degree of wealth concentration, but this process is not coordinated—it is the result of additive individual efforts by specific intra-elite interests. Further, the corrupting influence of the elite on policies directly affecting them corrupts other policies—both regulatory and fiscal, typified by Lessig’s catalog of “type 2” interventions, that have an aggregate and cumulative negative effect on the economy as a whole.⁴

This essay considers whether the organizational arrangements established by the Constitution of the United States, as that much-modified document is understood today, remain effective in promoting “life, liberty and the pursuit of happiness.” I conclude that they are not, and explore organizational reforms to address this failure. Specifically, the Constitution lacks a provision for substantive review of laws and regulations for consistency with the fundamental goals of government—a function known in the private sector as quality assurance.

I propose the creation of a new branch, tentatively called the United States Board of Overseers, with responsibilities and powers analogous to those of the Supreme Court. The judicial power is chiefly concerned with protecting life and liberty through the rule of law. In contrast, the Board of Overseers safeguards the people’s well-being or happiness against corrupted legislation and administrative rules. The proposal is limited and relatively modest. It does not

³ Annie Lowrey, “Income Inequality May Take Toll on Economic Growth,” **New York Times**, October 16, 2012 <http://www.nytimes.com/2012/10/17/business/economy/income-inequality-may-take-toll-on-growth.html?pagewanted=all> citing Michael Kumhof and Romain Rancière, “Inequality, Leverage and Crises,” International Monetary Fund Working Paper (2010), Andrew G. Berg and Jonathan D. Ostry, **Inequality and Unsustainable Growth: Two Sides of the Same Coin?** International Monetary Fund April 8, 2011, Lawrence Mishel, Josh Bivens, Elise Gould and Heidi Shierholz, **The State of Working America 12th Edition**, Economic Policy Institute 2012, Organization for Economic Cooperation and Development, **Economic Survey of the United States 2012**, <http://www.oecd.org/unitedstates/economicsurveyoftheunitedstates2012.htm>, Raghuram Rajan, “Is Inequality Inhibiting Growth?” <http://www.project-syndicate.org/commentary/is-inequality-inhibiting-growth->

⁴ The New Year’s Eve legislation postponing the January 1, 2013 “fiscal cliff,” for example, contained a non-germane provision (Section 632) highly favorable to a drug company, Amgen, that had lobbied hard to continue selling a high-priced dialysis pill to Medicare. A January 19, 2013 **New York Times** article by Eric Lipton and Kevin Sack, “Fiscal Footnote: Big Senate Gift to Drug Maker,” provides details of the lobbying effort that produced this result. The story vividly illustrates the process of Type 2 corruption. <http://www.nytimes.com/2013/01/20/us/medicare-pricing-delay-is-politic>

address other problems—most prominently, “gridlock” and corrupt *failure* to legislate. The Overseers are a check on what Congress and the Administrative State do, not on what they fail to do. The structure of the Constitution contains no internal or external mechanism, save elections, to force the government to act. Unfortunately, the same corrupting influences that can lead to legislation that reduces well-being can prevent enactment of legislation that enhances well-being.

The eleven Overseers are chosen by lot from a College consisting of millions of citizen volunteers qualified by age, education and (middle) income. In political terms, the proposal is intended to counter the power of the oligarchy over the legislature and, through it the administrative process, with a strongly democratic institution representing the principal victims of oligarchic power, the middle class. Given the difficulty faced by the oligarchy in containing the destabilizing and inefficient aggregate excess greed of its members, the proposal is also in the collective interest of the one percent. The proposal has a Rawls-inspired mechanism to protect the poor.

The Framers took great care to build checks and balances into the Constitution, in part to counter the threat from special interest “factions,” and in part to satisfy anti-federalists who distrusted centralized power. But times change—perhaps the three-branch structure of the United States government no longer is well designed to promote the public interest, or to protect us from uniquely modern dangers. After all, the major utility of any constitution lies in its existence as a set of default options, in its allocation of rights and duties between the people and the state, and in its provisions for change. In spite of the famous checks and balances built into the three-branch structure in 1788, it is questionable whether the very limited role of the federal government contemplated by the Framers led them to define an organization fit for modern times, now that the government “wields vast power and touches almost every aspect of daily life.”⁵

⁵ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. 08-861, 130 S. Ct. 3138 (2010). (slip op. at 18).

The theory of representative government is that when things get bad enough, rather than engage in bloody revolution the people will simply be moved to vote their representatives out of office.⁶ The new representatives will try to do better in order to stay in office, and they may even change the Constitution, tacitly or explicitly, to improve the decision-making process. This has been done many times in U.S. history, sometimes quietly, sometimes after protracted and passionate public debate, and once after a horrific civil war. In the centuries since the founding, the Constitution has been modified to accommodate the growing Administrative State, but nothing has been done to protect the people from the menacing consequences of misrule by the state. Perhaps *in extremis* elections will save us, but for now the electoral process is a primary focus of corrupting influences.

What changes can we make today to improve the performance of government and thus to better protect the welfare of the people? Answering this question requires some groundwork. First, what goals should government seek, and how can we measure the gap between what it does accomplish and what it could achieve? Second, what incentives lead government officials to be moved by corrupting influences, increasing the gap? Only after answering these baseline questions can we rationally discuss potential institutional changes to remedy either the sources of underlying problems or their adverse consequences.

Change is not easy, either to agree upon or to implement. It is therefore useful to try to specify the minimum institutional change capable of making substantial improvements in the performance of government, as measured by potential reduction of the gap between performance and potential. Accordingly, I take as given the current constitutional framework and other political institutions and ask what single change in this framework might address the source and/or the consequences of corrupted policies.

The paper is organized as follows. Section B proposes to adopt Jefferson's view regarding the purposes (goals) of government. That is followed by a brief discussion in section C of the feasibility of conceptualizing and measuring achievement of those goals. Section D provides a discussion of quality assurance as applied by private sector organizations. Section E lists and

⁶ See generally, Alan Ryan, **On Politics** (2 vols., 2012)

discounts the effectiveness of current means of quality assurance in government as it bears on Jefferson's purposes of government. Section F points out that most current proposals for reform such as regulation of campaign finance and lobbying are dangerous to civil liberties and likely to be ineffective. Regulating these *inputs* to the legislative and administrative process is inferior to filtering the *outputs*, mechanisms for which are now extremely weak in the dimension of public well-being. This motivates a proposed new branch of government with responsibility for monitoring performance in that dimension, and the constitutional power to intercede. Section G concludes the text, and the details of the proposal to establish a United States Board of Overseers follow at the end of the paper.

