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Type 2 Political Corruption: Sources, Impacts, Solutions

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Abstract

That Congress is corrupt is no secret. Polls show that it is held in very low esteem by the public. Why is that? The effectiveness of voter control of public policy in a system of representative government depends on compatibility of representative incentives with voter preferences. Many non-salient policy issues, among them both the details of complex legislation and most policies of administrative (regulatory) agencies, escape electoral discipline because voters rationally lack relevant preferences and information. Further, voters as consumers face barriers to effective collective action, such as diffuse interests and free rider problems. Consequently, consumer interest groups able to participate in effective lobbying and campaign financing do not form. Meanwhile, political agents (politicians) are forced by the electoral system to compete for campaign resources, while effective interest groups have a demand for favorable treatment by administrative agencies. Many such agencies are controlled by Congressional committees rather than by the Executive and are accorded substantial deference by the judiciary. The result is what Lessig calls lawful and systemic "Type 2" political corruption, in which policies favorable to prevailing interest groups are supplied by committee chairs and other Members of Congress allied with compliant agencies. There is strong evidence that these policies generate welfare losses. They also contribute to occasional disasters such as the 1980s S&L Crisis and the 2008-2009 financial collapse.

The absence of accountability in the administrative state is chiefly caused by the U.S. campaign finance system. Another root cause is the Supreme Court's tacit amendment of the Constitution in *Humphrey's Executor,* 295 U.S. 602 (1935), repealing the "implicit non-delegation doctrine." This has permitting the creation of policy-making and adjudicatory agencies for whose performance the president is not responsible and whose actions the judiciary typically reviews only for procedural lapses. *Humphrey's Executor* and other judicial accommodations of the administrative state reflect the outcome of a struggle between Congress and the judiciary that is plausibly modeled by positive political theorists. In this struggle the stake of the people was, and remains, unrepresented. No elected official or Article III judge is held responsible for the transfers and welfare losses of the administrative state.

Both types of political corruption redistribute income from consumers to shareholders, but Type 2, especially, also reduces aggregate welfare. They do so by impairing the creation and enforcement of regulatory policies that harmonize private incentives with welfare optimization. Both corrupt redistribution and impaired efficiency can reduce the stability and security of the state, but their adverse effect on stability and security is likely to be greater in an increasingly

open or global economy. Falling transport and communication costs have increased producer, consumer and labor mobility, providing many economic interests with alternatives to continued participation in U.S. economic and political affairs. The danger is that even an extended period of economic decline and instability may not be sufficient to induce fundamental reforms.

Solutions do not abound to the problem of Type 2 corruption and the resulting threat to the future security of the United States. Reform of the campaign finance system has proved to be difficult to reconcile with constitutional rights. Article III judges arguably should not be asked to make policy through substantive review of agency legislation. Revival of the defunct non-delegation doctrine may be impractical. Other potential solutions seem improbable. Lessig has gone so far as to suggest as a remedy a constitutional convention under Article V. I propose what may be a more modest reform, a mechanism to identify and publicize the most serious instances of Type 2 corruption—those that lead to the largest welfare losses and that do the most harm to the poor.

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Keywords: Corruption, collective action, principal-agent problem, interest groups, incentive compatibility, factions, political representation, political stability, security, administrative law, constitutional amendment, constitutional law, constitutional convention, non-delegation doctrine, hard look doctrine, positive political theory, welfarism, political equilibrium, administrative state, regulatory capture, campaign finance, Chevron deference, lobbying

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Contents

Abstract 1

Introduction 4

Organized and unorganized interests 6

Systemic biases in political representation 7

Captured regulators, captured legislators, captured contributors 9

Inadequacy of the Constitutional framework 12

The PPT account of administrative agencies 20

Welfare effects of Type 2 corruption 27

Type 2 corruption threatens political stability and national security 30

What can be done about Type 2 corruption and its consequences? 33

A modest proposal 38

Conclusion 40

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Introduction

Much scholarly discussion surrounds the many laws that regulate private economic and social activity. Some of these laws, especially those that impose criminal sanctions, fall into the enforcement jurisdictions of the attorney general or other cabinet officers. But most often these laws create specialized "agencies" either within the executive branch, such as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) or in the constitutionally murky region between the executive and the legislature, such as the Federal Communications Commission (FCC), the Securities and Exchange Commission (SEC) and the United States Postal service. These agencies have enforcement responsibilities that include making the very laws the agencies enforce. Such laws are called *rules* or *regulations*. There is nothing neat about these categories. Congress enacts many statutes that are complex and particular, seeming to imply that Congress has a deep understanding of matters that might be regarded as the provinces of narrow expertise. Meanwhile, agencies enact many regulations that are sufficiently significant and sweeping to resemble legislation, but are nevertheless based on no greater expertise than any Member of Congress might be assumed to possess. It seems that the assignment of responsibility for law-making about economic regulation has to do with factors other than the need for subject-matter expertise. As it turns out, Congress delegates law-making responsibility only to agencies it can trust.[1] Agencies more likely to respond to presidential than to Congressional influence tend to operate under detailed statutes that circumscribe their discretion.

Some political scientists explain the existence and jurisdictions of regulatory agencies as reflecting the continuing strategic power struggle between Congress and the executive. Many administrative agencies are to a greater degree than cabinet departments outside the direct control of the president. The directors or commissioners of such agencies cannot, as a practical matter, be dismissed by the president or by a cabinet officer who reports to the president in a dispute about policy. This leaves the agency free of formal executive branch control. (The president may nevertheless exercise some informal control through appointments, the budget process and the political parties.) And of course Congress also exercises control of all agencies through

[1] Cite Weingast

the operation of its powerful budget, appropriations and oversight committees. Again, there is not a sharp distinction between independent agencies and some executive branch agencies. The Food and Drug Administration (FDA), for example, although part of the cabinet Department of Health and Human Services, often acts more like an independent agency than like a cabinet department. The FDA and its Congressional committees pay close attention to each other. On the other hand, the Environmental Protection Agency (EPA) is closely monitored by and responsive to the White House.

Government agencies that as a practical matter have the power both to legislate and to enforce law in the manner of courts present interesting and important constitutional issues. Certainly it is important to understand why they exist and how they affect economic welfare and the distribution of wealth in our society, as compared with such theoretical alternatives as unregulated markets or consolidation of regulatory policy-making in the legislature and regulatory administration in the executive. Constitutional and administrative law scholars, along with political scientists, have long studied this issue. Much of the wider discussion reflects ideological conflicts between those who favor and those who oppose the rise of the administrative state. The discussion has a curious feature. It is a commonplace that those who associate themselves with business interests and unregulated markets have opposed the rise of the administrative state, while those inclined to populist or anti-business interests tend to support increased regulation. Yet it is primarily business interests that benefit from (at least) non-salient regulation, and consumers who lose. In many cases of regulatory policy making, consumer interests are not even in the picture; the struggle is between opposing business interests.

From an economic perspective, the ultimate test of government agency performance is its contribution to economic welfare and equity.[2] There can be no question that unregulated markets suffer from numerous potential or actual failures for which government intervention could in

[2] For purposes of this paper, I associate "welfare" with the idea of minimizing the cost of producing goods and services, and selecting the quantities of goods and services so as to maximize (or at least increase) aggregate happiness, as best we can measure it—traditionally, by assuming a correlation between economic value (willingness to pay) and happiness. I associate "equity" with the Rawlsian idea of adopting policies that (at a minimum) do not make the least happy citizens even worse off, and preferably making such citizens happier. However, I do not include Rawls' egalitarian objective in the present definition of equity. John Rawls [cite] These usages are very rough and ready; a somewhat more detailed discussion appears below in connection with my "modest proposal."

principle provide effective remedies. But while this is a necessary part of the political rhetoric required to justify initial interventions, it is not sufficient as a matter of sound economic policy. Sufficiency logically requires at least that agency incentives are compatible with welfare and equity improvements, and that agencies designing or implementing interventions be at least as effective as imperfect markets. But these policy concerns with promoting the people's welfare do not loom large in the power struggle between Congress and the president. Instead, Congress acts as if its primary motivation in establishing and overseeing regulatory agencies is to promote and protect the interest of its Members in a continuing flow of campaign contributions from interest groups. And, indeed, that is where Congressional incentives predictably lead.[3]

Organized and unorganized interests

For present purposes an interest group is a collection of individuals with significant common goals capable of collective action affecting government policy. The "interest groups" of concern here are those to which government officials, legislators and even judges, along with other groups, must pay attention under penalty of serious costs to themselves or those persons and values about which they care. Interest groups have power if they can inflict such damage. Power arises from having *alternatives*. Put differently, interest groups are powerful when they can inflict damage on others at low cost to themselves. Most obviously, they can withdraw support from one elected official and support another instead. Or they can take measures to reduce their contributions to the coalition of interest groups supporting the current political equilibrium by exiting or partially exiting the coalition. Such political engagement typically requires organization and collective action.

However, some interests can act "collectively" as individuals, *without* organizing, through the operation of markets. But such groups cannot participate in political debate or negotiation. For

[3] Lawrence Lessig makes the same point at greater length in his book **Republic, Lost: How Money Corrupts Congress—and a Plan to stop It,** New York: Hachette, 2011. Lessig emphasizes the corrupting effects of individual wealthy donors on elected officials. This paper takes an economic perspective on "agent" incentives and their compatibility, or not, with the promotion of public welfare and equity. I identify the insulation of the administrative state from political accountability, in addition to the campaign finance system, as a principal source of corrupt policies.

example, well-educated or skilled workers can migrate to jurisdictions with better services or lower taxes, decreasing output and tax receipts in their current places of residence. The same is true of firms—some can move production and/or headquarters to more advantageous locations around the country or the globe. Markets and mobility give consumers, investors, workers and consumers some of the power of interest groups, but not the power to negotiate or to compromise.

