

# PUBLIC POLICY FOR LAW STUDENTS

MICHAEL DEBOW\*

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In an earlier article for this *Review*, I made the case that the astonishing level of material well-being enjoyed by Americans depends upon the institutions of private property ownership and freedom of contract.<sup>1</sup> Government plays a vital role in this story. By enforcing the rights of the owners of private property, and providing sensible substantive rules of property, contract, and commercial law, and a fair and impartial court system to adjudicate disputes that cannot be settled by the parties themselves, government contributes significantly to the smooth operation of the private sector. This is most true when government lawgivers (legislators, judges) think in terms of facilitating, rather than superseding, private market behavior.<sup>2</sup>

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\* Retired Professor of Law, Most Recently the Stephen Everett Wells Professor of Municipal Law, Cumberland School of Law, Samford University. B.A. 1976, M.A. 1978, University of Alabama; J.D. 1980, Yale University. Member of the Cumberland faculty from 1988 to 2024. I am grateful to Dean Blake Hudson and Samford University for the sabbatical leave which allowed me to finish this project. I also wish to thank Lisa Ezell, Hannah Kunasek, and the members of the *Cumberland Law Review* for their comments on earlier versions of the article. Any remaining errors are my own.

<sup>1</sup> Michael DeBow, *Capitalism for Law Students*, 54 CUMB. L. REV. 249, 278 (2024).

<sup>2</sup> When government proceeds in this manner, the legal rules it adopts normally may be contracted around by the parties involved (that is, the legal rules are “default” rather than “mandatory” rules) and will reflect what the lawgivers think most private parties would have agreed on had they bargained over the issue in question. Most of this law is made at the state, rather than the federal, level.

This second Article focuses on government activity that is mandatory, rather than simply enabling or facilitating. This area of government action—what we will call *public policy*—seeks to replace the outcome that would have been generated by unfettered private, consensual market behavior (that is, capitalism) with a different outcome favored by the government (and any private interest groups that convinced the government to act).<sup>3</sup> The scope of government action of this type grew dramatically during the 20th century, as explained in 1965 by legal historian Lawrence Friedman:

The most dramatic changes touching the significance of contract law in modern life [] came about, not through internal developments in contract law, but through developments in *public policy* which systematically robbed contract of its subject-matter . . . [such as] labor law, anti-trust law, insurance law, business regulation, and social welfare legislation. The growth of these specialized bodies of public policy removed from “contract” (in the sense of abstract relationships) transactions and situations formerly governed by it.<sup>4</sup>

This Article is intended for students taking one or more of the elective courses mentioned in the Friedman quote, as well as courses in administrative law, legislation, consumer protection, employment law, environmental law, health care, land-use planning, and so on. My goal is to help students see the differences between private ordering (the subject of my first Article) and public ordering (the result of political and governmental action, and the subject of this Article), and strengthen their ability to assess arguments for and against proposed changes in public policy.

It should be noted at the outset that most of the work on this Article was done in the summer of 2024. As a result, there is no attempt here to evaluate the first few months of Donald Trump’s second term in office, during which he has sought to expand the power of the Executive Branch dramatically, and in a number of ways. It is the author’s hope that the ideas outlined in this Article help the reader to think through the public policy issues raised by the President’s domestic strategies.

## I. THE BIG PICTURE: OUR MASS REPRESENTATIVE DEMOCRACY

### A. *Structure*

American governments—national, state, and local—are structured by their constitutions as representative democracies, now with virtually

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<sup>3</sup> Barend A. de Vries, *Public Policy and the Private Sector*, FIN. & DEV., Sept. 1981, at 12–13.

<sup>4</sup> LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 24 (1965) (emphasis added).

universal adult suffrage. Within these frameworks, American voters elect legislative representatives and executive officers (and, in most states, judges as well).<sup>5</sup> The vast majority of government decisions are made by elected officials (or their surrogates, in the case of agency actions taken with delegated authority) rather than being made by voters directly (through referenda or town meetings, for example). Let's refer to our form of government as *mass representative democracy*.

We live, it is said, in a time of unusually deep political division and polarization. Nonetheless, it should be possible to get wide agreement on one simple point: Americans today live with a great deal of government and a great deal of public policy. We all are subject to the federal government and to our state governments, and at least one layer of local (or municipal) government. At the present time, both the federal and state governments wield very open-ended, virtually unlimited legislative power, subject only to a few formal restraints and the shifting sands of electoral politics. In short, there are few areas of life that are clearly beyond the reach of either the U.S. government and/or any given state government.<sup>6</sup>

Our current situation is quite different from what the founding generation had in mind. In brief, their idea was for the federal government to have responsibility for the areas of public policy enumerated in Article I, section 8; the rest of the burden of government was to be carried by the states.<sup>7</sup> The reality of American government has not looked like this since the 1930s. As Gary Lawson put it in a brilliant 1994 article, "[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."<sup>8</sup> The result? "The actual structure and operation of the national government today has virtually

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<sup>5</sup> Americans vote for only two federal executive officials—the President and Vice President. Provisions for all the rest of the structure of the executive branch are in statutes enacted by Congress. The top leadership of executive branch agencies are nominated by the President, subject to confirmation by the Senate. In addition, there are so-called "independent" agencies whose leadership is selected by the same procedure as the heads of the executive agencies, but who are not subject to presidential dismissal without cause. The relevant history is set out in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 492–95 (2010). State executive branches typically include several officials who are popularly elected in addition to the governor and lieutenant governor, such as secretary of state, attorney general, treasurer, and so on.

<sup>6</sup> If this statement is shocking or puzzling to the reader, you should take a look at the brief review of some basic constitutional structure and history offered in Appendix I to this article. See *infra* Appendix I.

<sup>7</sup> See U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

<sup>8</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

nothing to do with the Constitution. There is no reasonable prospect that this circumstance will significantly improve in the foreseeable future.”<sup>9</sup>

Lawson’s analysis was correct thirty years ago, and it is still correct today. Neither major party candidate for President in 2024 had the slightest interest in, or commitment to, the American founding’s vision of a limited, constrained national government. In fact, the very idea seemed unknown to them. And while some voters may claim to care about limiting government, their commitment lies primarily in the realm of the abstract. Once a person has a personal interest in a particular federal policy or program, she tends to lose interest in the question of whether the federal government has the authority to adopt the policy or program in the first place.

### B. *Government Finance*

Another unmistakable feature of American governments is that they collect mind-boggling amounts of money through taxation and borrowing and expend these funds on a bewildering range of programs.