B. The Goals of Government

There is near universal agreement that all organizations and those who deal with them benefit from efforts to specify goals, assess performance, identify failures to meet goals and their causes, and to take corrective actions. Difficulties in specifying goals and measuring performance in complex non-market organizations with multiple and multi-dimensional objectives are reasons to work harder at the problem, rather than to avoid the effort. Professional managers are explicitly trained to do this. Accountability in this sense is now demanded not merely by profit-seeking enterprises but by voluntary associations and by donors supporting NGOs that deliver services to the disadvantaged or promote other causes.⁷ Many issues raised in the process of identifying organizational goals and measuring performance are addressed in the context of policy and program evaluation, which includes not just economic welfare but also psycho-social dimensions of agent, member and client satisfaction.⁸

⁷ See for example Paul Brest, **Money Well Spent: A Strategic Plan for Smart Philanthropy** (Bloomberg, 2008)

⁸ Economists often use the term "economic welfare" in a way that was originally intended to be synonymous with "happiness," (or "subjective well-being") but frequently must rely on money income as a rough approximation because more complete data have not been unavailable. But it is now possible to estimate consumer valuations of non-market goods and services (such as environmental amenities), and even to obtain representative individual assessments of well-being. See generally Daniel L. McFadden, "The New Science of Pleasure," NBER Working Paper No. 18687 January 2013 <http://www.nber.org/papers/w18687>

The proper role and design of government is an age-old question to which political theorists and philosophers since Plato have devoted two and one-half millennia of continuing thought and commentary—four millennia if we impute such thought to the authors of the earliest surviving written legal codes.⁹ While nothing at all is universally agreed, certain themes with support in the literature are listed in Figure 1. These factual claims and principles help define useful practical goals and constraints on the organization of government.

The “welfarist” view adopted here rejects all purely deontological goals for government—that is, all goals that do not promote well-being.¹⁰ Nevertheless it is important to consider that happiness arises in part from instincts such as altruism and a preference for fairness, and therefore that, if equity must rely on the state’s monopoly of coercion, equity and fairness must be included in the list of services that are the state’s responsibility. The possible effect of equity and fairness policies on incentives implies that efficiency, equity, and fairness must be considered simultaneously in order to promote happiness.¹¹

⁹ The Code of Ur-Nammu dates from about 2100 B.C. http://en.wikipedia.org/wiki/Code_of_Ur-Nammu

¹⁰ Louis Kaplow and Steven Shavell, **Fairness versus Welfare** (2002)

¹¹ “Equity” is used here as applied to distributional concerns, and “fairness” is used in reference to process.

Figure 1: Political and Economic Theory

1. Government should seek to serve the interests of the people, promoting happiness (well-being) or at least the option of happiness for all individuals.
 2. No individual's opportunity for happiness should be more important to the state than that of any other person.
 3. Political liberty is one but not the only source of happiness, ditto material wealth.
 4. A well-governed society can produce greater happiness than anarchy.
 5. Direct democracy is ideal but impractical and dangerous.
 6. All societies historically have been governed directly or indirectly by elites pursuing private interests, which extend to the people only as necessary to preserve the safety of the elite.
 7. Elites must contend with internal rivalries and have difficulty reaching cooperative political solutions.
 8. Elites are inevitable, but sound governance limits the exploitation of the people by the elite and seeks to settle intra-elite rivalries peacefully for the good of the people.
 9. Elites should be replaceable by the people through non-violent processes.
- Going further, and without contradicting the foregoing, an economic perspective emphasizes efficiency and equity--
10. Scarce resources should be allocated so as to maximize collective happiness.
 11. The opportunity for happiness should be allocated fairly among the people because people value fairness.
 12. Efficiency and equity cannot be determined independently of each other.¹²
 13. The government should be organized so as to harmonize elite incentives with the welfare of the people.
 14. Resource allocation methods should be based on pragmatics (pie maximization) rather than ideology.

¹² John Rawls points out that coerced economic equality may impair the supply of goods and services, potentially making everyone worse off. He proposes the principle that justice requires whatever distribution makes the poorest members of society as happy as possible. Rawls, **Justice As Fairness: A Restatement** (2001)

These ideas are consistent with Jefferson's famous, almost platitudinous, 1776 statement of the purpose of government:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.¹³

A decade later, James Madison in *The Federalist* No. 62 was even more explicit:

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people, secondly, a knowledge of the means by which that object can best be obtained.¹⁴

Jefferson's statement of the purpose of government is not a part of the Constitution, but the Declaration in a sense umbrellas our present Constitution as but one instance of a "form of government" instituted in an attempt to achieve the Declaration's explicit goals. Jefferson would be the last to oppose a new or changed Constitution if an existing form of government failed to meet the Declaration's objectives.¹⁵ For present purposes it is sufficient to assume that the purpose of government is to permit individuals to cooperate in a civil society that promotes greater happiness for all than would or could otherwise be achieved. Corruption of

¹³ Thomas Jefferson, **The Declaration of Independence** (1776)

http://www.archives.gov/exhibits/charters/declaration_transcript.html. These goals are have not become irrelevant with the passage of time. They are repeatedly affirmed for example, in President Obama's second inaugural address. <http://www.nytimes.com/2013/01/21/us/politics/obamas-second-inaugural-speech.html>

¹⁴ See the commentary by Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framers' Intent," **The American Political Science Review** 53(1): 52-68 (1959).

¹⁵ See Louis Michael Seidman, "Let's Give Up on the Constitution," **New York Times** December 30, 2012 <http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?pagewanted=all>. Jefferson himself once expressed the view that each generation might require a bloody revolution: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure," Letter to William S. Smith Paris, Nov. 13, 1787. <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl64.php>. The same letter however suggests that Jefferson's views were more nuanced than this popular quotation suggests. See also Thomas Jefferson to James Madison, 6 September 1789, in **The Papers of Thomas Jefferson**, ed. Julian P. Boyd et al. (Princeton: Princeton University Press, 1950), 392-97. <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>.

government policy by this definition simply leads to less happiness than could be achieved in the absence of corruption. This is equivalent in its effects to using resources wastefully. From this essentially economic perspective the essence of government's responsibility is to manage social organization in order to realize the greater productivity that results from cooperative specialization, economies of scale, competitive markets, justice and reduced individual zero-sum exertion.

For present purposes I do not emphasize the much-studied role of the judicial system in providing protection of life and liberty (or, as the Declaration puts it, "safety") through the rule of law. The rule of law is an essential service of government because it is an necessary element of economic efficiency and happiness. Safety through the rule of law is not, however, sufficient to satisfy the responsibility of government. No one thinks that it is in the province of the judicial power to provide for the people's happiness.

C. Measurement

Measurement of the people's happiness is a more controversial subject than reliance on Jefferson's Declaration of Independence for the proposition that the principal goal of government is to protect life and liberty and the pursuit of happiness. The key question is deciding whether the quantitative tools for measuring happiness are adequate for the purpose of assessing legislative and administrative performance. Today many social scientists think that happiness is measurable.¹⁶ Others are skeptical.¹⁷ The literature is enormous.

This is not the place to decide whether the measurement of subjective well-being is accurate enough for scientific inquiry. All we need to decide is whether such measurements are good enough for government work. On balance it seems reasonable to conclude that happiness is at least as concrete and ascertainable as, say, "lawfulness" or "constitutionality." Our society relies heavily on expert judgments of what is lawful or constitutional, in spite of ample evidence that reasonable experts may differ sharply on such issues. Judicial analysis is often quite

¹⁶ McFadden, *supra*.

¹⁷ See Matthew D. Adler, "Happiness Surveys and Public Policy: What's the Use?" (May 2012), *Duke Law Journal*, Vol. 62, 2013 (forthcoming).

arbitrary, in the sense that there exist equally plausible and legitimate justifications for a contrary outcome. Appellate court dissenting opinions and reversals are common and commonly persuasive. Even when judgments are arbitrary, peaceful dispute resolution, certainty and predictability are a useful products of the judicial power.

