Madison’s Missing Branch

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Abstract

The role of the U.S. federal government in regulating economic and social interactions has grown exponentially since the establishment of Madisonian democracy in 1788. This has undermined one of the Founders’ key assumptions—that the role of the federal government would be small. The three-branch structure of government is inadequate to control the vastly increased opportunities for private interests to influence policy. The power of private interests is unbalanced; easily organized influencers have far more weight than large, poorly organized interests. This leads to policies that promote inequality. In addition, political decisions are dominated by the reliance of legislators and administrators on interest group information and resources. There is little incentive for policymakers to consider their impact on the “general welfare,” however measured. Also, there is little effective quality control of federal policies. The standard remedy for these imperfections is regulation of campaign financing and lobbying. Unfortunately, such regulation is constrained by First Amendment freedoms. I propose creation, within the Madisonian framework, of a fourth branch with the power to veto policies that reduce aggregate welfare and equality of means.

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Preface

Five years ago, I published a law review article about “lawful” political corruption.¹ At the time I was concerned by powerful interest groups and wealthy campaign donors corrupting legislators. Lawful political corruption is different from quid pro quo bribery, which is a crime. Lawful (or institutional or systemic) corruption is the inclination of public officials to do favors for elite groups (special interests or factions) who can influence lawmaking and policymaking through campaign finance and lobbying.² The favors often have the effect of reducing the size of the pie and making the division of the pie more unequal. These effects reduce the happiness or well-being of the people, contrary to the foundational purpose of government.

The present paper updates and extends this concern to officials in the Executive Branch and so-called “independent” agencies. “Lawful” corruption is not a crime. Indeed, I am not concerned about any of the various causes of political corruption because, as I show below, most of them are irreversible. The whole point of representative democracy is that the people should be able to influence the behavior of their representatives. No reform should hinder or regulate this right, even though some people have much louder voices than others.


“Madisonian democracy” refers to the structure of the federal government as set out in the 1788 Constitution. James Madison played a leading role in the creation of the American republic. A republic is a representative democracy. Voters elect representatives, political agents, to advocate for the voters’ interests in federal policy making. Federal policy is made by the Congress and administered by the President, subject to review by the Supreme Court. Each of these three branches of government can veto actions of the others. This is the famous “checks and balances,” designed chiefly to resist tyranny by making changes in the law or constitution difficult.

Policy making requires at least tacit consent of the three branches. If there is an impasse, it is up to voters to elect a different president or different representatives, or to amend the Constitution. Political corruption (as used in this paper) occurs when representatives or the president do not act to improve the well-being of voters, usually because they are influenced by factions (special interests), but sometimes due to bribes or other illegal gifts. When elected officials do not act to improve or protect the well-being of voters, voters are made worse off. Special interests usually reflect the interests of wealthy citizens and their businesses. Therefore, in addition to reducing the welfare of voters in general, political corruption also increases inequality by transferring resources from poorer to richer citizens.

My theme is that efforts to reduce the costs of political corruption should focus on examination of the welfare impact of corrupted legislative and administrative policy rather than on the political or electoral processes or motives that led to the corruption. In addition to interdicting welfare- or equity-reducing actions directly, avoiding welfare-reducing policies will tend to diminish the incentive for factions and legislators to engage in political corruption.
So, we need to stop federal actions that reduce well-being or increase inequality. None of the three Madisonian branches seems able to do this. Therefore, we need a politically legitimate organization capable of conducting the proper analysis and empowered to veto such policies. The organization must be trustworthy and thus immune from elite and other political influence, and its own power must be tempered by proper checks and balances. In short, we need a new branch of government within spirit of the existing Madisonian framework.

Political corruption typically is blamed on elites who control legions of lobbyists and provide funds to friendly politicians running for office. As I will explain later, it is a waste of resources to try to reform campaign finance or lobbying by special interests. The mythical king Sisyphus was condemned by the ancient gods to push a boulder to the top of a hill, only to have it roll to the bottom repeatedly. So it is too with efforts to reform campaign finance or lobbying. There was no fix for Sisyphus’ eternal efforts, and the same is true of the causes of political corruption today.

Instead, it makes sense to focus on the type of political corruption that, often accidentally, makes people worse off and especially the poor poorer. If then we can find a way to stop such effects of political corruption, we may do what is possible and most important to our welfare. And while we are about it, why not include policies that reduce welfare simply because of legislative or administrative sloppiness and error?

The Trump administration reminds us of many well-known flaws in our federal structure, some of which date to the ratification of the 1788 Constitution. Max Fisher and Amanda Taub described these flaws in an opinion piece in the *New York Times* just before the November 2020
election; most of their points are summarized below.\(^3\) Many of these flaws are the legacy of ancient political compromises that are no longer relevant. Others are omissions of constitutional provisions that time has proven necessary but are embodied in customary democratic political culture. The vital importance of political culture became obvious only when Donald Trump, ignorant and uncaring of that culture, showed it to be toothless.

A major flaw is the original minimalist Madisonian separation of powers and checks and balances, intended to create gridlock and to deter tyranny. The checks and balances do not deter, and were not intended to deter, institutional corruption of the legislature or the executive and administrative branches. Presidents are reluctant to oppose welfare-reducing legislation because lack of line-item veto power and a need to maintain workable relationships with legislators limit what a president can do. The courts likewise typically avoid substantive review of the welfare consequences of legislation and regulation. The Constitution limits the jurisdiction of the federal courts to “cases and controversies” plus a few more specific matters. The effect of corrupted law on citizens is outside the jurisdiction of the courts, or so the courts have decided.

Most significant is the thing that is missing: there is no formal institution or branch responsible for finding and nullifying legislative and administrative actions that reduce the well-being of the people. It is all left up to elections, which are corrupted by the same forces that corrupt legislation—special interests buy influence with voters as well as politicians. In addition,

elections are biased because some voters—rural citizens and extremists—are given more weight than others, as I discuss below.

Giving preferential weights to certain voters is partly due to the Electoral College and the related allocation of two senators per state, regardless of population. Pauline Maier has explained how these and other compromises were needed to ensure that smaller states would support ratification of the 1788 Constitution.⁴ Today these provisions allow a minority of citizens, mostly living in rural states, to dominate both presidential elections and control of the Senate. Citizens in these states, acting together, are also able to veto constitutional amendments. There is no longer a good reason for this. It is a solution to a problem that no longer exists.

The primary system used by both major political parties to choose candidates is another source of biased voting. The system gives undue weight to voters at the extremes of the political spectrum at the expense of moderate party members. It is common, though simplistic, to regard “liberals” as left of center and “conservatives” as right of center on a one-dimensional political line. Party primaries are won by candidates who appeal to the “median liberal” or “median conservative.” In the general election, candidates would prefer to go after the “moderate” median voter. But they are constrained by their need to have taken positions in the primary election that appeal to the voters either farther left or right of center. In this way, extreme liberals and

extreme conservatives are given more weight in candidate platforms than voters with moderate views. Why should extremists be given more political weight than moderates?⁵

The system of campaign finance has long been criticized as favoring the wealthy at the expense of the middle class, encouraging what amounts to bribery, even though it is lawful. The criticism is valid, but perhaps unfortunately expenditures promoting candidates appear to be protected by freedom of expression, a First Amendment right. Much more on this below.

The list of items needing repair goes on.⁶

The most malignant flaw in our Madisonian democracy is the explicit assumption in the Declaration of Independence that “all men are created equal.” This blatant lie supports our tendency to blame character for any failure of a citizen to thrive.⁷ Humans in the United States are born very unequal indeed, some with such advantages as economic security, caring family

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⁵ Lee Drutman and others have suggested that the two-party system itself is the sources of political failure because the existing parties have created procedural hurdles that tend to exclude new parties. Drutman, Lee. 2020. Breaking the Two-Party Doom Loop. Oxford University Press.

⁶ A final possible example of flawed structure is lifetime tenure for judges, a system that allows politicians of past discredited eras to influence the interpretation of the Constitution and the laws in current times. Lifetime appointments are intended to shield judges from political influences. But both judges’ initial appointments and their efforts to be promoted to higher courts are heavily politicized. In some states, judges are elected or appointed to shorter renewable terms, and most of these systems appear to work tolerably well. Hyper-partisan warfare takes place over Supreme Court appointments. One remedy may be to require a super-majority vote in the Senate for confirmation of all appellate court appointments. That would incentivize presidents to nominate moderate justices, and ones that are better-qualified.

support, environmental and physical safety, and valuable talents. Only a fraction of these advantages is genetic. But others have none of these advantages. It is remarkable how proud we are of our American “equality.” We seem to have no difficulty believing two contrary propositions. Even the least worldly American citizen knows very well that we are not equal, even before the law, much less socially, economically, or politically.

Inequality at birth explains much of the growing inequality of economic and social status in America. This is neither morally acceptable nor politically tolerable. To be fair to Thomas Jefferson, the Declaration claims that all men are created equal and therefore have certain rights, such as the right to pursue happiness. But if Jefferson’s silly assumption of initial equality is false, the associated rights have meaning only if society is willing to redress the inequality. The rights in question should be self-evident, not premised on a false assumption.

Inequality has consequences. Many citizens, even among the middle class and elites, feel uneasy about growing inequality. The state of being poor is itself unhappy, and altruistic feelings among the non-poor reduces happiness as well. Inequality also can trigger political instability.

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Inequality triggers frustration, anger, and resentment—feelings that motivate many of Donald Trump’s supporters. More shocking than the behavior of Donald Trump and his appointees is the size of the mass of American voters who support him. Some political scientists and other commentators, such as Sandel and Goodheart, suggest that there is a fundamental divide in America between college-educated voters, who on average are better off economically and socially, and those lacking a college education. Trump supporters tend to lack college educations.10

Social status is a key component of well-being.11 Access to education does confer economic and social status, a sense of privilege, and sometimes an attitude of arrogance and entitlement among those so favored. Such attitudes are naturally viewed with resentment by those who lack access and status. Hilary Clinton, in her campaign against Donald Trump in 2016, may be an icon of this divide and its consequences. Clinton struck some voters as smug and entitled. This may have led them to favor Trump despite his bombast and lack of qualifications. Those who are victimized by unequal economic and social status as well as those who fear loss of status due to technological and economic change and political corruption are naturally alienated and angry. It is shameful to refer to them as “deplorables.”12


11 Sociologist Cecilia L. Ridgeway argues that “Status is as significant as money and power …[S]tatus stabilizes resource and power inequality by transforming it into cultural status beliefs about group differences regarding who is ‘better’ (esteemed and competent.)”

12 Merica, Dan, and Sophie Tatum, Clinton expresses regret for saying ‘half’ of Trump supporters are ‘deplorables’ CNN Politics Clinton expresses regret for saying ‘half’ of Trump supporters are ‘deplorables’ (cnn.com) September 12, 2016.
Whether or not there is some easily defined political dividing line in America, the fact is that many citizens lack access to an adequate educational or social support system and therefore lack status. Many lack the skills and ways of thinking needed for a fulfilling life.\(^{13}\) This condemns too many either to low status or the threat of lower status in the face of change.

What is different about a democratic political system, or ought to be, is that all citizens have equal status with respect to political rights. Circumstances might give rise to inequality at birth, but a democratic system should treat that as a problem to be remedied, not a given to be tolerated. In any event, welfare-reducing or inequality-worsening legislation needs to be better controlled, and that is the objective of this paper.

Effective remedies for the injustice of inequality at birth would do more to enhance the affective well-being of Americans than any political reform—that is, to reduce resentment and anger. It would be wonderful if all Americans could trust their own government to respond to their needs and defend their rights. If only our politicians could tear themselves away from partisan competitiveness and favors for special interests, the well-being of the people could be improved.

Why do we have this problem of institutional corruption producing welfare-reducing laws and policies? Is it a failure of Madisonian democracy? I think the principal cause has been the century-long expansion of central government in the United States. Changing political and policy preferences on the demand side and changing technologies, economic conditions, and political

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incentives on the supply side help to explain the expansion. The expansion in turn has under-
mined Madisonian democracy.

The federal government now impinges on every human interaction, both economic and social. But expansion of the federal writ has weakened Madisonian democracy because the structure of Madisonian democracy is built on the assumption of limited government. The ex-
pansion explicates the roots of political corruption and potential remedies for the modern prolif-
eration of corrupt legislation and regulation. The mere fact of expansion has turned what was a minor issue for the 18th century Framers into a major obstacle to well-being in America in the 21st century.

The key effect of expansion is the insight that every law or policy that constrains citizens away from their preferred behavior creates incentives both to evade the constraint (at some cost) and to influence Congress or an agency to alter the constraint. Whether or not the con-
straints or interventions are intended to be welfare-enhancing has little effect on these counter-
productive incentives. They simply increase the demand for lobbyists and PACs that work to under-
dermine even welfare-enhancing policies.

Thomas Jefferson once suggested that the preservation of the rights granted by the Con-
stitution might require a bloody revolution by each generation. “The tree of liberty must be re-
freshed from time to time with the blood of patriots & tyrants. It is it’s natural manure.”

Madison’s disagreement with this view is reflected in Article V of the Constitution.\textsuperscript{15} Amending the Constitution requires either a Constitutional Convention requested by two-thirds of the states, or an act of Congress supported by two-thirds of each house, in either case ratified by three-quarters of the states. Madison insisted on a constitution that could not easily be changed, even if the country changed beyond anything the Framers could have imagined, including elimination of a basic assumption of Madisonian democracy—limited government.

Our sentimental attachment to the details of Madison’s vision seems to serve as a barrier to the sorts of reforms that might forestall or at least postpone the fall of American democracy. The needed repairs are simple: in federal matters no one’s vote should count more heavily than others and the federal government should not burden the people with welfare-reducing laws, policies, and procedures. That same government should try to provide every person with the resources and protections needed to allow self-fulfillment. Experts regard such reforms as unlikely. Political scientist Bruce Cain comments that:

While the path to incremental reforms is not totally blocked, the deeper question is whether the United States can ever bring itself to examine the structural flaws that lead to overregulation, money dominance, and democratic distortion. Short of a major

\textsuperscript{15} See \textit{The Federalist} Nos. 47-51 (James Madison) (stating in \textit{The Federalist} No. 49 that “a constitutional road to the people ought to be marked out and kept open, for certain great and extraordinary occasions,” but that there were “insuperable objections against the proposed recurrence to the people”); Jack N. Rakove, The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman’s Neo-Federalism, 108 YaLe L.J. 1931, 1954-58 (1999).
breakdown in the US system, the inertial forces of vested interests and the ingrained cultural predisposition to retain our American institutional “exceptionalism” will win out.\textsuperscript{16}

All that said, my goal here is to focus more narrowly on a structural improvement that has received little or no attention, at least compared to the many issues summarized above. As an economist, I have been studying today’s forms of political corruption from a Madisonian perspective. That is, what are the economic effects of lawful political corruption, why does Madisonian democracy not prevent them, and what if any “Madisonian” (structural) solutions might protect citizens from corruption’s adverse effects? What are the minimum changes that could preserve Madisonian democracy?

There are two reasons for my focus on the effects of corruption. First, as an economist I study how to increase the “size of the pie,” a key determinant of the potential for widespread citizen well-being. Economists also focus on the distribution of wealth and income and hence well-being among the population. For example, U.S. life expectancy is now well below that of other developed nations. There are multiple causes, but a big one is a “lack of political power among the bulk of the population.”\textsuperscript{17} This lack of political power encourages corrupted legislation that makes inequality worse.


Both the size of the pie and the equity of its distribution are fundamental determinants of personal well-being as well as political stability. If, as I believe, lawful political corruption reduces the size of the pie and increases inequality, we must examine potential reforms in Madison’s system. At the same time, keeping elements of the basic Madisonian system may avoid some of the stubborn sentimental resistance to reform, reforms that better protect human rights and human welfare.

The world has changed, and the organization of government, as presently constituted, must change as well to protect the people from the tyranny of political corruption. I aim at three goals in this paper: (1) understanding at a deep level why human nature produces political corruption, including the major ways in which scholars have tried to understand and “model” corruption; (2) examining some of the leading remedies that have been proposed to stop political corruption; and finally, (3) to offer a remedy, not for corruption, but for the adverse effects of corruption on citizens.

Some initial working assumptions:

First, politicians are ordinary people--their behavior tends to respond to the incentives created by their economic and institutional environment. Such behavior is unlikely to change unless institutions and incentives are changed. Members of congress and administrative officials advance their careers by raising money for their own campaigns and for their party, by cooperating with their party leadership and by supporting the interests of potential employers and contributors. Supporting legislation or policies that promote the general welfare is not a primary goal, especially if it conflicts with officials’ own well-being and career advancement.
Second, it is critical to think of political corruption, not in terms of campaign finance and lobbying but in terms of its effects on the well-being of the people. As noted in the Preamble to the Constitution, the general welfare of the people is a key purpose of government. An act of congress or an administrative policy is economically corrupt if it lowers overall well-being or increases inequality, even if it does not arise from a crime or appear to be unconstitutional. This definition of corruption is vital in guiding efforts at reform.

Third, virtually all proposed remedies for political corruption are focused on regulating or constraining inputs into the political process, such as campaign contributions and lobbying. It is difficult to design effective input constraints without impinging on people’s constitutional rights. Also, most attempts to reform inputs have failed to be effective.

A better approach is to regulate outputs (legislation and administrative policies) rather than inputs. The Supreme Court, for example, constrains outputs of government by considering whether laws and policies are constitutional. The jurisprudence of the Supreme Court deters congress and the agencies from enacting laws that are likely to be found unconstitutional. If enacted, such laws are interdicted by the Court.

But of course, legislation can be constitutional and yet reduce the well-being of the people. While the Justices of the Supreme Court are acutely aware of the political impact of their decisions, they nevertheless generally ignore the impact of the laws they review on the productivity of the economy and the equity of income distribution.

We need an institutional monitor of corruption that checks laws and policies for their adverse effects on well-being, not just constitutionality. We need to filter out the effects of political
corruption that most matter to the people, rather than the processes that lead officials to behave without regard to the general welfare.

Regulating inputs without changing incentives is not likely to change behavior. If a branch of government can deter and, if necessary, interdict welfare-reducing and regressive policies, political corruption will have fewer devastating effects on the general welfare and on economic equality. In turn, the incentive of policymakers to ignore the well-being of the people will be reduced. This requires changes in the institutions designed so long ago by James Madison and his collaborators. Madison was wise in 1788 to design a government fit for his times and the then-foreseeable future. He should have recognized the folly of not adapting that government to times he could not foresee. In this, Jefferson had the more sensible view.18

18 Max Fisher and Amanda Taub (2020), writing in the *New York Times*, illuminate the sources of Americans’ unusual reluctance to question the weakness of the 1788 constitutional structure. They also point out that when U.S. experts are asked to advise developing nations about the best structure of government, they typically advise adoption of a parliamentary rather than a Madisonian system. Recognizing that any political system, however sacred, needs adjustment from time to time would be helpful. Indeed, most democratic nations amend their constitutions often, as times and conditions change.
A way to start this discussion is simply to set out one version of an Amendment to the Constitution, and then to supply the arguments in favor of the necessity for this or a similar reform. In part this requires a review of human motivations and examination of alternative solutions. I do this in the concluding section of this paper. I claim only that the proposed reform would help reduce the cost of just one defect in our system: the tendency of elected officials to ignore their sometimes-negative impact on the general welfare. Although I address a solution only to one issue, it is an important one because it supports the excessive and growing inequality and stagnant growth of well-being in America. It may well be chief among the causes of the current civil unrest in America because it has led many citizens to lose trust in government.

The very public abandonment by corporate supporters of politicians endorsing Donald Trump’s lies in 2020-21 may have awakened Americans’ appreciation of who really controls the federal government. Corporations support politicians who are positioned to benefit a given company; they care about profits. In the wake of the invasion of the Capitol, corporations feared boycotts and other consumer pushback, so they abandoned politicians who supported Trump. Wealthy individual donors, in contrast, tend to support politicians based on ideology. Some individual donors did abandon Trump, notably the Koch family, presumably because the insurrection threatened their long-term goals.
Section 1- Introduction

James Madison designed the famous checks and balances in the Constitution to protect the people from tyranny. But Madison’s original organizational structure for the federal government (which quite deliberately favored “gridlock”) is no longer adequate to protect us from the consequences of political corruption caused by elite interests. Indeed, it never was. Madison’s checks and balances were designed to protect us from tyranny. The Trump era leaves even that function open to question, because despite the checks and balances, Trump was able to aspire to a “strong man” dictatorship. His party’s majority in the Senate gave him the ability to fore-stall unfavorable legislation and his appeal to segments of his base energized a group prepared to resort to violence.

I use the terms Madison and Madisonian democracy throughout this paper, for convenience, as if there were no controversy about Madison’s own evolving views, and no other participants in drafting the Constitution of 1788. In fact, scholars have spent and are still spending whole careers debating what Madison and his collaborators really intended at various times in the founding era. Indeed, prior to the 1788 Convention, Madison’s views may have been quite different from what emerged.19

A republican or representative structure is a key feature of Madisonian democracy. Because this feature relies on an “agency” relationship between elected representatives and the

19 These matters are discussed, most recently, by Mary Sarah Bilder, but they are largely irrelevant to the present discussion.
voters, all types of political corruption reflect an agency failure: a government official sacrifices the public welfare to advance a personal or political agenda. In the Madisonian system, representatives are agents of the people acting in the people’s interest; we rely on elections to produce trustworthy representatives who seek to advance constitutional goals. This may include protecting the people from their own sometimes welfare-reducing impulses, which is the pivotal point of representative democracy.

This agency characterization of Madisonian democracy has been widely acknowledged and studied by, for example, James E. Alt and David D. Lassen, Robert J. Barro, and John Ferejohn. The existing Madisonian separation of powers and checks and balances are not effective safeguards against agency failure.

Before discussing remedies for these problems, we need to agree on the purposes of government and to understand James Madison’s constitutional design and its goals. In considering remedies for systemic corruption our focus must be on the performance of constitutional structures in achieving the Framers’ (and people’s) key goals, which remain uncontroversial.

As Pauline Maier has explained, the delegates to the 1787 constitutional convention in Philadelphia shared overlapping views of the proper role of government. The Framers’ views were derived from Rousseau, Locke and other enlightenment philosophers, the delegates’ own educations in the Greek and Roman classics, their observations of British institutions, and

20 James E. Alt & David D. Lassen, (2008); Robert J. Barro (1973), and John Ferejohn (1986).

21 Maier, supra, at n. 4.

their experience with colonial governance. Many had taken part in drafting new postcolonial constitutions in their home states. Some were practical men who appreciated as constraints the economic and political interests of prospective ratifiers in the several states. We have indications of their intent, in the prevailing enlightenment climate of opinion, but most clearly and famously in the Declaration of Independence, the Federalist Papers, and the Constitution’s Preamble, but also from sources such as James Madison’s notes taken during the convention and later amended.