In fiscal year 2021 (the latest year for which this data is available), state and local governments took in \$5.7 trillion in revenue (including \$1.1 trillion from the federal government) and spent \$4.5 trillion.<sup>10</sup> The largest categories of state and local spending were education (25.4% of the total) and public welfare programs (19.1%).<sup>11</sup> State and local debt totaled \$3.3 trillion, with local governments accounting for 63.8% of the total, and state governments, 36.2%.<sup>12</sup>

With six weeks to go in fiscal year 2024, the Federal government had collected \$4.92 trillion in revenue and spent \$6.75 trillion.<sup>13</sup> It is somewhat sobering to recognize that the federal government’s largest activity is *income redistribution*.<sup>14</sup> Programs like Social Security,

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<sup>9</sup> *Id.* at 1249. If you read only one article on the administrative state, it should be this one.

<sup>10</sup> Russell Pustejovsky & Jeffrey Little, *Annual State and Local Government Finances Summary: 2021*, U.S. CENSUS BUREAU (Aug. 2023), <https://www2.census.gov/programs-surveys/gov-finances/tables/2021/2021alfinsummarybrief.pdf> [<https://perma.cc/4DC3-3S8D>].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *The Latest Data on Federal Revenue, Spending, Deficit, and the National Debt*, FISCALDATA.TREASURY.GOV, <https://fiscaldata.treasury.gov/americas-finance-guide/> [<https://perma.cc/TKC4-U6AX>] (last visited Feb. 16, 2025). FY 2024 began on Oct. 1, 2023, and ended on Sept. 30, 2024.

<sup>14</sup> Chris Edwards, *How the Federal Government Spends \$6.7 Trillion*, CATO INST. (Mar. 12, 2024), <https://www.cato.org/briefing-paper/how-federal-government-spends-67-trillion#redistribution-dominates-federal-spending> [<https://perma.cc/QD66-CC3A>]

Medicare, and food stamps transfer funds from taxpayers (and lenders) to eligible individuals, who make the ultimate consumption decisions.<sup>15</sup> In fiscal year 2024, Social Security accounted for 21% of federal spending, Medicare for another 15%, income security programs for 9%, and veterans benefits and services for 6%.<sup>16</sup> It is worth noting that the Constitution makes no provision for such programs. National defense accounts for 14% of the federal budget; net interest payments on the debt, 13%.<sup>17</sup>

The \$1.83 trillion of deficit spending was covered by federal government borrowing.<sup>18</sup> As a result of decades of deficit spending, the federal debt stood at more than \$35 trillion by the end of 2024.<sup>19</sup> The most recent forecast from the bipartisan Congressional Budget Office estimates that federal debt equals 99% of current GDP.<sup>20</sup> The CBO forecasts that increases in federal spending, particularly on transfer programs,<sup>21</sup> over the next ten years will be more than \$50 trillion, equal to 122% of projected 2034 GDP.<sup>22</sup> Although many question whether this unprecedented path will be sustainable,<sup>23</sup> there was very little discussion of this issue in the 2024 presidential campaign.<sup>24</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *How Much Has the U.S. Government Spent This Year?*, FISCALDATA.TREASURY.GOV, <https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/> [<https://perma.cc/H5YV-ATRD>] (last visited Feb. 16, 2025).

<sup>17</sup> *Id.*

<sup>18</sup> *The Latest Data on Federal Revenue*, *supra* note 13.

<sup>19</sup> *Id.*

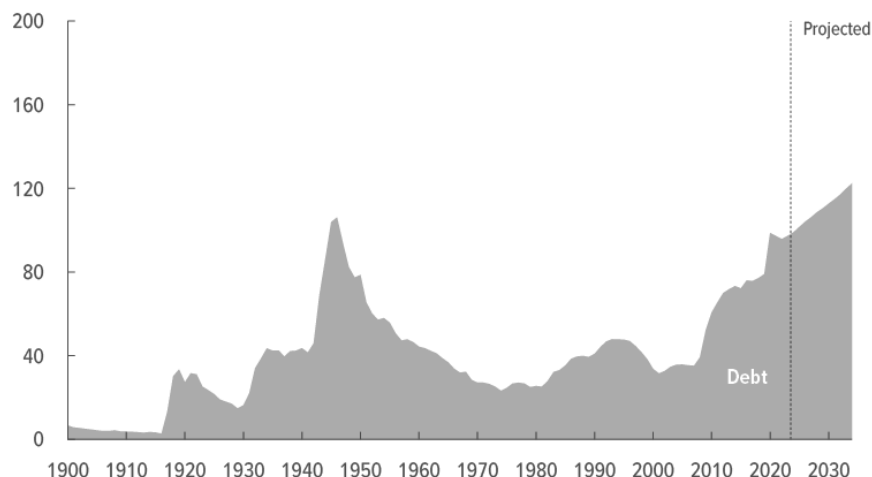
<sup>20</sup> *An Update to the Budget and Economic Outlook: 2024 to 2034*, CONG. BUDGET OFF. (June 18, 2024), <https://www.cbo.gov/system/files/2024-06/60039-Outlook-2024.pdf> [<https://perma.cc/8AUS-7WYX>].

<sup>21</sup> Romina Boccia, *CBO Update: Medicare and Social Security Are Key Drivers of Exploding Debt*, CATO INST.: CATO LIBERTY (June 25, 2024, 7:20 AM), <https://www.cato.org/blog/cbo-update-medicare-social-security-are-key-drivers-exploding-debt> [<https://perma.cc/NG63-3KY6>].

<sup>22</sup> *An Update to the Budget and Economic Outlook: 2024 to 2034*, *supra* note 20. Wealthy countries around the world are in similar circumstances.

<sup>23</sup> See, e.g., Dwight R. Lee & Michael DeBow, *Fiscal Recklessness, Path Dependence, and Expressive Voting*, 28 INDEP. REV. 123, 124 (2023).

<sup>24</sup> See Thomas Savidge, *An Entitlement Wake-Up Call*, LAW & LIBERTY (May 20, 2024), <https://lawliberty.org/an-entitlement-wake-up-call/> [<https://perma.cc/8ZXD-YJWY>] (noting that the official estimate of the present value of the shortfall in funding for Social Security and Medicare totaled \$78.2 trillion in 2024); Brett Arends, *Social Security: The \$22.6 Trillion Issue the Harris-Trump Debate Totally Ignored*, MARKETWATCH, <https://www.marketwatch.com/story/the-harris-trump-debate-ignored-this-22-6-trillion-issue-that-most-workers-are-worried-about-e7d8dac5> [<https://perma.cc/HRS7-QAYC>] (Sept. 12, 2024, 9:48 AM).



[PHOTO] *Federal debt as a percentage of GDP (read off the vertical axis), from the most recent ten-year forecast of the Congressional Budget Office.*<sup>25</sup>

Finally, we should not overlook the huge off-budget impact of American government. In particular, regulation imposes compliance costs that show up on the books of American businesses, but not on the government's books.<sup>26</sup> The National Association of Manufacturers estimated the total cost of complying with federal regulations in 2022 was a little over \$3 trillion.<sup>27</sup> Although these costs are initially covered by businesses, they are ultimately borne by consumers (paying higher prices), investors (earning lower profits), and employees (experiencing lower wages and fewer jobs).<sup>28</sup> To put it differently, these costs flow through to people with whom businesses trade—which is all of us, eventually.