Similarly, individuals with shared passionate goals form natural "voting blocks," or unorganized interests, on particular issues or candidates, even though they may lack any formal organization or leader, and in spite of an apparent free rider disincentive. Both voting and political participation by individuals are "irrational" because no individual vote or contribution is likely to change an outcome. But of course humans do behave irrationally in this sense all the time, because we derive pleasure (or relieve distress) by feeling connected to others, or because we form a passionate interest in some cause or candidate. Actions, such as voting, that require a modest sacrifice of time or convenience accordingly may "feel good" to us, and are irrational only to the extent that we mistake their longer term effects on happiness. Support of a cause or candidate becomes rational when it satisfies an emotional need, perhaps even if it is later regretted.

Systemic biases in political representation

In *Republic, Lost,* Lessig makes a distinction between two sorts of political corruption. The first and most obvious is bribery—where a politician is simply paid in cash or kind to produce some desired result. Such "Type 1" corruption is endemic in some cultures, and according to Lessig was commonplace in the United States in much of the 19th century, but it appears to be relatively rare in the U.S. today, at least at the federal level.[4]

Understanding the problem of Type 2 corruption requires taking a "principal-agent" perspective. Very often we, as principals, rely on others to make or to implement decisions on our behalf. We may hire lawyers to explain the law and to make effective legal arguments for us. We may hire accountants to audit the businesses we own or may purchase, or simply to keep our books. We hire real estate *agents* to advise and assist in buying or selling property. In all of the-

[4] Lessig, page cite.

se cases we may assume that the agent will act in the same way we would act if we had the agent's knowledge and expertise. We rely on the agent's desire to protect her reputation and to follow the ethical codes of her profession. But this assumption is not reliable. Agents may very well act in their own interest, rather than ours, at least in some matters. For example, a real estate agent may advise us to accept a low bid in order to ensure her commission, rather than wait for a possible, but delayed and uncertain, higher bid. A lawyer may urge a client to accept a plea bargain in order to avoid what is for her the inconvenience and expense of a trial, even when the client has an excellent chance of winning. Reputation concerns may not be sufficient to stem such behavior. In dealing with agents it is important for a principal to consider whether the compensation arrangements make the agent's interest reasonably compatible with the goals of the principal.

Elected political representatives are in the position of agents for their electoral constituents, actual and potential voters. They are likely to be less effective agents if their incentives are not compatible with the goals of their principals, the people. Elections in which incumbent representatives are subject to periodic evaluation are the chief constraints on the actions of political agents.

Understanding the incentives that politicians face is one way to understand the problem of Type 2 corruption. Clearly most Members of Congress resist the temptation to solicit or accept outright bribes; otherwise we would be more frequently bemused by stories of large quantities of cash found in home freezers.[5] In contrast, Type 2 corruption is perfectly consistent with politicians having the highest ethical or moral standards. Nevertheless, politicians are for the most part in the business of getting elected and then re-elected to the same or a higher office. Politics is a profession. As in any other professional calling, politicians want to be successful. They respond to the institutional incentives that lead to success, such as the need for well-funded re-election campaigns and the absence of well-financed opponents.

[5] "William J. Jefferson," in Wikipedia http://en.wikipedia.org/wiki/William_J._Jefferson, visited Jan 30, 2012.

Type 2 corruption is systemic, and it is a very big problem in the United States. It is *corruption* because it distorts the incentives of politicians in ways that are harmful to the people they represent, and does so in ways and on issues that are mostly invisible to voters. It is not unlawful. Indeed, it arises *because* of our laws and legal institutions, and if remedies exist, they are to be found in reformation of law and legal institutions. Type 2 corruption is easily observable at the state and federal levels, and is directly responsible for much of what is wrong with government, including for example the recent crises in financial markets and the near bankruptcy of several states, such as California, where Type 2 corruption can be even more corrosive than in Washington, because state-level politics receives far less media coverage. I discuss some these examples below, and Lessig offers many more examples.

Captured regulators, captured legislators, captured contributors

The economics and political science literature devotes substantial attention to the behavior of regulatory agencies and their interactions with industries they regulate. The early economic models of administrative agencies assumed that regulatory agencies took seriously the "public interest" objectives of their statutory foundations.[6] Those models saw regulation chiefly as a battle about excess monopoly profits, in which agencies with less than adequate resources, information, and expertise struggled against utilities adept at hiding the ball and evading constraints. Subsequently, the literature turned to focus on interest groups (including but not limited to regulated firms) that succeed in "capturing" the regulatory agency by fostering close personal relationships between agency officials and lobbyists, by controlling information flowing to the agency, and by hiring ex-regulators in order to induce current regulators to form expectations of future rewards for present favors.[7] In this account, collective action limitations

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[6] See, e.g., Dwight Waldo, **The Administrative State**, Transaction Publishers 1948.

[7] Ernesto Dal Bó, "Regulatory Capture: A Review," OXFORD REVIEW OF ECONOMIC POLICY, vol. 22, no. 2, 203-225; 2006; Jean-Jacques Laffont and Jean Tirole, "The Politics of Government Decision-Making: A Theory of Regulatory Capture," QUARTERLY JOURNAL OF ECONOMICS November, Vol. 106, No. 4, 1089-1127, 1991.

prevent consumers from forming effective representative groups, permitting the agency to be captured by some combination of the better-represented interests.[8]

The day-to-day, issue-to-issue work of independent regulatory agencies is very largely controlled by the cognizant Congressional committees and especially their chairs and minority leaders. Susan Snyder and Barry Weingast make the point quite directly:

> Although economists and political scientists approach the politics of regulatory agency policymaking in different ways, nearly all agree that, to a great extent, elected officials control regulatory agency policymaking for political ends. Elected officials negotiate the balance between citizen and interest group demand, translating this balance into pressure on the agency. Scholars presume that agencies respond to political pressure, implementing the goals of elected officials. An impressive body of scholarship supports these conclusions.[9]

Congressional committees are not aloof from the agencies in their jurisdictions. Members of Congress communicate frequently with the heads of agencies as well as senior agency officials both formally (in hearings and correspondence) and informally (in phone calls, meetings, and encounters at political or social events). Congressional committee staffs as well as Members' personal staffs are in frequent communication with agency employees at all levels and rub shoulders at industry-sponsored and other events. Lobbyists and reporters scurry back and forth, carrying messages and gossip. The trade press covers as much of the action as it can, some of it deliberately leaked. Although the law of administrative procedure restricts the timing and scope of communications and may require disclosure, there are effective "work-arounds." If the agency is engaged in policymaking on an issue affecting an influential Member's significant supporters and campaign contributors, the Member's views will be well-known to the agency decisionmakers, and are likely to be respected. Therefore, well-funded interests with a

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[8] Collective action theory describes the conditions necessary, and barriers to, effective political action by people with common interests. Phenomena such as "rational ignorance," "diffuse interests," and "free rider problems" link individual incentives to group effectiveness. See Mancur Olson, **The Logic of Collective Action,** Cambridge, MA, Harvard University Press 1965

[9] Susan Snyder and Barry Weingast, "The American System of Shared Powers: The President, Congress, and the NLRB," 16 JOURNAL OF ECONOMICS, ORGANIZATION, AND MANAGEMENT, 269, n. 2, 2000. Note that Snyder and Weingast challenge the quoted proposition.

stake in the issue will certainly be contributors and supporters of key Members and build personal and social relationships with agency heads, agency staff, and corresponding denizens of Capitol Hill.

Captured regulatory agencies, in short, reflect, to a significant extent, captured Congressional committee chairs and other legislative leaders. But “captive” has a misleading connotation. The legislators are not unwilling participants. On the contrary, they rely on regulated entities and their representatives for election campaign funding and related support.

The political system as a whole is set up to favor policies that win elections, but most regulatory issues are insufficiently salient to have any direct effect on elections. Therefore, the system is biased in favor of policies that favor campaign donors and those who control grassroots election machinery, such as passionate advocacy groups, unions and major local employers, and now perhaps online social media.[10]

There is seldom a serious principal-agent conflict between committees and independent agencies like the FCC. Such agencies seldom buck their Congressional overlords. Agency heads try to avoid antagonistic and sometimes humiliating public hearings aimed at criticizing their performance. They also try to avoid budget cuts and funding delays that disrupt agency operations and distract attention from urgent policy matters. Unless backed enthusiastically by the president or under direct orders from the judiciary, very rare events, agencies are chiefly responsive to the wishes of their cognizant congressional committees.