Many political philosophers (with such notable exceptions as Plato) have endorsed democracy as a superior method of governance. Winston Churchill casually characterized democracy as a terrible system but better than the alternatives. A democracy is a society governed by the will of its people. A people’s will is slippery, vague, fickle, and transient. What matters to people, of course, is what has always mattered: well-being and justice, or as the Framers put it, life, liberty, and the capacity to pursue happiness. A democracy can claim to be “best” only to the extent that it delivers on these aims.

“All political systems are prone to decay over time,” according to Francis Fukuyama. The same is true of whole civilizations. Constitutions can be social contracts or peace treaties among contending interests. Nevertheless, if the legitimacy of a constitution rests on the will of

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the people, and if the people’s will be variable, it follows that the constitution (or at least its interpretation) must also change.

The lawful corruption problem was well understood by the founding fathers and 18th century political philosophers, most of whom had studied the history of Athenian democracy and the Roman Republic as well as Niccolò Machiavelli’s political theories. Madison, the principal author of the 1788 Constitution, designed a system of checks and balances which, together with the initially limited size and power of the federal government, were thought sufficient to control the problem of political corruption. But the founders could not have expected the enormous power that the federal government has come to exercise in modern America. Government today regulates virtually every human interaction, both social and economic.

**Madisonian Democracy**

As noted above the term Madisonian democracy refers to representative government (i.e., a republic) along with the famous checks and balances designed to impede a return to tyranny. The delegates to the Philadelphia convention of 1787 were educated white men of means, hardly representative of the public of that era, much less the public today. They did genuinely believe in liberty from government oppression and had themselves been prepared to sacrifice their lives in that cause. It would not have occurred to them that permanent inequality of means, based partly on suppression of non-white citizens, would become an important social and political problem.

Also, their choice of a republic with decisions made by an elite group of elected representatives not unlike themselves, (though they themselves were not elected), reflected their
disregard of the danger that economic elites would come to dominate electoral outcomes and policy choices. This disregard arose in part from their own sense of patriotism, honor, and civic virtue, qualities that many modern policy makers are lacking. Opposition to the proposed new Constitution arose from a diverse group of “anti-Federalists,” especially the smaller states.

We have evidence from the founders themselves as to the fundamental goals and purposes of Madisonian democracy. What could be better evidence of the Founders’ intent than the Preamble to the Constitution they drafted?

Conservative judges, now in the majority on the Supreme Court, tend to favor “originalism:” investigation of the beliefs and objectives of the Founders when faced with ambiguous or absent Constitutional clauses. Although the Supreme Court has ruled that the Preamble to the Constitution has no force of law, it is difficult to disregard such evidence of intent when interpreting the Constitution, and especially when applying its often-flexible wording to modern problems. The purpose of a preamble is the same as a preface—to introduce readers to the purpose of the work, basic assumptions, and analytical tools.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. [emphasis added]
Furthermore, according to legal scholar Mark Seidenfeld, it is not merely the Preamble which defines the intent of the Framers:

The Spending Clause of the Constitution, unlike all the other enumerated powers granted to Congress [by the Constitution], allows its exercise to provide for the general welfare. ... [T]hat aspect of the Spending Clause permits the federal government to circumvent limits inherent in the other enumerated powers. ... The Spending Clause alone would permit pursuit of the general welfare... 25 [emphasis added]

Unlike the Preamble, the spending clause in Article I is actionable. Jefferson’s politically popular and terse statement of the proper role of government, adopted and published a decade earlier by many of the same men who returned to Philadelphia in 1787, offers another excellent guide to the Founders’ intent.

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 effect their Safety and Happiness. (Declaration of Independence from English rule, July 1776.)

Key ideas in the Declaration of Independence and the Preamble still appear in the speeches of modern politicians, although they have become ritualistic. It is clear enough how Madison’s Constitution served the ends of life and liberty by creating specific personal rights

against the government. More important for present purposes, the Preamble says, in different words, the same thing as the quoted paragraph from the Declaration: that the general welfare of the people—their capacity to achieve happiness—should be a primary objective of govern-
ment, no less fundamental than protection of life and liberty.

The Framers accepted the necessity of government itself as protection from Hobbesian dangers and as provider of essential collective services, such as national defense and justice, and for the peaceful resolution of conflicts. While these functions advance the purposes of gov-
ernment, the Framers also saw two related threats—those of tyranny and of corruption. The larger and more powerful the government, and the broader its scope, the greater the extent or threat of tyranny. Moreover, as explained above, given the inherent self-interest of public offi-
cials—even if only for their own careers—government that is more extensive implies a greater burden of corruption.

The Federalists’ Constitution relied on limited central government (abandoned a century later) and on elections to control corruption. The Framers were aware of the potential short-
comings of voters and elections but saw no superior alternative. Indeed, it was Federalist doc-
trine that the people themselves were the only legitimate source of political power.

The Constitution produced by the Philadelphia Convention of 1787 relied on ratification by the people for its own legitimacy. Political legitimacy has more than one definition, but
according to constitutional historian Jack Rackove it most commonly refers simply to what people believe.26

The “people” referred to in the Preamble and the Declaration of Independence were the voters who elected delegates to the state conventions that ratified the Constitution. Those voters were not all the inhabitants of the former colonies. All persons lacking white skin, all persons without significant means, and all women were ineligible to vote. Much less than half the population could vote.

The key role of a small central government in controlling corruption helps explain Madison’s creation of a central government structure that permits or even encourages “gridlock.” To Madison, gridlock would have meant disagreements among the three branches of government. Modern gridlock has more to do with partisan extremism than with branch rivalry.

In the absence of near unanimity among the interests supporting the branches, each with veto power over the others, the federal government would be prevented from acting quickly or easily, especially after Chief Justice John Marshall made clear in 1803 in the famous case of Marbury v. Madison that the Court claimed the right of judicial review of legislation.27 The Framers would also have taken as given the technologies of their times, which themselves limited the roles of central government in a vast and growing nation.


27 Marbury v. Madison 5 US 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 - Supreme Court, 1803
Madison could hardly have foreseen or imagined the nineteenth century changes that eventually made unlimited central government inevitable, among them national markets, mass production, the limited liability corporation, and technological revolutions in manufacturing, communication, and transportation. Most important, by the twentieth century, for many citizens the federal government had become the natural remedy for all social and economic discontents and the favored vehicle for all social and economic aspirations.

Madison designed federal government structure to minimize the potential cost, in corruption and tyranny, of supplying what were in 1787 considered the essential services of central government. He also designed the Constitution to appeal to a majority of ratifiers. Although many of the Founders condemned Black slavery, obtaining favorable votes on ratification from the southern colonies required a compromise. Importation of slaves was banned, but the ban was postdated by a generation. Slavery itself was not abolished—the problem kicked down the road until settled by a bloody civil war.

It is instructive to consider how an effective restraint on political corruption could fit into the Madisonian structural framework, given unlimited government. Much more on this below. The more urgent point is that, if we do not find a less dangerous solution to the corrupt consequences of modern demands for an unlimited administrative state, we may be faced with the messy Jeffersonian default:

[I]t is the Right of the People to alter or to abolish [government], 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 effect their Safety and Happiness. (Declaration of Independence.)
That, in fact, may be what Donald Trump’s and his supporters’ thrashing about reflected. Trump opportunistically hit upon the economic and social frustration of many citizens, offering them the prospect of a political or even a violent revolution. Neither Trump nor his disaffected supporters had the political or strategic expertise to bring this about, but the saga has not ended.

Welfare and Corruption

Political philosophers are catching on to the idea that institutional corruption is an important source of dysfunction in the United States and elsewhere. An important part of the dysfunction is growing inequality despite a public and even elite preference for egalitarian policies.

Dennis F. Thompson surveys four different theories of institutional corruption, arguing that from the institutional perspective:

[C]orruption is distinctively integral to an institution in three ways. First, it is equivocal: The corruption benefits the institution while undermining it. The corruption exploits legitimate institutional practices that provide benefits that even an uncorrupted institution needs, and for which alternatives must be found if the institution is to function well. Unlike the practice of bribery, for example, campaign fundraising serves a legitimate function. Second, institutional corruption is impersonal: The individual agents of corruption act in institutional roles and do not have the corrupt motives that characterize agents who participate in quid pro quo exchanges. Politicians who accept campaign contributions and do favors for their constituents act partly in their own political interest but also promote the competitive and other values of the democratic process. Third, the corruption is generalizable: It is found not only in government but in many other kinds of institutions. Although most of the institutionalists focus on political institutions, all suggest that their theories can be extended. The general approach has stimulated other scholars to examine institutional corruption in a wide variety of contexts, including the
pharmaceutical industry, the mass media, universities, hospitals, think tanks, banks, community development authorities, the arms industry, and sports associations.28

Lawful corruption problems arise from the human condition and the complexity of collective action and are one of the prices we pay for civilization. If loud voices have too much power, that is a problem that must be addressed by other means than censoring voices or else we abandon the First Amendment. In any case a concern with the causes of political corruption does not justify longstanding neglect of remedies for bad outcomes.

To be clear, a “bad outcome” is one that either reduces the size of the pie or contributes to greater inequality, specifically by making the rich better off at the direct or indirect expense of the poorest citizens. There are circumstances where increasing the size of the pie has the incidental effect of making some group (especially the poor) worse off. In that case an accompanying redistribution may be needed to ensure than some of the gains are used to compensate losers and restore or improve distributive justice. This can be carried out by changes in tax and transfer policies.

I focus here on the outcomes of the legislative and administrative processes because it is the corruption of these outcomes that directly reduces the well-being of the people and incidentally reduces the equity of access to well-being. Can a filter be placed between lawfully corrupt officials and the execution of policies that reduce public welfare?

Systemic political corruption is widely acknowledged as a fundamental problem. Such corruption often impairs efficient production and allocation of goods and services, shrinking the pie. Corruption also often violates consensus principles of equity. Reduced economic efficiency shrinks (or does not expand) aggregate well-being.

The distribution of well-being among the electorate obviously must be treated as no less important than economic efficiency. Indeed, the two are closely related, a fact that motivated an important part of the work of Harvard philosopher John Rawls. Rawls’ most famous work, *A Theory of Justice*, posits that while egalitarian goals should dominate approaches to social justice, policies implementing those aims can backfire by reducing the incentive of individuals to work and invest. This can reduce the size of the pie, shrinking the dollar value of every person’s percentage of the pie. This observation led him to promote egalitarianism up too, but not beyond, the point where it makes the poor worse off. Rawls’ “maximin” principle calls for increasing the welfare of the poor in the direction of equality for all, but stopping when redistribution deadens initiative and effort among the most productive members of society, thereby reducing the size of the pie and the value of the share going to the poor.

Following John Rawls, egalitarian principles of equity require, at a minimum, avoiding policies that reduce the well-being of the least favored citizens. (Rawls himself advocated a stronger condition: “Social and economic inequalities are to be arranged so that they are ... to the greatest benefit of the least advantaged, consistent with the just savings principle ....”)29

30 Id.
There is ample empirical evidence that good government is linked to citizens’ well-being, satisfaction, and happiness. For example, John F. Halliwell and coauthors write, “Annual subjective life evaluations from 157 countries 2005–2012 demonstrate strong empirical linkages between government quality and national happiness.” Niclas Berggren and Christian Bjørnskov offer the following summary of the empirical literature:

The degree to which people are satisfied with their lives is affected by many factors. ... Such [factors], typically laws that enable and constrain political, legal, and economic decision-making, have the potential to affect how satisfied people are with their lives in at least two ways. First, there can be direct effects in that rules either enable certain individual choices or constitute constraints on the individual’s choice set; furthermore, such effects can be of a “symbolic” kind: certain types of rules are valued for their character. Second, there can be indirect effects in that rules shape the overall character of society, through the actions that are, and that are not, taken by people.

... Some main results can be summarized as follows: Political institutions are related to life satisfaction through democracy and direct democracy; legal institutions seem able to boost life satisfaction by being effective, fair, and inclusive; and economic institutions that strengthen the role of markets in society are positively related to life satisfaction (as are some “complementary” regulations of employment and welfare-state policies). In all, it is demonstrated that the incorporation of formal institutions into studies of life satisfaction is essential, and that careful design, or reforms, of institutions has the potential to increase – or decrease – life satisfaction in society.


Although many factors affect life satisfaction or happiness, there is little doubt that income is a key ingredient, no doubt in part because it the source of access to other components of well-being. The wealthier you are, the happier you feel. According to Betsey Stevenson and Justin Wolfers:

Studies by us and others have pointed to a robust positive relationship between well-being and income across countries and over time. [citations omitted] Yet, some researchers have argued ... that beyond a certain income threshold, further income is unrelated to well-being. The existence of such a satiation point is claimed widely, although there has been no formal statistical evidence presented to support this view.33

When progress slows or stops, public discontent is inevitable. Americans have expectations of increasing prosperity. Such expectations may be out of reach in any case, but today widespread discussion of substantial and growing inequality reinforces discontent. Expectations have complex interactions with actual inequality and political upheaval.

Although experts quibble about the details of measurements, there is broad consensus that income and wealth have become increasingly unequal in recent decades, in the U.S. and around the world. The widely advertised work of French economist Thomas Picketty and his co-authors has been highly persuasive on this point.34 Florian Hoffman, et al. provide an analysis with comparable results, disaggregating the components of inequality and concluding that:


Labor income remains the main driver of inequality over the last 40 years, and it clearly would be difficult to slow down income inequality growth without addressing the inequality in labor income. We also find that education accounts for over half of the growth in US labor and capital income inequality. Growing income gaps among different education groups have led to a large expansion in between group inequality, while the growing fraction of highly educated workers increased inequality because of composition effects.35

Most experts, including Nobel-prize winner Joseph Stiglitz, agree that real wages for middle Americans have declined since World War II. According to Stiglitz, “[r]eal U.S. wages have stagnated for decades. Adjusted for inflation, average hourly earnings of production and nonsupervisory employees have decreased some 30 percent since 1990. More dramatic, ... the aggregate share of labor excluding the top 1% compensation ... has slid from just under 80% to around 60%.”36

Although money income is different from well-being (because it leaves out other key factors such as non-market and public goods) the distribution of income is an important determinant of well-being. Nevertheless, there remain several controversial assumptions that go into estimates relating to government taxes, transfers, and in-kind services. Emmanuel Saez and Gabriel Zucman explore these problems and cast some doubt on the validity of the conclusions


above. Still, people believe that the rich are getting richer and everyone else is not, and for political purposes it is what people believe that matters.

When asked about their own well-being many people answer by comparing themselves with a reference group such as relatives or neighbors. The ubiquity of media focused on the (imagined) welfare of the wealthy elite energizes reduced well-being among the disadvantaged. Even very well-off people may feel unhappy if they are regularly exposed to those perceived to be even better off. A large majority of Americans now regard themselves as “have nots.” While there are many explanations of growing inequality, corruption of political institutions is prominent among them.

Finally, we need to abandon the false dichotomy between capitalism and socialism. The fact is that in many circumstances capitalistic “free” markets produce important contributions to aggregate happiness through efficient production and innovation. But despite this, the contribution of free markets can often be increased by interventions to correct market failures. Moreover, the emphasis on competition in free markets gives an entirely false and misleading aura of legitimacy to unequal economic outcomes. Individuals can be seriously injured by the demise of an inefficient competitive firm or industry, for example, without being in any way responsible for that failure. The failing entity contributes to expanding the pie, (because a more efficient rival will take over production,) but often is harmful for individuals who bear no

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responsibility for the failure. Being poor is not and never should be a moral stain on the social value of an individual. Just as a policy decision based on the costs and benefits of a proposed intervention should rest chiefly on economic efficiency considerations, adverse effects of market forces on the well-being of individuals should require compensating redistributions.

**Government and Rule of Law**

Justice and the rule of law are abstractions not salient in everyday life. They are nevertheless at the very heart of all human civilization and the only force holding back the darkness of Hobbesian dystopia. Both are under continuous attack by those who would benefit from disorder and social stress.

Government itself is necessary to support welfare-enhancing voluntary human interactions. This is done in part by enforcing private promises (contracts), punishing false promises (fraud) and by ensuring public safety. In addition, laws and regulatory policies seek to internalize external costs and benefits. Effective government needs coercive power and a monopoly of violence. Coercion is necessary to make people keep promises they would prefer not to keep and to deter fraud and other crimes. If private citizens or groups of citizens had the means to violently resist government law enforcement, anarchy will replace order and many welfare-enhancing transactions would be impossible.

Government must also deal with the inevitable desire of organized interests to increase their shares of the pie at the expense of others. It is a proper role of government to mediate such conflicts when the alternative is a reduction in well-being due to violence, revolt, secession, or other such measures. In resolving the dispute through some form of compromise it is
the government’s responsibility to ensure that the pie is not reduced, or its growth retarded by the outcome.

Corruption always has been part of government, although it has often been routine and benign. Possession of power is rewarding and attracts competitors. Competing successfully for power requires resources and supporters. Achieving success gives leaders access to public resources (such as tax revenues and patronage employment) necessary to attract and keep support. These truths apply to any form of government—democracy, republic, monarchy, or dictatorship. Incumbent leaders in any of these regimes also face competitive discipline from potential usurpation and the threat of secession.

If leaders tap too much wealth from the public, rivals are strengthened, and secession or insurrection become more likely. Worse, resources devoted to such essential services as public order and justice may be reduced to levels that no longer support a cooperative economy and state. As Thomas Hobbes predicted, anarchy may then follow, a “war of all against all.”

Lawful corruption would seem to be beyond the reach of law. But when the law itself is corrupted, we need to understand the role of law, and especially the process by which it is produced. Corrupted creation of statutory and administrative law results in harm to public well-being. What intervention might shield the public from this disfunction?

The World Justice Project (WJP), an NGO (Non-Governmental Organization) founded by William Neukom, Microsoft’s first lead lawyer, releases an annual Rule of Law Index, rating 128

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38 Hobbes, Thomas. 1651. The Leviathan.
countries around the globe. There is no single way to measure such an amorphous concept as the rule of law. Hence the need for an index—a weighted average of several measurable factors. The WJP surveys ordinary households, lawyers, academics, and others in each country, asking questions like “how likely is a judge in your country to accept a bribe?” The 2020 Rule of Law Index rates Denmark at the top, Venezuela at the bottom (128) and the United States at 21. The United States is ranked well below Estonia and not far above Slovenia.

A more rigorous approach is suggested by Alina Mungiu-Pippidi and Ramin Dadašov:

New research, based on a comprehensive theory of governance defined as the set of formal and informal institutions determining “who gets what” in a given context, allows for more specific and objective, albeit indirect, measurement of control of corruption. To uncover the institutional setting which empowers public integrity, such research tests numerous anti-corruption tools and good governance strategies in a comparative framework. The result is an evidence-based national framework for control of corruption and a clear measure able to indicate both current status and change in corruption control from year to year or because of policy intervention.

Welfare-enhancing law has three key economic aspects: creating incentive compatibility between private action and public welfare where necessary (substance), reliance on coercion as needed, and impersonal enforcement (procedural due process). “Incentive compatibility” is an economic concept that refers simply to ensuring that incentives facing individuals and firms promote both an individual or firm’s well-being and increases in the size of the pie. Simple

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examples are laws against murder, fraud, and the like. The concept also extends to making sure that everyone takes account of the costs or benefits they inadvertently impose on others, such as second-hand tobacco smoke or dumping sewage into rivers. Such externalities can be controlled by property rights, criminal law, tort law, or taxes and subsidies as well as social mores.

Effective management of any large organization or polity requires coercion. Management must establish welfare-enhancing rules and interventions governing behavior. Interventions such as taxes, subsidies, or property rights can suffice to force producers and consumers to consider ("internalize") the positive and negative effects they have on others, as well as cheating. But certain welfare-reducing behaviors can be deterred only by coercion. Theft is a simple example. Hence the need for the state to have a monopoly of violence. This can be done in part through formal law and law enforcement. Social pressures, reward structures (medals, honors, ceremonies, and parades) religion and other aspects of emotional or arational motivation may add to the effectiveness of managed cooperative behavior.

If coercive law is a principal mechanism supporting cooperative effectiveness, the law must be clear, clearly motivated, and run by institutions regarded as legitimate. Otherwise, it will produce mistaken incentives and imperfect results. As John Adams wrote in the Constitution of Massachusetts, it is the law itself that must be sovereign, not the individuals who interpret and enforce the law.41 This is the essential "rule of law."

In contrast, a system in which even well-intentioned individuals have wide discretion to apply the law in what seems the most sensible, just, or empathic manner in each case is the rule of men. Such a system deviates from welfare-enhancing rules set out in the substantive law, impairs deterrence, and undermines the welfare gains from cooperation. Judges should have some discretion, but not so much that the operation of law (“what courts will do” as Holmes put it\(^{42}\)) becomes unpredictable and thus loses its major impact, which is to reconcile incentives affecting behavior with social welfare.

Surprisingly, retired federal appellate Judge and prolific author Richard Posner engaged in the following exchange with a *New York Times* reporter:

“I pay very little attention to legal rules, statutes, constitutional provisions,” Judge Posner said. “A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?” The next thing, he said, was to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. “And the answer is that’s actually rarely the case,” he said. “When you have a Supreme Court case or something similar, they’re often extremely easy to get around.”\(^{43}\)

Posner’s practice, if this quotation is accurate, directly contradicts the rule of law. It reflects the key skill and temptation of lawyers’ training: getting “around” the law or the evidence to achieve a short-term result.

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\(^{42}\) Holmes, Oliver Wendell, Jr. 1890. The Path of the Law. Harvard Law Review.

The importance of the rule of law of course suggests the need for and role of a state in supporting human well-being and success in competition with other species for the limited resources of the planet. But the state itself, because it is composed of and managed by humans, suffers from many of the same conflicting adaptations as individual humans.

One of the most important roles of law is to govern the conflicts of interest between political managers and representatives and other citizens. Political corruption is one of several ways in which a polity can fail. Simple managerial incompetence is another way. External costs of individual greed are not controlled in a failed state, nor are external benefits encouraged. Hobbesian “war of all against all” ensues. Many countries ruled by a succession of “strong men” like much of Africa and some of Latin America, fit this description, and the American brand of representative democracy is thoroughly corrupt because lawmakers are selected and influenced by elite interests.