<sup>25</sup> *An Update to the Budget and Economic Outlook: 2024 to 2034*, *supra* note 20.

<sup>26</sup> Nicole V. Crain & W. Mark Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, NAT'L ASS'N MFRS. (Oct. 2023), <https://nam.org/wp-content/uploads/2023/11/NAM-3731-Crains-Study-R3-V2-FIN.pdf> [<https://perma.cc/LZS4-FQ5D>].

<sup>27</sup> *Id.*

<sup>28</sup> When economists try to identify who actually bears a cost, they speak in terms of “incidence.” See e.g., JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 517 (Craig Bleyer et al. eds., 1st ed. 2005). Self-test—Spot the incidence question contained in this headline: Lev Facher, *Biden Administration Finalizes Rules to Ensure Insurers Pay for Mental Health Care*, STAT (Sept. 9, 2024), <https://www.statnews.com/2024/09/09/insurance-mental-health-parity-addiction-treatment/> [<https://perma.cc/8TJ9-EX29>].

## II. FIVE HELPFUL IDEAS

This section lays out five ideas drawn from economics that are very helpful in thinking about public policy. Using economics is not the only way to discuss public policy, but it seems to me to offer the most powerful tools for understanding this subject. This is a positive, rather than a normative, claim. You may or may not agree with it after reading this article; I ask only that you give economics-based reasoning a fair chance to convince you.

### A. *Self-Interest and Methodological Individualism*

This Article adopts the standard assumption in economics about human nature—namely, that we make choices and undertake actions in a rational attempt to reach the goals we have set for ourselves. In short, human action is *self-interested*. Not all self-interested behavior deserves the label “selfish,” let alone “greedy.” As the Federal Reserve Bank of St. Louis put it:

While the term self-interest has negative connotations, it does not necessarily imply greedy or immoral behavior. Self-interest just means that you seek your goals. In fact, your self-interest might lead you to study hard for . . . [a] test, give money to your favorite charity or volunteer at a local school.<sup>29</sup>

The assumption of self-interest will be familiar to anyone who has taken an economics course, as will the assumption that businesspeople seek to maximize profits and consumers seek to maximize the satisfaction they derive from consumption. The parallel assumption about people acting in the political arena is that their overriding goal is to acquire (or maintain) political power by winning elections and exercising governmental authority.<sup>30</sup> In other words, people in politics and government are just as self-interested as everyone else; they are not angels endowed with a more noble set of motives than anyone else.<sup>31</sup>

A related idea known as “methodological individualism” asserts that “social phenomena must be explained by showing how they result

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<sup>29</sup> The Economic Lowdown Podcast, *The Role of Self-Interest and Competition in a Market Economy*, FED. RESRV. BANK ST. LOUIS, at 2:19, <https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-3-the-role-of-self-interest-and-competition-in-a-market-economy> (last visited Mar. 2, 2025); see also John Paul Rollert, *What Is the Line Between Self-Interest and Selfishness?*, CHI. BOOTH REV., Winter 2021/22, at 51, 51–53 (sketching the views of Hobbes, Hume, Mandeville, and Smith).

<sup>30</sup> The Federalist No. 51, at 322, 324 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> *Id.* at 322.

from individual actions” and motivations.<sup>32</sup> This is a variation on a theme most law students encounter in a course on business organizations: is it more accurate to view a business firm as an entity—a thing in itself—or as an aggregation of individuals interacting within a “nexus of contracts?” Most business law teachers think the latter approach is typically more useful to students. As one widely used text puts it, “[g]enerally, to gain a clear understanding of how a firm behaves and why it is structured in a particular fashion, one must decompose the firm into the various categories of participants whose activities are coordinated within the firm: equity investors, creditors, managers, employees, suppliers, etc.”<sup>33</sup>

Essentially the same entity/aggregate question presents itself when one is thinking about government action, and it is similarly more productive to approach government not as a thing, but as an aggregation of individuals interacting with one another within a particular framework. In other words, government is “they,” not “it.” Since human beings populate both business firms and government entities, we may use the same basic understanding of human nature (as self-interested) in thinking about both sets of institutions.

*B. Agents, the Agency Problem, and Avoiding the Nirvana Approach*

What the law calls an agency relationship is one that “arises when one person (a “principal”) engages another person to act on behalf of the principal and subject to his control.”<sup>34</sup> Modern life is full of agency relationships. For example, the typical employment relationship is treated as an agency relationship between the employer (the principal) and its employees (the agents).<sup>35</sup> Agency law imposes a *fiduciary duty* on agents “to act loyally for the principal’s benefit in all matters connected with the agency relationship.”<sup>36</sup> The law also provides as a default rule that “an agent has a duty to the principal to act with the care,

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<sup>32</sup> Joseph Heath, *Methodological Individualism*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/archives/sum2024/entries/methodological-individualism/> [https://perma.cc/NMW3-ZLMA] (June 12, 2024).

<sup>33</sup> WILLIAM A. KLEIN ET AL., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 117 (11th ed. 2010) (footnote omitted).

<sup>34</sup> RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006); RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958).

<sup>35</sup> RESTATEMENT (SECOND) OF AGENCY § 1 cmt. D–E (AM. L. INST. 1958).

<sup>36</sup> RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006); *see also* RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 1958).



competence, and diligence normally exercised by agents in similar circumstances.”<sup>37</sup>

These fiduciary duties amount to a very high standard of behavior expected of agents. Human nature being what it is, some agents will fail to work as faithfully and diligently as their principal wishes. This failure may be the result of laziness or inattention or lack of skill. But it may be through something more actively malevolent on the agent’s part: dishonesty, for example. The fact that agents may fail to meet the fiduciary standard of behavior generates the *agency problem*—namely what, if anything, can the principal do to deter, or to detect and respond to, departures from the standard?<sup>38</sup> Any attempt to deal with an agency problem will be costly to the principal, to some degree. Failure to deal with the problem will also be costly to the principal, probably to a different degree. To take an example I used in class many times: bar owners tell their bartenders not to use more than a specified amount of liquor in pouring a drink. Yet bartenders often “overpour,” presumably seeking more generous tips from their patrons. What’s the bar owner to do?<sup>39</sup>

The operation of both business (the private sector) and government (the public sector) can be understood in terms of principals and agents.

In the private sector, the law of business organizations views the managers of a business as the agents of the owners of the business (the principals). In the corporate setting, the directors and officers are considered the agents of the corporation and its owners, the shareholders.<sup>40</sup> The shareholders (equity investors) hold the claim to the residual left-over after the business pays all its contractual liabilities (to employees,

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<sup>37</sup> RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. L. INST. 2006); *see also* RESTATEMENT (SECOND) OF AGENCY § 379 (AM. L. INST. 1958).