The creation and delegation of legislative, judicial and executive power to administrative agencies began in the Progressive Era, more than a century ago. It required among other things significant changes in judicial interpretation of the Constitution, and these changes were forth-

[10] Online media may prove to be a new nexus of political power. Members of interest groups can be cheaply identified and mobilized to participate in political activism. The Obama 2008 primary campaign and the success of Wikipedia and other sites in organizing opposition to proposed intellectual property rights legislation early in 2012 are suggestive examples. For a brief, cogent review and analysis, see Lee Drutman, “How SOPA and PIPA Did and Didn’t Change how Washington Lobbying Works,” http://sunlightfoundation.com/blog/2012/01/30/sopa-lobbyin/

coming from the courts only grudgingly. The Supreme Court had to abandon the "non-delegation" doctrine, said to be tacit in the Constitution, which held that the powers granted to the three branches of government by the Constitution were granted to those branches *and to no one else*. Previously, legislative and judicial powers were held to be exclusive and could not be delegated by Congress to administrative agencies—i.e., to the bureaucracy.[11] By the time of the New Deal, expansion of the administrative state seemed highly desirable as a political response to voter preferences, neither Congress nor the judiciary thought it feasible to handle the increased workload in-house, and Congress was unwilling to give the Executive Branch full control of a bureaucracy empowered to, in effect, make law and decide cases.

Inadequacy of the Constitutional framework

The Constitution of the United States establishes the institutional groundwork for politics. Mountains of political science, legal, and historical analysis attempt to describe the Framers' reasons and objectives in designing our constitutional institutions. But the Framers and those who ratified the Constitution did not speak with one voice, any more than voters do today, and the Constitution reflects compromises and contains deliberate ambiguities that arose from this diversity of viewpoints.[12] Nevertheless, it is clear that the Framers sought a democracy in which ultimate power was held by the people, exercised through elections of political representatives.

The proper scope and role of the federal government was hotly debated in post-revolutionary America. The result by 1791 was to replace a failed initial solution (the Articles of Confederation) with our present Constitution, now much-amended both formally and informally (by neglect of certain clauses and judicial reinterpretation of others), plus a Bill of Rights.[13] The relative power of the federal as opposed to the state governments was a primary dimension of dis-

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[11] Cynthia R. Farina, Deconstructing Nondelegation, 33 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 87-102 (year).

[12] See Pauline Maier, **Ratification: The People Debate the Constitution, 1787-1788**, (Simon & Schuster, 2010).

[13] The Constitution was debated and written in Philadelphia by a convention of state delegates in 1787 and ratified by the necessary nine states in 1788. The first ten amendments (the Bill of Rights) were ratified in 1791.

pute. The memory of British colonial rule, associated with excessive and arbitrary centralized power, provided context for the debate. Various compromises led to the establishment of a federal government with limited jurisdictions versus both the states' rights and the people's liberties. The Constitution also constrained the federal government by an elaborate system called the "separation of powers," designed to reduce the risk of the legislature or the executive engaging in tyrannical behavior.

Constitutions work by articulating a structure for political decision-making and a default or starting distribution of rights among the people and their rulers. Obviously, something close to unanimity is required for a constitution initially to be an effective alternative to anarchy, and the need for near unanimity requires some imprecision or even internal contradictions in any constitution. Every actual or potential interest group must believe that, for itself, the constitutional compromise is better than resort to isolation or rebellion. Changing technology, economic conditions, culture, and foreign affairs almost inevitably change the identities, power and composition of key interest groups over time, and to survive, the constitution of the state must also change to accommodate a changing equilibrium among the important groups.

In order to reduce the threat of excessive federal power the Framers not only made all officials except judges subject to periodic elections, but imposed an elaborate system of "checks and balances," designed in effect to hobble the potential of any individual part of the government to tyrannize the people, and in part to prevent even a unanimous government from acting in great haste. Finally, the functions of government at the federal level were tightly reined. The federal government was largely limited to activities, such as diplomacy, war, and regulation of interstate commerce, which could not be carried out efficiently by the individual states.

From an economic perspective, the Constitution provides politicians with the incentive to remain popular with their electorates by pleasing a majority of voters. This is sometimes expressed as the need to satisfy the "median voter."[14] How does a politician persuade a median

[14] Of course, except perhaps in the case of referenda, the "median voter" is apocryphal. Most voters care about several issues in elections, and the median voter on one issue is unlikely to be

voter? Ultimately, the politician must persuade the median voter that the politician's interests are the same as the voter's, at least on issues that matter most to the voter. The alignment of interests leads to voter expectation that there will be an alignment of preferred positions on specific legislation or other policy actions. The short-hand term for this alignment of interests is "incentive compatibility."

Voters are persuaded in many ways, but most often through family and friends who are "opinion leaders," by direct rhetorical appeal, by positive and negative advertising, by media coverage, and by less concrete factors such as candidate demeanor and personality. Effective use of these methods of persuasion require substantial expenditures, especially in contested elections. Contested campaigns are very expensive. Professional politicians can look forward to a career in which a substantial fraction of their time and energy will be spent raising funds, if only to reduce the likelihood of a challenge. This means approaching potential donors and asking for contributions. The most likely donors are representatives of interest groups to which the politician's goodwill is especially important. For example, pharmaceutical companies are more likely to make campaign contributions to a senator or representative who sits on one of the committees that oversee the Food and Drug Administration (FDA) than to one who does not. This should not be surprising to anyone. Soliciting donations from the public at large generally is not a very cost-effective strategy. It is more efficient to seek donations from associations or organizations that represent many individuals and thus absorb the costs of dealing with many different donors. Any organization, including even relatively small not-for-profit associations of individual citizens with a common interest, can be an efficient source of campaign funding.[15]

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the median voter on another. Politicians have to cobble together positions on multiple issues that aggregate more than 50% of the voters.

[15] The Supreme Court was widely and unjustly ridiculed for "deciding that corporations are people," in the notorious *Citizens United* case, 558 U.S. 08-205 (2010). Chief Justice Roberts observed in his majority opinion that the term "corporation" applied to many thousands of small, not-for-profit benevolent organizations, and that outlawing independent political speech and political activity by such organizations clearly violated the First Amendment because it could not be distinguished from comparable activity by unincorporated groups of citizens.

The Framers were not naïve about the ways of politics and politicians. They understood that interest groups (then called "factions") could have tremendous power to influence elections and therefore policy. Supporters of the new Constitution, Federalists such as Jefferson, Hamilton and Madison, took part in the state-by-state battles over ratification of the Constitution. They wrote a series of anonymous newspaper articles (signed by "Publius") explaining and defending the Constitution. These essays collectively are called *The Federalist.* One of the arguments Madison made in one of the best-known of the Federalist Papers, No. 10, in favor of a strong federal government, as opposed to sole reliance on state governance, was that the geographically wider and larger federal constituency would help control the power of factions by playing them off against each other.

Madison focused on one of the "problems of democracy"—the power of factions. Factions, for Madison, included not only special interests in the modern sense—well-organized minorities seeking advantage at the expense of the ill-organized majority—but also and especially *passionate majorities* seeking to disadvantage others, such as property interests or geographic or sectarian minorities. Thus, as Madison put it: "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community."[16]

Madison argued that a large and diverse republic would tend to include specialized and conflicting interests within the majority, which would discourage the dangerous exercise of the majority's potential power. Specifically, the great danger of popular government from the perspective of the propertied class that wrote the Constitution was that the less-well-off majority would seek to expropriate the property of the well-off minority, precipitating class warfare, violence, and the destruction of the state.

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[16] James Madison [Publius], *The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued),* 1787 (Federalist No. 10), New York: Heritage Press edition, 1945, 54-62.

The Framers' argument may be read as focused on the usefulness of unfettered private enterprise and opportunities for self-betterment in diverting members of the majority away from a focus on redistribution and toward productive rivalry amongst themselves.[17] The major purpose of Federalist No. 10 was to support a national representative republic, properly structured, as having a better shot at achieving successful and stable popular government than smaller (i.e., state or local) government, even with direct democracy.

One element of Madison's argument was the equation of individual material success, or at least its hope, with happiness, and the pursuit of happiness thus understood as a principal legitimate aim of government. The Founders did not deny the importance of aims higher than material well-being, but they saw those aims as belonging only to individuals or like-minded individuals convened in non-government organizations. Governments with nobler aims than material welfare were seen as greater threats to liberty and individual freedom. This helps to explain, for example, the necessity to forbid establishment of religion.

Much of Federalist No. 10 has now been made obsolete. The Founders' vision of a limited government chiefly concerned with the promotion of material happiness hardly would be approved by many today, with materialism in disrepute. For many Americans this aspect of the Founders' vision is an embarrassment. The Founders' argument and assumptions in favor of this limited vision are not generally understood, and the theory's empirical validity is open to question. Most everyone now has at least one passionate or deontological belief that "ought" to be read into the Constitution, if not already discernible therein. Government, far from being limited, according to the Supreme Court, "now wields vast power and touches almost every aspect of daily life."[18] Still, history is not inconsistent with the success of the Founders' design, at least prior to the events that ushered in the regulatory state—events such as the loss of legitimacy that free markets suffered in the Great Depression and the continuing revolution in in-

[17] Id. at 61-64.

[18] *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, ___ U.S. ___ (2011), slip op. at 18.

formation collection and processing technology that permits greater bureaucratic control of economic and social activity.