All this is, of course, only a simplified description of a complicated and uncertain set of relationships. Risk and uncertainty play a key role in political dynamics, and crucial information useful for predicting the behavior of participants may be lacking. Further, cultural norms and non-government institutions influence political behavior in important ways. The Trump administration showed vividly the chaotic consequences of leadership untutored in and unconstrained by the informal political customs and culture of government. Philosophers and other students of governance, from Plato to John Rawls, have long focused on the tension

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44 Plato, c.375 b.c. *The Republic.*

between abstract concepts of the public good and the practical and predictable imperfections of human leaders.

Given the enormous breadth and depth of received political philosophy, no brief work can hope to advance the subject far. The goal here is modest and practical, not philosophical. Using the tools and common assumptions of political economy, are there potentially effective way to improve public welfare within the existing framework of representative or Madisonian democracy?

Guardians
I have chosen the title “Guardian” for an official, described in detail later, who is responsible for detecting and vetoing acts of government that reduce the well-being or welfare of the public. I conceive of a Council of Guardians as a fourth branch of government. This proposal will produce snickers in any knowledgeable audience and puzzled frowns elsewhere. Many Americans have heard about the branches, checks, and balances from an early age, even if they do not have a clear idea of the specifics. Even people with no exposure to “civics” are quick to agree that politicians are corrupt—but what they imagine is bribery: trash bags filled with cash, delivered in dark alleys, or vacation condominiums on exotic islands.

Explaining the problem and costs of “lawful corruption,” how it arises despite the Madisonian checks and balances, how it ensnares benevolent elected officials, and why interdiction of its effects is more effective than reforms aimed at causation requires a multidisciplinary educational process.

Madisonian democracy recognizes the people themselves as the only legitimate source of political power. However, Madisonian democracy also recognizes that the people are
unreliable—even dangerous—as a source of day-to-day legislative action. Instead, the people entrust their power to elected representatives.

As noted above, this makes elected officials the agents, in an important sense, of the people. But most citizens as voters are lacking both incentive and opportunity to monitor the behavior and performance of their elected agents or of the federal government generally. Most citizens ride free on the biased information of advertiser-supported media, both new and old, and often on social media, which profits from extremist views and “fake” news.

Although elections are competitions, they would not guarantee the performance of elected representatives even if the campaign finance system did not corrupt the contests. Voters are “rationally ignorant” of most aspects of their political agents’ performance, especially regarding non-salient legislation and administrative rule making.

For some citizens voting participation stems in large part from impulse and emotion, motivated by a desire for self-validation. Indeed, many citizens who did not vote in recent elections (but share demographic characteristics with those who did) tend to report falsely in survey responses that they voted. Gregory Eady explores the extent and motivations for such false reporting.

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Electioneering and voting are not exercises in public policy analysis. Voting certainly is not based, and these days could not be based, on well-informed voter assessment of the contribution of incumbents either to local or national well-being. Relative advertising expenditures and simple name recognition strongly influence election outcomes, along with the attitudes predominant in each voter’s immediate social network. A handful of high-salience policy issues dominate the media and influence debate.

Changes in attitudes among political elites precede corresponding changes in the electorate. The process that produces elected officials is in many respects identical to the process that produces legislation—that is, a struggle among interest groups—and both are subject to political corruption by elite interests. The major virtue of elections is the absence of superior alternatives, just as Churchill suggested.

Given the difficulty faced by elites collectively in restraining their potentially destabilizing and pie-shrinking greed, it seems that a monitoring Amendment also is in the collective interest of the elite, as suggested by Alan Feuer.48 Both politicians and elites today face a situation in which it is in their collective interest to promote reform. Neither group can do this successfully on an individual basis because there is no way any individual elite interest or politician can commit convincingly to avoid future welfare-reducing corruption.

As noted above, I rely on the principal insight that most of the causes of corruption in our Madisonian republic cannot, as a practical matter, be reduced without also infringing on several important First Amendment rights. Those rights include freedom of speech, press, and

the right to petition Congress for redress of grievances. Efforts to reform the financing of elections have uniformly failed.

It is therefore necessary to regulate the unhealthy outcomes of the legislative process, rather than the causes. James Madison himself made this point in the Federalist Papers:

*The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.*

An organ of government with power equal to that of the other branches must stop actions of the other branches that reduce the public welfare. Two conditions are necessary if such an approach is to be effective. The new branch itself must be protected credibly from corrupting influences, and the new branch must be subjected to the same checks and balances that limit the power of the other branches.

Some of the many people with whom I have discussed this idea are at once outraged that yet another source of gridlock should be created. They claim the government “will never be able to get anything done!” My response to this is simple: it might be an exceptionally good thing that the government, as now constituted, should do less, if what it does do reduces the well-being of most citizens.

The actions just mentioned would be vetoed or deterred by a branch of government with that responsibility if it were insulated from elite corruption. As with the established branches of government, no one should expect perfection from a new “monitoring” branch.

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49 Madison, James. 1787. *Federalist No. 10.*
Welfare-oriented Guardians will not perfect or “optimize” the output of law, but at least welfare and equity issues will have a place, and an institutional advocate, in policy formation.

No less important, truly insulated and thus legitimized Guardians will reduce the elite bias that infects current lawmaking. As for legitimacy, what matters in the end is whether people trust the government to act in their interests. The most trusted unit of government in the United States is the petit jury, twelve persons chosen by lot from the population and questioned to screen out bias, tasked to decide disputed facts in court rooms. A fourth branch led by a panel chosen by lot from a large pool of qualified candidates would have political legitimacy and could be, to a significant degree, insulated from elite influence in the manner set out in the Amendment proposed in section 6 below.

Fixing any, much less all, of the structural flaws in our system is difficult or impossible if current office holders see disadvantages for themselves from change. Current office holders have a common interest in supporting the status quo to protect their own power. Major reform effort might be more productive and workable if current officials did not resist change. Reforms designed today but postdated so as not to threaten current political interests may be easier to adopt. The 1788 Constitution, for example, did exactly that with respect to the slave trade, postponing its abolition for 25 years.

Also, any fixes that require constitutional amendments or a constitutional convention are hampered by Americans’ tendency to believe that our system of representative democracy is the best in the world and should serve as a model for other countries. This chauvinistic view is encouraged by our education systems and cultural traditions.
There is some urgency, as the Trump debacle and especially the attack on the Capitol, made clear. There are many observers who see recent U.S. political history and specifically the behavior of Trump and his supporters as signs of the apocalypse. This idea is explored in an opinion piece by *The New York Times*’ Ben Ehrenreich. Ehrenreich reviews the recent academic focus on the collapse of civilizations, especially the work of Joseph Tainter. Graeme Wood in *The Atlantic* likewise channels Peter Turchin’s elaborate empirical models of history used as tools of prediction—predictions of a dystopian future reminiscent of Isaac Asimov’s *Foundation* series of science fiction novels.

Clearly there is little chance that the amendment I propose will be adopted as written. My purpose is to start debate, and especially to turn attention away from futile attempts to control the causes of corruption, a crusade in which much good will has been wasted. It would help if Americans better understood the broad sweep of history—how polities and civilization have risen and fallen over the millennia of recorded history.

Study of the reasons for the collapse of whole civilizations is far from new. Edward Gibbon’s classic work on the fall of the Roman Empire comes at once to mind. So does more recent

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work by Jared Diamond and Yuval Noah Harari.\textsuperscript{55} Of course, very civilization in history has eventually collapsed. Collapse, dystopia, and anarchy are scary thoughts and no doubt unlikely. There is great drama in the fall of civilizations, but they are harmful events best avoided. What if we walking too close to the cliff?

Section 2- Adaptative Evolutionary Impulses and Economic Behavior

Until behavioral economics became popular in this century, economic models of human behavior assumed that people acted “rationally,” or even super-rationally, as if we had perfect information and perfect foresight. The vulnerability of these assumptions to evidence is explored at length in a book by George Akerlof and Robert Schiller.\textsuperscript{56} Such unrealistic assumptions are convenient for modeling, just as medical researchers assume, for purposes of experimentation with new drugs, that lab rats are the same as humans. But of course, there are significant differences between people and lab rats; humans are not rational. Understating human motivations and behavior requires an understanding of how the human brain works, and that understanding begins with evolutionary adaptation.


Human behavior is governed in part by a Darwinian process in which highly mutable and therefore diverse biologic entities meet random environmental insults. Some of our ancestors survived these changes and challenges by adapting. Now, we are they, and we retain some instinctive motivations that have lost relevance now that we are Earth’s apex predator. However life on earth—specifically, the DNA molecule and the cells it inhabits—may have begun, its one indisputable characteristic is survival. Survival of DNA in the face of eons of random and often near-fatal bombardment rests on an equally random process of genetic and epigenetic mutation across billions of life forms or species. Most of the species of plants and animal that have ever existed are now extinct. Their genes, along with the process of gene expression and epigenetic factors, adapted to changing conditions by random accident, creating new and fitter species for new environments.

The longevity of a species is vulnerable to excessive specialization in the competition for resources. A species that is highly effective at exploiting a given environmental niche is unlikely to survive sudden disappearance of that niche. But all species, even those highly mutable in the face of environmental change, are each a collection of mutants, only a tiny fraction of which, if any, may survive their next challenge. Humans are among the highly adaptable species. It is said that human adaptability is attributable in large part to DNA’s gift to us of a large brain and the resulting ability to devise and use tools and language to support survival and to pass along “memes” as well as genes and epigenetic impacts on gene expression. Most important, mutations associated with learning from experience and partial reduction in fear of others has eased our resistance to social cooperation and allowed us to understand that cooperation can enhance well-being.
Memes consist of information passed down orally or in written form to future generations, a potential source of adaptation that can be speedier than natural selection. Obviously spoken and later written language was necessary to this adaptability. Our inherited genes allow us to use the experience of our ancestors to adapt to new challenges. This is nothing to crow about. There are many other species that have survived longer on this earth without language or much brain power. Others have evolved like Darwin’s finches to create sequential starbursts of new species.

A human’s frontal neocortex taken together with the older parts of the brain are an analog of the Biblical gift of knowledge—reason comes right along with the original sin of self-interest. Self-interest is both good and bad. An organism lacking self-interest will not survive to reproduce, because it will not prioritize the acquisition of the necessities of life. Self-interest is responsible for our continuing and costly efforts today on a hedonic treadmill, along with feelings of envy and resentment toward other humans who appear better off. Species in which individuals do not attend to their own needs are doomed. Altruism, in contrast, generally arises from circumstances where it is consistent with self-interest and self-esteem.

No less important to survival than the ability to devise new and increasingly productive and protective tools is the human ability to understand and take advantage of the benefits of
cooperation. As Plato and later Adam Smith taught us, cooperative specialization produces increased benefits such as food and shelter from given inputs such as human labor. Given resources support larger populations because the benefits of cooperation increase through specialization and the use of surplus for capital investment. Some scientists believe that *homo sapiens* emerged alone from the larger groups of humans that once existed because we adapted through “friendliness,” enabling cooperation. Also, *sapiens* may have butchered its competing cousins.

Larger populations promote more rapid productivity gains and deeper specialization, in a virtuous feedback loop. As this process continues society becomes more complex. Everyone becomes more dependent on others, including many complete strangers, to sustain well-being. As specialization and complexity grow, dependence on government to define and enforce rights and ensure that externalities are internalized becomes increasingly important. Eventually even nature’s check on ungoverned growth—the Malthusian tragedy—can be forestalled by human specialization and cooperation.

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58 Plato, *The Republic.* (c.375 b.c.)


Thomas Malthus described the history of human populations as tending to grow until available resources were exhausted, which then precipitated a collapse through disease and famine (“misery and vice”), until the cycle renewed itself.\textsuperscript{61} Populations grow (in the absence of predators) because humans who avoid reproduction do not pass on their DNA, while those who choose to reproduce do pass along their DNA. The result is a multitude of reproducing humans. As humans learned to eliminate natural predators, periodic overpopulation followed by famine, pestilence, and war became the natural fate of the species, all in the service of the survival of DNA.

We solved the Malthusian problem by learning how to make more productive use of given resources through agricultural and manufacturing innovations and by economic growth that reduced the motivation to produce children for support. As our population has grown our productive activity has become increasingly specialized. That means that more of our consumption and production needs are satisfied by others. Obtaining these supplies through transactions that require time and transaction fees can become an increasing burden. The economic gains from specialization are limited by the growth of transactions costs.

All this said, it is undeniable that human nature has been forged by its evolutionary history of adaptive genetic success and good luck. All humans share certain common genetic traits along with variations that have arisen from the mixing of genes through sexual reproduction and new variations introduced by random mutations and environmental stresses. Evolutionary happenstance gives us many common characteristics—one head, two arms, a desire for food,

\textsuperscript{61} Malthus, Thomas Robert. 1798-1826. \textit{An Essay on the Principle of Population}. 
sex, relief from pain and so on. We did not become the earth’s apex predators through altruism or empathy, except toward those who share our genes. We are driven in large part by what can fairly be called greed—a fervent desire to accumulate resources. It is selfishness that promotes the survival of our genome and it is self-interest that motivates much of our innate behavior.

Selfishness promotes survival and transmission of genes in the context of scarce resources. Humans strive for more resources or seek to enhance their own well-being (welfare), often at the expense of unrelated members of our own and other species. Individuals within society sometimes tend to act as if their survival was a zero-sum game. Opposing this is a second result of self-interest, namely a desire for the gains that result from cooperation with others.

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Our genetic heritage provides us with two incentives arising from the same need for resources: to treat life as (1) a zero-sum game in which our gains come from others’ losses, and (2) a positive-sum game, in which both we and others gain from cooperation. A positive sum game is one in which all sides can win, and thus should be attractive to anyone’s self-interest. Human positive-sum cooperative activities are far more productive than isolated individual efforts. Unfortunately, even as we take part in the cooperative game, we can consciously or unconsciously threaten the success of that game by cheating and shirking—increasing our share of the pie at the expense of others. We have evolved many cultural checks on such cheating. It is universally condemned on social and religious levels. We must cheat furtively. As we will see below, cheating is also checked by the operation of law. A positive sum game is complicated by its need to create incentives, constraints, and institutions to ensure everyone wins.

Because humans have evolved as “social animals,” selfish behavior also promotes economies of scale and specialization, meaning more output from given raw materials. This adaptation was crucial to the ascent of man. Even small Neolithic tribes are thought to have relied on specialized labor—leaders, healers, and tool makers, for example. Humans are open to cooperative investments in specialization that eventually increase own and descendants’ welfare and the size of the economic pie, but only if there are ways to ensure reciprocal cooperation and
deter cheating. Our selfish need for more of everything is what encourages gregarious or cooperative behavior.63

A productive organization of humans, like a polity (state), is a coalition of many individuals each of whom seeks greater well-being from membership in the collective than from isolation, implicitly recognizing that civilization is a positive-sum game. Unfortunately, that does not eliminate the earlier focus of adaptation, to serve the need to pass on one’s genes and those of close relatives. So, we find both cooperation and cheating arising from the same evolutionary roots.

Cooperation in the production of goods and services that satisfy our innate needs requires organization and direction. According to Deborah M. Gordon, ants, termites, and some other species seem to have evolved automatic ways to do this.64 Beyond small kinship groups and tribes humans cannot instinctively organize themselves into productive cooperatives. The problems include both production technology—finding the best ways to combine inputs—and the temptation to free ride on the efforts of others. It is in everyone’s interest to join relevant cooperating groups, but having joined, it is in every member’s interest to cheat, if possible, to increase their share of the cooperative gains. Both the incentive to join and the incentive to cheat arise from self-interest.


Economics teaches that capital, labor, and other factors can be employed, in various combinations, to produce goods and services, but only certain input combinations maximize productivity or best economize on resources. Similarly, greed and greed-induced cooperation, both responsive to economic and cultural incentives, together with many other factors, determine both individual and aggregate well-being.

Determining and then implementing the most efficient combinations of labor, capital and other inputs on a large scale requires centrally directed organizations or a collection of voluntary individual market transactions—in effect, contracts—that can be enforced. Markets and centralized control are polar alternatives. But both markets and private or hierarchical organizations may be imperfect. For example, voluntary welfare-enhancing market transactions between two parties may ignore resulting harm or benefit to third parties. So, there is a middle ground, combining one or the other of these alternatives with adjustments to make individual behavior more consistent with welfare enhancement. This creates opportunities to correct organizational or market imperfections, increasing welfare. That opportunity can be exploited in several ways. Fiat (orders from superiors in the enterprise, organization, or polity) is one such way. For example, a social club might fine or expel members who miss too many meetings. Law is another way to induce cooperative behavior. For example, we could seek to control air pollution by nationalizing all pollution sources, or we could permit private ownership combined with a tax on emissions or a subsidy to polluters who reduce emissions. Similarly, we incentivize safe driving with fines and other penalties for speeding, inducing drivers to take greater care.

Finding and supporting socially ideal combinations of greed and cooperation requires management, just as allocation within an enterprise requires management of input
combinations and organizational structure. Management seeks to combine efficient combinations of inputs with inducements to workers to behave compatibly with enterprise or social welfare.

Aggregate welfare benefits result from internalization of everyone’s external effects and from the encouragement, through incentives, of informed rational action. This simply incentivizes economic or social actors to take account of their positive or negative effects on others, in a fashion that leads them away from a focus on purely personal gain to a focus on social gain by equating the two. “Internalization” simply means that individuals are induced, as a matter of social policy, to take account of the costs and benefits that their activities impose on others.

It follows that effective management of a large polity of humans (one larger than a small tribal or kinship group) has the potential to make everyone better off. Nevertheless, even while taking part in achieving such a cooperative overall welfare gain, many humans retain an incentive to deviate from socially efficient behavior (i.e., to breach the social contract) to increase their own expected welfare, even at the expense of others or of shrinking the pie. Cheating, shirking, and free riding are difficult for us to resist, especially if we think we will not be caught.

Principal-Agent Conflict

“Agency” in economics refers to the relationship between an expert supplier of services and poorly informed users of those services. Individuals and firms deal with suppliers of goods and services when it is not efficient to produce their own. Although all suppliers can be thought of as agents, suppliers assume an important agency character when, due to information or skill asymmetry, supplier performance cannot easily be checked by those who rely on the service.
This condition may prevail even when users regularly consume the product or service if, for example, readily comparable alternatives do not exist, or some effects on well-being (or profit, in the case of firms) are delayed, occult, or situational. The production of law in a democratic state has this character.

Agency in this economic sense is fundamental to the division of labor that allows scarce resources to be employed more efficiently than would be the case in a world of autonomous individuals. Absent reliance on specialists, which is avoided when agents are untrustworthy; humans would not have progressed much beyond hunting and gathering in small family groups. The economic growth literature from the time of Adam Smith has laid great emphasis on the roles of economies of scale, the division of labor (specialization), and the sharing of knowledge and expertise amongst a growing population. Cooperation among individuals, backed by social and cultural institutions, particularly law, is in constant tension with innate human self-interest.

In fact, there exists what may be a metaphor, an analogy, or even a deep biological connection between this agency tension and the tensions among the specialized cells of all multicellular living things, including humans. Evolution has selected specialized cells to sacrifice themselves to the benefit of the organism because doing so supplies benefits from the division of labor and economies of scope, more than repaying the sacrifice. This happens simply because it is one way DNA survives.

This achievement requires multiple dimensions of protection from cells that would cheat or “free ride” on the cooperative behavior of others, damaging the organism in the process. When these protections fail, the organism suffers from cancer.\textsuperscript{66} Samir Okahsa posits that Individual cells and organisms act “as if” they were trying to make their DNA survive.\textsuperscript{67} Similarly, when human agents with political power cheat, the social organism to which they belong is corrupted, injuring many or potentially all other members of society.

Political corruption can be viewed as a conflict between principals (citizens) and their agents (government officials). Principal-agent conflicts are common in the private sector. When they occur, they discourage what would be welfare-enhancing transactions. If you cannot trust your accountant, you prepare tax returns yourself, spending more time and effort than the expert accountant and making potentially costly errors.

The brief and greatly simplified discussion of evolutionary adaptation and gene expression above serves as motivation for what is known as the “principal-agent problem.” We employ specialized, hopefully efficient agents to help us make decisions or to carry out tasks, trusting them to act in our interest. But for the same reason we hire agents, their expertise, they have an advantage over us that makes it difficult for us as principals to check agents’ performance. This imbalance of expertise gives agents an opportunity to rob us. If we could somehow trust our agents not to act on their DNA-fueled instinct to cheat, there are many welfare-

\textsuperscript{66} Aktipis, C. Athena et al. “Cancer across the Tree of Life: Cooperation and Cheating in Multicellularity.” Phil. Transactions Royal Society London B: Biological Sciences 370, no. 1673.

\textsuperscript{67} Okasha, Samir. 2018. \textit{Agents and Goals in Evolution}. Oxford University Press.
enhancing opportunities to delegate decisions to others. The truth is that we cannot, and really should not, trust them.

There exists a variety of methods to mitigate the inefficiency that results from such conflicts. One is to increase principal-agent incentive compatibility by giving agents a share of the gains from representation, rather than a flat fee. Another is formal civil and criminal legal remedies for agent breaches of fiduciary duties. Other measures include competition among suppliers, long-term contracts between buyers and sellers, ways of monitoring performance, and vertical integration (do it yourself). Most of these remedies are inapplicable to political representation and the rest are ineffective in a political context.

The remedies for principal-agent disharmony in the private sector are inapplicable to political representation. Government officials are also agents for our well-being and of necessity at the federal level they enjoy a monopoly of that function. Having multiple governments with the same jurisdiction would be unworkable. Moving to another nation is very costly for most citizens. A central problem of constitutional design in the context of representative democracy is finding solutions to the principal-agent problem.

The principal-agent trust problem is only one of the challenges that tend to reduce the performance of government. An approach to reducing the adverse effects of political corruption on the well-being of the people is “quality control.” The federal government lacks effective quality control of laws, policies, and administration.

Quality Control

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68 Fiduciary duties apply, technically, only to a subset of agents. I use the term here to describe all agent duties to promote the interest of their principals.
Quality control is an important and widespread approach to performance issues in the private sector. Quality control of commercial products and services includes incentive-related compensation measures but depends on direct measurement and evaluation of performance or outcomes, often by testing random samples and by seeking customer feedback. Both sellers and buyers inspect and test finished products and services for adherence to design specifications and check customer satisfaction. A feedback loop adjusts organizational practices and incentive structures.\textsuperscript{69} Sellers obviously care about product or service quality because failure to meet buyers’ expectations impairs the seller’s reputation and reduces its stock value.\textsuperscript{70} This only works, however, if there is economic competition among sellers.