Expert judgments about the happiness of the people, based on measurements that are at the least more transparent and rigorous than legal reasoning, appear to be as reliable for purposes of governance as judgments of courts on legal matters. Neither lawfulness nor happiness is easily assessed, but such measurements are unavoidable.¹⁸ Measurement of well-being is imperfect but practicable and necessary for purposes of evaluating the performance of the state.

D. Quality Assurance in Private Organizations

The study of private organizations sheds light on some of the practicalities of evaluating and controlling effectiveness in government. It is surprising that the connection is not generally commented upon. To the extent that private organizations must continuously survive both competition for clients or members and government oversight, they are likely to have evolved useful methods and structural designs to manage corruption and error. While profit-oriented firms are an important form of private organization, many membership and other not-for-profit organizations also provide useful models of such controls.

Control and management of organizations in general take various forms, typically involving reliance on a market (outsourcing) or on a small group of individuals with substantial hierarchical authority to direct the use of resources, along with a much larger group with less or no such managerial authority. Managers in many cases may be expert agents responsible to

¹⁸It is worth recalling that even physicists disagree on important matters, and that scientific revolutions such as those of Newton, Einstein, and quantum theory turn the world of physics upside down with increasing regularity. See Thomas Kuhn, **The Structure of Scientific Revolutions**, 3rd ed. 1996. In short, it seems that nothing is measured easily. Measurement is inherently controversial and even measurements made with “scientific” precision are mutable and ultimately ephemeral.

owners, clients, members or some other group defined by law, wealth, birth, a residual claim on organizational surplus, or other entitlement.¹⁹

Organizations that face competition or oversight must seek to control error and corruption in order to survive.²⁰ Error as the term is used here arises when decisions or actions impair performance in spite of the intention of the responsible agents to help achieve the organization's goals. In contrast, corruption results from a mismatch between an agent's incentives and the organization's goals. Corruption is intentional in the sense that the agent's actions are taken in pursuit of a personal goal whether or not that goal or action is consistent with the organization's goals.

Error and corruption in private organizations result in delays or failures to achieve organizational goals. If the organization produces commercial goods or services, error may reduce product quality or reliability and thus value, or it may increase production costs. Too much quality or reliability and too much economy in production can also result from error. Error and corruption may arise from many sources. Detecting and reducing error and corruption generally is costly. Economics teaches that resources should be spent on detection and reduction of error and corruption up to the point where a further increment of expenditure yields less than an equivalent incremental benefit. Likewise, the allocation of resources among types or sources of error and corruption should be based on equating the marginal benefits of expenditure on each type or source of error. In general, the optimal levels of error and corruption exceed zero, because the cost of their complete elimination would exceed the benefits.

A simple example will illustrate some possible sources of error or corruption and some quality assurance measures resigned to control them. A semiconductor manufacturer purchases silicon ingots from a supplier. Although a silicon ingot is a single crystal, the crystal lattice may contain impurities. The number and type of impurities in the silicon substrate upon which

¹⁹ Surplus is the residual income of the organization after paying market prices for all resources used.

²⁰ Persons engaged in an organization favor its survival if they face risks and transition costs in moving to their next best option after an organizational failure.

microcircuits are etched affects the performance of semiconductor products. Semiconductor suppliers guarantee certain minimum performance standards for their products. Higher performance is correlated with higher manufacturing cost and price. Customers rely upon these standards in designing downstream products. An error occurs when a product does not meet the applicable performance standard. The cause of such an error may lie at any point in the purchasing or production process, or in the communications between the manufacturer and the customer.

Errors are mistakes, mishaps, or accidents; they are individually unplanned, although their overall number is a policy variable. Some errors can be avoided or reduced by increased worker effort and care or increased monitoring of worker performance, which increases manufacturing cost. Others are truly random and can only be controlled by monitoring and filtering out defective units prior to further processing or shipment, which also increases costs.

Errors can be completely eliminated by a 100% inspection and test of each unit prior to shipment, assuming that there is a feasible test for every performance standard and that the inspection and testing process is itself error-free. But no test is error-free, and some testing is not feasible. For example, one common performance standard is the “mean time between failure” (MTBF) of a component. Testing MTBF of all units shipped would be impossible because such testing is “destructive”—units that passed the test prior to shipment would have been stressed by the test itself and will fail sooner than if untested. Further, testing all units shipped might be so costly and time consuming as to make the units cost more than customers are willing to pay, even for perfectly reliable products.²¹

Failure is not, of course, the only dimension in which quality is measured. Simpler issues, such as the physical dimensions of the product, may be very important in mass production environments where parts have to fit together with only tiny margins of error. In service industries, customer waiting time and management of customer expectations are often

²¹ In this situation, the practice is to engage in statistical sampling of units ready to be shipped. The error rate in the sample is then extrapolated to the non-sampled units, and the performance guarantee is expressed in terms of a minimum failure rate higher than zero.

important. In general, both the average quality and the variance of quality (reliability) are important.

Inspection of some or all of the finished products or services is but the simplest method of monitoring product quality. It may often be better to inspect some or all products at each step of the production process, from raw materials to finished goods. Inspections help identify the locus of error or corruption and provide opportunities to reduce defective work in progress and avoid further expenditure on processing of doomed units. Indeed, a major goal of the quality assurance process in any organization is to identify conditions that promote errors so that process managers can make improvements. Depending on costs, preventing error or corruption may be better than eliminating defective products at the end or at any intermediate stage of production. For example, changing to a more reliable raw material supplier may be cheaper than extensive testing of raw materials on receipt.

As this example suggests, quality assurance methods and goals arise from the desire of the organization to supply products and services (for which there is sufficient willingness to pay at a defined quality) at the lowest possible cost. That does not mean that the organization necessarily seeks to produce the highest possible output quality. Customer or member needs differ, and some prefer lower-quality products at lower prices. Diversity in product quality is commonplace and not necessarily inefficient. Quality assurance is a component of the more general goal of any organization to meet the needs of its members or clients as effectively and efficiently as possible. This applies equally to profit-seeking and non-profit organizations.

How is corruption different from error in an organization? The difference lies simply in the cause or source of the dysfunction, rather than its effects. The result in either case is a defective product or service, or one that could be produced at lower cost, and therefore a failure of the organization to fully reach its goals. Perhaps the clearest instance of corruption is peculation—theft of money or goods from the organization by one of its trusted agents. Deterrence, duty and loyalty to the organization may not be sufficient to overcome an agent's greed or need. Stealing in this example is of course a crime, and the state plays a key role in

detering crime, but so does the organization—through monitoring and motivation of agents, another form of quality control.

Shirking is more subtle than theft, but has similar effects. There are many lawful ways in which agents may maneuver for more compensation, while undermining the organization's effectiveness. For example, an agent may simply put in less effort while accepting the same compensation. As with stealing, a relaxation of effort may be difficult to detect because the agent will try to conceal his or her behavior. The same is true of agent strategies to sabotage the efforts of other workers, so as to make themselves appear relatively more productive. Also, an agent may redirect the organizational resources under his or her control in order to indulge personal preferences or benefit third parties from which reciprocal favors are expected. The organization then produces goods and services different in kind or quality from those that would maximize organizational surplus.