If we apply the Founders' model to modern conditions, we see some new problems of democracy, or rather, problems of a democratic regulatory state. But on the whole, the United States has resisted the particular threat that Madison and his colleagues feared—tyranny of a redistributive majority that threatens to produce class warfare and violence. Other nations have gone much further along the redistribution route than the United States without instigating class warfare. Consider, for example, the comparative success and stability of democratic socialism in Western Europe, which makes a much nearer approach to egalitarianism than does U.S. policy. It is clear that the United States has never approached the precipice in this respect. John Rawls, perhaps the most famous political and moral philosopher of the last century, brought a respect for supply-side realities into the liberal mainstream, and it seems likely to remain there as a safeguard against excessive egalitarianism.[19]

The Framers did not foresee the regulatory state. If they had, they might have predicted that two of the phenomena they feared would arise in a different way and on a different level than in the context of 1787. First, both the legislative and the administrative processes associated with regulation by administrative agencies are battlegrounds in which special interests vie to redistribute the gains from both private productive activity and any efficiency-enhancing interventions. Second, as the Founders sensed and Mansur Olson formalized, the regulatory state is systematically biased against consumer and other interests that face collective action barriers to effective participation in the political process. Power in American society has been characterized by Andrew McFarland as "largely a matter of co-option of specific public-policy areas by elites, serving their own private interests."[20]

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[19] John Rawls, **Justice as Fairness: A Restatement** (Belknap Press, 2001). Rawls' "difference principle" advocates equality up to the point that resulting supply-side disincentive effects reduce output and thus lower the welfare of the least well off.

[20] Andrew S. McFarland, "Interest Groups and Theories of Power in America," BRITISH JOURNAL OF POLITICAL SCIENCE, 17, 130 (April 1987).

A more fundamental problem with interest-group influence on regulatory outcomes is that there is no strong mechanism to limit outcomes to those that are welfare-enhancing. Although the game in which all (or a subset of) interest groups interact often is potentially positive-sum when externalities and other market failures are being addressed, there are numerous bargaining, legal, and other constraints on the process. Interest groups may gain by focusing on their own shares even of a somewhat diminished pie, or they may simply be unaware of any adverse welfare effects of their success. Indeed, in the context of complex technical, legal, and economic regulations, there may be circumstances in which a group can gain *only if* the greater pie is incidentally diminished. So, in the regulatory state, not only are certain interests un- or under-represented, but the cause of welfare enhancement is often orphaned. This happens especially when the beneficiaries of a significant slice of the pie (i.e., consumers) are unable effectively to defend themselves from expropriation. If the owners of every slice of the pie had effective defenses against expropriation, there would be more support for the pie's expansion.

The Framers were not surprised to see politicians from the southern states favoring free trade policies, because it was in the economic interest of the voters in those states, exporters of cotton and tobacco and importers of British manufactured goods, to favor free trade. Similarly, northern politicians favored protectionism because their constituents produced manufactured goods that competed with those from Europe. What the Framers might have been very surprised to see, however, was politicians favoring policies that caused economic harm to voters (or more generally, consumers) in their own states or districts. The Framers focused largely on factions defined by geography. They did not foresee the rise of factions defined by the jurisdictions of Congressional oversight and budget committees. They also did not foresee the rise of the Administrative State or the creation of regulatory agencies with substantial regulatory authority over particular industries or passionate interests. These developments changed the game.

Underlying these and other specific policy issues is a basic political tenet of our representative government—the tacit assumption among legislators and regulators that only interests sufficiently well-organized and wealthy to affect the outcome of an election are entitled to a place

at the negotiating table. This assumption derives from the lack of political salience of regulatory policies and the mismatch between congressional districts and economic interest groups.

Further, there is a tendency of regulatory intervention to have a ratchet effect, whereby those whom policy benefits form coalitions dedicated to the preservation and perhaps extension of the intervention. In the absence of the original intervention, many such groups might never have organized. Some, perhaps many, interest groups exist only because government has created the benefit they seek to retain and expand. The creation of such groups may be inadvertent, an unanticipated consequence of steps taken toward another, perhaps entirely benign, policy objective. All of this is categorized by courts, reviewing regulatory doings, as political activity beyond their ken, or if within it, adequately addressed by liberal standing rules.

Whether or not an interest group was previously organized, each increment of new benefit from the extension of regulation will strengthen the group's demand for continued intervention. In some cases virtually every interest at the table has been created by past government actions, but the economic pie these interests sit down to divide belongs in part to a missing party: the people in their roles as consumers. The people have no effective voice in the bargaining because those who are elected to represent them, in practice, represent only those who can "pay to play." Public opinion is important, of course, but it lacks a voice proportionate to voters' collective stake or their potential but unorganized power. Also, public opinion itself is responsive to the effective expenditure of interest-group resources.

Responsiveness in a democracy is by no means regrettable, of course. No one favors a government unresponsive to the welfare of those it represents. The problem lies not in responsiveness to organized interests but in *lack* of responsiveness to un- or ill-organized interests such as consumers. To be sure, legislators and other officials are admired if they rise above their self-interest in re-election or future employment opportunities in order to serve those who are under-represented, weak, poor, disadvantaged or unpopular. Yet there is faint applause indeed for the politician who defends the ordinary consumer from welfare-reducing regulations.

Statesmanship or courage in public officials was long seen as evidence of good character and honorable behavior, and was the norm of civic expectations for elected officials. But the ideals

expressed by James Stewart's character in the movie "Mr. Smith Goes to Washington" may never have been realized in practice, and today that view is unfashionable and naïve. Modern public expectations of political behavior are much reduced. Congress is held in disrepute by a large majority of the public, and trusted by few.[21] To behave in one's self-interest, after all, is "rational," the norm of nearly every economic model. Within the bounds of law self-interested behavior is taken for granted. The modern administrative state is no more immune to interest group politics than any other form of government. Indeed, as suggested above, it is a core feature of that state.

The PPT account of administrative agencies

A branch of political science approaches the study of politics using positive political theory (PPT), corresponding to economists' rational actor models of decision-making behavior.[22] In essence, political actors are assumed to pursue their goals strategically, taking account of each other's expected reactions, in a series of interdependent sequential decisions. [23]

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[21] Approval ratings for Congress ran as low as 9% in 2011. See *New York Times/CBS News/ Roper* polling data, http://www.cbsnews.com/stories/2007/10/12/politics/main3362530.shtml

[22] See David Austen-Smith, *Economic Methods in Positive Political Theory*, **Oxford Handbook of Political Economy** (Wittman and Weingast, eds.) pp. 899-914 (2008), and McNollGast, *The Political Economy of Law,* in M. Polinsky and S. Shavell, eds, **Handbook of Law and Economics,** Volume 2, (Amsterdam, Elsevier B.V., 2007) 1651-1738.

[23] "PPT of Law uses sequential game theory as its core analogy, but in PPT the process has four stages. … In the first stage, citizens vote for candidates. In the second stage, elected officials (legislators and, where relevant, independent executives) produce law that empowers bureaucrats. In the third stage, a bureaucratic official makes decisions to elaborate and to enforce the law as authorized by statutes or decrees (e.g., Executive Orders). In the fourth stage judges make decisions on the basis of their own preferences, subject to the constraints and incentives that are established by pre-existing law (judicial precedent, statutes, the Constitution). In each stage, decisions reflect "rational expectations" in that choices are based on expectations of the future behavior of decision-makers in subsequent stages. Because the four-stage game is repeated, in the fourth stage courts make decisions in expectation that all other actors will have a chance to respond to them."   McNollGast, *The Political Economy of Law*, in M. Polinsky and S. Shavell, eds, **Handbook of Law and Economics**, Volume 2, (Amsterdam, Elsevier B.V., 2007) at 1662 (footnotes omitted).

PPT provides a useful framework for understanding the dynamics of intra-branch and other political disputes and power struggles. So far, however, it has not addressed the roots of Type 2 political corruption. The essence of Type 2 corruption is the absence of a political check on Congressional pursuit of electoral advantage, rooted in (1) voter indifference to most regulatory policy issues and (2) lack of voter sympathy for business in general and free markets in particular. In this context, Congress' historical success in wresting control of the bureaucracy from the president, the judicial retreat from substantive due process, and the relative lack of party discipline in both Houses, have left nothing to constrain legislators from responding to the incentives they face to make deals at odds with the overall efficiency of the economy and the particular interests of consumers.

In circumstances where the resulting strategic game has an equilibrium (a set of strategic choices such that no actor, knowing the strategies of other actors, wants to change her strategy),[24] these models seek to make what are, in principle, testable predictions about political behavior. Use of PTP is contentious in political science, where it is contrasted with traditional verbal descriptions (histories) of motivation and behavior, based on such factors as the personalities and experiences of political leaders, that seek to explain observed outcomes.[25] PTP aspires to greater rigor by emphasizing the observation-theorizing-hypothesis-empirical testing paradigm of positivist philosophy, or what is generally referred to as the "scientific method." The primary impact of PTP in political science has been to emphasize the interdependence of political actors and the usefulness of explanations involving strategic interaction in making sense of

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[24] This describes a Nash equilibrium. Other types of equilibria and many types of disequilibria are possible. In the absence of equilibria, PPT has no basis for predictions of behavior.