We can think of the federal government simply as an organization offering essential public services. Law, law enforcement, and administration in their various forms are major service “outputs.” Today the output of law, enforcement and administration is of inferior quality, in part because of corruption, but also due to poor or no quality control. Compared to ordinary practice in the private sector, there is only nominal official attention to the relationship between output of laws, administration and enforcement and the well-being of citizens.

Law at the national level is a monopoly of the state; competitive discipline is absent. The only alternative is to join one of the streams of refugees fleeing poorly governed countries.


Contrast local government, where some citizens have opportunities to move to rival jurisdictions, putting pressure on poorly performing governments by reducing tax revenues.

Federal intra-organizational rivalry that stems from Madison’s separation of powers is seldom about substantive policy; it is chiefly about power and branch jurisdiction. Branch rivalry may protect against tyranny, but the U.S. brand of branch rivalry does little to forestall the consequences of corruption or incompetence. Quality filters such as presidential vetoes and judicial review attend only to a small subset of legislation and seldom address the general welfare objective of the Preamble. Even if political corruption were not a problem, the absence of formal quality control of legislation and administration would harm citizens.

The need for effective quality control calls for an institution capable of evaluating the quality of output of law, administration, and policy. It also calls for an enforcement mechanism such as the power to nullify government law and policy that reduces the well-being of the people or increases the disparity between the rich and the poor. This describes a non-existent branch of government.

Public Choice
One of the circumstances that supports institutional corruption is the relative ease with which small groups of wealthy individuals or industries can cooperate to lobby government for favors. The public is too numerous to allow such organization. Consequently, the public, whether as citizens, patients, students, or consumers do not have a lobbyist at the table. The consequence is obvious. This problem is the focus of economic analysis classified as “public choice theory.”

The public choice literature in economics and political science explores the supply and demand for legislative action and related subjects by collections of people with common
interests. The theory identifies factors that make interest groups effective. For example, the larger the group, other things equal, the less effective it will be because of the temptation of individuals to “free ride” on the efforts of others.

The origins of public choice theory are found in seminal works by James M. Buchanan, Gordon Tullock, Anthony Downs, and Mancur Olson, Jr.\(^\text{71}\) Like all economic models—indeed, all scientific models, public choice (and its subfield of “constitutional economics”) makes simplifying assumptions. The public choice literature typically assumes that voters and officials are “rational actors,” and often emphasizes economic efficiency while sometimes neglecting income distribution.\(^\text{72}\)

Public choice models predict that Madisonian democracy will be corrupted through the influence of powerful interest groups on the electoral process, just as the Framers feared. Todd Zywicki supplies a succinct summary of the argument, including several real-world examples of such political corruption.\(^\text{73}\)

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\(^\text{71}\) James M. Buchanan & Gordon Tullock (1962, 1987), Anthony Downs (1957), and Mancur Olson, Jr. (1965). Like all economic models—indeed, all scientific models, public choice (and its subfield of “constitutional economics”) makes simplifying assumptions. The public choice literature typically assumes that voters and officials are “rational actors,” and often emphasizes economic efficiency while sometimes neglecting income distribution. For a more detailed survey of the field see Ennio E. Plano (2019).


Public choice theories are attractive to those inclined to libertarian or objectivist views because the theories appear to suggest that “big government” reduces public welfare. Moreover, the logic of public choice undermines the legitimacy of Madisonian democracy because it traces ultimate political power to prevailing interest groups rather than to the people, given the influence of elites on election outcomes. Public choice theories tend to promote the use of private, competitive markets wherever possible. As Harvard legal scholar Cass R. Sunstein argues, markets have a partial but instrumental role in protecting democratic rights.\(^4\) Public choice theory is important because it is consistent with what we see happening in government and supplies a formal explanation. Corruption is not the result of a few bad actors. It is built into the Madisonian system.

Critics of public choice theory decry normative conclusions that rely on such assumptions as rationality. Some see reason as merely a tool of persuasion. Yale law school professor Bruce Ackerman, for example, writes, “In constitutional economics, the initial distribution of entitlements is treated as if it were sacrosanct ... To the contrary, it would be utterly wrong to allow the beneficiaries of injustice to veto any collective effort to stop them from enjoying the fruits of oppression.”\(^5\)

Another common criticism of public choice theory is its neglect of “irrational” behavior. Attributes of honor, morality, and self-regard seem to contradict, or at least undermine, the


narrowly defined concept of rationality that forms the basis for the theory. This criticism is vulnerable to empirical evidence that the political system in fact behaves as if its participants were rational actors in the sense relevant to public choice predictions.

A less common criticism is that public choice theory neglects normative solutions other than reducing the size of government. That the extent of government will grow and continue to grow is a prediction of public choice theory itself, making it unlikely that even a heroic one-time rollback of government programs and regulations would create a permanent solution to the problem. A different and more effective solution is to change the structure of the political process that produces welfare losses as unintended byproducts of successful elite influence.

It may not be practical to eliminate the political process in which interests compete for shares of the pie. But not all increases in elite shares necessarily come at the expense of the poor or have the effect of reducing the size of the pie. Public choice theory would serve us better if it focused on reforms that have the effect of restricting the set of permitted redistributions to those that do not reduce the welfare of the least well off. For example, public choice theory supports the use of an institutional solution to limit the effects of corruption—something like the amendment here proposed.

**Section 3- Corruption in Government**
The Framers of the American Constitution were familiar with corruption, which permeated the 18th century British parliament and the monarchy. Partly in response, the Framers designed a small federal government with limited powers, which necessarily used the available
technologies known to the Founders. That design is no longer adequate to restrain corruption of public officials or to make their incentives compatible with the interests of the people.

What has changed is not necessarily the inclination of a typical elected official to seek private goals at the expense of aggregate well-being. Instead, that inclination is now presented with a much wider set of opportunities, often embedded in politically legitimate responses to public needs or demands.

One of the reasons why institutional corruption has become so significant is that the federal government has grown enormously in size, relative to the state and local governments. Significant expansion of central government jurisdictions and interventions in America began in the Progressive era (roughly 1880-1920), partly in response to demands by organized interests and official desire to create and protect continuing streams of political support. The latter seems to have been a moment of awakening for federal political entrepreneurship and innovation. National elites found it convenient to substitute federal for state-by-state political influence.

Expansions also arose from popular—often populist—demands for protection against “unfair” behavior by others or from various perceived risks to well-being. It was in this era that the modern party system emerged in an ultimately futile attempt to increase electoral accountability. The idea of political parties is modeled on labor unions; collective political action organized around a formal hierarchical structure. The Great Depression later cemented Americans’ sense of reliance on big government and big political parties.
Successful candidates for congressional seats have some combination of the following characteristics: expertise in campaign strategy and operations, prominent levels of name recognition, sufficient funding to buy advertising and other campaign resources, local support groups (e.g., parties or interests) willing to help with canvassing, and positions on high-salience issues that are consistent with those of most voters in the primary and general elections.

Equally important, of course, is the failure of rival candidate(s) to have these same characteristics in greater measure. Discussions of the importance of money in politics often seem to assume that money is the only thing that matters. Not true. However, it is useful to assume, for the sake of discussion, that all the candidates do the best they can to run an effective campaign, given the money and related support that they command. In that context, money, and the resources it can buy makes all the difference between winning and losing.

Campaign donors (or “independent” supporters) can help a candidate by giving or spending money for the candidate, or by not giving or spending money in support of rival candidates. An interest group can influence a candidate or an incumbent seeking reelection without spending a penny in support of that candidate simply by supporting or threatening to support the rival candidate.

Unfortunately, in practice, elections do not effectively discipline systemic corruption. Voters are not inclined to try to assess candidates’ contributions to public well-being. The task is beyond the capability of any voter, however well-informed or diligent. Moreover, elections are biased in favor of the same powerful interests that corrupt legislation because these interests also finance campaign advertising.
It is good that elected officials are responsive to interest groups. That is why the First Amendment has its Petition Clause. However, both legislation and the administration of interventions are vulnerable to corruption because important interests are unable to participate in the process; those interests are diffused, difficult to organize, or lack the resources to invest in political action. Further, neither the judiciary nor the President is in the business of blocking corrupted, welfare-reducing legislation.

Madison defended the new Constitution in Federalist 10 partly on the basis that a larger and more diverse republic would diffuse the power of interest groups (“factions”) that, in a single state or region, might constitute an oppressive majority. The formation of a larger federal government might make such factions less harmful by reducing them to minorities. He recognized that powerful factions could influence political outcomes in unhealthy ways, including repression of the interests of less powerful or less well-organized, but more numerous, citizens. He argued that a strong central government would be better able to control such factions (as compared to individual states) because the number of competing interests would be greater at the national level. Madison also held that the separation of powers, the ability of citizens to discipline political misbehavior through frequent elections, and the limited scope of government itself would help to suppress corruption.

Madison saw this mitigation of the effects of faction as far superior to trying to regulate faction directly, for example, by restricting freedoms of speech, press, assembly and so on. Federalist 10 foresees what I am calling systemic or lawful political corruption as inevitable and claims that a strong but limited central government is preferable to individual state governments because factional competition will be more robust in the larger arena. By limited
government, I mean limited in its jurisdiction or scope, measured, for example, by the notional percent of all economic and social interactions subject to government regulation.

The increased number and variety of competing factions, which the Federalists insisted would result from a stronger national government, have not forestalled corrupting factionalism. It simply moved from the states to the central government.76

Factions typically are issue-oriented; only the organized factions directly concerned affect policy on a given issue. They do not face pushback from other elite interests concerned with different issues. Local or regional factions do face greater difficulties in the federal system than they do in dealing with the states, but they have logrolling as a work-around. Moreover, a strong central government encourages the formation of national factions. In any event, the ratification of the Constitution has not prevented political corruption.

A major purpose of any democratic government is to provide an arena in which interest groups can reach peaceful solutions to conflicts. The constitutional regulation of this struggle in a Madisonian democracy consists in defining and protecting certain minority rights that the government may not sacrifice to majority demands. Madisonian minority protections are general purpose: they protect not only disadvantaged or unpopular interests but also powerful minorities with ample resources to influence government policy. Because of these protections, we cannot regulate interest groups and their influence on legislation except through elections or pushback from the other two branches. Regulation that is more direct tends to invade foundational rights that serve important general constitutional purposes.

By the early twentieth century the Madisonian structure had come under enormous strain. The ratifiers of 1788 were no longer representative of the popular will. Agricultural, industrial, labor, and other easily organized supply-side interests began to demand added central government protections and compensations in adjusting to the new age of mass production and mass media. During the time of the Great Depression, such demands were magnified.

Simultaneously, the federal government became freer to respond to demands for political solutions to economic discontents. Big business had pioneered the development of scientific management and large organizational hierarchies. A professional and reformed civil service, freed of patronage appointments by early in the twentieth century, faster and cheaper communication and transportation, and national media enabled Congress to offer solutions to the problems of organized interests who could produce votes, directly or indirectly.

Simply put, central government services could now expand to meet the demand. As the Supreme Court majority noted in *Free Enterprise Fund v. Public Accounting Oversight Board* (2010), the federal government today, a century after the Progressive movement, “wields vast power and touches almost every aspect of daily life …”

Broadly speaking, the expansion of government that began in the Progressive era has been associated not with provision of more effective or extensive liberties, but with the creation and administration of new entitlements. Both liberties and entitlements require administration, as do taxation and procurement.

Administration of each of these functions unavoidably implies policies, rules, regulations, and adjudications that directly or indirectly marshal and reallocate resources within the
private economy. Administration, whether assigned to independent or executive branch agencies, entails the exercise of discretion. Both agency officials and members of congressional appropriations and oversight committees must choose among options that create and destroy income and wealth. Those affected have an obvious interest in influencing the process.

Specifically, ongoing regulation of any economic or social activity by an administrative bureaucracy creates a fulcrum for interest group leverage. Leverage is exercised directly on the political appointees that head the agency and on career bureaucrats and is traceable in most cases to members of congressional committees. The delegation of legislative, judicial, and executive power to administrative units establishes a linkage between individual members of Congress and administrative agencies, creating not only an immense expansion of opportunities for elite interests to influence policy, but also undermining the Madisonian separation of powers.

Most corrupted legislation is obscure, hidden in important unrelated bills, and devoid of interest to the media and media audiences. The established checks and balances simply do not work in stemming non-salient, welfare-reducing, and redistributive legislation and regulation. According to scholars Kay Lehman Schlozman, et al. (2012) “If you are not at the table, you’re on the menu.”

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**Trust in Government**

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People do not trust their government. Any solution to the problem of institutional corruption must restore (or establish) trust in government. Politics is essential because it addresses conflicts among contending interests without resort to costly and risky violence. Under benign political leadership, these conflicts can be resolved peacefully and often in a way that increases aggregate welfare. But especially now that the scope of government extends to every aspect of our daily lives, corruption has become a more serious threat to prosperity and political stability. The pluralist competition is imbalanced and so are its outcomes. Unless a Madisonian check or balance intervenes, welfare-reducing outcomes are likely to prevail.

Legitimacy is crucial to trust and thus to political stability. Political scientist Robert Post (2014) writes: “Democratic legitimation occurs when persons believe that the government is potentially responsive to their views ... Democratic legitimation therefore depends upon what people actually believe.” Political corruption undermines in the most fundamental way not merely the performance but also the legitimacy of representative democracy.

In Madison’s age there was a climate of opinion among men of affairs, derived in part from their understanding of the behavior of the political leaders of the Roman Republic. The climate took for granted that leaders would behave selflessly when the good of the Republic required them to make personal sacrifices. They called this manly quality “civic virtue.”

Columbia Law School professor Tim Wu, channeling Madison, puts it this way:

It may sound naïve in our untrusting age to hope that people will care about ethics and professional duties. But Madison, too, saw the need for this trust. “There is a degree of depravity in mankind,” he wrote, but also “qualities in human nature which justify a certain portion of esteem and confidence.” A working republican government, he argued,
“presupposes the existence of these qualities in a higher degree than any other form.” It is called civic virtue, and at the end of the day, there is no real alternative.\textsuperscript{78}

Thomas E Ricks has devoted an entire book to the connections between the Founders and the leaders of ancient Athens and Rome whom they emulated.\textsuperscript{79} Ricks focuses on the first four presidents and especially Washington who, along with the other founders, idealized public virtue, placing the public good before private interest. This ideal was given lip service well into the 19\textsuperscript{th} century, but thereafter disappeared, even as theory, from public discourse.

Belief in civic virtue allowed people to trust their leaders. Americans’ lack of trust in their leaders reflects the absence of civic virtue as a relevant concept in practical political ideology. No one today expects elected leaders to behave honorably, willing to sacrifice their own welfare for the common good. There is simply too much evidence to the contrary.

If people understand that government is corrupted by elite interests, they are unlikely to have faith or trust in government. Lack of trust in government, up to the point of healthy skepticism, is sensible. Lack of trust beyond that point is likely to leave people open to allegiances to other sources of support, or at least to ideological explanations of why they should not trust the government. The evidence about people’s trust in government is alarming, as illustrated in polling data. The June 2020 Gallup poll\textsuperscript{80} offers the following summary table:


\textsuperscript{79} Ricks, supra at n. 20.

Similarly, the Pew Research Center in 2020 reported that, “For years, public trust in the federal government has hovered at near-record lows. That is still the case today, as the United States struggles with a pandemic and economic recession. Just 20% of U.S. adults say they trust the government in Washington to “do the right thing” just about always or most of the time.”

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<th>Great deal/Quite a lot of Trust in Institutions (Gallup)(^1)</th>
<th>National adults</th>
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<td>The military</td>
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### Public Trust in Government (Pew)\(^2\)

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<th>Year</th>
<th>Percent who trust the Government all or most of the time</th>
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\(^1\) Q. Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one -- a great deal, quite a lot, some, or very little? First,, Next..., [RANDOM ORDER] (sorted by “national adults”) White adults, Black adults, etc. GALLUP NEWS SERVICE: JUNE 8-JULY 24, 2020 – FINAL TOPLINE Copyright © 2020 Gallup, Inc. [https://news.gallup.com/file/poll/317165/200811Confidence.pdf](https://news.gallup.com/file/poll/317165/200811Confidence.pdf) Results are based on telephone interviews conducted June 8-July 24, 2020 with a random sample of –1,226—adults, ages 18+, living in all 50 U.S. states and the District of Columbia, including an oversample of Black adults. The total sample is weighted to represent racial and ethnic groups proportionately to their share of the U.S. population. For results based on this sample of national adults, the margin of sampling error is ±4 percentage points at the 95% confidence level.

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**Special Interests and Elite Influence**

Among the greatest internal threats to any civilization is defection by a significant minority. The legendary secession from the city of Rome by the plebian class around 500 BC supplies an example, although the plebs were a majority. To guard against the risk of secession, formal rules must be consistent with the preferences of most of the population. Consent by “median voters” on key issues may not be enough to guard against disaffections, but it is at least a necessary requirement. Minorities may have a credible threat of secession if the intensity of their preferences is ignored by the majority. The political system agreed upon must be capable of responding to preference intensity as well as simple individual dichotomous choices.

Individuals with very intense minority preferences may agitate to make their preferences on matters moral, ethical, religious and the like into formal laws or to change existing laws to accommodate such preferences. The problem is that we want to legitimize our own beliefs, if necessary, by forcing others to adopt them, or to behave as if they do. This creates a political (and therefore also economic) market for laws and changes in laws that presents

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Electronic copy available at: https://ssrn.com/abstract=3800374
policymakers with opportunities and incentives that can override their common interest in social harmony.

The distribution of preferences typically will change over time, reflecting changing tastes, so that any related formal laws will require periodic changes. This helps explain why laws about specific behaviors and social interactions may change radically over time. As noted, the process is complicated by the intensity of preferences of people at the extremes. These individuals are most apt to devote resources to promotion of or resistance to change. Fewer instances of formal law-making reduce the risk of political secession arising from passionate tailenders as well as revolt and revolution.

Participants in the economy and other interests today have enormous incentives and opportunities to influence government policy. Well-funded interest groups wield much of their leverage by influencing policy options selected. Their aims, broadly, are to advance their own agendas without regard to the impact on other interests or on the economy.

The public choice term for this, as economist Anne Krueger (1974) has explained, is “rent seeking.” An economic rent is a form of profit, a return greater than the cost of production based on possession of power over scarce resources, such as information. Rent seeking by elite interests is nearly by definition regressively redistributive (i.e., making the poor poorer) and reduces aggregate welfare—by making the pie smaller. The name itself derives from the

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monopoly rents (profits) gained by Stuart, Tudor, and earlier royal favorites who were granted such concessions as the right to collect customs duties at a British port of entry.

Elites succeed today by providing elected officials with financial and other support, by foregoing such aid to rival candidates, hiring officials after they leave office, and providing all officials with informational resources crucial to the legislative or rulemaking process. In consequence, of course, organized interests threatened by rivals are obliged to defend themselves in like fashion. The goals of elite interests often are most effectively pursued by inducing public officials to neglect their obligations to the people.

On the other hand, institutions that effectively limit the corrupting power of elites may threaten the stability of the coalition of humans forming the polity. Elites may secede or rebel, especially if they view the distribution of welfare as zero-sum.

Secession or rebellion may occur when a coherent elite can gain from reducing, or not increasing, the welfare of other coalition members—even when this reduces overall welfare. Only a firmly held general expectation of continued growth of aggregate welfare offers hope of long-term stability of a polity focused on optimization of well-being. That is why the declining average real wage for labor is a potentially momentous danger.

Public officials, meanwhile, can advance their careers as elective officials or appointed regulators, or later as lobbyists, by servicing these interests. Legislators seeking election or reelection, in fact, may have little choice, even if they hope merely to remain in office, but to promote interests that will support, or at least not oppose, their reelection. In contrast to pre-
Great Depression practice, the Supreme Court no longer resists these expansions of federal jurisdiction and intervention.

The ability of elites to influence policy through both contributions and informational lobbying is modelled by Christopher S. Cotton and Cheng Li in *The Journal of Law, Economics and Organization*. Summarizing, they claim to have developed:

...a model of policymaking in which a politician decides how much expertise to acquire or how informed to become about issues before interest groups engage in monetary lobbying... the policymaker may prefer to remain less informed than would be optimal, even when acquiring expertise or information is costless. Such a strategy leads to more intense lobbying and larger political contributions.85

The famous “revolving door” between Congress and K Street lobbying and law firms includes both former members of Congress and senior staff members. The extent of overlap between lobbyists and members alone is staggering:

When members of Congress retire or get voted out of office, they don’t necessarily leave Washington Hill. The most popular next step for them is to become a lobbyist. Sixty percent of Senators and Representatives who left office last year, and got a new job, landed at lobbying firm, where the pay is significantly higher and their inside knowledge of how Congress works pays off for their clients. That’s the analysis from liberal advocacy group Public Citizen, which tracks this stuff and would like to see the “revolving door” between Capitol Hill and K Street closed.86


86 Rose, Julie. 2019. Summarizing interview with Alan Zibel of Public Citizen. BYIRadio. *Sirius XM talks to Alan Zibel on the revolving door - Public Citizen*
Powerful interest groups and wealthy donors hold legislation and policy hostage to their own interests, demanding ransom in the form of tax favors, procurement contracts, exemptions from regulations, and support for extremist causes. Examples appear later in this work. Even well-intended legislation aimed at solving real defects in our capitalist market system must pay tribute to the elites that control Washington. “Independent” agencies designed to correct market imperfections are too often captured by those they regulate. The most recent round of tax “reforms” chiefly helped the rich at the expense of the middle class.

It is no accident that working- and middle-class incomes have stagnated for decades, while the number and wealth of billionaires has exploded. Corrupt legislation not only transfers wealth from much of the population to an elite group of powerful interests, but it also impedes economic growth and thus reduces the average level of well-being.

The Trump presidency has made it clear that the executive branch is no less subject to corrupting influences than the Congress. Nothing better illustrates this than Trump’s summary dismissal or transfer of departmental inspectors general and his use of acting officials in place of those requiring senate confirmation. No part of the executive branch was free to pursue its duty to the people, if that duty conflicted with Trump’s whims, personal interests, or the interests of his friends and major donors. It follows that my proposal must deal not only with corrupted law that reduces the welfare of the people, but also with corrupt law enforcement by the executive and independent branches.