Organizations exist, as noted above, because they permit agents with a given collection of resources to produce more or more valuable output through managed interactions than independently or through arms-length market transactions.²² In spite of the resulting incentive to cooperate, each agent also has an incentive to compete with others in the organization for a larger share of the organization's surplus value. When this competition impairs organizational effectiveness it constitutes (generally lawful) corruption. That is, the mechanics of corruption actually reduces the size of the "pie" for shares of which agents are competing. Effort and resources devoted to competition for a fixed pie are socially wasteful both because they reduce the effort and resources available to produce output and because they may facilitate competitive strategies that reduce the effectiveness of organizational procedures, including production. This further reduces the size of the pie beyond the reduction caused by misdirection of resources devoted to zero-sum competition.²³

²² See the discussion of Adam Smith's **Wealth of Nations** and the division of labor in Bruce M. Owen, "Antitrust and Vertical Integration in 'New Economy' Industries with Application to Broadband Access," **Review of Industrial Organization** 38:4 363-386 (2011).

²³ These two effects are well-known in the literature on rent seeking. See, e.g., Robert D. Tollison "Rent Seeking." **In Perspectives on Public Choice**, edited by Dennis C. Mueller, (1997); Gordon Tullock, "Rent Seeking." **In The**

Mitigating corruption is similar to optimizing mistakes, except that while errors may tend to be random in their effects on agents, corruption is biased in favor of agents. This makes the source of corruption somewhat easier to detect than the source of error. In both cases monitoring and adjustments of incentives are important remedies. In the extreme case of criminal penalties (or equivalently harsh provisions in agent contracts) the major effects are accomplished by deterrence. The effectiveness of deterrence is a function of monitoring effort by the organization and the state as well as the value at risk from the expected burden of penalties.

Where corruption is difficult to identify or to distinguish from mistakes, and where the penalties are so great as to require costly due process protections, criminal or contractual deterrence may not be an efficient remedy. Monitoring and interdiction of defective inputs and flawed outputs and process design changes that increase the effectiveness of monitoring will likely be more useful, along with attention to those agent incentives that can be adjusted to increase compatibility with organizational goals.

The goals of a supplier organization are likely to include enhancing the welfare of its clients either as an end in itself (as with charitable works or altruism toward clients or members) or as a means to enhance the organization's own surplus. Those who deal with an organization as clients or members are of course vulnerable to impaired organizational performance, even when there are competing sources of the product or service provided. Changing sources often requires a costly and risky search plus a potentially sizeable up-front investment in the new relationship (for example in forbearance from strict enforcement of contractual terms) in order to establish mutual trust. Clients obviously have a significant interest in the quality of supplier output.

In response to client/member interest in product or service quality, organizations not only try to optimize quality, consistency and reliability, they also invest in signals intended to reassure clients that the organization is doing so. Clients who cannot costlessly observe supplier quality

must rely on a combination of evidence from past transactions, monitoring of current product or service characteristics, and trust arising from the willingness of the supplier organization to invest in signals of trustworthiness.

Trust is particularly important when products or services have important characteristics that cannot be easily measured, inspected, or monitored. One prominent example of a signal intended to inspire trust in organizations is ISO 9000 and its more specific companion ISO 9001. More than one million organizations worldwide have been certified by continuing external and internal audits as adhering to these standards, including police departments, sports teams, and city councils.²⁴

ISO 9000 and Six Sigma are essentially quality control process standards, but are also examples of various signals in which organizations may invest in order to engender trust in members, clients and the public generally. The offer of guarantees and warranties is another. Good works, charitable endeavors, awards and favorable press coverage perform the same function, and may promote both the value of the organization's products and trust in the organization's processes. To the extent that members and agents of the organization identify with the organization, these measures also promote agent loyalty and increase incentive compatibility. These signals may create greater value than the substantive direct contributions of ISO 9000 or like symbols of organizational commitment to quality and reliability.

²⁴ The International Standards Organization (ISO) administers and coordinates the national standards bodies responsible for a certification process designed to signal quality assurance and reliable performance. The terms ISO 9000 and 9001 describe a program of independent certification of organizations that adhere to procedural (management) standards of quality assurance. The details differ according to the nature of the business or manufacturing process. In some cases formal industry-specific standards exist. In other cases the specifics are developed by each certified organization as an implementation of the general principles in ISO 9000 and 9001. Essentially, ISO 9000 certification specifies both particular quality assurance procedures and specific numerical standards (e.g., that fewer than one output unit in 10,000 is defective, or that the signal to noise ratio in a communications channel exceeds 3 db. or that the mean time to failure for a hard disk exceeds 10,000 hours.) The term "Six Sigma" is often used in this connection. The emphasis on minimum standardized quality assurance procedures is intended to engender trust. Both the certification process and the quality assurance procedures themselves are costly, and certification signals that the organization seeks to serve clients who place high value on specific quality levels and reliable achievement of those levels. Numerous Wikipedia articles characterize the ISO quality assurance standards. See also D.H. Stamatis, **Six Sigma and Beyond**, (7 vols.) CRC Press, (2002); TQT Europe, **Training for Quality: Concepts and Practice**, McGraw-Hill (April 2000); Timothy Amukele and Cynthia J. Wilcock, **Introduction to Analytic Quality Assurance Tutor**, [CD-ROM] University of Washington, Department of Laboratory Medicine (2010); and Chris Ashton, **Managing Strategic Performance: Aligning Strategy, Performance and Business Results**. Business Intelligence (2000)

Based on non-government organizational theory and experience, the elements of quality assurance can be summarized as indicated in Figure 2.

Figure 2: Elements of Quality Assurance

1. Awareness and articulation of the organization's goals for members, agents and clients, including target levels of quality and reliability
2. Organizational designs that harmonize agent incentives with organizational goals
3. The ability to monitor performance of inputs, outputs, agents and intermediate processes
4. Dynamic feedback loops by which performance information is continuously translated into improved procedures and incentives, taking account of the advance of knowledge and changing goals (evidence-based practice)
5. A mechanism to interdict outputs that do not meet performance standards

E. Quality Assurance in Legislation and Rulemaking

The quality of private sector organizational performance has analogs in the quality of government policy performance. All organizations or unorganized groups include people with an interest in cooperating to achieve common objectives but with conflicting interests in how the benefits of cooperation are to be shared.²⁵ All organizations face the difficult challenge of managing these two incentives—to cooperate and to cheat—and the individual behavior that flows from them. Some interest groups are unable to organize at all because these challenges cannot be overcome. While government, viewed as an organization, serves high purposes and possesses sovereign power, it is in many respects subject to the same incentives and limitations as private organizations.

What mainly distinguishes government from private firms, organizations or cooperatives is the absence or weakness of external checks. Private organizations face two important external checks on corruption: competition and public law. If corruption reduces the ability of an

²⁵ Mancur Olson, **The Logic of Collective Action**. (1965)

organization to deliver benefits to members or customers, that creates profitable opportunities for competitors. Further, public law attempts to deter certain types of corruption, conducts investigations, and offers means of redress, such as retribution and some forms of compensation. Both the criminal and the civil (tort, contract) systems provide deterrence. In some cases, public regulatory agencies provide a degree of protection for members and customers of corrupted private organizations. In the public sector, there is no competitive alternative available to victims of government corruption. Individual officials face possible penalties for accepting bribes and outright theft, but most forms of corrupting influence are not unlawful. More important, no external or internal body checks the quality of government policy (laws and regulations) against any public welfare standard.²⁶

Figure 3: Checks on Quality of Law

1. Voters can monitor performance and refuse to re-elect under-performing representatives.
2. The press can publicize under-performance in aid of voters.
3. The president can veto mistaken or corrupt legislation.
4. The judicial branch can hold any law or administrative policy to be unconstitutional.
5. Congress and the courts together can adopt procedural standards for administrative and congressional decision-making that reduce the opportunity for error and corruption.