<sup>38</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309–10 (1976).

<sup>39</sup> Lisa Osburn, *Bars Pouring Money into Liquor Monitor Systems*, BIRMINGHAM NEWS (Feb. 24, 2007); *see also* *Why Shrinkage and Pour Costs Effect Bar Inventory*, BARCOP, <https://www.barcop.com/blogs/why-pour-costs-and-shrinkage-effect-bar-inventory> [<https://perma.cc/WEA4-V9ZE>] (last visited Feb. 13, 2025) (“Industry studies have found that most bars are getting hit by an average 15-20% profit loss due to employee theft and carelessness.”).

<sup>40</sup> Technically speaking, Delaware corporate law imposes duties on directors and officers to act in the best interests of “the corporation for the ultimate benefit of the shares” of common stock. That is, the stockholders are not owed these duties in their capacity as individuals, but rather derivatively, as the owners of the shares. *See* *McRitchie v. Zuckerberg*, 315 A.3d 518, 557 (Del. Ch. 2024). Nevertheless, it is easy to find judicial opinions that speak of fiduciary duties owed to shareholders. *See, e.g.,* *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986). This point is not important to our purpose here.

suppliers, and so on) and the taxes it owes. The shareholders wish to hold the managers of the corporation accountable for its “bottom line” performance: its profitability.<sup>41</sup>

In the public sector, citizens can be understood as the principals, and government officials as their agents.<sup>42</sup> The agency problem arises when officials seek to ignore or shirk their responsibility to serve the public.<sup>43</sup> This unfaithful behavior runs from minor cases of laziness or neglect all the way to theft, extortion and bribery,<sup>44</sup> and other forms of corruption.

Since both businesses and governments are faced with the agency problem, we probably should ask which form of organization—business or government—better deals with it. Does the private sector do a better job of holding directors and officers accountable to their shareholders than the public sector does in holding politicians and office holders accountable to the public?

The accountability structure that constrains corporate directors and officers contains at least two major elements: the capital structure and the private interests (financial and reputational) of the directors and officers themselves. As for the first, the need for corporations to go to the capital market for periodic injections of investment capital means that the recent financial performance of a corporation is actively monitored by analysts employed by large investors and other financial institutions.<sup>45</sup> Good corporate performance lowers the cost of either borrowing money or raising it by selling stock to investors, and thus positively impacts the reputations of the directors and officers involved, as well as the value of their stock holdings in the corporation they lead.<sup>46</sup>

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<sup>41</sup> *McRitchie v. Zuckerberg*, 315 A.3d 518, 559, 562 n.132 (Del. Ch. 2024).

<sup>42</sup> Robert Higgs, *Principal-Agent Theory and Representative Government*, 22 INDEP. REV. 479, 479–80 (2018).

<sup>43</sup> For a brief but provocative treatment, see *id.*

<sup>44</sup> See, e.g., *New Jersey Senator Bob Menendez Resigns After Bribery Convictions*, BBC (Aug. 21, 2024), <https://www.bbc.com/news/articles/cdx6l3p5lrr0> [<https://perma.cc/RH28-G54E>]; Peter Van Doren, *California Corruption and Zoning Reform*, CATO INST.: CATO LIBERTY (Sept. 4, 2024, 4:09 PM), <https://www.cato.org/blog/california-corruption-zoning-reform> [<https://perma.cc/S7NR-3CBF>] (discussing an FBI investigation of possible bribery of Los Angeles city officials in connection with rezoning requests from real estate developers).

<sup>45</sup> The seminal article in this area is Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

<sup>46</sup> *Importance of Corporate Governance in Modern Business and Its Pivotal Role*, IDEALS Bd., <https://idealsboard.com/importance-of-corporate-governance/> [<https://perma.cc/7Y7A-QYR6>] (Sept. 27, 2023).

The accountability structure that constrains politicians and office-holders is largely dependent on the need to seek periodic approval from the voting public.<sup>47</sup> Elections give the public an opportunity to register their approval or disapproval of the recent performance of government personnel in their pursuit of *public interest*.<sup>48</sup> This is a very imperfect form of oversight, for reasons we will consider below.

The private sector accountability structure is not perfect, but it seems to be much more effective in disciplining directors and officers, as compared with elections in the public sector. So, we would tend to find government enterprises less competently run than private sector enterprises. Strong evidence that this is true is provided by the so-called *bureaucratic rule of two*—the idea that, on average, moving “an activity from the private sector to the public sector will double its unit costs of production.”<sup>49</sup> This is such an important piece of information about the relatively poor management of the public sector that it is remarkable that it is not more widely known.<sup>50</sup> It is one of the strongest arguments supporting the “privatization” of government functions—the contracting out of government functions to private firms—whenever possible.<sup>51</sup>

Proponents of new government programs usually fail to deal seriously with the question of government accountability. Instead, would-be performers tend to present “the relevant choice as between an ideal norm [e.g., a perfectly designed and executed government action] and an existing ‘imperfect’ institutional arrangement [e.g., free market capitalism].”<sup>52</sup> In his famous 1969 article, economist Harold Demsetz further explained “[t]his *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is

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<sup>47</sup> Higgs, *supra* note 42.

<sup>48</sup> *Id.*

<sup>49</sup> Thomas E. Borcharding, *The Sources of Growth of Public Expenditures in the United States, 1902-1970*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 45, 62 (Thomas E. Borcharding ed., 1977).

<sup>50</sup> For more, see JAMES T. BENNETT & MANUEL H. JOHNSON, BETTER GOVERNMENT AT HALF THE PRICE: PRIVATE PRODUCTION OF PUBLIC SERVICES 37 (1981), and DENNIS C. MUELLER, PUBLIC CHOICE III 373–79 (2003) (collecting seventy one academic studies comparing cost differences between private firms and government enterprises in the same lines of business).

<sup>51</sup> John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?*, HARV. BUS. REV. (Nov.-Dec. 1991), <https://hbr.org/1991/11/does-privatization-serve-the-public-interest> [<https://perma.cc/2FQ6-XW4E>].

<sup>52</sup> Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 1 (1969).

between alternative real institutional arrangements.”<sup>53</sup> The choice we face in the real world, Demsetz explains, is between imperfect market behavior and imperfect government intervention seeking to “correct” the imperfect market behavior.<sup>54</sup> Both the positive and negative aspects—the benefits and costs—of *both* alternatives need to be considered. We will return to this point shortly.

This Article will try to remain faithful to the spirit of the comparative institution approach.<sup>55</sup>

### III. DEFINING THE PUBLIC INTEREST: PARETO AND COST-BENEFIT ANALYSIS

Let’s assume that most citizens of a mass representative democracy would agree that their elected government officials *should* make decisions and act with the best interests of the public (somehow) in mind.<sup>56</sup> This normative statement immediately raises two related questions. First, how exactly should public interest be understood and, critically, implemented? Second, do elected government officials actually behave in this way all, or most, of the time?