In addition, the Trump Administration took steps to deregulate sectors of the economy for which regulation was essential to Americans’ well-being. Environmental controls were chief among these. The air and water are dirty, even toxic, because it is costless for enterprises to
dump their garbage there. Well-being suffers in well-documented ways, reducing life expectancy and increasing the burden of illness, often on those least able to afford private remedies. That humans have contributed to climate change is beyond reasonable dispute, and climate change is already imposing significant costs on humans in return. Encouraging expanded production of fossil fuels such as oil and coal is the opposite of welfare-enhancing policy. Most alarmingly, these Trump Administration policies were implemented without the consent of Congress, because Congress has delegated important policy choices to administrative agencies in thrall to executive and elite power.

A vicious circle helps to explain our corruption problem. Our public policies allow a very unequal distribution of resources, creating elites with the power to direct policies to their own advantage. For example, we do not sufficiently help those born with below-average circumstances and opportunities. Those citizens disadvantaged by this system, despite or rather because of their multitudes, have difficulty organizing themselves to exert collective countervailing power. According to New York Times reporter Alan Feuer87, even billionaires have started to voice concern over the trend toward less equal distribution. Bradley Saacks88, writing for Business Insider, reports that “Even billionaires are acknowledging that the system that created their crazy amount of wealth is unsustainable.”

Berkeley law professor Bertrall L. Ross writes:

87 Feuer, supra at n. 49.
Why has democracy failed to check economic inequality in the United States? Political scientists and legal scholars have pointed to political inequality as the culprit. Political scientists have shown that elected representatives are much more responsive to the wealthy than any other income group. Legal scholars have argued in favor of equalizing campaign finance and regulating lobbying as ways to reduce political inequality. Empirical studies, however, have raised doubts about the effectiveness of any reform efforts aimed at those areas, and constitutional law disfavors solutions aimed at diminishing the political voice of the wealthy. [Emphasis added]

Dominant interests that achieve and preserve advantages through corrupting influence each have narrow aims involving a single political or policy issue. A particular interest may seek a tax concession, an import duty, a regulation increasing rivals’ costs, or a national defense project for which they hope to supply goods and services. Each successful elite interest may affect aggregate well-being only slightly. Nevertheless, the process is ongoing, and the aggregate effect is cumulative, and potentially large.

Even a successful, dominant interest group must protect itself from rivals through continuing expenditures on lobbyists and campaign support. The process is dynamic—a banquet for politicians, lobbyists, and contributors that goes on 24/365, like a free buffet at a Las Vegas casino. In addition, even though each successful interest increases its share of the pie at the expense of other interests, the political process may result in every interest, strong and weak alike, ending up worse off in absolute terms. The resulting distribution of well-being may be one that even the winners find unattractive, as Alan Feuer points out. [90]

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89 Ross, Bertrall L. 2018.
90 Feuer, supra at n. 49.
Congress and much of the federal bureaucracy are now thoroughly corrupt in the sense that officials routinely service well-represented elites without regard to adverse effects on the well-being of the people. According to Stanford political scientist Francis Fukuyama, “[P]olitical decay ... is evident in the capture of large parts of the U.S. government by well-organized interest groups. The old nineteenth-century problem ... [of political patronage] ... has been replaced today by a system of legalized gift exchange, in which politicians respond to organized interest groups that are collectively unrepresentative of the public.” 91

Most legislation involves low-salience issues or low-salience riders to high-salience bills. Low-salience legislation is most likely to reflect corrupt influence and to have adverse welfare or equity effects. New York Times reporters Eric Lipton and Kevin Sack (2013) describe an instance of plain low-salience corruption. Here is the lede:

Just two weeks after pleading guilty in a major federal fraud case, Amgen, the world’s largest biotechnology firm, scored a largely unnoticed coup on Capitol Hill: Lawmakers inserted a paragraph into the [emergency] “fiscal cliff” bill that did not mention the company by name but strongly favored one of its drugs. The language buried in Section 632 of the law delays a set of Medicare price restraints on a class of drugs that includes Sensipar, a lucrative Amgen pill used by kidney dialysis patients.92

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91 Fukuyama, supra, at n. 22.

The chair of the relevant Senate Committee owed a favor to Amgen. The cost of the favor fell on all Medicare patients, for whom the available Medicare budget was reduced, and ultimately on taxpayers, when the Medicare budget had to be increased to cover Amgen’s rents. Despite more recent attempts to limit non-germane provisions in legislation stories like this one are still commonplace.

Sharon LaFraniere writes a vivid description of corruption built into the Washington “swamp”:

It is a trial tailor-made to grab the attention of this city’s power brokers: In a federal courtroom this month, one of Washington’s most prominent lawyers is battling criminal charges of lying to investigators about his work for a shady foreign client. But the most riveting aspect of the case against the lawyer is not his innocence or guilt. Rather, it is the depiction of the seamy world of power brokers that prosecutors have painted during nearly two weeks of testimony and in an array of court filings. The trial has supplanted any image of Washington’s elite as sage Brahmins with a vivid picture of the ruling class at its avaricious worst. The details include a $4 million payment shunted through a secret offshore account to a law firm, a backdated invoice, a lying publicist, a scheme to net one player’s daughter a cushy job and a bungled wiretap by a suspected Russian intelligence asset nicknamed “the angry midget.”

Fred Wertheimer, president of Democracy 21, a watchdog NGO, offered this critique of a must-pass omnibus spending bill:

The legislative process just completed is an irresponsible and indefensible way to govern the country. The blatant misuse of riders to try to jam dozens of policy decisions into law without serious consideration or regular order is an undemocratic and highly

93 LaFraniere, Sharon. 2019.
destructive way for Congress to function. The abusive use of riders on appropriations bills must be brought to an end.\textsuperscript{94}

Despite the likelihood that the direct effects of riders and earmarks are to reduce aggregate welfare or redistribute income toward the already-well off, it must be admitted that riders and earmarks may be an essential element of the legislative recipe for compromise. Attempting to ban all such legislation may do more harm than good. But some riders and earmarks have a more harmful effect on welfare than others. Unfortunately, there is no mechanism requiring that these “bribes” to obtain votes be evaluated for their effects on well-being, nor a process for limiting such damage.

International Monetary Fund researchers Igan and Mishra (2014) trace much of the blame for the 2008 financial collapse and later “Great Recession” to political corruption in Washington.\textsuperscript{95} Daron Acemoglu et al. report that:

The announcement of Timothy Geithner as nominee for Treasury Secretary in November 2008 produced a cumulative abnormal return for financial firms with which he had a prior connection. This return was about 6% after the first full day of trading and about 12% after ten trading days. There were subsequently abnormal negative returns for


connected firms when news broke that Geithner’s confirmation might be derailed by tax issues.  

Lawrence Lessig, Robert G. Kaiser, and many others offer numerous examples of such lawful corruption and their political and personal motivations. Eric Lipton reports in the *New York Times* (2020) that “Airlines, hotels and restaurants. Military contractors and banks. Even Broadway actors. These are just a few of the special interests already maneuvering to get a piece of the next coronavirus relief package about to be taken up by Congress.” They generally succeeded.

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One line of empirical research tries to use surveys of policy preferences in conjunction with data on incomes and policy outcomes to test various political theories of “who governs?” Martin Gilens & Benjamin I. Page provide one of the most ambitious of these studies.\textsuperscript{101} The origins of political outcomes, however, likely depend on the nature of the matter at issue. High salience issues, for example, are more likely to invoke passionate and popular forces than the narrow, low salience issues that attract attention from special business, taxpayer, and commercial interests.

Focusing on the linkage between representatives, their support staffs and constituent preferences, Alexander Hertel-Fernandez, Matto Mildenberger and Leah C. Stokes report that:

Legislative staff link Members of Congress and their constituents, theoretically facilitating democratic representation. ... Using an original survey of senior US Congressional staffers, we show that staff systematically misestimate constituent opinions. We then evaluate the sources of these misperceptions, using observational analyses and two survey experiments. Staffers who rely more heavily on conservative and business interest groups for policy information have more skewed perceptions of constituent opinion. Egocentric biases also shape staff perceptions. Our findings complicate assumptions that Congress represents constituent opinion and help to explain why Congress often appears so unresponsive to ordinary citizens.\textsuperscript{102}


Thomas Ferguson et al. write:

The extent to which governments can resist pressures from organized interest groups, and especially from finance, is a perennial source of controversy. This paper tackles this classic question by analyzing votes in the U.S. House of Representatives on measures to weaken the Dodd-Frank financial reform bill in the years following its passage. The analysis focuses on representatives who originally cast votes in favor of the bill but then subsequently voted to dismantle key provisions of it. This design rules out from the start most factors normally advanced by skeptics to explain vote shifts, since these are the same representatives, belonging to the same political party, representing substantially the same districts. ... Our results suggest that the links between campaign contributions from the financial sector and switches to a pro-bank vote were direct and substantial: For every $100,000 that Democratic representatives received from finance, the odds they would break with their party’s majority support for the Dodd-Frank legislation increased by 13.9 percent. Democratic representatives who voted in favor of finance often received $200,000–$300,000 from that sector, which raised the odds of switching by 25–40 percent.103

What have been characterized as “networks of power” by Marc Pilisuk and Jennifer Achord Rountree are made up of individuals connected through employment or membership who now occupy positions of political power.104 Examples of such “cronyism” are said to


include the Bohemian Club, Skull & Bones, the Bilderberg Group, the Bechtel Group, The Carlyle Group, and various large financial and military-industrial firms. Although such social networks are used to influence policy, it is understood that it is the pursuit of profits that motivates the use of leverage. Public well-being is not on the menu.

The most straightforward way to document political corruption is in connection with international trade barriers. Tariffs and quotas imposed on imported goods nearly always reduce welfare; they increase prices and restrict supply, reducing the well-being of both commercial customers and consumers.\textsuperscript{105} This is true whether foreign governments subsidize the imported goods or not. The beneficiaries of trade barriers are domestic suppliers of goods that face import competition. To illustrate, consider solar panels, which convert sunshine into clean electricity.

The price of solar panels helps determine how much we can reduce air pollution emitted by conventional coal-fired power plants. In addition to contributing to the problem of global warming, conventional power plants have serious adverse effects on human health. Lower prices for solar panels mean less air pollution, as consumers and businesses adopt solar power for their daytime needs. United States policy has been to encourage use of alternative (non-coal) power sources. The federal government and many states subsidize investments in solar

\textsuperscript{105} There are exceptions for such reasons as national security and infant industry concerns. In these cases there are anticipated future benefits that outweigh the immediate loss from reduced well-being.
power installations. So why would the federal government impose tariffs on solar panels imported from China, which has the world’s largest and most efficient solar panel factories?

Late in 2014, the Obama Administration imposed heavy tariffs on Chinese solar panels and their components, according to *New York Times* reporter Diane Cardwell.106 According to Carol D. Leonnig, reporting in the *Washington Post*, Obama officials has been involved in supporting loan subsidies to one U.S. solar panel manufacturer with connections to the administration.107 The tariffs, equivalent to sales taxes, and range from about twenty-five to more than seventy percent, are intended to help domestic manufacturers compete with Chinese makers. The result is to increase prices paid by consumers and the profits made by U.S. manufacturers.

U.S. producers are less efficient than suppliers in China and several other Asian countries. Higher prices for the panels make U.S. customers less likely to install solar panels, which reduces jobs related to panel installation and maintenance. Further, the tariffs make the environment unhealthier for U.S. citizens, increasing health care costs and reducing life expectancies. These effects are the same as those that would result from a criminal conspiracy among solar panel producers to fix prices. Executives and companies who did that would face jail time, fines, and expensive lawsuits. Fortunately for them, the U.S. government produced the same result, reducing the “general welfare.” Consumers were not so lucky.


Trade barriers in general are unambiguous injuries to the general welfare; they result from political corruption. To appreciate this, consider that a major reason for the establishment of the new American republic from a group of 13 sovereign states was to abolish the trade barriers between the states. Imagine what would happen if California and New York today could impose tariffs on each other’s exports. Domestic commerce would be reduced and far less efficient. Output and welfare would be reduced. Inefficiently small factories would dot the landscape. Prices of goods and services would skyrocket.

Domestic industries (and their labor unions) seek trade barriers by making campaign donations or independent expenditures to benefit Members of Congress. They also spend money to hire effective lobbyists, often former Members and senior committee staff. Protection of domestic industries is for sale.

So-called “big data” and advanced econometric methods have documented these links:

- Stephen Ansolabehere and coauthors suggest that the value of PAC contributions may be in buying access to lawmakers rather than in buying votes;\(^{108}\)
- Kishore Gawande & Usree Bandyopadhyay claim that “The broad picture that emerges about the U.S. pattern of protection is that it is influenced by lobbying spending and lobbying competition, and that, hence, protection is ‘sold.’”\(^{109}\)

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• James Lake (2015), “[T]he sum of trade-related contributions and lobbying expenditures by, respectively, business and labor groups reveals a statistically significant relationship between political money and voting on Free Trade Agreements …”;  

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• Consumers who pay the price increases and suffer the other effects of trade barriers have no effective voice in the political process that results from such systemic corruption. Omer Gokcekus and Sertac Sonan conclude that:  

The empirical evidence indicates that political contributions and corruption are complements, rather than substitutes. ... Accordingly, we propose an alternative explanation for the relationship between political contributions and corruption: two components of a comprehensive strategy for rent seeking. As long-term investments, political contributions influence legislators to change the rules of the game; as short-term investments, corruption influences public officials to sidestep the existing rules, to maximize the rent collected.  

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• Jeffrey R. Brown and Jiekun Huang study the effects of visits to the White House from 2009 to 2014, finding:

[That corporate executives’ meetings with key policymakers are associated with positive abnormal stock returns. We also find evidence suggesting that firms receive more government contracts and are more likely to receive regulatory relief (as measured by the tone of regulatory news) following meetings with federal government officials. Using the 2016 presidential election as a shock to political access, we find that firms with access to the Obama administration experience significantly lower stock returns following the release of the election result than otherwise similar firms. Overall, our results provide evidence suggesting that political access is of significant value to corporations.]


• Similarly, economists Alexander Borisov and coauthors examine “whether the stock market considers corporate lobbying to be value-enhancing.”

[We used] an event that potentially limited the ability of firms to lobby but was exogenous to their characteristics and prior lobbying decisions. The results show that this exogenous shock negatively affects the value of firms that lobby. In particular, we estimate that a firm that spends $100,000 more on lobbying in the 3 years before the shock (where sample average lobbying expenses are about $4 million), experiences a loss of about $1.2 million in shareholder value on average.

Corruption has always been a camp follower of political power. Its modern form is imbalanced pluralism. Political scientist E. E. Schattschneider called modern governance “pluralist” because legislative outcomes reflect the interplay of various interest groups.\textsuperscript{115} Pluralism involves political effort by such well-represented interests as regulated industries and professions (today, virtually all industries and professions) and passionate factions (the gun lobby, AARP, environmentalists, Trump supporters). However, pluralism in practice omits unorganized and ill-represented interests such as citizens in their roles as consumers, nonunion workers, small investors, patients and so on. This lack of balance is corrupting because among the outcomes reduce public welfare, at the expense of everyone, but especially absent interests.

**“Independent” Administrative Agencies**

The progressive movement and the New Deal created one of the chief sources of failure of the original Madisonian system. That system relied on the assumption of limited government to limit the effects of corruption. But the progressive movement and its sequelae turned limited government into unlimited government, accompanied by unfettered corruption.

Expansion of the federal jurisdiction produced “interventions”—most often, regulatory regimes or tax policies. Interventions of course can mitigate market and other imperfections in human interactions and thus increase aggregate well-being. That is the point, for example, of criminal and civil justice systems.

Nevertheless, interventions intended to remedy even undisputed imperfections (air pollution, to take one example) are subject to corrupted design and implementation. Popular interventions often evolve to serve elite interests by distorting markets and behavior, usually at the expense of ill-organized interests.

The greater the number and reach of regulatory interventions, the greater the range of continuing opportunities for political corruption, in which one or more elite interest is serviced at the expense of other, less effective interests. Eventually these effects accumulate to slow or stop the improvement in well-being that results from economic growth and technological change. It is always a legitimate question to ask whether a particular government intervention aimed at a market failure or social inequity will in practice make people better off or not. Because of corruption and error, interventions have no greater claim to virtue than imperfect markets.

The government of the United States is often referred to as the “administrative state.” Although this phrase is sometimes intended to describe the so-called “independent agencies,” it is equally applicable to executive branch agencies. The point is that federal bureaucrats, under very loose congressional supervision, today control much of what used to be citizens’ private choices. Neomi Rao (2015) has pointed out that delegation diminishes the role of Congress in substantive understanding and choice of policy alternatives. Thus, although senior members of Congress and, more recently, the President, can intervene occasionally to achieve political ends, the agencies have substantial autonomy.
Interventions intended to control prices or quality of commercial products and services, when delegated to administrative agencies, often evolve into industry-friendly policies in a phenomenon called “regulatory capture.” Representatives of the regulated industry have the loudest voices influencing policy and often control the information flowing to regulators.

Agencies themselves then have ways to influence Congress. According to Christopher J. Walker, “[T]he empirical findings ..., based on extensive interviews and surveys at some twenty federal agencies, suggest that agencies provide technical drafting assistance on most of the proposed legislation that directly affects them and on most legislation that gets enacted. ... Agencies are usually intimately involved in drafting legislation that ultimately delegates—to themselves—the authority to interpret that very legislation.”\textsuperscript{116} That authority is then given “deference” by reviewing courts under the 1984 \textit{Chevron} doctrine.\textsuperscript{117}

Users of the product or service being regulated have no effective voice. Ernesto del Bo supplies a useful survey of the problem from an international perspective.\textsuperscript{118} Bruce Owen and


Ronald Braeutigam offer an early U.S. case study of Federal Communications Commission capture.\textsuperscript{119}

Corruption costs also arise from the adverse impact of hundreds of regulatory interventions that damage the efficiency of production and of markets. Many reflect agency compromises among warring elites, reached without regard for the cost imposed on the public. Major costs result from pervasive distortions in the tax system,\textsuperscript{120} and legislature-influenced federal procurement decisions.\textsuperscript{121} Free entry (and exit) from the marketplace is a key factor supporting efficient production and competitive prices. Germán Gutiérrez and Thomas Philippon study entry and exit in U.S. industries over the past 40 years. They find “that lobbying and regulations have caused free entry to fail.”\textsuperscript{122}

Regulated industries in the United States typically enjoy entry barriers such as monopoly franchises and licensing conditions. Professional associations of, for example, hair stylists and construction contractors, must meet costly and time-consuming eligibility conditions for state licenses. While these licensing regulations are justified by consumer protection arguments,

\textsuperscript{119} Owen, Bruce, and Ronald Braeutigam. 1978. \textit{The Regulation Game: Strategic Use of the Administrative Process}. Ballinger.


\textsuperscript{121} Neu, Dean, Jeff Everett, and Abu S. Rahaman. 2015. “Preventing Corruption Within Government Procurement: Constructing the Disciplined and Ethical Subject.” \textit{Critical Perspectives on Accounting} 28:49-61.


Electronic copy available at: https://ssrn.com/abstract=3800374
professional associations lobby for them and the regulations create barriers to entry that limit competition and raise prices.

Unlike private organizations, legislators are not vulnerable to product liability lawsuits. It would be an improvement to rely on impartial professional monitors to decide which legislative “plays” are welfare-enhancing and which are not, particularly if the monitors themselves could be insulated from the political processes that lead to corrupt laws and policies.

The study of “regulatory impact analysis” or measuring the effects of government laws and policies on citizens’ well-being, is well-developed. For example, Rex Deighton-Smith, et al. survey several applications of these social science measurements. They review current impact analysis policies and guidance documents in a range of OECD (Organization for Economic Cooperation and Development) countries, by “reviewing the literature on the use of impact analysis to address social and environmental issues, and by sampling several recent impact analyses from leading countries. Building on the available evidence, the paper proposes a number of principles and considerations for decision-makers to design appropriate systems and mechanisms for addressing inclusive growth in impact analysis.”¹²³

Ultimately, of course, the question is whether a given law or policy increases well-being, and of what relevant categories of the population, compared to the status quo or some counterfactual. John F. Helliwell, et al. describe the process this way:

Starting from the assumption that improving well-being is the central consideration for public policies, we show how subjective well-being research can help, and already is helping, to choose public policies based on their consequences for all aspects of life. The core of the paper lies in examples where the methods we propose, often in systematic experimental contexts, have already been used to guide the evaluation and ranking of alternative policy options in public health, education, workplace training, and social welfare. ... A focus on subjective well-being as an umbrella measure of welfare might help to restore to economics the breadth of purpose and methods it had two centuries ago, when happiness was considered the appropriate goal for private actions and public policies.\textsuperscript{124}

Economic and other social science analysis of government policies, such as benefit-risk-cost studies focused on subjective well-being, are increasingly sophisticated. Descriptions and examples of such analysis are widely available.\textsuperscript{125} Of course, policy analysts, like judges, are human. But analysis of the effects of policy on well-being is no less reliable than the constitutional and statutory analysis carried out by the courts. We accept the Court’s decisions not because its reasoning is convincing—obviously, it is not convincing to dissenting justices—but because we accept the legitimacy of the rule of law, imperfect as it is, and the necessity for finality.

\footnotesize

Shrinking (or retarding growth) of the pie means that the economy is less efficient at producing goods and services than it would be absent specific (not all) government interventions. An example is the nationalization by the federal government of the electromagnetic (radio) spectrum. Starting in the 1920s and continuing to the end of the century the radio spectrum was owned by the people (read “the government”) and licensed to authorized users. This step was justified by the need to prevent interference between users of the same frequency. The alternative would have been a market system with private property rights in frequencies, just as we have private property rights in land and patents.126

As we now know, it is possible to auction off frequencies and permit licensees to buy and sell frequencies. There is no chance that the various uses to which the spectrum was put by the FCC would have resembled an efficient competitive market. This was true especially for the frequencies reserved for broadcasting.

Broadcast frequencies were deliberately constrained to protect first radio and then television stations and networks from competition. For most of the 20th century the supply of radio and TV content available to the public was restricted to protect the profits of broadcasters. Restricting output of any scarce good reduces welfare, especially the welfare of those citizens who would most value the good. Because broadcast content was free to users, those most likely to benefit from it were poor citizens. The FCC policies decreased output and welfare, especially of lower-income citizens, and transferred the gains from artificial scarcity of frequencies to the owners of stations and networks.