Several methods currently are used to monitor the quality of federal policy making and to deal with policies that do not meet standards set with respect to the fundamental goals of government. These methods are listed in Figure 3. Missing is competition from other governments (because emigration is not currently a realistic alternative for most unhappy U.S. citizens) and oversight by a higher sovereign power, such as the United Nations (because the U.N. currently exercises no such power.)

²⁶ The U.S. General Accountability Office (GAO), a congressional agency, audits the performance of other government agencies in carrying out legislative mandates. <http://www.gao.gov/about/cgprocess.html>. The GAO does not evaluate the performance of the legislature or the administrative-rule making process, nor does it have any enforcement powers. Inspectors-general in departments and agencies perform a similar role investigative role.

It is true of course that voters are by assumption able to assess the quality of government policies and that the media have traditionally been assigned a key role in exposing official corruption and publicizing important official enactments and decisions. But voters lack the time and expertise to evaluate policy. At best, voters may be assumed to have a general sense of whether they are happier than they were or might be under a different regime. Voters are not an effective check on legislative performance at least in non-salient and routine matters where “type 2” corruption occurs.

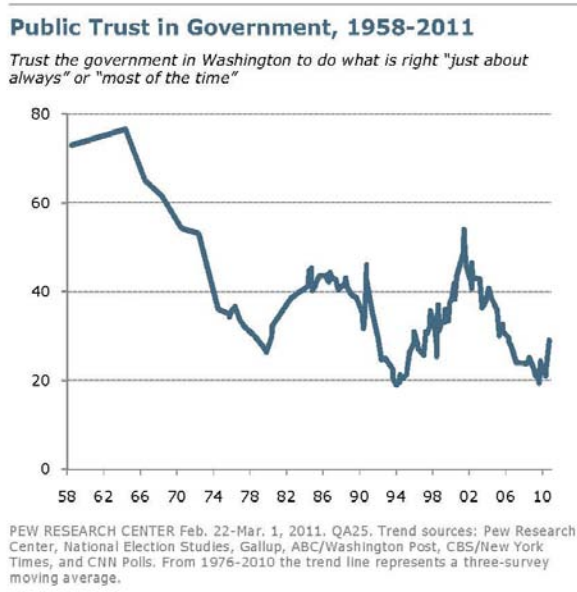
The media likewise are an imperfect and partial check on misgovernance. Mass media, seeking large audiences, have a strong economic bias toward coverage of events that arouse strong emotions, most often negative (suspense, anxiety, fear) in the public. This instinctively triggers audience attention. This is true for advertiser-supported media for obvious reasons, but it is also true of media for which readers or viewers pay directly, because the cost of content per viewer declines with the size of the audience. It is difficult not to notice that the national and local television “news” programs emphasize violent crime, disaster and conflict out of all proportion to its social or economic significance. When something works well, it is trivialized as an atypical “human interest” item. Other entertainment media also emphasize violent conflict, and sports is about little else. For these reasons the media are by no means a reliable watchdog on the quality of government policies, the most significant of which for present purposes are often deeply technical and several degrees remote from any strong emotion save boredom among the general public. The extreme weakness of voter and media checks makes government policy-making particularly vulnerable to corruption and error, and calls for strong scrutiny of government policies by other means.

The president cannot readily reject welfare-reducing legislation because he lacks line-item veto power and because of the complex political considerations attending the veto of legislation. For example, to veto a bill that favors the supporters of a particular legislator at the expense of the public risks loss of that legislator’s support for an unrelated bill favored by the president.

The judicial branch does not usually consider the effects of legislation on the well-being of the people; it is concerned chiefly with procedure (“due process”) and constitutionality.²⁷ Finally, Congress is unlikely to reform itself because the current system benefits incumbent members.

Compared to private organizations, error and corruption in government faces few constraints. Given the power and role of modern government, this should be reversed. In republican (representative) government, while elected officials are the elite, in practice there is a private oligarchy of wealthy individuals, corporations, and interest groups that are in practical control of the policy-making process. This sets the stage for “type 2” corruption that is destructive of aggregate well-being. And it helps explain the long-term decline in the people’s trust in government.

Figure 4: Public Trust in Government



The public’s long term and marked lack of trust in the federal government, illustrated in Figure 4, and particularly a lack of trust in Congress, is consistent with the hypothesis that the public views the policy-making process as corrupt. Policy appears to operate chiefly for the benefit of

²⁷ The U.S. Court of Appeals for the District of Columbia Circuit is sometimes willing to engage in substantive review of agency rulemaking.

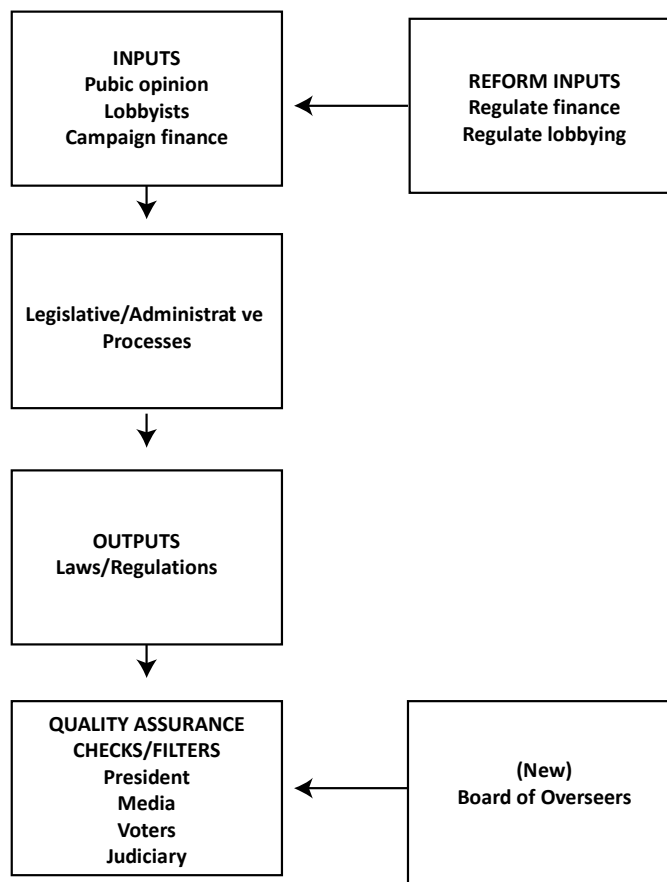
a well-connected and well-financed elite. On this the Tea Party and the Occupy movement agree. This lack of trust typically is explained by perceived corruption in the selection of key agents (elected representatives) and corruption in the supply (by lobbyists and other professional advocates) of information to the legislative and administrative processes.

In short, the public perceives a problem with the *inputs* to the policy process. This apparently de-legitimizes the legislative institution, even though individual citizens may, depending on framing, approve of all or most individual programs and policies and of their own representative. The mass media, focused on conflict, emphasize rancorous partisan gridlock and suggest that as the likely cause of why problems are not being addressed effectively. Politicians may have found that extremist drama garners more media coverage, campaign contributions, and votes. People can be made to act more like rabid sports fans than like thoughtful citizens.