The answers to these questions are far from obvious. Happily, economics provides some help in approaching them.

As an initial matter, it seems obvious that every kind of public policy will benefit some and burden others—that is, government programs will generate both winners and losers. Human nature being what

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<sup>53</sup> *Id.* He further explains: “The nirvana approach is much more susceptible than is the comparative institution approach to committing three logical fallacies – *the grass is always greener fallacy*, *the fallacy of the free lunch*, and *the people could be different fallacy*.” *Id.* at 2.

<sup>54</sup> *Id.* at 1.

<sup>55</sup> Although the comparative approach is most closely identified with the work of economists, there are a few law professors who follow it in their research and writing. The two most prominent are Neil Komesar of the University of Wisconsin and Thomas Lambert of the University of Missouri. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3–4 (1994); Neil Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 WIS. L. REV. 265, 289 (2013); THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS (2017); Thomas A. Lambert, *Addressing Big Tech’s Market Power: A Comparative Institutional Analysis*, 75 SMU L. REV. 73, 73 (2022). For an overview, see Daniel H. Cole, *The Varieties of Comparative Institutional Analysis*, 2013 WIS. L. REV. 383 (2013).

<sup>56</sup> It is worth pausing for a moment to note just how modern a statement this is. Before the establishment of mass representative democracies, the idea of the public interest as we now use it counted for very little. For millennia, the vast majority of mankind were subject to one form or another of autocratic rule.

it is, we can expect the winners to support the government policy and the losers to oppose it.<sup>57</sup>

To move from the theoretical to the concrete, let's begin with a topic from state and local government—namely, zoning ordinances. As a result of zoning, some landowners might see the value of their property go up (or remain constant), while some landowners might see the value of their property go down. In the landmark case of *Village of Euclid v. Ambler Realty Co.*, the plaintiff alleged that Euclid, Ohio's 1922 adoption of a zoning ordinance caused the market value of the land it owned in the town to fall by almost \$200,000 (about twenty-nine percent of its alleged market value in the absence of the ordinance).<sup>58</sup> This amounts to roughly \$3.63 million in 2023 dollars.<sup>59</sup> Take Ambler's estimate of its lost opportunity as proved. Did the Euclid, Ohio, village council promote public interest given the harm to Ambler?

Let's assume that at least one of the investors in Ambler lived in Euclid and was registered to vote there. Had this ordinance been adopted by a referendum, we can assume the Ambler investor would have voted against the ordinance. According to the 19<sup>th</sup> century social scientist Vilfredo Pareto, the opposition of even one citizen is a compelling reason not to adopt a proposed public policy.<sup>60</sup> He argued that only the rule of unanimous approval would ensure that public policies truly advance the public interest.<sup>61</sup> Only then can we be sure that at least some citizens benefit and no citizens are harmed by the proposed policy change.<sup>62</sup>

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<sup>57</sup> As George Bernard Shaw put it, "A government which robs Peter to pay Paul can always depend on the support of Paul." BERNARD SHAW, *EVERYBODY'S POLITICAL WHAT'S WHAT?* 256 (1st ed.1944). He assumes that voters will vote instrumentally, a question we will address *infra*. See discussion *infra* Part IV.

<sup>58</sup> 272 U.S. 365, 379, 384–85 (1926). Ambler owned sixty-eight acres in Euclid that it planned to develop as an industrial site. *Id.* at 379, 384. Before Ambler's plans could be realized, the village adopted the zoning ordinance and zoned a portion of the land owned by Ambler for residential, not industrial, use. *Id.* at 379–80, 382, 384. Ambler claimed the land was worth \$10,000 per acre as an industrial site, but only \$2,500 per acre if put to residential use. *Id.* at 384–85.

<sup>59</sup> MEASURINGWORTH, <https://measuringworth.com/calculators/uscompare/relativevalue.php> [<https://perma.cc/EQ52-WLTR>] (last visited Feb. 21, 2025).

<sup>60</sup> See Gonalo L. Fonseca, *The Paretian System: II - Efficiency*, Hist. Econ. Thought, <https://www.hetwebsite.net/het/essays/paretian/paretoptimal.htm> [<https://perma.cc/FF2B-FMQQ>] (last visited Feb. 12, 2025).

<sup>61</sup> *Id.*

<sup>62</sup> See Gonalo L. Fonseca, *The Paretian System: IV - Social Welfare*, HIST. ECON. THOUGHT, <https://www.hetwebsite.net/het/essays/paretian/paretosocial.htm> [<https://perma.cc/3WZD-A899>] (last visited Feb. 12, 2025).

Now consider the situation where the ordinance is taken up by an elected representative legislative body—the town council, say—rather than by referendum. Could a council member use the Pareto method to decide whether to vote for the ordinance? If she hears an objection from even one constituent, Pareto would recommend she vote against the zoning ordinance. But what if a large majority of the town supports the ordinance? Assume that the town contains 1,000 residential lots, and that zoning would increase the value of each lot by \$2,500. Our hypothetical council member, if she wishes to be reelected, is quite unlikely to follow Pareto’s advice, because “doing the right (Paretian) thing” would court political disaster. It would obviously be much safer to go with the supermajority view.<sup>63</sup> For this reason and others, Pareto is of little relevance to real-world political actors.

Fast forward fifty years or so. Two economists working separately came up with a clever variation on Pareto. In articles published in 1939 Nicholas Kaldor and John Hicks argued that a change in public policy was justified if the winners could conceivably compensate the losers out of the gains generated by the change in public policy.<sup>64</sup>

So, in *Euclid*, the adoption of the zoning ordinance could be characterized as promoting the public interest if the total increase in property values enjoyed by the landowners who benefitted from the ordinance exceeded the losses claimed by Ambler (and any other dissenters). This is simply a form of cost-benefit analysis (“CBA”), applied to questions of public policy. Put another way, Kaldor-Hicks analysis declares the public interest served whenever the value gained by the winners exceeds the value lost by the losers.<sup>65</sup> Notice that Kaldor-Hicks does not require that compensation be paid to the losers, only that this could potentially be done out of the increase in value generated by the public policy change.<sup>66</sup>

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<sup>63</sup> See *Debunking the Myth of Unanimity: Arrow’s Impossibility Theorem Examined*, FASTERCAPITAL (June 3, 2024), <https://fastercapital.com/content/Debunking-the-Myth-of-Unanimity—Arrow-s-Impossibility-Theorem-Examined.html> [https://perma.cc/XS8N-L3HW]. As a matter of fact, American homeowners strongly support zoning. See WILLIAM A. FISCHER, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION xii (2015).