126 Hazlett, Thomas. 2017; Thierer, Adam and Brent Skorup. 2013.
The National Association of Broadcasters had significant political power because members of congress coveted local coverage of their doings and campaigns. Network and station lobbyists were familiar faces in the corridors of the FCC and upscale D.C. luncheon meccas for almost a century. FCC commissioners were appointed without regard to expertise in the economics of regulation; often, they were former staff members of powerful senate and house commerce committee chairs.

Related stories can be told about other federal interventions. When transportation and electric power generation were deregulated in the 1970s, under presidents Ford and Carter, the prices of those services fell, generating new demand and an increase in output. The pie got bigger; public well-being increased. Lower-income people could afford to fly to visit friends and family or to take vacations abroad.

The more extensive the reach of government regulation of private economic activity, the greater the burden of corruption on the economy. Madison did not create a structure with this danger in mind. As a result, there is no institution in today’s government that effectively restrains impositions on economic efficiency or distributional equity resulting from Congress’s and agencies’ responsiveness to well-organized interests—and their neglect of adverse effects on ill-organized interests. Within Washington, the process is taken for granted: it is business as usual; the way things are done.

Both the Preamble to the Constitution and the Declaration of Independence assert that one purpose of government is to promote the well-being of the people. Today, political corruption produces the opposite result on a huge scale. Our representatives have no reason to consider the impact on public welfare of their favors to special interests.
Section 4- Alternate Solutions

“Lock ‘er up.”

It is tempting to suggest that authors of welfare-reducing legislation, and even those who vote for such laws, should face criminal penalties. However, the criminal law would be of little help in controlling currently lawful corruption.

Any criminal conviction requires proof of intent. Even putting congressional immunity aside, the behavior of legislators is often difficult to categorize. As the Supreme Court put it in McCutcheon v. Federal Election Commission (2003), “[U]nlike straight cash-for-votes transactions, such corruption [political contributions from interest groups] is neither easily detected nor practical to criminalize.” At one extreme, it may be unlawful: for example, naked bribery or extortion. At another extreme, it may be unambiguously virtuous—beneficial to constituents or citizens generally and neutral or adverse to the legislator’s personal interest.

Legislative behavior commonly reflects mixed motives and complex interactions with other legislators as well as imperfect information about the effects of the law itself. For this reason, constraints on legislative behavior intended to deter corruption can easily generate false positive or negative errors and adverse welfare consequences.

Campaign Finance Reform

There is a widespread appreciation that campaign contributions, in cash or kind, are a way to buy influence with elected officials or, when offered to a candidate’s opponent, a way to punish officials who oppose the contributor’s aims.
Most officials will admit that large contributions buy access—significant contributors typically can easily communicate their views to an elected official, and those views are likely to receive respect. Even legislators not up for reelection benefit from contributions that flow through to party coffers or other candidates because these contributions buy advancement within the party leadership hierarchy. Membership of legislators on relevant appropriation and oversight committees creates channels of influence to executive and agency officials. Access also goes with the “revolving door” of congressional staff alumni appointed to regulatory commissions and executive agency positions.

The exchange of money for access is very much like a bribe. Of course, the official does not explicitly agree to vote or otherwise act in the donor’s interest. The agreement is tacit. If the official would prefer to act in a way that is at odds with the contributor’s interests, she will take pains to explain why she cannot support the donor’s position. She will strive to find concessions, compromises, or side payments on unrelated matters. This interaction is very much like explicit bargaining over the price of (continued) political support.

However, because the interaction between officials and supporters is a “repeated game,” or what in commerce is called a “relational contract,” there is no need for explicit agreement. The large special interest contributor, unlike the typical voter, can monitor the representative’s performance of the tacit agreement. The contributor can punish a reneging official by withdrawing support or by supporting the official’s rivals. Threats to do so are highly credible.
Campaign finance is such an obvious source of corruption that many popular reform proposals focus on limiting contributions from special interests. Examples include the reforms associated with Professor Larry Lessig’s brief 2015 campaign for the Democratic presidential nomination and the related “Honest Election Seattle” voucher reforms approved by Seattle voters in 2015 and upheld by the Washington state supreme court in 2019.\footnote{“Honest Election Seattle” voucher reforms were approved by Seattle voters in 2015 and upheld by the Washington state Supreme Court in 2019.}

The efficacy of the Seattle system in reducing corruption has been questioned, however. Danny Westneat in the Seattle Times reported that, “[T]here has never been a Seattle City Council election so dominated by special interests, big businesses and the super wealthy as this year.”\footnote{Westneat, Danny. 2019. “Democracy vouchers are supposed to be an answer, but big money is swamping Seattle’s elections.” Seattle Times. September 25.}

Congress has enacted a variety of limits and reporting requirements on campaign contributions. Most have been upheld by the U.S. Supreme Court when direct contributions to candidates are being regulated. Reforms aimed at campaign finance unfortunately, are unlikely to be effective in limiting lawful corruption.

Candidates and contributors notoriously have evaded or avoided a succession of attempts to limit direct campaign contributions. There is usually a lawful way around any regulatory limitation, albeit at some cost to the manipulator. Given that the very politicians targeted by the regulations draft the regulations, any other result would be surprising.
Regulations have been most easily evaded by parties and by “independent” Political Action Committees (PACs). So long as the independent supporter (individuals or corporations) does not coordinate directly with the candidate, the First Amendment supplies complete protection for unlimited expenditures. The controversial *Citizens United* case protected the right of individuals and corporations to make unlimited contributions to such groups. The “independence” of PACs is a myth, according to James Arkin writing in POLITICO:

Coordination between campaigns and outside groups is illegal, though both parties’ election lawyers regularly give candidates a green light to evade that ban by sharing information in the public domain — for example, posting long YouTube clips clearly meant for use by friendly super PACs. Now, [some] senators are pushing the limits by essentially posting instruction manuals on how they prefer allied groups to attack their opponents, which super PACs have then turned into ads within a matter of days or weeks.\(^\text{129}\)

The Center for Responsive Politics compiles data on contributions and lobbying expenditures based on reports mandated by federal laws and Congressional rules. According to political scientist Mirko Draca, there is general agreement that lobbying expenditures exceed expenditures on campaign donations.\(^\text{130}\) The data themselves, however, are often of mediocre quality and certainly understate both sorts of expenditures, especially lobbying.


Some data include and other data exclude state and local lobbying, but in principle all data exclude legal services provided by the same firms and individuals that lobby. The incentive of reporting firms is to minimize reported lobbying expenditures; legal expenses are not shown. Nevertheless, many scholars have mined these and related election data. The current view, according to James Lake is simply that interest groups make both lobbying expenditures and campaign contributions in varying proportions.\footnote{Lake. Supra, at no. 108.}

Raymond La Raja and Brian Schaffner conducted an empirical study of large campaign contributions at state and federal levels over a period of twenty years.\footnote{La Raja, Raymond J., and Brian F. Schaffner. 2015. “Campaign Finance and Political Polarization: When Purists Prevail.” \url{https://library.oapen.org/handle/20.500.12657/24045}} They found that reforms aimed at regulating campaign finance had the unintended effect of encouraging strongly ideological groups and individual donors to dominate financing of campaigns, incentivizing candidates and elected representatives to adopt uncompromising ideological positions. Their suggested remedy is to direct all contributions to the respective political parties rather than candidates.

Few events better show the size of lobbying than the initial federal funding for relief during the COVID-19 pandemic. Karl Evers-Hillstrom and Dan Auble writing for Open Secrets, a watchdog NGO, reported that “Over 1,000 clients dispatched lobbyists with close ties to the
White House or congressional leaders through the first half of 2020. About 40 percent of those clients reported lobbying on issues related to the pandemic.”

On the other hand, the logic of representative government relies on representatives having accurate information about the problems and preferences of the electorate. Direct communication between citizens, their organizations, and representatives is an important means of acquiring such information. Indeed, the Petition Clause of the First Amendment protects such communication. Yet such protected communications, accompanied by support of the candidate for election or re-election, appears to have the same consequence as a cash bribe.

The Supreme Court faced one side of the campaign finance problem in *Citizens United*, which focused on “independent” campaign expenditures in support of a candidate, as opposed to contributions made directly to a candidate. As noted, the Court had previously upheld most statutory limitations on direct contributions as well as reporting requirements. In *Citizens United*, the Court had to balance the public’s interest in clean politics against the First Amendment freedoms to speak and to petition Congress.

The Court’s exceedingly narrow definition of corruption as common bribery informed its decision. In other words, the phenomenon of lawful corruption went ignored. The Court evaded the real question posed by corporate expenditure in the context of systemic faction-based political corruption. Most constitutional scholars, for example Zephyr Teachout, object to the

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Court’s definition of corruption, or at least to the Court’s originalist argument for the definition. Nevertheless, it is difficult to fault the Court for its choice to promote free expression even at the necessary expense of corruption—corruption that, in any case, would not be much reduced by regulation of political spending that did nothing about other channels of elite influence.

Campaign finance reform, even if it “succeeded,” would not solve the problem posed by political representatives whose incentives are at odds with the interests of the people. Well-organized and well-financed interests would still be able to influence officials. Given the Framers’ choice to promote access to legislators and their reliance on elections, combined with the inherent ambiguity of political motivation, means campaign finance reform appears futile as an effective remedy for systemic corruption.

Regulate Lobbyists
Although statutes require Washington lobbyists to register, identify clients, and report contributions, there is little chance that such regulation has or will reduce corrupted legislation. In the first place, lobbying takes place outside the scope of existing registration requirements. This is called “shadow lobbying” according to Karl Evers-Hillstrom and Dan Auble of Open Secrets. The First Amendment encourages lobbying. If lobbying were effectively ended, isolated elected

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135 Evers-Hillstrom and Auble, supra, at n. 111.
officials would have less information about legitimate (welfare-enhancing) legislation and legislative debate would be less well informed.

Moreover, restrictions on access by current lobbyists do not address the underlying problem, which is that important unorganized interests lack the means to hire professional lobbyists. In other words, lobbying is not the problem; the problem is imbalanced lobbying. It is unclear, however, how to define or achieve “balanced” lobbying.

Regulation cannot make lobbying more balanced because there is no practical way to establish private lobbyists who are neutral in supporting their sources of income, whether private or public, and no mechanism to shield private lobbyists from corrupting influences. Once again, as with campaign finance, it appears futile to rely on reforms aimed at decreasing the effectiveness or imbalances of lobbying to improve legislative outcomes.

Finally, trying to regulate lobbying runs smack into the built-in human instinct for reciprocity. According to behavioral economists Ulrike Malmendier and coauthors:

Reciprocal behavioral has been found to play a significant role in many economic domains, including labor supply, tax compliance, voting behavior, and fund-raising. What explains individuals’ tendency to respond to the kindness of others? Existing theories posit internal preferences for the welfare of others, inequality aversion, or utility from repaying others’ kindness. ... We present a novel laboratory reciprocity experiment (the double-dictator game with sorting) and show that failure to account for external
motives leads to a significant overestimation of internal motives such as fairness and altruism.\footnote{Malmendier, Ulrike and Schmidt, Klaus. 2017. “You Owe Me.” American Economic Review 107, no. 2: 493-526.}

A similar result appears in a 2015 paper by Frans van Winden.\footnote{van Winden, Frans. 2015. “Political economy with affect: On the role of emotions and relationships in political economics.” European Journal of Political Economy. v. 40, Pt B. December. pp. 298-311. Volume 40, Part B (oclc.org).} The personal relationships between helpful lobbyists and elected representatives and their staffs, in other words, attenuates and may overcome motives of faithfulness to the interests of the electorate. No form of regulation is likely to reduce these incentives. The same relationship-infected incentives also motivate executive and administrative law enforcers.

**Watchdogs**

Another potential remedy is reliance on the numerous “watchdog” organizations, both partisan and nonpartisan, publicizing lapses by legislators and agencies. Examples include ProPublica, the Sunlight Foundation, the Government Accountability Project, the American Center for Law and Justice, and the American Civil Liberties Union. The category overlaps with investigative journalism and with individual government employees (“whistleblowers”) who leak and publicize agency misdeeds, especially those that officials try to conceal.
The most famous whistleblower, and certainly the most effective in bringing about change, is Edward J. Snowden, who passed secret U.S. government documents to web sites and newspapers. The documents revealed extensive unlawful government monitoring of private communications of U.S. citizens by the National Security Agency.

Government watchdogs such as inspectors general and whistleblowers have a potentially key role, like media, in making the public aware of dubious government policies and procedures. Several factors, however, reduce their effectiveness in combating welfare-reducing corruption, chiefly the lack of independence from political retribution. The ability of the Trump administration to sideline inspectors general and other dissenting officials (despite controlling only one house of Congress) illustrates the point.

Private watchdog organizations and especially policy think tanks often rely on partisan sources or public donations. In either case, the nature of the funding source and any watchdog’s need for continued funding introduces a source of bias that limits its credibility. Further, watchdog organizations seldom are staffed with the skilled analysts equipped to assess the impact of highly technical legislation and regulatory policies on the welfare of those affected. Finally, watchdog groups have no direct power to intervene because they cannot end the harm caused by corrupted legislation and regulation.

**Media as Watchdogs?**

Freedom of the press or “fifth estate” is supposed to be a check on government, and especially government malfeasance. This idea was plausible in the 18th and 19th centuries when many cities had multiple competing daily newspapers or printers. Individual publishers established
political identities and often had an important effect on local elections. By the 20th century the
number of competing newspaper publishers in each city began to decline, because of econo-
mies of scale in production and distribution of daily papers, because of assimilation of non-Eng-
lish-speaking immigrants into the American mainstream, and because local radio stations and
later television began competing for advertisers.

By midcentury, most newspaper cities had but one daily newspaper. Because radio and
then television licenses were restricted by the Federal Communication Commission, typically to
three in each city, the courts allowed the FCC to regulate content—despite the First Amend-
ment ban on government regulation of the press. Most broadcast content originated not with
local stations but with a handful of networks. Given FCC regulation, networks tended to offer
politically anodyne content. The focus was on mainstream entertainment, not news and public
affairs. TV and network radio news did seek out criminal political corruption but avoided parti-
san controversy and ignored lawful political corruption.

Most of the revenue of daily newspapers and all the revenue of broadcast stations and
networks came from advertisers. This, together with the shortage of competing outlets led to a
distinct bias in content, with each network trying to maximize its audience to attract those ad-
vertisers seeking to reach virtually every household. Critics complained of the excessive same-
ness of broadcast content. Newton Minow, FCC chair in the Kennedy administration, spoke of
network TV as a “vast wasteland.”138 Local TV stations affiliated with the three broadcast net-
works offered local news programming that focused chiefly on crime and conflagrations.

wasteland’ of television speech (terramedia.co.uk)
Advertiser support of the traditional press led to coverage chiefly of high salience issues that do not correspond systematically to policies that most deeply threaten welfare. Media seek to produce audiences, chiefly by appeal to emotion, especially fear. By reporting on criminal corruption and high visibility waste the news media supported cynicism and distrust of politicians but not attention to the welfare and distributional consequences of lawful corruption. High salience issues may be more likely to be decided in a way that increases welfare, simply because they get so much attention from the press and citizens. High salience makes their resolution more democratic. In a Madisonian democracy we must grit our teeth and accept, at least temporarily, popular, welfare-reducing majoritarian errors. We need not accept, however, low-salience outcomes favoring elite interest groups at the expense of the people. Such outcomes should not be accepted because they are not legitimatized by any expression of or appeal to the popular will.

The constitutional role of the press as a check on government misbehavior has always been overblown. Although vigorous competition took place among the print media in the 18th and 19th centuries, the focus was chiefly on politics and criminal corruption rather than the effectiveness of the federal government in promoting citizen well-being. During most of this period the role of individual states overshadowed that of the federal government. Also, advertising revenue dominated newspaper incentives in choosing content. In the 20th century the new broadcast media, because of FCC restrictions on the number of competitors and the need to protect their licenses from challenges, took a middle-of-the road strategy with respect to
content. Middle of the road content tended to split the national audience about equally among the networks. None had much to gain and potentially a lot to lose by airing controversial and especially anti-government content.

The media and digital platforms have no malign intent; they are simply in it for the money. A fringe group cannot afford to buy access to a broad audience, but digital platforms can target small audiences that show interest in the content promoted by any given fringe group. The ability to promote extremist content is a natural byproduct of the process of producing specialized audiences for sale to advertisers. Digital media are much more efficient at this task than the older print and broadcast media. In addition, social media algorithms promote positive feedback to those interested in extremist views, because that increases advertising revenue and access fees from propagandists.

The greater efficiency of digital platforms in producing targeted audiences for advertisers has an unfortunate downside. People or organizations producing “information” (in a neutral sense of that term) intended to persuade susceptible audiences to endorse political or other positions that encourage socially harmful behavior can cheaply purchase access to their target audiences. While most people are inured to commercial product advertising and likely to understand that its content may not be accurate or balances, this is less true non-commercial information.

A person would likely have some subjective view as to the validity of their current understanding of a given subject, based on prior experience and learning. The arrival of new information should rationally be viewed as an opportunity to adjust one’s own prior understanding, based on the degree of credibility associated with their prior belief and the credibility of the
new information. That observation is the basis of Bayesian statistical analysis. Unfortunately, humans often suffer from a disability called “confirmation bias.” A person with confirmation bias tends to accept information consistent with her prior understanding, increasing her commitment to that view, and to reject new information with contrary content. Thus “fake news” may confirm objectively false beliefs. There does not appear to be an evolutionary explanation for confirmation bias and it may be an incidental side effect of an adaptive mutation.

For these and other reasons, the press is no longer, if it ever was, a check on the power and performance of government; it has become a source of empowerment for the disaffected and the uneducated and uninformed. Even the investigative press is not an effective watchdog in the face of welfare-reducing government policies and actions because they focus exclusively on causes of bad law rather than ways to police outcomes, and because they have no ability to act on the corruption they uncover.

All agents (including media editors) are unreliable to some degree because of self-interest, particularly if their performance is difficult to check or evaluate. James Madison relied on competitive elections to control this conflict of interest between political agents (representatives) and citizens. We can assume that the Framers understood that elections would be biased if the partisan influences on voter choices were themselves biased but saw no better choice. In the modern world, voters are woefully bad judges of the performance of their political agents.

Voters are incapable of monitoring the performance of legislators, at least on non-salient issues. Worse, many voters are easily influenced by demagogues and subject to various cognitive biases that are induced and exploited by influencers beholden to elite interests or extremists. The implication is that consumption choices, opinions, and voting preferences are
subject to insidious manipulation by anyone with the necessary resources. Hiroko Tabuchi in *The New York Times* offered a dramatic example of an elaborate propaganda program to convince Americans that fossil fuels are good for the country and debunking climate change theories.\(^{139}\)

The point of this discussion of social media and confirmation bias is that we now live in an age when older forms of political corruption, acting directly on government officials, has been supplemented by more effective forms of propaganda, which feedback on political candidates and current office holders through the medium of public opinion. This encourages policies and administration aimed at ideological goals other than public well-being.

**Congressional reform**

Congressional reform could be a path to mitigate corrupt legislation. On several occasions, Congress has found the means to impose discipline upon itself and its members. For example, a legislative branch agency, the Congressional Budget Office (CBO), “scores” proposed legislation with respect to impact on budget deficits. Members of Congress accept the result as an authoritative bipartisan restraint on deficit spending.

Another reform permits a suspension of normal procedure for trade bills, the so-called “fast-track” for ratification of trade agreements. Similarly, the Base Closing Commission (BCC)

reviews proposed retirements of domestic military facilities. The BCC produces a list of recommended closings, and the Congress votes on the package, rather than on individual closings.

Finally, both houses of Congress have rules restricting non-germane amendments to bills on the floor and restrictions on so-called “earmarked” bills proposed by individual legislators. Nevertheless, these rules are not effective. Corrupt bills often become law by riding the coattails of “veto-proof” spending bills in the form of non-germane amendments or line items inserted in committee or in conference. Examples appear above. Further, earmarks or “pork spending” may permit party leaders greater control of their own party and more effective means to attract members of the opposing party on a particular issue.

There is no solution to this problem because Congress cannot bind itself to follow its own rules next week, much less bind future Congresses. The most recent law on a given matter always trumps preceding laws. Moreover, majority party leaders can decide with impunity to ignore congressional rules simply by suspending them. No branch, court, or police agency can intervene.

For example, party leaders are in continuing negotiations with members of their caucuses to gain support for legislation that advances party aims. A crucial bargaining tool in the negotiations is the leaders’ ability to include bills favored by members (and the interests supporting those members) in the portfolio of must-pass party legislation. This mechanism is

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Cross reference drug and covid discussion.
necessary to party discipline and congressional leaders are unlikely to let procedural rules prevent its use.

**Secret ballots in Congress**
Another approach would be to make votes, both in committee and on the floor, secret. Prior to the 1970 Legislative Reorganization Act, all committee proceedings, including votes, were carried on behind closed doors. The advantage of this was to ensure that interest groups could not monitor the voting behavior of members, and therefore had reduced influence. The potential disadvantage was leaks from members and staff. Also, citizens could not monitor the voting behavior of their representative in Congress, although it is unclear whether many citizens make such enquiries. Of course, members could announce their votes, but would face a credibility gap if the vote could not be confirmed. Nevertheless, some version of credible secret voting might be helpful in reducing corruption and might be politically workable. It is notable that the Constitution of 1778 was drafted behind closed doors. Alexander Hamilton saw that “Had the deliberations been open while going on, the clamors of faction [special interests] would have prevented any satisfactory result.”

**Parliamentary system**
One of the remarkable features of Madisonian democracy is its competing independent but inter-dependent branches. Most democracies use a parliamentary or “Westminster” system. In the Westminster system, the prime minister is both head of government and the leader of the majority party or coalition in the legislature. The prime minister’s party controls the legislative agenda and executes the resulting law, directing a permanent professional civil service. In the

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United Kingdom there are three branches (monarchy, parliament, and supreme court) and the legislature has two houses: Lords and Commons. There is no written constitution, but by tradition the Commons has supreme power over all other branches. Gridlock normally is absent from such a system, except during political crises that occur when the parliament loses confidence in the prime minister.