[25] As with the assumption of Nash equilibrium, there is ample room for disputes about the meaning and existence of "rationality" and other basic assumptions of PPT. See James Johnson, *What Rationality Assumption? Or, How 'Positive Political Theory' Rests on a Mistake*, POLITICAL STUDIES, VOL 58, 282–299 (2010).

political outcomes. As it happens, PTP scholars have explored administrative agencies and law in depth.[26]

By way of background to the PPT "take" on the administrative state, following Rodriguez and Weingast, it is useful to consider three modern watersheds in the growth of regulation: the Progressive Era, the Great Depression-New Deal Era, and what I will call the Inflationary Era of social and economic regulation that began in the 1960s.[27]

Federal regulation of business emerged in the Progressive (or Populist) Era that began in the last quarter of the 19th century. Prior to that time, the federal government was chiefly concerned to promote trade and commerce among the states, as the Framers intended. Federal

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[26] Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, (writing under the acronym "McNollgast,") have been major contributors to the PPT literature. Examples include "Political Control of the Bureaucracy," in **The New Palgrave Dictionary of Economics and the Law**. (London: Palgrave, 1999); "Administrative Procedures as Instruments of Political Control," 3 J.L. ECON. & ORG. 243 (1987); "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," 75 VA. L. REV. 431 (1989); "The Political Economy of Law," in M. Polinsky and S. Shavell, eds, **Handbook of Law and Economics**, Volume 2, (Elsevier B.V., 2007); "Slack, Public Interest, and Structure-Induced Policy," JOURNAL OF LAW, ECONOMICS, & ORGANIZATION*,* Vol. 6, (1990), pp. 203-212; "Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation," LAW AND CONTEMPORARY PROBLEMS, Vol. 57, No. 1, (Winter, 1994), pp. 3-37; "Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures," JOURNAL OF LAW, ECONOMICS, & ORGANIZATION*,* Vol. 6, (1990), pp. 307-332; "The Political Origins of the Administrative Procedure Act," JOURNAL OF LAW, ECONOMICS, & ORGANIZATION, Vol. 15, No. 1, (1999), pp. 180-217.

[27] The metaphor refers to the inflation of the universe thought by cosmologists to have occurred between about 10^{-36} and 10^{-33} seconds after the hypothesized Big Bang. The growth of the administrative state is commonly quantified by counting the number of pages of new regulations published annually in the FEDERAL REGISTER. Rodriguez and Weingast refer to this third watershed era as the "Great American Political Transformation."

1960	14,479
1970	20,036
1980	87,012
1990	53,620
2000	83,294
2010	82,590

"Federal Register Pages Published Annually," http://www.llsdc.org/attachments/wysiwyg/544/fed-reg-pages.pdf

support to stimulate at first canal and road and then railroad construction and the development of the American West were the culmination of the promotional era.[28] The federal courts, throughout most of this period, resisted efforts by the states to constrain business market power, again reflecting the Framers' emphasis on protecting property rights from democratic (majority) excesses.

The Progressive Era was energized by agrarian political forces such as the Grangers, by the growth and consolidation of trade unions such as the Knights of Labor and the American Federation of Labor, by other populist movements, and by muckraking journalists promoted by an emergent advertiser-supported mass media. Agitation by farmers led to the passage of the Act to Regulate Commerce (1887), which created the railroad-regulating Interstate Commerce Commission (ICC), aimed at protecting short-haul shippers such as farmers from price discrimination.[29] The Supreme Court backed away from constitutional bans on monopoly price regulation in *Munn v. Illinois,* 94 U.S. 113 (1877), but insisted that the courts have the last word on the *substantive* "due process" issues involved in the determination of rates,[30] an example of the strategic interaction of Congress and the judiciary. The Sherman Antitrust Act was signed in 1890. Ida Tarbell and others drew attention to abuses by the great trusts. Her book, The **History of the Standard Oil Company** (1904), was one of the first major exercises in investigative journalism. The disintegration of the Standard Oil Trust, 221 U.S. 1 (1911), the Tobacco Trust, 221 U.S. 106 (1911), and others were early victories of federal antitrust enforcement. Upton Sinclair wrote **The Jungle** in 1906, exposing unsanitary conditions at slaughterhouses, and contributed to the enactment of the Pure Food and Drug Act of 1906.

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[28] Richard J. Orsi, **Sunset Limited: The Southern Pacific Railroad and the Development of the American West**, 1850-1930 (Berkeley: Univ. California Press, 2007); Lloyd J. Mercer, **Railroads and Land Grant Policy: A Study in Government Intervention** (Beard Books, 1982).

[29] This explanation of the creation of the ICC was challenged by Gabriel Kolko, **Railroads and Regulation, 1877-1905** (Norton, 1965). Kolko argued that the Act to Regulate Commerce was chiefly motivated by the railroads' own demand for reduced inter-railroad competition.

[30] *Smyth v. Ame*s 171 U.S. 361 (1898).

The Progressive Era faded after World War I. But the Great Depression later brought enormous discredit to the political legitimacy of business and property interests, first with the public and the Roosevelt administration and eventually with the judiciary. Congress populated the resulting vacuum with new administrative agencies that had both regulatory and promotional (recovery) mandates. The Supreme Court permitted Congress to award "independent" legislative, judicial, and executive powers to these new agencies in *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), subject to appellate review by the judiciary, a pattern mirroring the compromise of *Smyth v. Ames. Smyth* introduced substantive judicial review of agency rate making as the price of permitting agencies to set rates; the Court invented the fiction that rates could be set below monopoly levels without triggering a taking, so long as a judge approved the result. But in the Depression period the Court retreated steadily from substantive review of agency policy, starting with such New Deal precedents as *Nebbia v. New York,* 291 U.S. 502 (1934) (permitting state regulation of the price of ice) and its subsequent repudiation of *Smyth* in *FPC v. Hope Natural Gas,* 320 U.S. 591 (1944) (abandoning substantive review of agency rate making proceedings.)

Both the Progressive Era and the New Deal consisted in part of power struggles between Congress, the courts and the presidency, as well as other actors, such as the states, against a background of changing public opinion, economic conditions, and technology. The administrative state emerged from these struggles with large sectors of the bureaucracy largely independent of the presidency. Some presidents may have welcomed this political insulation, at least for some agencies and some issues. Dominance by Congress then faced challenge only from the judiciary. But *Hope* presaged a steady retreat by the courts, not only from substantive review of regulatory policies, but even from full sovereignty over statutory interpretation, retaining for practical purposes only the power to review agency decision-making *procedures*. In return, Congress offered up the Administrative Procedures Act (APA), codifying various process rights and procedures binding the bureaucracy (and protecting the interest groups benefiting from the status quo).

Rodriguez and Weingast explore the most recent of three watershed periods in the development of the administrative state.[31] The story is chiefly concerned with the Inflationary Era and seeks to explain the evolving status of administrative law as the outcome of strategic interactions between Congress and the courts. The Inflationary Era began in a time of widespread civil unrest, including early protests against the Vietnam War and the peak years of the civil rights movement, and continued into the 1970s with the environmental movement, and lesser consumer and worker safety movements.[32] The period included interventions growing out of landmark civil rights legislation regulating the hiring and service behavior of business as well as solutions to the problems of racial discrimination in voting, education, and other areas. Interventions continued in the 1970s with sweeping economy-wide legislation aimed at air and water pollution, along with other environmental externalities. Antidiscrimination laws have since been extended to new categories of disfavored persons, such as the disabled. New areas of economic regulation were generally consistent with the idea that intervention should be responsive to market failures, but were often framed in anti-business terms. Similarly, social regulation, such as antidiscrimination laws, while less often framed as anti-business, had the effect of imposing new costs on business.[33]

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[31] Daniel B. Rodriguez and Barry R. Weingast, "A Positive Political Theory of the Reformation of Administrative Law," working paper University of Texas School of Law Faculty Colloquium (August 2011). http://www.utexas.edu/law/colloquium/papers-public/2011-2012/10-11-11_rodgast.adminlaw.1011.docx

[32] Two early examples, are George Hilton, "The Basic Behavior of Regulatory Commissions," THE AMERICAN ECONOMIC REVIEW, Vol. 62, No. 1/2 (Mar. 1, 1972), pp. 47-54, and Robert Bork, **The Antitrust Paradox: A Policy at War with Itself**, (Basic Books 1978).

[33] This is not intended to imply that such regulation necessarily reduces welfare, because it does not. However, the amount and incidence of costs associated with such interventions are not much considered, when rationality would counsel otherwise. Perhaps the most extreme example is the 1973 Endangered Species Act, which on its face protected endangered species and their natural habitats without regard to cost. "[I]t is clear from the Act's legislative history that Congress intended to halt and reverse the trend toward species extinction-whatever the cost." *Tennessee Valley Authority v. Hill,* 437 U.S. 184 (1978). Subsequent amendments have permitted only a very marginal role for consideration of costs and benefits. Gardner M. Brown

Contradictorily, the Inflation Era was also a period in which many of the older New Deal agencies fell into disrepute, based on the increasing popularity in the academy of welfarism and the sharp contrast between welfarist principles and agency behavior aimed at fairness norms and the suppression of "unfair competition."[34] By about 1980 most transportation industries had been deregulated, along with large and growing areas of banking and finance. Even the Federal Communications Commission underwent a period of regulatory reform.

The APA gave the judiciary a focus and a boundary for its retreat to procedural review, which, during the Inflationary Era, was used to expand standing rules to encompass new interests, such as consumer, health and environmental activists. As Rodriguez and Weingast point out, these social regulation interest groups grew in political power in the 1960s and later, they adopted a role similar to that of the producer interests in "capturing" agencies *and were captured by* entrepreneurial Members of Congress, who stepped forward to champion their causes, earning campaign and other support. In the areas of environmental and atomic energy regulation the new activists were able, thanks to these political bargains, to outmaneuver the business interests that had formerly dominated policy-making legislative committees and agencies.