<sup>64</sup> Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 711 (1939). Pareto and Kaldor-Hicks can be compared to the summation of the Hippocratic Oath: “First do no harm.” *First, Do No Harm*, HARV. HEALTH PUBL’G, <https://www.health.harvard.edu/blog/first-do-no-harm-201510138421> [https://perma.cc/GDU-2R9E]. Pareto is equivalent to this command, whereas Kaldor-Hicks amounts to “do no *net* harm.” That is, do not adopt a policy where the harm outweighs the benefit.

<sup>65</sup> See Hicks, *supra* note 64, at 700–01, 706.

<sup>66</sup> *Id.* Whether the Fifth Amendment to the U.S. Constitution, or parallel provisions in state constitutions, would require compensation be paid is a different question altogether.

Consider the Kaldor-Hicks test using the hypothetical gain of \$2,500 per lot for each of 1,000 residential lots. The total gain for residential owners would be \$2.5 million. Using the inflation-adjusted loss to Ambler Realty of \$3.63 million, the zoning ordinance fails the Kaldor-Hicks test. A comparison of the zoning's costs with its benefits in this hypothetical would lead a council member following Kaldor-Hicks to reject the proposal. But for reasons already discussed, we would not expect the elected council member to follow the Kaldor-Hicks roadmap.

If the numbers are significantly different, the Kaldor-Hicks recommendation can change. For example, if the value of each lot increases by \$4,000, the total gains of \$4 million outweigh the loss of \$3.63 million. Kaldor and Hicks would vote "aye" in this circumstance, and no compensation need be paid according to their analysis.

Cost-benefit analysis obviously has the potential to make government decision making much more rational than it would otherwise be. It is reasonable to assume most people would prefer not to live under a government that is oblivious to costs and benefits, because adopting government policies that generate more costs than benefits run the risk of impoverishing a country.

Cost-benefit analysis has been a formal part of federal executive branch rulemaking since 1981, when President Reagan issued Executive Order 12291.<sup>67</sup> It required any "major rule" developed by an Executive agency to be submitted to the Office of Informational and Regulatory Affairs (OIRA), in the Office of Management and Budget.<sup>68</sup> OIRA reviewed the cost-benefit analysis submitted by the agency as the final step in the rulemaking process.<sup>69</sup> Without OIRA's assent to the agency's conclusion that benefits will exceed costs, the rule could not become final.<sup>70</sup> Although this change in rulemaking was controversial at first,<sup>71</sup> it was continued by the Bush Administration and, with

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In *Euclid*, a six-member majority of the Court upheld the zoning ordinance against a facial attack by the landowner. 272 U.S. at 396–97. In other words, the Court decided that the ordinance did not, on its face, violate the Fourteenth Amendment; the decision did not address the question whether the ordinance as applied to the plaintiff violated its Fourteenth Amendment rights. *Id.* at 397.

<sup>67</sup> Exec. Order No. 12291, 3 C.F.R. 127 (1981), *reprinted as amended* in 5 U.S.C. § 601 app. at 431–34 (1982).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> For a description of the early years of OIRA from two people who were present at its beginnings, see Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075 n.1–n.2, 1076 (1986) (detailing the controversial nature of Reagan's program).

a few modifications, by the Clinton Administration.<sup>72</sup> The Obama Administration also modified the procedures, but the director of OIRA from 2009 to 2012 was Cass Sunstein, the most visible proponent of CBA among American law professors.<sup>73</sup> Recently, however, the Biden Administration adopted more controversial changes, raising some serious questions about the Executive Branch's interest in comparing costs and benefits in a rigorous way.<sup>74</sup> Further developments here await the outcome of the 2024 presidential election.<sup>75</sup>

If we nevertheless assume a good faith desire to perform CBA, it remains true that CBA can be very difficult to perform competently and is always subject to self-interested advocacy on the part of private interest groups that attempt to shape public policy. Our zoning hypothetical raises the important question: how difficult is it to quantify costs and benefits? I simply made up two numbers for the increase in market value that would follow the adoption of zoning. That's easy enough. Imagine actually trying to estimate the potential gains from the adoption of the ordinance. A researcher could talk to people with expertise in local residential real estate, who *might* have the basis for an expert opinion on zoning's impact on real estate market values. The researcher also might be able to gain some data from the experiences of comparable cities that have already adopted zoning. But however the research is conducted, the resulting estimates of likely benefits (and costs, for that matter) from the adoption of zoning should be taken with a considerable grain of salt.

An important comparative institutions point should be made here: cost-benefit analysis is used by actors in the private sector all the time. In fact, businesses can be thought of as perpetual motion cost-benefit machines. Businesspeople and consumers all compare costs and

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<sup>72</sup> Clinton's revised cost-benefit procedures were set out in Executive Order 12866, which superseded Exec. Order 12291. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1507 (2002).

<sup>73</sup> See CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 18–20 (2018) [hereinafter Sunstein, *The Cost-Benefit Revolution*]; Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 170–71 (2014) (hereinafter Sunstein, *The Real World of Cost-Benefit Analysis*).

<sup>74</sup> Benjamin Zycher, *The War Against Benefit-Cost Analysis*, NAT'L REV.: CAP. MATTERS (Sept. 15, 2023, 6:30 AM), <https://www.nationalreview.com/2023/09/the-war-against-benefit-cost-analysis/> [<https://perma.cc/8B68-KWGT>]. The most important change was lowering the discount rate used to value future benefits. This change, according to critics, has the effect of putting a thumb on the scale in favor of climate change regulatory measures. *Id.*

<sup>75</sup> On the current state of the debate, see Ashraf Ahmed et al., *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2219–21 (2024) (speculating that presidential administration, including cost-benefit analysis policies, will continue to evolve).



benefits in making the marketplace decisions they are called upon to make. In fact, the incentives to use cost-benefit analyses appear to be considerably stronger in the private sector than in the public (governmental) sector.

The reader may have read my description of the new “Uncrustables” plant currently under construction in Jefferson County, Alabama, in *Capitalism for Law Students*.<sup>76</sup> The J.M. Smucker Company is investing \$1.1 billion in this project and must have decided that the project makes sense in cost-benefit terms before embarking upon it.<sup>77</sup> This means the company’s managers have estimated that the revenue the facility will (likely) generate will (likely) cover all the costs of production and generate enough profit in addition to justify the initial investment in the project and its continuing operational costs. Moreover, the managers have compared this project to all the other possible projects that might have been financed with this \$1.1 billion outlay and concluded that this project is the best use of these funds currently available to the company. In one sense, CBA is easier for businesses to perform than for governments, since the “bottom line” for businesses is narrower and more clearly defined and measurable than the bottom line for governments.<sup>78</sup> On the other hand, the people evaluating businesses’ track records in conducting sound CBA are much more demanding than the voters looking at a government’s track record, for reasons we will now explore.