Many scholars prefer a parliamentary system (with proportional representation) to a Madisonian system, precisely because it reduces gridlock, and because the power and reach of central government is no longer resisted. If the United States should adopt a parliamentary system, the disruption might also permit the admission of new and reorganized political parties. But when it comes to the role of well-organized interests and lobbyists, the situation in Britain and other parliamentary democracies is no different from the United States according to such scholars as Mirko Draca. Corrupt influences, corrupt practices, and important ill-organized interests exist everywhere. Party leaders still need to negotiate with members of parliament, and both candidates and parties crave financial and career support from interest groups.

The chief relevant difference between Washington and Westminster is that in Britain there is no ambiguity about assigning responsibility for policy and performance to the current majority party, which may give voters a clearer basis for their decisions in the next parliamentary election. While a parliamentary system might alleviate the frustrations associated with Washington “gridlock,” it is far from clear that it would significantly reduce corrupt laws or corrupt law enforcement by executive and administrative agencies in non-salient matters. The

142 Draca. Supra at n. 128.
party in power and sometimes the minority, in general, would retain incentives and numerous opportunities to cater to elite interests without regard to the public welfare. Finally, pursuit of a parliamentary structure in the United States would certainly require a massive constitutional amendment or a constitutional convention.

Article V of the U.S. Constitution offers two methods for amendment: congressional legislation ratified by a supermajority of the states, or a constitutional convention, for which the only precedent is the Philadelphia Convention of 1787. Constitutional reform in the U.S. is thought to be hampered by the grave difficulty of amending the Constitution. As noted above, unacknowledged amendment by the Supreme Court is far more common than the formal routes.

Michael Gilbert describes the implications of Madison’s Article V:

Entrenchment is fundamental to law. Grand documents ... entrench themselves against change through supermajority rules and other mechanisms... Entrenchment frustrates responsiveness, but it promotes stability, a rule of law virtue extolled for centuries. ... Entrenched law is difficult to change. Entrenchment makes changes that do take place incremental. As entrenchment deepens, the scope of potential change to law collapses on the status quo. ... [W]hen we entrench law... we confine any changes ... to small steps. ... When voters’ preferences evolve consistently in one direction, entrenched law eventually becomes as unstable as ordinary law, only less popular. Thus, entrenchment buys neither stability nor responsiveness. Because entrenchment confines legal change to incremental steps, amendment cannot correct the problem. This recasts questions of
legal design in new light, and it may explain why some constitutions endure while others collapse.\footnote{Gilbert, Michael D. “Entrenchment, Incrementalism, and Constitutional Collapse.” \textit{Virginia Law Review} 103, issue 4 (2017).}

It seems that most of the constitutions of U.S. states and other democratic countries do not have high barriers to amendment. Mila Versteeg and Emily Zackin study these other constitutions and find that:

The empirical reality is that the majority of democratic constitutions today are subject to frequent revision and are therefore ill-equipped to facilitate the entrenchment of their contents. To explore the logic of these un-entrenched documents, we identify the historical periods in which different geographic regions moved away from highly entrenched constitutions, and we examine the political contexts of these transformations. We find that, in each context, constitution-makers were attempting to limit the discretion of constitutional interpreters and implementers by drafting highly specific texts and by updating them in response to continually changing circumstances.\footnote{Versteeg, Mila, and Emily Zackin. 2016. “Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design.” \textit{American Political Science Review} Vol. 110, No. 4. November. doi:10.1017/S0003055416000447}

\textbf{Line-Item Vetoes}

Why do presidents not simply veto corrupt welfare-reducing legislation? The line-item veto is politically as well as constitutionally controversial, implicating the separation of powers as well as the legislative process. One point of departure is to note that the governors of most states enjoy line-item veto power, in varying forms, and that the Supreme Court has long enjoyed and exercised a line-item veto in reviewing the constitutionality of federal legislation. For the Court,
the ability to declare a line item unconstitutional depends on the Court’s view of the item’s “severability” from the balance of the statute.

Whatever theoretical changes in the relative powers of the branches or in legislative log-rolling may result from line-item veto authority, it does not seem to have engendered cataclysmic consequences in the U.S. states that have adopted it, according to John R. Carter and David Schap. Carter and Schap reviewed empirical studies and found that they “provide little or no evidence that total spending, budget outcomes, or executive power are substantially affected in general by item-veto authority.”145 Similarly, Philip G. Joyce and Robert D. Reischauer cast doubt on whether the Line-Item Veto Act would have had the dramatic effects on expanding executive power or reducing the federal deficit as Members of Congress predicted.146

Most Presidents have wielded their veto power sparingly. This is not difficult to understand. First, the Supreme Court in Clinton v. City of New York (1998) denied the President line-item veto power. That enables Congress to package corrupt legislation in bills that the President cannot veto without endangering his own agenda or even the health of the Republic. Further, Presidents are in much the same position as congressional party leaders—they are in continuing negotiations, a repeated game with Congress, its leaders, and its members as they seek to advance their own legislative agendas. If they adopted a policy of vetoing welfare-reducing corrupt legislation, that might forestall the passage of such legislation but only at the price of


depriving themselves of a key negotiating tool. In addition, Presidents are often beholden to the same interest groups that influence Congress. Even Presidents who cannot succeed themselves have loyalties to aides, appointees, and nowadays, family members with political ambitions requiring elite interest support.

The Unitary Executive
A realistic appreciation of the political constraints facing any President also undermines a proposed reform aimed at malfeasance in the federal administrative bureaucracy, which includes cabinet departments as well as independent agencies. Justice Elena Kagan, then a Harvard law professor, discussed the idea in a 2001 Harvard Law Review article.147

The premise of the unitary executive (which Kagan calls “Presidential Administration”) is that most so-called “independent agencies” such as the Federal Communications Commission (FCC) or the Securities and Exchange Commission (SEC) are in thrall to the interests they regulate, producing rules and regulations harmful to public well-being.

The Ford and Carter administrations abolished or pared back many regulatory agencies. This was due in part to activism by the Senate Judiciary Committee, then chaired by Senator Ted Kennedy. In almost every case, the result of deregulation was to improve consumer welfare through lower prices, better service, or both.148 Unfortunately, President Trump focused on deregulation of environmental damage caused by toxic emissions into water and air and exposed protected environments to commercial exploitation. Unlike the earlier wave of deregulation,


which relied on entry and competition to protect consumers (and erred only when deregulation
was extended to banking and finance), Trump’s policies reduced welfare by making the environ-
ment less healthy for humans. Competition in commerce does nothing to remedy environmen-
tal damage.

The evidence from the earlier wave of deregulation is consistent with the premise for
abolition of the independent administrative agency system more generally. Kagan’s suggestion
is for the President simply to assume the duties of the independent agencies under Article II of
the Constitution. For this to succeed, the Supreme Court would have to reverse or distinguish
its holding in Humphrey’s Executor v. United States (1935), a Depression Era decision upholding
Congress’s right under Article I to delegate some of its powers to the agencies without thereby
granting supervisory power to the President.

The Court, with its too frequent lack of logic, found that Congress could limit the Presi-
dent’s ability to remove the Chairman of the Federal Trade Commission to removal “for cause,”
because the FTC’s authority mixed executive, legislative, and judicial functions, and thus “can-
not in any proper sense be characterized as an arm or an eye of the executive” ... and “must be
free from executive control.” Members of Congress would then have reduced influence on pol-
icy making by the agencies. Elite interests may face greater resistance within the executive
branch than in the legislature. Naomi Rao offers an analysis of the negative impact of Humph-
rey’s Executor on the Madisonian separation of powers.149

New York University Law Review 90, no. 5. pp 1463-1526.
However, giving the President responsibility for the work of the independent admin-
trative agencies runs into the same difficulty as relying on the President to veto corrupt legisla-
tion. The President has political reasons to permit some corrupt activity that an impartial moni-
tor would lack. Further, there are many agencies, parts of the executive branch, where congres-
sional influence exercised through oversight and appropriations dominates presidential control.

Direct democracy
In its “golden age,” Athenian democracy relied on direct government by the people. All citizens
could vote on matters of policy. Functionaries, including military leaders, were either directly
elected or selected at random from the community for very brief terms.

This system was—and still is—much admired by political philosophers. It eliminates or at least
reduces to a minimum the problem of agent corruption. However, the Athenian system was
flawed in several ways. Despite numbering in the thousands, the Athenian Assembly was not
inclusive—noncitizen residents, women, and slaves could not participate.

The Assembly suffered from the natural defects of “crowd-sourcing”—a weakness for
impulsivity and a tendency to be guided by emotion and demagoguery rather than critical
thinking. A standard example is the Athenian Assembly’s disastrous decision to invade Sicily in
413-415 b.c., described by Thucydides (c. 411 b.c.),150 and interpreted by historian Alan Ryan.151

Briefly, the Assembly was moved by a demagogue to invade Sicily and a fleet under the
command of the demagogue set sail. While the fleet was en route, the Assembly was

150 Thucydides, supra, at n. 70.
persuaded to change its mind and recalled the fleet. The message arrived too late to stop the invasion, which turned out to be a disaster for Athens. The fleet’s commander was recalled to Athens, where he would have faced the most severe penalty: exile from the city. Instead of returning he defected to a rival city (Sparta) and went on to a successful political and military career.

Direct democracy has avid advocates even today. Shaun Bowler & Todd Donovan provide a survey of the field. Modern technology offers potential solutions to the problem of voter numerosity. Political scientists such as James S. Fishkin have offered methods (and some evidence from experiments with a “deliberative” decision process) designed to overcome voter ignorance, emotional motivations, and free rider incentives. Of course, any direct process in practice would be subject to (and would rely in part upon) persuasive advocacy by well-organized and well-funded interests. Bias in favor of those interests is the likely result.

Political scientist John P. McCormick, channeling some of Niccolo Machiavelli’s lesser-known work, has suggested reliance on a system of selecting legislative representatives at random from among eligible citizens, excluding those from the elite class. That may preserve the

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advantages of having full-time representatives while eliminating corrupting incentives related to election and re-election campaigns.

However, random selection would not eliminate corrupting influences arising from im-balanced interest group lobbying. Juries may be sequestered, but not legislators. A citizen selected at random for a brief term in Congress, with no chance of serving a second term, would be particularly dependent on interest group sources of information and professional advocacy.

Vladimir Kogan, et al. argue, based on ballot initiatives in U.S. states, that direct democracy can have short-term disruptive effects on public service performance.155 Shaun Bowler, et al. report that:

Although some high-profile ballot measures, especially those related to ‘moral’ issues, may induce people to vote, most ballot measures are unfamiliar to voters and so have a limited effect on participation. Rather than mobilizing voters, the more choice confronting voters faced with ballot measures is whether to “roll-off” or abstain from voting on them. The subsequent decision, how to vote, is intimately related to the decision over whether to vote and is largely motivated by the same factors.156


Daniel Smith and Caroline Tolbert argue that although direct democracy may not be an ideal way to make decisions, it is a highly effective educational experience for citizens. That suggests its greater use on the state or local level. Professors Michael C. Dorf and Charles F. Sabel describe a variation on direct democracy called “demographic experimentalism,” in which power is devolved to local, state, or regional authorities, who then exchange information useful in discovering best practices.

They write, “This information pooling, informed by the example of novel kinds of coordination within and among private firms, both increases the efficiency of public administration by encouraging mutual learning among its parts and heightens its accountability through participation of citizens in the decisions that affect them. In democratic experimentalism, subnational units of government are broadly free to set goals and to choose the means to attain them.”

John S. Dryzek et al., writing in Science, argue that,

Uncivil behavior by elites and pathological mass communication reinforce each other. How do we break this vicious cycle? Asking elites to behave better is futile so long as there is a public ripe to be polarized and exploited by demagogues and media manipulators. Thus, any response has to involve ordinary citizens; but are they up to the task? Social science on “deliberative democracy” offers reasons for optimism about citizens’ capacity to avoid polarization and manipulation and to make sound decisions. The real


world of democratic politics is currently far from the deliberative ideal, but empirical evidence shows that the gap can be closed.\textsuperscript{159}

Despite this “optimistic” view, direct democracy at the federal level seems ill-suited to addressing the problem of political corruption.

**A Constitutional Court**
The United States lacks a constitutional court separate from its judicial court of last resort. According to Article III of the Constitution, the Supreme Court was to be a court of last resort for the resolution of disputes. John Marshall, Chief Justice of the Supreme Court from 1801 to 1835, believed that his Court should also be a constitutional court with the power to strike down federal legislation that was inconsistent with the Constitution.

As noted above, in *Marbury v. Madison*, the Court awarded itself the right to a line-item veto. At a stroke, this made the judiciary a coequal branch of government. Congress might have challenged this usurpation by starting an Article V amendment process but did not.

Article III of the Constitution sets up federal courts. Federal courts, while not immune to human failings, have been trusted by the public—at least more so than the other two Madisonian branches. The courts could be helpful in stemming lawful corruption if they were competent and willing to police not just the infringement of rights, but also infringements of well-being.

However, Article III courts have assumed they have no power to block laws that merely reduce well-being. To correct this, we need an “independent” monitor, with the power to assess

and veto legislation and agency policy that does not advance the aims of government set out in the Preamble. Such a function could supply Madisonian inter-branch discipline focusing on welfare reductions produced by elite corruption.

Article III does not require any judge to have legal training, but the Supreme Court has always been made up of lawyers. The Court’s appellate role makes the appointment of lawyers natural. Other countries, however, often have separate constitutional courts, to which non-lawyers are appointed. France, for example, has the **Conseil Constitutionnel** (Constitutional Council) on which former presidents of the Republic and other distinguished citizens sit. The Conseil rules on constitutional questions referred to it by any legislator, agency, or citizen.

Because it is made up of lawyers, the U.S. Supreme Court approaches constitutional questions much as it approaches appellate review of cases: focusing chiefly on “matters of law” which are either procedural or involve statutory interpretation, giving much emphasis to precedent, and mostly ignoring substantive effects on welfare. Worse, for present purposes, it is constrained by “legal reasoning,” a mode of justification for changes in law in which several factors are alleged to motivate or limit some prior action or doctrine, with respect to which the Court may now assign different subjective weights. The late Justice Antonin Scalia described the decision-making process quite vividly in a *University of Chicago Law Review* article.160

A 2015 Supreme Court decision, *Michigan v. EPA*, dealing with Environmental Protection Agency (EPA) regulation of mercury emissions from coal-burning power plants illustrates the

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problem. The question was whether the EPA should consider costs in deciding to impose regulation. It was undisputed that the costs of compliance with the regulation would exceed $10 billion per year, while the benefits would be well under $100 million per year. An assessment of the effect on aggregate well-being, on these facts alone, would lead one to reject the proposed regulation. However, the Court could reach this commonsense result only through a tortuous analysis of the Clean Air Act, the Administrative Procedure Act, canons of statutory interpretation, and other legal materials.

In the end, the Court’s legal analysis rests in large part on the simple observation it would be “unreasonable” for the EPA (or the Congress) to ignore cost. This, despite numerous instances in which Congress has mandated explicitly that costs be ignored in environmental matters, notably in connection with endangered species. The 1973 Endangered Species Act was upheld by the Court in *Tennessee Valley Authority v. Hill* (1978) holding, “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”

A more catholic constitutional court would consider substantive analysis of effects and treat “facts” as within its competence. What this suggests, unfortunately, is that the U.S. Supreme Court is unlikely to be comfortable asserting a position that would be perfectly natural for the French Conseil—for example, that a statute was unenforceable because its substance or effect

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was inconsistent with the general welfare standard in the Preamble to the Constitution, or with its spirit. Still, the modern Court has “found” all sorts of new rights and entitlements in the Constitution just as the Marshall Court “found” a momentous new right for itself.

Whether the U.S. courts would accept economic well-being and collective action pathology as a new dimension of the nebulous concept of due process may be the key to tacit acceptance of a monitor role. Richard Hasen (2012) advocating such a development, admits that “[d]espite longstanding public and scholarly concern about rent-seeking, I am aware of no court that has ever considered whether national economic welfare could be considered a sufficiently important (even compelling) government interest that could justify [anti-]lobbying (or other) laws.” Here is part of a forlorn dissent by Justice Stevens, channeling public choice theory, in *Citizens United*:

> When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, “provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation.” … Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering,

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and the door may be opened to a type of rent seeking that is “far more destructive” than what noncorporations are capable of.\textsuperscript{164}

The narrow traditional perspective of the U.S. Supreme Court is unfortunate because the Court represents the least controversial of the possible means to establish a credible monitor function within the existing Madisonian system. As John Marshall demonstrated, no formal amendment is needed for the Court to assert such a power, although a modern Court would doubtless move with greater reserve than did Marshall. One way to begin might be for a president to appoint a distinguished non-lawyer to the Court. However, noted scholars Francis Fukuyama and Einer Elhauge both have argued against offering the Court a wider scope of review.\textsuperscript{165}

The power of large corporations is supposed to be regulated by antitrust law enforcement. For about the last half-century this has meant only economic or \textit{market} power that results in harm to consumers. Populists such as Zephr Teachout argue that the original purpose of antitrust law was to restrain excess \textit{political} as well as economic power.\textsuperscript{166} As recently as 1945 Judge Learned Hand, in his famous \textit{Alcoa} monopolization opinion, endorsed this view:

\begin{quote}
Congress ... did not condone “good trusts” and condemn “bad” ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the
\end{quote}

\begin{footnotes}

\textsuperscript{165} Francis Fukuyama (2014) and Einer Elhauge (1991) both have argued against offering the Court a wider scope of review.

\textsuperscript{166} Teachout, supra, at n. 107.
\end{footnotes}
great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.167

Economist Carl Shapiro argues that, although effective merger control in recent decades has been lacking, antitrust law and institutions are ill-suited to contain the political or social power of large corporations.168

**Agencies that already assess policies**

Other solutions to the problem of creating a legitimate and credible monitor to serve as a substantive filter for legislative and administrative corruption seem to require a constitutional amendment. (Anything at all can be done, of course, without an amendment if none of the branches opposes it.) Any number of existing agencies, including the Office of Management and Budget (OMB), the Congressional Budget Office (CBO) and the Government Accountability Agency (GAO) have the necessary expertise to make such judgments but lack not only the authority to veto legislation or administrative actions but also the political legitimacy to survive resulting push back. Some better method for appointing monitors would be needed, such as presidential appointment with supermajority senate confirmation.

Those distressed by “gridlock” in Washington today clearly will be even more distressed to consider yet another locus of veto power over legislation. The first response to this is that veto points in the legislative process have proliferated precisely because of systemic corruption;

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each veto point offers an opportunity to extract payments from elite interests, like the extortionary highway roadblocks run by “rebel” groups in lawless nations. Alternatively, one can argue that from a Madisonian perspective it is not so obvious that gridlock is a terrible thing. It is a natural result of the checks and balances established to protect the people from ill-considered laws.

Further, if a fourth branch of monitors existed, it would deter efforts to enact corrupted legislation likely to produce a monitor veto. Paraphrasing Oliver Wendell Holmes, Jr., (1897) expectations of what sports referees will do deter most player rule infractions, not official action on every latent player impulse. Holmes wrote, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”

Grand Juries
The grand jury is, at least in theory, independent of the executive branch, the legislative branch and even the judiciary, though it interacts with each. In centuries past the grand jury has from time to time bravely interceded to resist excesses of the executive, for example in the case of newspaper publisher Peter Zenger in colonial times, but today it more commonly is accused of being a mere rubber stamp for prosecutors.

With a membership between sixteen and twenty-three citizens subject to the same qualifications as members of a petit jury panel, the federal grand jury is supposed to protect potential criminal defendants from abuse by politically appointed prosecutors. The grand jury votes on the sufficiency of the prosecutor’s evidence to justify an indictment, a majority but at

169 Holmes, supra, at n. 37.
least twelve votes being the minimum required to indict. Proceedings are conducted following Title III, Rule 6 of the Federal Rules of Criminal Procedure, which is a product of the legislature. A judge of the local district court has limited supervisory duties and issues subpoenas on behalf of the jury. Federal prosecutors have the option to bring criminal actions either directly to the district court or to the grand jury. At the state level, the duties of grand juries sometimes extend to civil matters. One state, California, has a “civil” grand jury in each county concerned with investigating and recommending local government efficiency or policy reforms.

The essential elements of the traditional grand jury for present purposes are its common law role of protecting citizens from the power of the state, its status as an agency outside the formal Madisonian framework, its composition of up to twenty-three ordinary citizens chosen at random, and its reliance on a professional staff (prosecutors and their staffs) to coordinate investigations. The work of the grand jury is defined by common law and statute. The Congress could create a grand jury tasked with discovering and “indicting” corrupt law, bypassing the need for a constitutional amendment.

There are some obvious problems with relying on repurposed grand juries to serve as umpires. The power of a grand jury lies in denying permission for the state to prosecute an alleged criminal when the prosecutor has insufficient basis to justify a trial. Even “civil” grand juries are limited to making reports and recommendations. Congress would have to give a monitoring grand jury the power to veto a law or regulation on the basis that the law reduced the “general welfare.” That is a lot of weight for the grand jury institution to bear—a change from protecting individual citizens from abuse of state power to protecting the people at large from abuses of state power.
Lessons from the past
There are at least two precedents for a monitoring role in a republican form of government. One is the “Council of Revision” that existed briefly in New York State under its first (1777) postcolonial Constitution, Article III of which said:

And whereas laws inconsistent with the spirit of this Constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the Supreme Court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law. 170 [emphasis added]

The other and more substantial example of an official monitor charged to protect the interests of the people from the self-interest of the legislature and the executive is the “Tribune of the Plebs,” an elective office under the Roman Republic (c. 500-27 b.c).

The Oxford Classical Dictionary describes the Roman “Tribunate” as follows:

The tribuni plebis (or plebi), ‘tribunes,’ were the officers of the plebs first created ... traditionally in 494 b.c ... The tribunes were charged with the defense of the persons and property of the plebeians ... elected by the plebeian assembly and exercising their

power within ... the city, the tribunes could summon the plebs to assembly and elicit resolutions (plebiscita). They asserted a right of enforcing the decrees of the plebs and their own rights ... They possessed ... a right of veto against any act performed by a magistrate ... The full acknowledgement of their power came with the recognition of plebiscita as laws binding upon the whole populus and not just the plebs ... Tribunes were first admitted to listen to senatorial debates; at least from the 3rd cent. b.c. they had the right to [convene] the senate; ... In the first surviving contemporary discussion of the tribunes, from about the middle of the 2nd cent. [b.c.], Polybius ... states that ‘they are bound to do what the people resolve and chiefly to focus upon their wishes.’ Succeeding years saw the tribunate active in the pursuit of the people’s interest and the principles of popular sovereignty and public accountability, as evidenced by the beginning of the practice of addressing the people in the forum directly, the introduction of the secret ballot in assemblies, concern with the corn supply agrarian legislation, ... and above all by the legislation and speeches, for which contemporary evidence survives, of Gracchus (123–122 b.c.)... Active tribunes came increasingly to be associated with the particular interests and grievances of the urban plebs ...