It is interesting to note that citizen trust in state and local government is substantially higher than trust in the federal government.²⁸ This is consistent with the hypotheses that state and local governments face at least some performance pressure from competition and oversight. Competition stems from the mobility of citizens who can “vote with their feet,” or at least become aware of how things are done in nearby jurisdictions, and potential oversight arises from the power of federal authorities to dictate and monitor state policy and performance when federal funds are used or when interstate commerce is at stake. Given the outsized power of the federal government compared to state and local government, and the consequent focus on federal issues in the media, it is not surprising to find that these differences lead to larger gaps between expectations and performance at the federal level than at state and local levels.

²⁸ “Just a third of Americans have a favorable opinion of the federal government, the lowest positive rating in 15 years. Yet opinions about state and local governments remain favorable, on balance.” Only 33% of those polled reported a “favorable view” of the federal government on April 4-5, 2012, compared to 64% in 2002. A majority (54%) of those polled says the federal government is mostly corrupt; 49% say state government is corrupt. Favorable views of state and local governments, although trending downward, remain above 50%.” Pew Research Center News Release <http://www.people-press.org/files/legacy-pdf/1-19-12%20Obama%20Release.pdf> (January 2012); Pew Research Center News Release <http://www.people-press.org/files/legacy-pdf/4-26-12%20Govt%20Favorability.pdf> (April 2012); Pew Research Center News Release <http://www.people-press.org/files/legacy-pdf/606.pdf> (April 2010). Trust in Congress has recently been even lower, around 10%.

Figure 5: Quality Assurance in Government



F. Monitor the outputs, not the inputs

The most common prescription for improving the performance of government is to regulate inputs to the policy-making process. The targets of such reforms are corrupting influences like campaign contributions and lobbying activity. The argument is that these inputs are largely controlled by the elite and hence biased in favor of their interests. Put differently, the interests of groups that cannot easily organize themselves for political action have little or no influence on policy and therefore tend to be victimized. These are often “the people” as consumers, small businesses, non-union employees, small investors, middle-class taxpayers, and consumers of environmental amenities. Victimization can take either or both of two forms: (1) outright

transfers of income or wealth, increasing the share of the pie going to the elite and (2) often inadvertent economic inefficiency that shrinks the pie, reducing incomes without necessarily changing relative shares. Tariffs and quotas and poorly designed transfer payments for example do both, and the Amgen provision noted earlier is an example of cumulatively significant “type 2” corruptions made possible by the enormous scope of government.

Filtering inputs to the policy-making process is impractical and dangerous. It is impractical because regulation of campaign funding in the past has been notoriously easy to evade. Likewise defining the particular category of lobbying to be regulated, and how to regulate it, are extremely vexatious questions. Filtering inputs is dangerous because it threatens important provisions of the First Amendment: freedom of expression and the right to petition Congress for redress of grievances. This was the central holding of the Supreme Court’s famous *Citizen’s United* case.²⁹ The Court held that freedom of expression encompasses independent expenditures in support of (or opposition to) particular candidates. This was not a silly position for the Court to take, in spite of some questionable language in the opinion. Lobbying likewise is the essence of the First Amendment right to petition Congress for redress. While we could scale back the First Amendment to weaken these civil rights, in order to better regulate the political influence of elites, the effectiveness of such regulation is questionable and the price in lost liberty could be considerable.

Reforms to the procedures of Congress might hold some hope of improvement in policy outcomes, but it is difficult to imagine Congress reforming a procedural system that has been designed in part to promote the advantages of incumbency. The internal procedures of Congress are not a likely subject for a Constitutional amendment. Reform of procedure seems unlikely to be an effective remedy for policy corruption. That leaves end-product quality inspection as the remaining vector for reform. In essence we need a quality assurance process for legislation and administrative rule making that can operate on a line item basis when appropriate.

²⁹ *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

A constitutional check on the quality of legislation is hardly a new idea. In the time of Roman republic (about 500-50 B.C.) tribunes were elected by the plebeians to protect the interests of the propertied middle class. Tribunes had the power to veto any official act of the Roman senate or any official or judge. Machiavelli proposed a similar office for the city of Florence in the 16th century, based on the Roman model. Political theorist John P. McCormick has modernized Machiavelli's proposal in the form of a constitutional amendment for the United States.³⁰ The focus is on class representation through random selection, rather than elections that can be hijacked by the elite. Many of the details of the Roman and Machiavellian tribunates, designed for city-states, are irrelevant to modern conditions, however, and I believe McCormick's modernized version of Machiavellian democracy as a whole is considerably too democratic to achieve the goals set out in this essay. Nevertheless, elements of McCormick's approach have great merit in designing a remedy for corrupted legislation that reduces well-being in the administrative state. One strength of the more restrained proposal made here is that it may promote the collective interests of the elite as well as the middle class, while also offering protections for the poor, making implementation more likely. This is accomplished essentially by turning zero-sum games into a positive-sum game.

G. Conclusion

The proposal, which follows below, or something like it, would go far to help protect the people as a whole from some of the adverse effects caused by error and corruption in legislative and administrative policies. In addition to increasing the welfare of the people, the proposal may increase political stability by addressing the causes of movements such as Occupy, which have the potential to become violent. Occupy was in part a student and middle class protest against an elite corruption of government which is widely believed to have caused very substantial economic and psychological harm to the middle class in the 2008 crash and Great Recession. This is a view shared by certain elements on the far right. The Board of Overseers will not solve every political problem we face, but it might permit the United States to achieve the longevity of the Roman republic.

³⁰ Niccolò Machiavelli, *Discourses on Livy* (ca. 1517); John P. McCormick, *Machiavellian Democracy* (2011)

Proposal

The United States Board of Overseers

For the sake of concreteness, I set out below some candidate features of a new branch of the federal government designed to reduce the impact of legislative and administrative error and corruption on the well-being of the people. In political terms, the proposal is intended to counter the current power of the oligarchy in the legislature and the administrative process with a strongly democratic institution representing the principal victims of oligarchic power, the middle class. Given the difficulty faced by the oligarchy in containing the destabilizing and inefficient excess greed of its members, it seems more than possible that the proposal also is in the collective interest of the elite.

Perhaps this proposal requires a constitutional amendment, although there is an argument that the president might be able to assert his Article II powers to accomplish this, just as Chief Justice John Marshall asserted his Court's power to review (and veto) legislative acts in the famous case of *Marbury v. Madison*.³¹

1. *Function. Severability. Counterfactual. Control of docket. Strategy.*

The function of the **United States Board of Overseers**³² (**Board**) is to review on its own initiative any law (or regulation with the force of law) for consistency with the fundamental goals of government, as set out in the Declaration of Independence.

Comment 1.1 "Law or regulation" includes any detail, such as a "line item" in legislation. However, the **Board** considers whether the portion of any law under review is an integral part of the legislation as a whole, i.e., whether it is

³¹ *Marbury v. Madison* 5 U.S. 137 (1803) 177–78. Justice (then professor) Elena Kagan made the argument regarding presidential power and the unified executive in "Presidential Administration," **Harvard Law Review** 114 (2001): 2245.

³² Names are important. The terms *inspector-general*, *comptroller* and *fiscal* are used for modern functionaries, none of whom have the Roman tribune's power to veto laws and regulations, as opposed to investigating agency implementation practices or employee malfeasance. We need an office or officer that is responsible for reviewing substantive law against a meaningful public interest standard, and the political power to nullify such laws. As a placeholder, the term *overseer* will do.