#### IV. POLITICAL ACCOUNTABILITY, THE PARADOX OF VOTING, AND RATIONAL IGNORANCE

To recap briefly: in the private sector, shareholders seek to hold directors and officers accountable for corporations’ financial performance, and our systems of accounting and capital markets enable some degree of this accountability. The accountability mechanisms that act on business managers are not perfect but clearly appear to be much more effective than the accountability that politicians and officeholders face.

In a mass representative democracy, government is supposed to be accountable to the citizenry.<sup>79</sup> Regularly scheduled, honestly

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<sup>76</sup> DeBow, *supra* note 1, at 304. Uncrustables are crustless peanut butter and jelly sandwiches.

<sup>77</sup> *Id.*

<sup>78</sup> Tim Dodd, *What’s the Bottom Line in Government?*, PA TIMES (Feb. 10, 2019), <https://patimes.org/whats-the-bottom-line-in-government/> [<https://perma.cc/7PNK-D89T>].

<sup>79</sup> *Who is Accountable? To Whom? For What? How?: Highlights*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/products/111071> [<https://perma.cc/ZWS3-FB6F>] (last visited Mar. 28, 2025).

conducted elections make elected officials accountable, to some degree, to the voters.<sup>80</sup> Unfortunately, voting has rather severe limitations as an accountability mechanism.<sup>81</sup> This is not a recent insight. As British historian and politician James Bryce put it in 1881, at the dawn of mass representative democracy, “[t]he choice of persons for offices is only an indirect and often unsatisfactory way of declaring views of policy.”<sup>82</sup> This is an understatement, for several reasons.

First, any candidate is a package deal, from the voter’s point of view. You might find yourself agreeing with Candidate Jones’s position on Issue X rather than Candidate Smith’s position, but also finding yourself agreeing with Smith over Jones when it comes to Issue Z. To put it differently, candidates are very complex products put before the voters because they take positions on a large number of issues and offer their combinations of positions in a take-it-or-leave-it fashion. The voter in effect chooses between A’s portfolio of policy positions and B’s portfolio of policy positions. This differs dramatically from the markets for goods and services, where consumers can, say, choose to buy a pizza without being told they also have to buy a box of printer paper and a toothbrush in order to get the pizza.

Second, voting is a form of collective decision making while market decisions (buying goods and services) are the result of individual decision making. In your market decisions, your final decision determines what happens next for you. In your political activity, your decision for whom to vote must be combined with the decisions of many others in order to determine the outcome. When you decide what to have for lunch today, that is the end of it. Imagine if your entire contracts class had to vote on what everyone would have for lunch, collectively. Wouldn’t everyone find this arrangement inferior to having everyone make their own individual decisions about lunch?

Moreover, voting reflects significant rational ignorance on the part of voters. Let’s unpack this perhaps disquieting, but nonetheless very important, term. Begin with a simple mathematical fact: the probability that the single vote you cast will determine who wins any given race is, for all practical purposes, zero. A shorter way to say this is that your vote doesn’t count *in the sense of determining who wins*. While it is

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<sup>80</sup> *Id.*

<sup>81</sup> Finlay Malcolm, *The Purpose and Limits of Electoral Accountability*, 24 J. ETHICS & SOC. PHIL. 258, 258 (2023).

<sup>82</sup> 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 357–58 (The Macmillan Co. 1923 ed.) (1893). Bryce retraced Tocqueville’s travels in the U.S. in researching this remarkable book.

possible to find stories about local elections that end in ties, this is quite rare and does not furnish *ex ante* a sensible motive for voting.<sup>83</sup>

One person's vote will (almost certainly) have no effect on the outcome of the election and the act of voting involves some personal cost in terms of time and trouble. Viewed instrumentally, voting looks like an irrational act . . . and yet many people vote. This is the so-called *paradox of voting*.<sup>84</sup> What, other than an instrumental motive, might account for this?

Several possible explanations come to mind. Some may vote out of a sense of duty, perhaps inculcated long ago by parents or teachers. Some may want to avoid appearing to others to be a "bad" (that is, nonvoting) citizen. Some may enjoy the experience of voting itself, especially if it makes the voter feel as if she belongs to something "larger than" herself.<sup>85</sup> Some may enjoy engaging in political partisanship for the same reason some enjoy sports fandom.<sup>86</sup> Doubtless other motives exist in the minds of voters.<sup>87</sup>

Please note that the preceding three paragraphs are expressed in positive, rather than normative, terms. They do not amount to an

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<sup>83</sup> But see Eric Levenson, *Coin Flips, Poker Hands and Other Crazy Ways America Settles Tied Elections*, CNN, <https://www.cnn.com/2018/01/04/us/tie-elections-history-lots-coins-draws-trnd/index.html> [https://perma.cc/MLA2-9TPT] (Jan. 4, 2018, 2:12 PM); Paul Gattis, *Alabama GOP Declares State Senate Race a Tie, to Be Decided 'by Lot'*, AL.COM, <https://www.al.com/news/2022/06/alabama-gop-denies-2-election-contests-in-etowah-county-after-hearings.html> [https://perma.cc/C4GA-62B9] (June 25, 2022, 9:47 PM) (discussing state senate election almost tied, 8,373 to 8,372); Dixon Hayes, *Coin Toss Decides AI Election, for Now*, WBRC NEWS, <https://www.wbrc.com/2018/11/13/coin-toss-decides-clay-co-election-now/> [https://perma.cc/2VRL-M3CS] (Nov. 13, 2018, 3:59 PM) (describing county sheriff race tied, 2,680 votes each); Mark Moore, *Virginia Decides Tied Election by Drawing Name From Bowl*, N.Y. POST, <https://nypost.com/2018/01/04/virginia-decides-tied-election-by-drawing-name-from-bowl/> [https://perma.cc/5NLK-896A] (Jan. 4, 2018, 1:22 PM) (describing state house election tied, 11,608 votes each, and drawing gave control of the state house to GOP); The Canadian Press, *Liberal Wins PEI Seat Through Coin Toss After Recount Tie*, CTV NEWS (May 19, 2015, 7:09 PM), <https://www.ctvnews.ca/politics/liberal-wins-pei-seat-through-coin-toss-after-recount-tie-1.2381306> [https://perma.cc/97RM-QMAW] (discussing race for Prince Edward Island provincial legislative seat tied, 1,173 votes each).

<sup>84</sup> *Paradox of Voting*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100305176> [https://perma.cc/W2JH-RUH4] (last visited Feb. 22, 2025).

<sup>85</sup> For a very interesting discussion of this idea, see Daniel B. Klein, *The People's Romance: Why People Love Government (as Much as They Do)*, 10 INDEP. REV. 5, 10–11 (2005).

<sup>86</sup> Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RSCH. Q. 225, 225 (2015).