From a policy perspective, nothing could better illustrate the distinction between procedural and substantive review than the courts' failure to recognize that activist groups given standing, just as with the industry groups they opposed, generally lacked incentives consistent wholly with the welfare of the people as consumers. The Clean Air Act Amendments of 1970, for example, imposed design standards on utility power sources with the intent and effect of preventing the substitution of cheap low-sulfur western coal for high-sulfur eastern coal. This favored the dominant western environmentalists at the expense of exposing eastern populations both to higher levels of air pollution and higher energy costs. Similarly, environmentalists suc-

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Jr. and Jason F. Shogren, "Economics of the Endangered Species Act," JOURNAL OF ECONOMIC PERSPECTIVES, Vol. 12, No. 3 (Summer, 1998), pp. 3-20.

[34] Welfarism refers to the notion that policy should seek to satisfy weak, so-called Kaldor-Hicks, versions of Pareto efficiency (seeking to increase aggregate net welfare without immediate regard to distributive concerns), with a rebuttable presumption favoring competitive markets rather than regulation as a means to that end.

ceeded in reversing the national policy of promoting nuclear power production, at the expense of public health, in order to mitigate an irrational environmentalist fear of nuclear energy.[35]

The landmarks of judicial retreat after the APA include two Supreme Court cases handed down in 1983 and 1984. The first, *State Farm,* adopted the so-called "hard look" standard of appellate review of agency action, which brought the *logic* of administrative decisions within the purview of judicial *procedural* review.[36] The "hard look" doctrine focuses on the path taken by the agency in the journey from "facts" to policies, given statutory goals. It asks only whether the path is internally "rational," not whether there might be facts or alternatives not considered for lack of effective representation of certain interest groups. As noted, the Court treats easy *access* to standing as if it were sufficient to assure effective representation of all interests. The second case, *Chevron*, conceded to administrative agencies the right to judicial deference in interpreting their own statutes.[37] *Chevron* actually overrode the part of *Marbury v. Madison*, which held that "[i]t is emphatically the province and duty of [the judicial branch] to say what the law is."[38]

Welfare effects of Type 2 corruption

There is a great deal of literature examining the often adverse effects of regulation on consumer welfare, and overlapping literature associating regulatory policy with congressional and special interest influence. Lessig's *Republic, Lost* contains numerous examples, and publications such as *Regulation* magazine specialize in this topic.[39] There is a variety of organizations that collects and publishes online data pertaining to Type 2 corruption issues, including for example OpenSecrets.org, POGO Project on Government Oversight, and the Sunlight Foundation.

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[35] [Need cites]

[36] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 27 (1983).

[37] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

[38] 5 U.S. 137 (1803) at 177–78. *Marbury v. Madison* marked the Supreme Court's seizure of the right to determine the constitutional status of laws.

[39] [citations to survey articles – Whinston JEL?]

Transportation. As regulatory institutions age, stories of Type 2 corruption tend to become clearer. Kolko's revisionist history of the Interstate Commerce Commission, cited earlier, is an example. Even if Kolko is wrong about "the" purpose of the Act to Regulate Commerce, he certainly is correct that the ICC did everything it could over many decades to reduce both railroad and inter-modal price competition, and ended up encouraging elaborate systems of price discrimination. This obviously is not what the Grangers had in mind. It is widely accepted that ICC (and later Civil Aeronautics Board) regulation significantly reduced the economic efficiency of transportation services in the U.S., to the disadvantage of consumers. Encouragingly, both agencies eventually were abolished on precisely those grounds. It may not be coincidental that both agencies distorted but could not eliminate competition, so that industry profits were low in spite of the interventions. Abolition of the agencies may have been facilitated by industry recognition that regulation no longer served their interests.

Foreign Trade. Probably the oldest and simplest stories of interest group success in diverting Congressional incentives away from consumer interests come from trade policy. The point of trade barriers (tariffs and quotas) is to enhance the profits of domestic manufacturers at the expense of domestic consumers, by depriving consumers of competitive alternatives. Trade policy, however, has long been prominent in political debate and political campaigns. In that respect trade policy, like other high-salience political debates, has differed from the regulatory institutions of the administrative state that remain insulated from political accountability.[40]

Broadcasting. Federal nationalization of the electromagnetic spectrum occurred in 1927, encouraged by then-Commerce Secretary Herbert Hoover. Since that time, the spectrum has been allocated by the Federal Communications Commission together with an inter-agency committee that deals with government spectrum uses. Whatever may have been the case in 1927, most economists agree that the spectrum could be allocated by private markets, provided that adequately defined property rights were first allocated to private owners, by auction or other means. In making spectrum allocation decisions the FCC has been heavily influenced by industry

[40] [Insert discussion of politics of fast track trade negotiation authority. See Levent Celik, Bilgehan Karabay, John McLaren, "When is it Optimal to Delegate: The Theory of Fast-track Authority," NBER Working Paper No. 17810, February 2012]

interests, both directly and through congressional patrons. For example, the FCC for decades made first radio and then TV licenses artificially scarce in order to protect the economic interests of networks and big-city stations. This resulted in massive losses of consumer welfare, both in programming that was never produced or viewed and in the costly construction of cable television, and later satellite television, facilities by the private sector to mitigate the continuing unmet consumer demand. No one has quantified the welfare loss, but the construction cost of unnecessary cable and satellite facilities alone ran to many tens of billions, taking no account of the lost willingness to pay for additional video content over many decades.

Banking and Finance. Regulation of financial services appears to have been largely responsible for the two great financial crises of the post-World War II period. In the period around 1980, rising interest rates threatened the solvency of Savings & Loan ("S&L") institutions. Congress directed regulators to treat S&Ls institutions as solvent, rather than close them at the expense of their owners, even if the market value of their liabilities exceeded the market value of their assets, so long as the nominal or "book" value of net worth was positive. The investment incentives of S&L managers were created by real (market) values, not accounting fictions such as book value. With nothing to lose, hundreds of S&Ls began to invest in extremely risky assets, knowing that any losses would be the responsibility of taxpayers, while rare good luck would benefit owners. In the end, taxpayers had to pay out hundreds of billions of dollars to protect depositors from the consequences of congressional and regulatory capture by S&L shareholder/campaign contributors.[41]

Housing finance. The financial crisis of 2008, although not yet fully assessed by economic historians, also appears to have been caused in part by political contributor-motivated congressional and regulatory policies, in several ways. The immediate cause was a failure of regulators to consider, assess, and limit the exposure of key financial institutions to systemic risk and specifically to the risks associated with a housing market bubble. Even if systemic risks were too difficult for regulators to assess, it is clear that regulators could and should have understood the risks asso-

[41] Lawrence J. White, **The S&L Debacle: Public Policy Lessons for Bank and Thrift Regulation**, Oxford University Press, 1992.

ciated with the housing-based derivatives and sub-prime assets on individual bank balance sheets. Equally, it was construction and related housing industry campaign contributions that encouraged congressional pressure on Fannie Mae and Freddie Mac to securitize, and thus promote, subprime mortgage lending. Far from tending to mitigate market failures associated with cognitive errors in consumer risk assessment and information, Type 2 corruption in federal housing policy made the problem worse.

Financial Crises. The movement to deregulate financial institutions starting in the 1970s was originally motivated by anti-competitive regulations such as the ban on inter-state banking, the Fed's Regulation Q, the fixing of commission rates, and the gerrymandering of competitive boundaries between different categories of banks. Eventually, however, deregulation became an end in itself. Both Congress and regulators ignored the presence of factors, akin to those that caused the S&L crisis, that made the incentives of financial corporations inconsistent with welfare optimization. The 2008 crisis appears to have involved principal/agent conflicts between corporate management and both customers and shareholders. Correcting such misaligned incentives requires changes in law or regulation, not deregulation. Making matters worse was the proliferation of financial regulatory agencies, each with a confined jurisdiction designed to accommodate new congressional oversight and budget committees and thus new opportunities for industry interests and Members of Congress to exchange contributions for influence. As the 2008 crisis unfolded, the first thoughts of many regulators and legislators likely turned to finding ways to protect financial firms, not taxpayers or investors.

Type 2 corruption threatens political stability and national security

The judicial branch of the government in America seized an early opportunity to designate itself as the final arbiter of what actions, statutes and procedures were consistent with the Constitution and thus lawful.[42] This power grab was tacitly accepted as part of the constitutional compromise, perhaps because key interest groups saw advantages in having a conservative body (i.e., a supreme court constrained by the tradition of respect for *stare decisis*) in charge of constitutional interpretation. This would tend to preserve the privileges accorded to such groups in

[42] *Marbury v. Madison* 5 U.S. 137 (1803).

the face of challenges from future rivals. Nevertheless, the Constitution does change over time, as it must to remain a foundation for a viable government in a changing world. Jefferson thought the Constitution should be rewritten or renewed every generation.[43] That the Constitution changes (or is understood to mean something other than what it says or doesn't say) is no guarantee that the nature and structure of government will remain viable, however.

Change is not a linear process. Adaptations of governments (and constitutions) to changing conditions can take various forms and follow multiple subsequent paths. In general, the path of change in the past constrains the range and timing of alternatives available in the future. This is called "path dependence." It is possible for a government (and a constitution) to take a path that, while initially highly adaptive, results eventually in structure that is no longer viable—that is, a path on which one or more interest groups have more to gain from abandoning the coalition than from remaining. At such a point either the constitution must be renegotiated or the state may collapse.