“severable,” and its analysis compares the effects of the law as a whole with and without the portion that may be objectionable.

Comment 1.2 In general, the **Board** compares the effects of a law or portion thereof under review to the state of affairs that likely will prevail if the law or portion of law is vetoed by the Board. The **Board** has no obligation to review any given new or existing law. It controls its own docket. It may act on suggestions from any citizen. Laws selected for review are chosen strategically and to the extent possible consistently, in order to deter Congress or agencies from enacting harmful categories of legislation and to target particularly egregious categories of affronts to well-being.

2. *Predictability.*

Any new law or amendment is subject to review by the **Board** for three years after enactment, and not thereafter until the 13th year after enactment and at 10-year intervals thereafter. All laws in force upon the creation of the **Board** are subject to review for 10 years and thereafter for one year at 5-year intervals. Laws vetoed by the **Board**, if the veto is overridden by Congress, are not subject to further review for 10 years (and then for one year) and at 10-year intervals thereafter. The **Board** has one year after public notice to act on a given law it has chosen to review, and not thereafter for 10 years.

Comment 2.1 While these intervals may require fine-tuning, the law should be predictable, and it is undesirable to cast a pall of extended uncertainty over large swathes of new or existing statutes.

3. *Criteria for veto.*

The **Board** may veto any law likely substantially to reduce aggregate well-being [“reduce the size of the pie”] or likely substantially to redistribute income or wealth in a way that reduces the well-being of the poor [“absolute size of the slice available to the least well-off citizens”].

Comment 3.1 The wording here requires some work—it needs to be reasonably precise but not hyper-technical.

Comment 3.2 Slicing the pie clearly is a matter for Congress, elites notwithstanding, so long as the process does not reduce the size of the pie or the lot of the least advantaged.

Comment 3.3 The Rawls-like constraint is not particularly controversial so long as “least advantaged” is narrowly defined. The poorest have little of their own worth stealing beyond their claims on government assistance.

4. *Jurisdiction.*

The **Board** may not veto an item solely on the basis of its lack of lawfulness or constitutionality.

Comment 4.1 A sufficiently broad definition of well-being might reach the issue of lawfulness. Thus the jurisdiction of the **Board** includes matters that may also be within the jurisdiction of the judicial branch. But the **Board** should avoid trespass on the judiciary’s core functions.

5. *Legislation.*

The **Board** does not have the power to propose legislation or to override a presidential veto.

Comment 5.1 As with quality control in the private sector, the **Board of Overseers** has no affirmative power to design and enact “product improvements.” That would usurp Congress’s responsibility to choose politically acceptable solutions from the options available. The **Board** may of course send explicit or tacit signals of what solutions are likely to be veto-proof through its public explanations of vetoes.

Comment 5.2 The mere existence of the **Board** is intended to have a significant behavioral effect on the legislature. Once the **Board** has created a sufficient record to make its behavior predictable, the necessity for vetoes should decline.

6. *Congressional override*

The **Board's** veto can be overridden by a two-thirds majority of both houses.

Comment 6.1: A supermajority of Congress has a strong claim to political primacy because, unlike the **Board**, Congress does not have a narrowly-defined mandate. The president, having signed the original bill, need play no official role in the override.

7. *Members. Terms.*

There are 11 **Overseers**, each serving a non-renewable term of ten years.

Comment 7.1 Life tenure or 15-year terms are among other plausible solutions. Terms at the outset should be staggered.

8. *Selection by lot. Competence. Political legitimacy.*

Overseers are chosen by lot from among members of the **College of Overseers** (described below) as follows. **College** members' names are chosen by lot, one at a time, until an eligible member is selected and appointed. The **Board** determines for each randomly selected candidate whether the qualifications are met.

Comment 8.1 The process of selecting **Overseers** is of extreme importance both for the **Board's** proper functioning and for political legitimacy. The selection process as well as the **Board's** own decision-making process may also affect the well-being of the people directly.³³

The **Board** must be competent to do its job, which means capable of understanding the economic and other concepts laid before it by its staff. Age and formal education filters appear to be the only practical means of accomplishing this, short of Confucian examinations. The **Board** must also be *trusted* by the people and especially by the people it is designed to protect. It must not be associated with the oligarchy. Because corruption originating with the elite is implemented *through the agency of elected officials*, elections of **Overseers** will not do. The elite are likely to be assumed capable of biasing the

³³ John F. Halliwell, "Understanding and Improving the Social Context of Well-Being," NBER Working paper 19486 (2012) www.nber.org/papers/w18486

outcome of such elections, regardless of the tests of integrity that may be imposed on the candidates.

Appointment is another alternative. The heads of U.S. agencies, departments and commissions are generally appointed by the president subject to Senate confirmation. The people expect the president to appoint persons who share his views (or who will take his orders) on policy issues. If the electoral system is understood to be corrupted by the elite, it is a small step to the inference that appointees of elected officials are also subject to corrupting influences.³⁴

A lottery is the third method of selection for office considered in political theory. In classical Athens, any of the thousands of citizens belonging to the Assembly could be chosen at random to serve a one-year term in an executive capacity. This is an extremely democratic method. The problem with random selection is competence. In Athens it was not possible for a slave, a woman, or a peasant to sit in the Assembly or be selected for official duties. That is, the college of eligible members of the Assembly and potential officials was restricted, precisely because of the presumed incompetence of women, slaves and peasants to deal with political or policy matters.³⁵

In sum, one cannot look to the extremes of democratic theory or practice to support universal eligibility for **Overseers**. Similar limitations apply to our jury system; membership on a jury is heavily filtered by the parties and by the court. So, while a lottery has very attractive features in terms of political legitimacy, some adjustment must be made to have the **Board of Overseers** taken seriously as a solution to the problems it is intended to address. In the case of the

³⁴ Lessig makes a point of the ability of wealthy interests to gain access to the president through campaign contributions. In the case of the judiciary, appointments by the president, again subject to Senate confirmation, are for life. The federal judiciary is held in higher esteem than Congress, but the case of Bush v. Gore and other factors may have undermined this trust. Further, because of the lens of conflict through which the media report on the Supreme Court, the Court is understood to be divided along partisan political lines, reflecting the views of the president who appointed each justice and tainted by long association between each of the justices and members of one of the parties.

³⁵ The ancient Greeks of course had rather different ideas than we do today about what constitutes competence in this domain.

Supreme Court, only lawyers with some litigation experience are considered nowadays for appointment, although no such criterion appears in the Constitution. The Roman republic (and Machiavelli) chose tribunes elected from particular social classes rather than on the basis of random selection. In sum, the collection of people from which a random person is appointed to the Board needs to be filtered or pre-qualified in some way.

9. *College. Qualifications. Membership voluntary.*

Eligibility for membership in the **College of Overseers** includes all U.S. citizens 35 years of age or older, who have completed at least 16 years of schooling, and whose family income in the preceding five years preceding selection by lot is in the middle third of U.S. family incomes. No person admitted to the **College** may decline to serve as an **Overseer** if chosen by lot and qualified to do so, except in case of disability. Admission to the **College of Overseers** is automatic upon application by persons meeting the stated qualifications; application is voluntary and members may resign on reasonable notice for any reason, except if chosen by lot to serve as an **Overseer**. The **Board** designs and administer an appropriate admissions procedure, including investigation of applicants' claims to qualification (except the income test, which is investigated at the time of selection by lot) and maintains a roll of current members. The **Board** supplies administrative support for the **College**.