Famously, J.-J. Rousseau used a romanticized version of the Roman Republic as a touchstone of his 1762 Social Contract.171

Briefly, the socioeconomic class called the “plebs” became restive under the tyranny of the aristocratic families that collectively ruled the Roman Republic and staged a credible boycott. The aristocracy and the plebs negotiated a lasting settlement that granted substantial political power to the elected representatives of the plebs. The Plebeian Assembly held Tribunes

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of the Plebs to nonrenewable one-year terms. The Tribunes do seem to have sought to protect the interests of the plebeian class for several hundred years.

To be fair, the earliest surviving account of the Tribunate, by Polybius (c. 160 b.c.), paints too rosy a picture of the tribunes’ effectiveness. In addition, it would be a mistake to regard the plebs as “the people” in a modern sense. As in classical Athens, women, slaves, and (perhaps) those who lacked land ownership were excluded, and participation in the Plebeian Assembly was governed by membership conditions.

Our understanding of the political operation of the early Roman Republic is limited; most surviving materials were created centuries after the fact. Still, what we do know of the Plebeian Tribunate offers a useful model for a modern umpire that might reduce the social cost of political corruption, using the veto power. The relevance of the Tribunes to mitigation of modern systemic corruption is twofold: The Tribunes protected the people (or at least the plebs) from executive and legislative actions adverse to plebian interests, and they did so ex post—after the legislation or action was enacted or ordered.

John P. McCormick explores the advantages of reviving the Tribunes of the Plebs as a modern solution to the problem of political corruption, as does Eric Posner, who supplies a political economy perspective on the Roman constitution, including the tribunes.

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173 McCormick, supra at n. 125.
Section 5- Guardians

I have hinted broadly, and I hope convincingly, that we need an effective mechanism to forestall the effects of lawful corruption. I use “Council of Guardians” as a working name for new fourth branch of government. For the sake of concreteness, and in emulation of John P. McCormick, I set out a discussion of some of the candidate features of such a new or fourth branch of the federal government designed to reduce the impact of legislative and administrative error and political corruption on the well-being of the people. In political terms, the illustrative proposal is intended to counter the influence of elite interests in the legislature and the administrative process with a legitimate democratic institution representing the principal victims of elite power, the middle class.

As with any Madisonian system, the effect of such a new branch would be felt chiefly through changes in the incentives of the remaining branches. The Constitution and its amendments leave many details up to future implementers. If we are to follow this tradition, only the most important provisions should be included in the Amendment. Which ones are most important? Articles 1 and 2 in the illustrative amendment below are the core of my proposal.

Edward L. Rubin and Cary Coglianese have recently published law review articles that clearly articulate the lapses of governance that form the basis for my indictment of the current

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McCormick, supra at n. 125
structure of the federal government and describe in some detail the responsibilities that should be assigned to the new branch of government that I propose.  

Rubin does not however suggest a structural solution, nor does he assess alternative reform proposals. The solution is not complicated: we need an organization (a new branch of government) that has the capability to analyze the effects of law, policies, procedures, and other actions of the federal government and to identify those that pose a threat to the well-being of citizens, and especially the poor.

If government were immunized to elite influence, fewer resources devoted to influence would be necessary or worthwhile, and the extent of corrupt influence would decline. The immunity need not be 100% effective to improve well-being. It is not possible, or even desirable, to make elected officials immune to elite influence because that could be done only by making them immune to all influence. However, it is possible to reduce the cumulative and escalating adverse impact of current elite corruption on everyone, elites and non-elites alike. The key is to rule out elite-favored ends that reduce the size of the pie. The following text illustrates the sort of improvements that need to be made to Madison’s democratic structure.

Amendment to the Constitution of the United States of America

The United States Council of Guardians

Article 1. Establishment and powers of the Council

(a) Promotion of the general welfare of the people being chief among the purposes of government, there is established a Council of Guardians, which shall not be among the branches established by Articles I, II or III of the Constitution nor among the independent agencies established by Congress.

Making the Council explicitly a fourth branch is necessary to emphasize its independence from the other branches, or more generally its role in Madisonian checks and balances. If the Council were merely a subordinate agency of the executive or legislative branches, the judiciary would likely limit its powers to those granted by articles 1 or 2 of the Constitution.

The Council’s authority is limited to the “general welfare” clause of the Preamble, excluding the remaining enumerated goals, to keep its mission focused and its power within
bounds. Lawful corruption affects official behavior on many issues, not just those that reduce well-being. Issues such as abortion, national defense and foreign policy are targeted by interest groups, but when the effects on well-being are indirect and difficult to measure the Council should avoid intervention to gain and retain credibility.

(b) The Council may veto any action, procedural requirement, order, or part thereof, having the force of law, by the President, or any other officer of the Executive Branch or any independent agency, judged likely to reduce the well-being of the people or that of the poorest citizens.

Such phrases as “general welfare,” “well-being,” and the like are not well defined.

Within the founding documents the term whose meaning best serves as a bridge between the terminology of 1788 and today is “happiness.” Happiness is something that people “pursue” according to the Declaration of Independence and it is one of the purposes of government to facilitate that pursuit according to the Preamble to the Constitution.

Current social science and neuroscience shed a great deal of light on what that means as a practical matter and how to measure it. The science of happiness or well-being is not settled in the same way that we think (incorrectly) of physics or chemistry as “settled” science, but it is certainly no less settled than the proper application of law to disputed matters by the courts.

“The general welfare” could be formally defined in the Amendment in terms of the average or aggregate well-being of the people, with the possible addition of other characteristics of its distribution. Put in distributional terms, the Council’s purpose is to increase the mean or median well-being of the citizens and to reduce, or at least not increase the variance (spread) of that distribution.
The suggested clause forbidding policies that make the poor worse off could be left implicit in the general welfare purpose, because well-being includes components of altruism and policy preferences for living in a just society that affect non-poor citizens. Such values should count in the Council’s analyses to the extent that the people are willing to pay for them.

Economists have long tried to measure well-being by proxy, using income or the consumption of marketed goods and services. The basis for relying on this proxy has been the difficulty of measuring other components of well-being such as the availability of non-market goods and services, the distribution of wealth and income, and the satisfaction of preferences for procedure and justice. The Council should try to measure well-being as directly as possible using modern social science methods, and to include happiness arising from non-market goods and services to the extent possible. For many purposes what matters is the effect of an act or order on the direction (plus or minus) of the expected change in well-being, and that can often be inferred from the effect on income and its distribution—at least if there is no clear impact on other factors affecting well-being. Quantifying the size of the effect is more difficult, but an approximation on the order of “large” or “small” may be sufficient. Although well-being is different from income, the two are highly correlated.

For clarity, although the poor merit special attention and protection, they are not the rational targets of elite corruption; the poor have little worth stealing, and the harm done to them by corruption is chiefly the result of systemic efficiency losses. The middle class still has a collective share of half or more of the pie—an amount worth stealing through, for example, corrupted tax, trade, and regulatory policies. Still, expenditures that may result from corrupt influences or error may fail to benefit the poor because they are structured to direct benefits to
non-elite but non-poor citizens. For example, subsidies designed to increase teachers’ salaries might omit provisions directing special funding for teachers serving poverty-stricken areas. Or, tax and tax expenditure policies aimed at subsidizing private colleges might omit trade and occupational training schools.

The point of this clause, in contrast to my 2016 paper, is to extend the Council’s jurisdiction to welfare-reducing actions of the executive branch and the so-called “independent agencies.” Former president Trump’s sometimes successful attempts to satisfy interest group asks and his own whims through executive decrees have gone mostly unchecked by Congress. Only the judiciary supplied a restraint on executive corruption. Unfortunately, the judiciary is hampered by its own limited authority. The judiciary can only ban violations of statutory and constitutional law; it has no authority to ban executive action that reduces public welfare. Further, the judiciary is often ineffective because its own appellate review processes take so long.

A last point: it is not the Council’s responsibility to decide what if any form of corruption led to a legislative or executive action that threatens well-being or just distribution. An action that is simply careless is no less harmful on that account than one that has resulted from political corruption.

Just as it might be wise to require a super-majority of the Senate to confirm a Supreme Court justice, and a super-majority of the Supreme Court itself to overturn a law, so it may be prudent to require a super-majority of Guardians to overturn a welfare-reducing law, policy, or procedure. The effect of super-majority requirements is to limit changes to those enjoying a broad consensus.
(c) For purposes of this Amendment, law shall mean any provision or part thereof, or related provisions of the United States Code, the Code of Federal Regulations, or any Bill or part thereof enacted during the preceding congressional session, whether codified or not.

This clause is technical, attempting to define “law” for purposes of vetoing congressional actions. Maybe it is not necessary, depending on how the Supreme Court would interpret the word in a dispute. The clause’s substantive content, which also appears in the previous clause, supports line-item vetoes by the Council. A line-item veto is the ability to remove a single provision or provisions from a law while leaving the rest of the law intact. In jurisprudence this is known as “severability.” In dealing with enacted bills, it may be preferable to limit line-item veto power to nongermane or severable provisions because the elimination of a relevant provision may change the effect of the law on well-being. On the other hand, it seems obvious that the Council should consider such relationships: the effect on happiness depends not merely on the extinction of a particular provision of law but also on all the significant effects on other provisions of the same and other laws.

There are many difficult timing and other technical issues associated with this broad definition of “law.” Perhaps Statutes at Large (or other codes) could be specified instead of or in addition to the United States Code. The Council is not allowed to veto bills before they become laws, which limits the Council’s jurisdiction during a session of Congress. However, there may be a case for allowing the Council to veto bills that are signed by the president prior to the end of a session if they present a clear and immediate threat to well-being.

(d) The Council’s veto under article 1(b) shall have immediate effect when Congress next adjourns, except that a two-thirds majority in each House of Congress may override the Council’s action.
Some enacted bills, order, policies, or procedures may require emergency action if the effect on well-being is immediate and unmistakable and clear in advance, especially if private expectations of enactment have begun to produce adverse welfare effects. Such a provision could be added to the text above. Actions and orders by the executive branch and the agencies typically have immediate effect and may require immediate intervention. The independent agencies make laws (policies or rules) and enforce them. The courts may ban policies or actions that are contrary to statutory law or the Constitution but lack the power to ban those policies or actions that are “merely” welfare-reducing.

**Article 2. Membership of the Council of Guardians**

(a) Any citizen of the United States, having voted in six of the last seven federal elections and meeting other standards, established by law, of character, education, and mental fitness may apply to join the Council.

The requirement to have consistently voted suggests serious engagement with public policy, and is readily verifiable. An Amendment is not the place to set out more detailed qualifications. That is a job for Congress. While it is crucial to have Guardians selected by lot to ensure against elite influence, it is also important to choose Guardians who are equipped with a “judicial temperament.” Expertise in policy analysis can reside in the Council’s staff.

(b) A new Guardian shall be selected by lot from among qualified applicants within 45 days of a vacancy, for a term to begin no later than 90 days after selection. The qualifications of a candidate shall be reviewed upon first application and again upon selection. The Council shall decide whether a selected candidate is qualified.

I am assuming here that the job of a Guardian is sufficiently desirable and well-compensated that many thousands of citizens will go to the trouble of applying, even though the odds of being selected are small. To avoid the influence of elite or partisan interests, it makes sense
to let the Council members themselves decide on the adequacy of qualifications, rather than
relying on Senate confirmation.

(c) Guardians shall serve a term of 15 years. Shorter terms shall be awarded to mem-
bers of the initial panel and those initial members awarded terms of five years or less
may be renewed.
(d) The Council shall have as many Guardians as Congress may by law provide, but not
fewer than nine nor more than nineteen.
(e) Guardians must swear or affirm an oath of office prescribed by law.
(f) For life upon their assumption of office, members must renounce and divest to the
Treasury all income from any source other than as provided by this Article. Debts
owed by a Guardian prior to appointment shall be settled by the United States and re-
imbursed by the Guardian over time. Assets held by a Guardian prior to appointment
shall be converted to obligations of the United States.
The point of this clause is to prevent undue influence arising from the financial affairs of
members. If a candidate has net indebtedness more than an amount capable of being liqui-
dated by salary deductions, the candidate should be disqualified.

(g) Guardians shall receive a salary for life, not less than twice the salary received by
the highest-paid Member of Congress, which Congress may not reduce, except that
Congress shall by law provide for Guardians’ and former Guardians’ salaries to be in-
creased or decreased annually by the increase or decrease in the real per capita in-
come of citizens of the United States.

This clause gives the Guardians the same salary protection as federal judges, but adds
an option for a kind of incentive pay related to the performance of the economy. The Council is
unlikely to have a measurable impact on year-to-year fluctuations in economic performance,
but should have a positive longer-term influence.
(h) Guardians may receive limited and incidental income from appreciation in value of personal and residential real property occupied by them, gifts of nominal value unrelated to their duties, and interest on loans made to the United States, as Congress may by law provide.

It is desirable to close as many loopholes as possible in the procedures preventing elite influence on Guardians, but this sort of detail is usually left to implementing legislation. On the other hand, legislators’ own economic and political welfare is at stake in the empowerment of the Council. As discussed above, this may be a reason to postdate implementation of the Amendment.

(i) The Council shall establish reasonable rules and procedures to protect its members and staff from political influence in connection with matters under review.

It may seem trivial but a lot of elite influence takes place in Washington’s social milieu. Guardians should be discouraged from too-active a social life among the political class.

(j) Guardians may be removed for cause by a two-thirds majority of the Council or by impeachment by the House and removal by the Senate after trial, and Congress may by law provide for the dissolution of such Guardian’s rights or obligations under this Article.

This provision describes a selection design that is practical and politically legitimate. The Council would have a staff devoted to a mechanical review of applications to join the selection pool and special staff to review with great care the qualifications of persons selected by lot to serve. As noted, the expectation is that the selection pool would have thousands or tens of thousands of names. A person selected by lot from the pool may decline to serve, as considerable time may pass between application and selection.

The composition of the Council, method of selection, and number of Guardians are each critical to issues of political independence, public trust, and competence. Having Guardians elected invites political corruption. Having Guardians appointed by, say, the President with
Senate confirmation invites partisanship. Having only a few Guardians supplies potential pressure points for influence; having many Guardians complicates discourse and may unduly potentiate the Council’s professional staff. The method described in Article 2 produces a Council of fifteen Guardians, with new appointments each year to fill vacancies. If new appointments were made four times a year the Council would have sixty Guardians; three appointments per year yields a membership of forty-five, and so on. Sixty or forty-five Guardians seems unwieldy for *en banc* discourse and decisions; fifteen may be the lower end of the range needed to discourage corrupting influences, particularly if all decisions to veto need to be *en banc*. Legislation may best address such issues as the use of panels, *en banc* review, and supermajority requirements.

While it may be helpful to include a cap on applicants’ prior year(s) earnings or wealth to exclude members of the elite, the restriction on lifetime income makes it very costly for those with high private sector incomes from wealth or employment to serve. Even if it did not, the small number of such persons makes it unlikely that they would be selected in a random assignment. It is tempting but unwise to require relevant ability or training. (None is needed for the Supreme Court.) Eligibility to become a potential member must be designed in a way that preserves the political legitimacy of the Council. Our best example is the petit jury. Even though the quality of decisions by petit juries may be variable, even criminal defendants seldom question their legitimacy.

Choosing members by lot from an exceptionally large panel invokes the legitimacy of modern juries as well as Athenian direct democracy. Imposing requirements (such as education) on the population of the panel tends to undermine legitimacy by suggesting elite bias. One
middle ground might be random selection from a panel of middle-income or middle-wealth citizens, with moderate educational requirements such as at least two years of postsecondary schooling. The suggestion in Article 2 would likely produce members well informed about public affairs, engaged, and educated, because such people are more likely to vote. Existing studies of voting patterns by age, education, and the like will shed light on these issues. The details in the illustrative amendment imply a minimum age of at least thirty. There should likely be a maximum age as well.

An alternative procedure combines nomination with random selection: If the President, the Vice President, the Chief Justice, the Speaker of the House, the Majority Leader of the Senate, and the Minority Leaders of the Senate and House each nominate ten (10) candidates within forty-five days of a vacancy on the Council, that would yield a pool of seventy nominations from which an individual could be chosen at random.

Salaries for Guardians must be set considering the effect of the restriction in clause 1.2.(f) and (g) and the need to attract professional and other citizens away from careers that cannot be rejoined after service. Unlike other officials, Guardians cannot expect income from post-service employment.

**Article 3. Other provisions**

**(a) The Council shall publish the reasons for its decisions.**

This is crucial to the deterrent effect of Council decisions. Officials and factions must be able to predict Council decisions and thus to avoid laws, policies, procedures, etc. that reduce well-being.

**(b) Congress shall by law provide for the Council to compel testimony.**

**(c) The Council may, if it considers necessary, deliberate in secret.**
(d) The Council shall elect, and may remove, its chair, whose term shall last until the addition of a new Guardian.
(e) Guardians shall be protected with judicial immunity.
(f) The Council may not veto, or reverse a congressional override, of a presidential veto.
(g) The Council may, for purposes of its review, consider what alternative(s) would prevail if the subject matter of the review were vetoed.

This is an important but easily overlooked issue. A law or regulation cannot be evaluated in isolation; its positive and negative effects on well-being must be assessed compared to something else, generally either the status quo ante enactment or some alternative law or regulation. The Council in some cases may have to make a political judgment as to the reaction of the government in case of a veto.

(h) The Council may receive petitions requesting reviews. The Council may decline to undertake any review requested of it and shall not be required to explain denial of such petitions.

Without control of its own docket, the Council could be overwhelmed with cases requiring review. Moreover, the Council should have the ability to choose cases in a way consistent with guarding its credibility and setting up expectations that it will exercise its “prosecutorial discretion” strategically. For example, the Council should avoid overturning laws that, even if welfare-reducing, were enacted accompanied by extensive public awareness and debate, thus invoking Madisonian political legitimacy.

(i) The Council may order a stay, pending its deliberation, of enforcement of any law or other matter within its jurisdiction. Such stay may not exceed 45 days.

(j) Any law in effect upon ratification of this Amendment shall be subject to review by the Council for 10 years and thereafter for one year at 10-year anniversaries of the law’s enactment.

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Older laws should not be exempt from review, but to make all older laws at once subject to review may be unduly disruptive. From the point of view of the well-being of the people, the sensible thing would be to target first those laws, old or new, that most significantly and directly reduce welfare. Of course, vetoing any law requires careful analysis of its connections with a network of related laws and institutions. One cannot extract one building block, however flawed, from the base of a tower with considering the effect on the rest of the tower.

(k) The Council may not veto a law based solely on any provision of the Constitution except this Amendment, nor treaties except for those provisions concerning international trade and commerce, nor laws concerning the armed services or national security, including declarations of war, except those provisions dealing with procurement.

It is useful to distinguish the jurisdiction of the Council from that of the judiciary. Trade barriers and corruption in procurement are major sources of reduced well-being. Federal procurement, especially in defense equipment, is a perennial source of corruption according to Sikka Prem and Glen Lehman.\textsuperscript{177} Other areas of foreign and military policy often involve complexities that the Council may be ill suited to consider. A related issue is the extent to which existing law and procedures, currently affecting other agencies, apply to the Council, which is not part of any branch. The Administrative Procedures Act and various civil service regulations are examples. It may be useful to establish a default status of non-applicability in the absence of congressional action.

(l) The Council may consider the principles of stare decisis.

\textsuperscript{177} Prem, Sikka and Glen Lehman. 2015.
It is not clear that this provision is necessary. It is intended to remind the Council that its principal impact on well-being arises from deterrence, and that deterrence is undermined if the Council’s behavior is not reasonably predictable from its prior decisions.

(m) The Council may not stay or veto appointments to federal executive or judicial offices made by the President with the advice and consent of the Senate.

This avoids excessive power in the Council and removes any temptation to guess on the possible consequences of appointments.

(n) The Chair shall appoint, with the consent of the Council, a Staff Director with a renewable 5-year term.

This and the next two items may be useful in protecting the quality, independence, and integrity of the Council’s staff. The Council must make decisions based on sometimes-complex quantitative analyses and economic reasoning. It is important that the Council hire and keep a competent staff of experts, analysts, and communicators, especially given the members’ amateur status.

(o) Professional employees of the Council shall serve “at will” and without tenure.

Notwithstanding any provision of law to the contrary, the Council may offer staff compensation equivalent to that in the private sector.

Civil service job protections are based in part on the need to avoid politically-motivated hiring and retention decisions. They have the effect, however, of protecting a cadre of deadwood. Political influence is unlikely to be an issue for Council’s staff, and incompetent or non-productive staff members should be encouraged to move on.

(p) Neither a former Staff Director nor any former professional Council employee may earn income from representing or advising clients on matters related to their employment by the Council until five years after leaving employment.
Article 4. Judicial Review

The Supreme Court shall have original jurisdiction to decide the constitutionality of any action of the Council. Any state shall have standing to bring such an action.

Article 5. Implementation

Congress shall authorize and appropriate such sums as are necessary to provide the Council with staff support and facilities sufficient to perform its duties and may otherwise provide by law for the implementation of this Amendment.

If Congress wished to punish or intimidate the Council, cutting or eliminating its budget might be a temptation. A similar issue could arise with the Supreme Court, although there is little or no sign that it ever has. One way to guard against such a threat is to set a minimum level of appropriation—in effect, an entitlement—that does not have to pass through the usual annual appropriations process. The minimum could be set by linking to the budget of the Congress itself.

Article 6. Council’s authority post dated

This Amendment shall become effective in all respects upon ratification, except the authority of the Council to veto acts of government shall not become effective until five years after ratification.

As discussed previously, resistance to the creation of the Council by those whose power or influence would be threatened is a considerable barrier to the reform. This article is intended to reduce such resistance by postponing the effective date of reform. Ratification of an amendment to the Constitution by three-quarters of the states often takes years. If an additional period, such as five years is added to an already uncertain future impingement on their power, those who benefit from political corruption are much less likely to invest current resources in opposition. Moreover, it would not be unreasonable to allow a period of time for the Council to organize itself and develop staff and systems for decisionmaking.
Section 6

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