As discussed above, a condition for a viable constitutional coalition is that each included group with the alternative not to join views joining (under the proposed conditions or constitutional terms) as preferable to not joining, assuming that all other included groups meet the same condition. In this sort of equilibrium, every group is doing the best it can while assuming that every other group is doing the same, so no group has any reason to change strategies. Obviously, the existence and structure of any equilibrium depends on the nature of the internal arrangements of the coalition as well as the values and risks of alternatives available to those groups. As the state, considered as a political coalition of its interest groups, moves through time, any number of exogenous influences, such as changing economic conditions, foreign entanglements, or new technologies, threaten to undo the equilibrium. Of these influences, some can be countered by internal re-arrangements, but others not. If no internal adjustment can be made, one or more groups may depart the coalition, possibly triggering further changes. A

[43] Thomas Jefferson to James Madison, 6 Sept. 1789. Papers 15:392—97 http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html

range of final outcomes is possible, including, obviously, the absence of any ensuing equilibrium, implying a descent into political instability.

These two sources of non-viability for a state and its constitution (that is, internal path dependence that ends badly and disruptive external exigencies) are held in check by the substantial costs and risks associated with collapse of the state. A coalition member whose departure would render the state non-viable must anticipate a period of chaos and anarchy potentially harmful to itself. The gains from departure must be quite large to offset these costs and risks. On the other hand, such a group constitutes a great threat to the remaining groups. In contrast, a departure that would not lead to the demise of the state (because the remaining groups would comprise a smaller but still viable coalition) has a higher opportunity cost of remaining in the coalition, but constitutes less of a threat to the remaining members.

Because every group with the power (on account of an attractive alternative) to leave a coalition compares its prospective gains from continued participation with its expected gains from the external opportunity, state viability is a comparative matter. A state is more likely to remain viable if the gains it produces in the aggregate are expected to be greater, or growing faster, than gains expected to be available externally. Given the aggregate gains expected to be available internally, the remaining variable is how the gains are divided among the interest groups that comprise the coalition. An interest group focuses not on aggregate gains alone (though that affects the viability of the coalition as a whole) but also on its share of those gains. Thus, a government seeking to remain viable must concern itself both with making the most productive use of available resources, including investment in growth, and also with the distribution of value among the various interest groups.

The systemic neglect of consumer economic, not to mention environmental, health and other interests, by an administrative state corrupted by Type 2 influences must ultimately threaten the stability and survival of the United States. Markets and new technologies provide interest groups with attractive alternatives. Type 2 corruption transfers welfare from politically ineffective consumer interests to politically effective producer and passionate interests. Simultaneously, regulatory intervention tends to reduce productive efficiency and therefore aggregate wel-

fare. In response, ineffectively organized economic interests will simply seek to leave if market conditions permit. Changing technologies, especially falling communication costs, and global markets now make it much easier for market forces to act as if consumers were effectively organized for collective action. The costs imposed on productive economic activity and ultimately on consumers and taxpayers by the administrative state make relocation of consumption, investment and production to competing states increasingly desirable. Yet in spite of their growing ability to exercise power by departing from the coalition supporting our current political system, politically ineffective interest groups have no lobbyists and can engage in no negotiations. Preservation of our current system will require that an accountable political actor speak and act for these interests.

What can be done about Type 2 corruption and its consequences?

Proposed solutions to the capture problem take several forms. One is greater oversight by the courts.[44] As indicated above, however, the judicial branch has essentially abandoned the field by limiting itself to formal process reviews of agency decisions. Still, the Court has left numerous loopholes through which it might reassert itself. For example, it could decide to include collective action pathologies within the scope of "hard look" rationality. That is, it could recognize that neither standing nor the petition clause of the First Amendment alone are sufficient solution to the problem of effective interest group participation, either before the bureaucracy or before the legislature.

Another approach to the Type 2 corruption problem, akin to Madison's solution to the problem of controlling majority passions, discussed above, is an aggregation of agency jurisdictions, seeking to eliminate highly specialized agencies such as the FCC in favor of regulators with broad jurisdiction such as the antitrust agencies. This could reduce the number of highly specialized congressional committees and diffuse the power of special interest groups to purchase favorable regulations in return for campaign contributions in cash or kind.

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[44] For a summary (and negative assessment) of proposals to subject regulatory decisionmaking to stricter judicial review, see, e.g., Einer R. Elhauge. "Does Interest Group Theory Justify More Intrusive Judicial Review?" 101 YALE LAW JOURNAL 31 (1991).

“High politics”—periodic interventions by the president or other political leaders to reform regulation—is another potential solution. High politics is said to produce cycles of political reform or at least periodic high-salience that only briefly interrupt “business as usual” at the captured agency.[45] Of course, high politics is the natural forum for debate on salient political issues such as war, abortion rights, tax reform, the national budget and other headline news issues where Type 2 corruption is not as common.

None of these solutions seems very promising, simply because they leave problems of incentive-compatibility unaddressed. Modeling the relationship between Congress and agencies in a principal-agent framework assumes, naively, that Congress (or, more realistically, relevant committees and committee chairs) seeks to advance the public good. Except in times of “high politics,” typically involving the president, legislators have very little incentive to advance the public good at the expense of potential campaign contributions and other interest group favors. Indeed, legislators are even more likely to be captured than the heads of regulatory agencies, simply because they, unlike regulators, can lawfully accept cash contributions.

The fact is that Congressional committees and the regulatory bodies they oversee often do not have seriously incompatible incentives. In communications policy, for example, key legislators often successfully pressure regulators to adopt policies favoring important contributors or politically powerful groups such as the National Association of Broadcasters. If pressure does not work, the threat of legislation often can solve the problem. In general, independent regulatory agencies such as the FCC are in fear of and eager to please the oversight and budget committees to which they are responsible.

Leaving aside far-reaching and unlikely constitutional changes affecting campaign contributions or the scope of government, the only remedies would seem to be empowering underrepre-

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[45] Anthony Downs provides an early description in “Up and Down with Ecology—the ‘Issue-Attention Cycle,’” THE PUBLIC Interest (Summer 1972), 38-50. Downs illustrated the cycle with the example of environmental policy which, ironically, turned out to have very long-term rather than cyclical salience. Frank R. Baumgartner and Bryan D. Jones have developed, based on observed quantitative data, a “punctuated equilibrium” model that offers a different interpretation. **Agendas and Instability in American Politics,** 2nd ed. (Univ. Chicago Press, 2009).

sented interests or insulating regulatory policy from the political process.[46] Neither of these approaches is appealing.

Empowering citizen or consumer interests is unappealing because those who purport to speak for such groups have a poor track record in identifying important sources of welfare loss and because they reflexively favor more or more intrusive regulation and less reliance on market solutions, while ignoring the imperfections of regulation. But it is regulation that keeps such advocates in business, by providing a legitimizing forum. For the most part these consumer activist groups are self-nominated and not accountable to their own purported constituencies, creating principal-agent problems akin to those facing Congress.

Insulating regulation from the political process throws the baby out with the bath water. The point of "independent" administrative agencies is to insulate quasi-legislative and quasi-judicial regulatory bodies from the exercise of executive power while preserving accountability to those branches whose power has been delegated—the legislature and the judiciary. To untether agencies from Congress *and* the Executive, and to accord them judicial deference, opens the door to bureaucratic tyranny. As Madison put it in Federalist No. 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."[47] Solutions to the problem of Type 2 corruption must not insulate public officials from the people, instead, solutions must provide public officials with incentives to take account of *all* the interests of the people, and to balance those interests in a way that passes muster at the ballot box.

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[46] Justice (then-professor) Stephen Breyer proposed creating a kind of Confucian bureaucracy of regulatory experts sitting in the White House and speaking with the voice of the president. *See* Breyer, **Breaking the Vicious Circle: Toward Effective Risk Regulation,** (Harvard Univ. Press., 1995). Experience has shown that White House economists are not talented ventriloquists.

[47] James Madison [Publius],. "*The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts,"* 1787, (Federalist No. 47), in **The Federalist**, New York: Heritage Press edition, 1945, 322.

This last observation raises the question of direct democracy. In a direct democracy, citizens themselves vote on matters currently decided by legislatures (or regulators). The outcome of such voting becomes law. Modern communication technology is making such a system technically feasible. One reason for the use of legislatures of elected representatives in the past was the practical impossibility of direct democracy for governments much larger than those of small New England towns, where all the voters could literally meet and debate the issues. Now that it is possible, should we exchange our current republic for a direct democracy? The obvious advantage: citizens could express their preferences directly even on obscure regulatory issues, eliminating the requirement that they rely on representatives who share only some but not all voter preferences.

Communication costs aside, there are strong reasons to prefer representative government to direct democracy. Most citizens lack the time and resources to understand fully the range of issues currently considered by Congress or even state legislatures or city councils. In contrast, elected representatives typically are employed full time in making public policy. Members of Congress employ substantial personal expert staffs and have access to the work of even larger staffs employed by each Congressional committee. They can call on the Congressional Research Service of the Library of Congress, the General Accountability Office, and the Congressional Budget Office for analyses of issues related to legislation. They can call for hearings and listen to both interest groups and academic and other experts. Few individual citizens have comparable resources. Elected representatives therefore are in a position to be much better-informed about most issues than are typical citizens. Of course, that does not necessarily mean that representatives will honor voter preferences, because of incentive incompatibility.