Comment 89.2 As discussed above, the **College** is the set of potentially eligible **Overseers**. It does not meet and has no powers. This proposal relies on qualification by family income (as a proxy for membership in the middle class), age and education. Sixteen years of education corresponds to a community college degree, although the qualification is not defined in terms of a degree. As summarized in Figure 6, about 60 million U.S. persons are qualified for the **College** by reason of age and education. If the middle third of family incomes (\$50-\$100,000) is taken as a proxy for the middle class, eligibility is reduced to about 20 million persons, not all of whom will choose to apply. Twenty million is about 6% of the population, a long way from universal eligibility. Possibly the

middle should be more broadly defined, or simply exclude the top 1, 5, or 10 percent. Political legitimacy or trust requires that the group be so large that “pre-corruption” by the elite is unimaginable. The downside of educational and other such formal qualifications is that the **College** may seem to reflect the characteristics of the elite. The higher the educational qualification the more elite the **Overseers** may appear to be, if only by association. Membership in the **College** should be more than an honorific—it should require some sense of commitment to one’s country; hence the absence of an option to decline selection for the **Board**. On the other hand, to encourage application, it may be wise to confer some nominal privilege or honor on members of the **College**.

10. *Budget. Staff.*

The **Board** has a budget to retain a staff of experts and analysts. The budget is not less than the budget of the Congress. The **Board** establishes a category of senior staff members whom the **Board** may dismiss without showing cause and whose compensation is set by the **Board**.

Comment 10.1 Some check is needed on Congress’ power to punish the **Board**. The congressional budget (currently over 4 billion dollars) is likely much more than the **Board** would need, but it needn’t all be spent.

11. *Board chair. Staff director.*

The **Board** has a rotating Chair (by seniority) with a 5-year non-renewable term; the Chair appoints with the consent of the **Board** a Staff Director with a renewable 5-year term. The **Board** chair is also the president of the **College**. The Staff Director is a member of the **College** at the time of appointment, but not the **Board**. The Director appoints the rest of the staff, subject to the approval of the **Board**.

12. *Compensation of Overseers. Lifetime ban on other income.*

Overseers are compensated at three times the salary of a member of Congress. No **Overseer** may earn any other form of income from any source while in office. Financial and other substantial assets owned by an **Overseer** at the time of appointment is placed in a blind trust for the benefit of his or her heirs. An **Overseer** who retires or resigns, or whose

term otherwise ends, may not earn or accept income in any form, including gifts, for life, but is paid a pension equal to the **Overseer's** salary in his or her final year of service, adjusted thereafter at the same percentage rate as the nominal per capita GDP of the United States.

Comment 12.1: Serving on the **Board** for a lengthy term should not require a financial sacrifice and should be sufficient to discourage taking bribes. There are numerous additional conflict issues related to the employment and income of an **Overseer's** spouse and other close relatives that need to be resolved.

13. *Compulsory process.*

The **Board** has the right of compulsory process, including (with appropriate safeguards) access to classified or confidential materials.

14. *Reasons for decisions.*

The **Board** explains and promptly publishes its reasons for any decision, including decisions not to veto a law that has been reviewed.

15. *Procedure. Conflicts of interest.*

The **Board** establishes and publish rules regarding conflicts of interest and ethical conduct for **Overseers** and its staff, and rules of procedure such as quorums and majorities, and other procedures as necessary.

16. *Immunity from civil and criminal liability.*

No **Overseer** is liable in civil or criminal proceedings for actions taken in the course of **Board** business, except for bribery or extortion.

17. *Immunity from congressional appearance.*

Congress may not compel **Overseers** to appear before it.

18. *Expulsion of members.*

The **Board** may expel an **Overseer** for cause by a two-thirds vote of its remaining members.

Comment 18.1 Given the random selection process and the necessity of having a **Board** that is competent, sane, healthy and industrious, the **Board** should have substantial discretion in expelling its own members.

19. *Notices. Submissions.*

The **Board** publishes notice of reviews in process and any person may submit written comments. All written submissions are public except for those containing classified information.

20. *Oral presentations.*

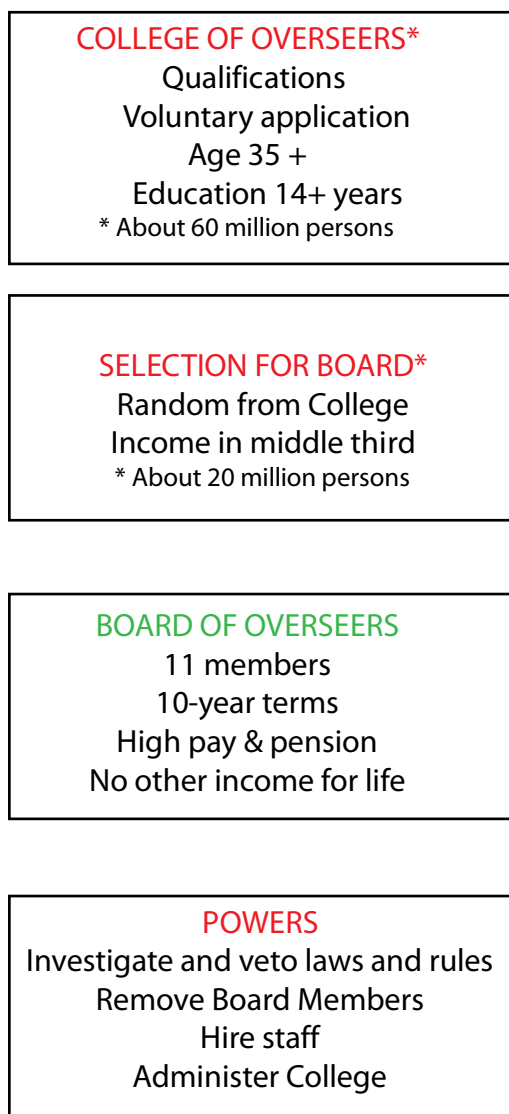
The **Board** may invite oral submissions by any person, including government employees and elected officials, before panels of no fewer than three **Overseers**. All oral presentations are public, except for those concerning classified information.

21. *Treaties. Armed services. No power to veto appointments.*

The **Board** may not veto treaties except for those concerning international trade and commerce. The **Board** may not veto laws concerning the armed services, including declarations of law, except those (portions) dealing with procurement. The **Board** may not veto appointments to federal executive or judicial offices made by the president by and with the advice and consent of the Senate.

Comment 21.1 The right to veto these excluded categories of legislation would confer too much power on the **Board** relative to the likely benefits to aggregate well-being.

Figure 6: U.S. Board of Overseers³⁶



³⁶ There are roughly 60 million U.S. persons with the proposed age and education qualifications, of which one-third, or about 20 million, are in the “middle third” of *family* income, about \$50,000 - \$100,000 per year. U.S. Census Bureau, Population Division, “Annual Estimates of the Resident Population by Sex and Five-Year Age Groups for the United States: April 1, 2000 to July 1, 2009 (NC-EST2009-01),” June 2010, <http://www.census.gov/popest/national/asrh/NC-EST2009/NC-EST2009-01.xls>; U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2009, Current Population Reports, P60-238, and Historical Tables—Table F-23, September 2010.