Partly because of the lack of information available to individual citizens combined with lack of time and analytical training, direct voting is more likely to reflect emotional or instinctive reactions than thoughtful cognitive processing of information. A large majority of direct votes on a given matter may be based on essentially random influences. There is no reason to expect these votes to cancel each other. Humans share many common genetic and cultural endowments

that produce a range of emotional or instinctive influences in decision making.[48] These biases are random only in the sense that they have no predictable relationship to the analytical issues presented for voting. It is the wording, context or framing of questions presented that, for example, may produce predictable biases in instinctive responses, where "bias" refers to a systematic departure from rational decision-making. By definition, rational decision making promotes the conscious objectives of the decision-maker. Irrational decisions are regretted by the decision-maker at a later time, when the decision can be considered dispassionately. Fear of making such an error is minimized in direct democracy, because each voter knows that a single vote is unlikely to affect the outcome. Thus, voters have little incentive to attempt avoidance of irrationality. Madison's feared "passion" can run amuck. Of course, people also have little incentive to vote except when they *are* passionate.

Voting for legislative representatives is to some extent a different matter. There still is little incentive to vote, especially to vote online. (Voting online or by mail deprives voters of the positive feedback that comes from encountering neighbors and friends at the polls, everyone exercising their political entitlement and patriotic duty to participate.) But the decision process regarding the choice of a representative typically is not seen as analytical in nature. Voting on a bond measure is quite different from voting for a Member of Congress or a mayor. Choosing a person is a matter of character evaluation, which we always do instinctively, seldom analytically. Are we better at picking people to trust than at analyzing issues?

Another approach to pushing back the consequences of Type 2 corruption is what professor (now Justice) Elana Kagan has called "presidential administration."[49] The idea is that instead of struggling to control the bureaucracy, the president supplants it by expanding the white house staff, especially around such starring roles as various "czars." This idea is a variant of "unitary executive" theories, in which the president seeks to exercise his constitutional power as chief executive simply by issuing orders on policy matters to administrative agencies, seizing the po-

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[48] See Daniel Kahneman, **Thinking Fast and Slow,** Farrar, Straus and Giroux (2011).
[49] Elana Kagan, "Presidential Administration," 114 HARVARD LAW REVIEW 2245 (2001).

litical and media high ground on key issues.[50] As Congress is unlikely to accede passively to such a power shift (even if the president's party controls both houses), an alliance with the judiciary appears to be a necessary strategic ingredient of presidential administration. However unlikely it may be, this sort of reform does seem to offer a path out of the Type 2 corruption mess, because the president and his party are subject to electoral discipline by the people.

Lawrence Lessig, inventor of the phrase "Type 2 corruption," in his recent book surveys a range of potential solutions, dismissing all of them as either ineffective or very unlikely to be implemented. [51] But of all these, Lessig himself favors convening a convention under Article V of the Constitution. Such a convention could be charged with fundamental reform of political campaign financing, along with other, perhaps structural changes in the relationships among the three (or four) branches of government. Success in persuading a super-majority of states to petition Congress for a convention would require substantial time, energy, financial resources, inspired leadership and luck.

A modest proposal

I propose a new national elected office, the Inspector-General of the United States (IGUS). This perhaps requires a constitutional amendment. The inspector-general's mission will be akin to that of Congress' General Accountability Office (GAO), headed by the Comptroller-General of the United States. GAO reports to Congress, and is part of the Legislative Branch. GAO's mission is to audit the operations of executive branch and independent agencies, and to report on the efficiency and effectiveness of those agencies in carrying out their statutory goals. GAO does not audit legislation itself, or the performance of congressional committees.

The Inspector-General of the United States would report to the people and would have responsibility for identifying and publicizing (but not prosecuting) the most serious instances of Type 2 corruption. The current inspectors general in each agency might be included in this organiza-

[50] Mark Tushnet, "A Political Perspective on the Theory of the Unitary Executive," 12 JOURNAL OF CONSTITUTIONAL LAW 313-329 (2010).

[51] Lessig [page cite] .

tion, but this detail is less important than the Inspector-General's mission statement, which should focus on identifying the most significant *welfare-reducing* Type 2 corruption, as well as the most significant reductions in the welfare of the poorest.

The premise for the creation of this new federal office is that there is no more effective way to protect the people of the United States from the adverse effects of Type 2 corruption on the economic welfare of the people, especially including the least well-off, or from the threat of Type 2 corruption to the national security of the United States.

Empowerment of voters is the mechanism by which the mission is to be accomplished. The Inspector-General will seek to identify, through investigation and analysis, the most important current cases of welfare loss and inequity stemming from Type 2 corruption, either in administrative regulations or in the details of enacted legislation. Having done so, the Inspector-General will have the equally important responsibility to communicate this information *effectively* to voters, identifying with particularity the Members of Congress, members of congressional committees, and the officials and agencies of government (not limited to independent agencies) who are responsible for initiating, supporting, or voting for the provisions of law or regulation identified. Type 2 corruption will be identified by the Inspector-General on the basis of facially lawful direct or indirect political contributions to or expenditures on behalf of individual Members of Congress, the president, or political parties. Information reported to the people will include the details of such contributions or support.

The Inspector-General is to use the best available analytical methods and any necessary but reasonable assumptions in conducting studies of the welfare and equity effects of instances of Type 2 corruption. The Inspector-General should not be held to any particular standard of proof, but should indicate his or her degree of confidence in any quantitative estimate.

The Inspector-General should have access to compulsory process, including access to classified material. In matters involving classified material the Inspector General need not report classified information to the public, but may describe in summary terms the estimated effects on welfare and the identities of responsible legislators, officials, and private parties. The Inspector-General should not engage in criminal or civil litigation against any person, but may refer cases

to the Department of Justice or congressional disciplinary committees as appropriate. The Inspector-General is not directed to investigate matters involving Type 1 corruption or issues of high salience that have been widely debated in public fora, or had extensive media coverage, but may investigate non-salient details of such legislation or regulation. The Inspector-General should be selected by voters from among candidates meeting specific qualifications in periodic non-partisan contests coinciding with presidential elections.

The impact of instances of Type 2 corruption on welfare and equity will be assessed with respect to the alternative policies, laws or regulations most likely to prevail in the absence of the subject policy, law or regulation. The Inspector General's reports will identify these alternatives. Except when direct and reliable measurement of effects on happiness are available, the Inspector General will use conventional economic measures of lost welfare, such as consumer willingness to pay. Changes in surplus accruing to corporate entities will be attributed to their stockholders for purposes of assessing equity impacts of Type 2 corruption. The Inspector General is not charged to monitor or report on instances of income redistribution other than those that cause welfare losses or penalize the poorest citizens.

The ability and desire of the people to absorb, process, and act on information is limited. The Inspector General will take account of these limitations by ensuring that reports to the public are accessible in various popular media formats and in a style that effectively communicates their content. The number of reports should not be excessive. The details of investigations and analyses supporting reports to the public should be available to any person online.

These and many other details describing the functions of the Inspector General require much study and debate. In addition, given the small likelihood that this "modest proposal" will be adopted, it would be useful to consider private efforts and organizations that could perform a similar function.

Conclusion

Members of Congressional budget and oversight committees that deal with agencies have little incentive to promote public interest (welfare-enhancing) solutions to market failures within the jurisdictions of the agencies. The issues are seldom salient in Congressional elections. Instead,

their incentives are to induce well-organized special interests to make contributions, in cash or in kind, to Members' re-election campaigns, or to the parties. In return, Members support the interest groups' positions on agency policies and regulations or at least grant access to the policy negotiating table. Typically there is no misalignment of incentives between the agencies and the committees. The agencies have no greater incentive to pursue welfare than the committees. The same interests (and often the same lobbyists) seek to influence the agency directly, with the tacit backing of the committees. Despite procedural safeguards, the agency, the committees, and the potent interest groups communicate frequently and informally to reach agreement on the details of regulatory policy. The special interests generally seek increased economic rents, some of which are created at the expense of consumers by policy actions that retard competition and innovation. Others do damage to the poorest among us.

While this paper has been framed largely in terms of Type 2 corruption of the relationship between Congress and the administrative bureaucracy, most of its conclusions also apply to the non-salient details of complex legislation, such as tax and budget bills, especially legislation that issues regularly. For that reason, any solution must also address the legislative process. It is simply wishful thinking that power resides with the people on account of the elective status of legislators. No voter (indeed, no single person) can possibly be aware of the motivation and effects of tens of thousands of pages of new administrative regulations published each year, or the hundreds of new laws. The mass media focus on the sort of issues that sell newspapers and draw TV audiences, not the details in which the devil resides.

Type 2 corruption is a built-in or systemic bias of the administrative state. Its significance grows as the jurisdiction of the regulatory state grows. Jurisdiction grows because regulatory legislation (including that which is merely prophylactic) grows, and administrative regulation satisfies a public demand for action in response to well-publicized, but often purely hypothetical dangers. And it grows because the resulting regulatory institutions serve the private interest of Members in tapping into interest groups' rents.

The aggregate impact of Type 2 corruption's policy bias on the economy is analogous to the steady growth of a parasitic organism in a biologic model. The model is less able to compete

effectively for resources. This cannot continue indefinitely in an economy that faces global competition, and therefore it will not. Finding an effective solution is an urgent matter. A solution is required. Given the diagnosis of the problem, only two categories of solutions exist: campaign finance reform or empowerment of voters to consider Type 2 corruption in elections. One example of the latter category is to increase the accountability of Congress for the worst insults to welfare and equity by creating an elective office of the Inspector General charged with identifying the most consequential instances of Type 2 corruption, estimating the quantitative impact of those instances, and bringing that information effectively to the attention of the electorate.