<sup>87</sup> For more on this, see Michael Huemer, *Political Activism: What's the Point?*, FAKE NOÛS (July 16, 2022), <https://fakenous.substack.com/p/political-activism-whats-the-point> [https://perma.cc/PBP7-53AU].

argument that you (the reader) should not vote. You should do what you want to do. What you've just read is a discussion that flows from the fact that, for each one of us, the probability that casting our one vote will determine the outcome of any election is, basically, zero.<sup>88</sup>

Because our individual vote is statistically insignificant, we do not have any incentive to invest time and effort in becoming well-informed voters. Think about it. Becoming well-informed is hard work. Most people enjoy many other things (watching TV, gardening, bowling, playing pickleball with friends, etc.) much more than they enjoy studying debates over public policy. (This seems less true of law students as a group, but you choose among many competing uses of your time, too.) In sum, life is too short for most people to become amateur policy wonks. In that sense, we can say that the average voter is ignorant (such a harsh word) of the details of much of government and politics.<sup>89</sup> This of course does not mean that less-than-completely-informed voters will not have preferences and opinions about politics.<sup>90</sup> They do; we all do.

And it is quite rational for us to remain ignorant about politics and public policy. Our vote will not determine who wins, so any effort to become better informed will turn out to have no effect on anything. By this point some readers will likely be discouraged with this analysis, but there is another way to look at rational ignorance: imagine the pressure if your vote *did* determine the outcome of an election. That would be a lot of pressure, right? Better start right away to study the issues and the candidates so you can vote (and elect!) the "right" person. But this nightmare scenario will never come to pass. Quite the contrary: because your vote won't matter you can relax. Nothing depends on you (or me).<sup>91</sup> A relief, isn't it?

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<sup>88</sup> For a thorough treatment of this idea, see GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* (1993).

<sup>89</sup> It is depressingly easy to cite evidence like this: a survey conducted in August 2016 found that "31[%] of respondents could not name [a single one] of [the] three branches" of government. Only 26% could name all three, down from 38% in 2011. *Americans' Knowledge of the Branches of Government Is Declining*, ANNENBERG PUB. POL'Y CTR. U. PA. (Sept. 13, 2016), <http://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining/> [<https://perma.cc/MMJ3-775L>].

<sup>90</sup> At the risk of sounding harsh once again, I will mention the aphorism attributed to George Berkeley, an 18<sup>th</sup> century philosopher: "Few men think; yet all have opinions." *George Berkeley Quotes*, GOODREADS, [https://www.goodreads.com/author/quotes/92770.George\\_Berkeley](https://www.goodreads.com/author/quotes/92770.George_Berkeley) [<https://perma.cc/LC5N-PM2Y>] (last visited Mar. 4, 2025).

<sup>91</sup> How many people use this logic to decide not to vote? Since World War II voter turnout in presidential elections has ranged from 52% to 66%, meaning that 34% to 48% of eligible voters chose not to participate. Aaron O'Neill, *Turnout Rates Among the Voting-Eligible Population in United States Presidential and Midterm Elections from 1789 to 2020*, STATISTA (July 4, 2024), <https://www.statista.com/statistics/1139251/voter-turnout-in-us->

Our collective ignorance is the rational response to the fact we live in a very large mass representative democracy. One voice, one vote, counts for vanishingly little. This is simply a fact of life.<sup>92</sup>

For all these reasons, voting in a large democracy is an odd way to make important decisions, and this oddness is the strongest argument I know for confining government power to those areas where it is absolutely necessary.<sup>93</sup>

## V. MARKET FAILURE AND PUBLIC POLICIES

By the mid-20<sup>th</sup> century, economists had developed a set of justifications for government action framed in economic terms, highlighting four situations in which unregulated free enterprise (arguably) performs so poorly that government intervention *might* be appropriate.<sup>94</sup> It is important to stress the word “might” in the preceding sentence. To repeat Demsetz’s account of the Nirvana fallacy: simply determining that the marketplace does not operate perfectly in a particular situation does not lead inexorably to the conclusion that government action would serve the public interest.<sup>95</sup> Government might fail to (1)

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presidential-and-midterm-elections/ [https://perma.cc/V952-TW8S]. Turnout is lower in midterm elections, of course. *Id.*

<sup>92</sup> That’s what makes the following breathless headline so funny: Wynton Hall, *Study: You Have ‘Near-Zero’ Impact on U.S. Policy*, BREITBART (Aug. 12, 2014), <https://www.breitbart.com/politics/2014/08/12/study-you-have-near-zero-impact-on-u-s-policy/> [https://perma.cc/7FC5-2KXG]. The study in question was Martin Gilens & Benjamin I. *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 564–65 (2014). The Breitbart story includes a stock photo of some angry demonstrators somewhere, looking as if someone just told them about the paradox of voting. Wynton Hall, *Study: You Have ‘Near Zero’ Impact on U.S. Policy*, BREITBART (Aug. 12, 2014), <https://www.breitbart.com/politics/2014/08/12/study-you-have-near-zero-impact-on-u-s-policy/> [https://perma.cc/7FC5-2KXG].

<sup>93</sup> Self-test: Evaluate the following statement made by 20th century American author Martha Gellhorn: “People often say, with pride, ‘I’m not interested in politics.’ They might as well say, ‘I’m not interested in my standard of living, my health, my job, my rights, my freedoms, my future or any future.’ . . . If we mean to keep any control over our world and lives, we must be interested in politics.” *Martha Gellhorn Quotes*, AZ QUOTES, [https://www.azquotes.com/author/5422-Martha\\_Gellhorn](https://www.azquotes.com/author/5422-Martha_Gellhorn) [https://perma.cc/4KRV-J6KW] (last visited Mar. 4, 2025).

<sup>94</sup> For more on the varieties of market failure, see Francis M. Bator, *The Anatomy of Market Failure*, 72 *Q.J. ECON.* 351, 351, 354 (1958); SUSAN E. DUDLEY & JERRY BRITO, *REGULATION: A PRIMER* 12–14 (2d ed. 2012); STEPHEN BREYER, *REGULATION AND ITS REFORM* 17, 19, 23, 27, (1982); CHARLES WOLF, JR., *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* 17–33 (2d ed. 1993). For a trenchant critique of the whole idea, see Richard O. Zerbe Jr. & Howard E. McCurdy, *The Failure of Market Failure*, 18 *J. POL’Y ANALYSIS & MGMT.* 558, 558–59, 561 (1999).

<sup>95</sup> See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 *J.L. & Econ.* 1, 1–2 (1969).

properly diagnose the market's failure, or (2) devise a plan for government action that will actually ameliorate the failure, or (3) honestly and competently execute the plan. In short, while markets fail to operate flawlessly, governments fail to operate flawlessly as well.<sup>96</sup> As Henry Sidgwick put the point more than 100 years ago, "[i]t does not of course follow that whenever laissez faire falls short government interference is expedient; since the inevitable drawbacks and disadvantages of the latter may, in any particular case, be worse than the shortcomings of private enterprise."<sup>97</sup>

With this caution against rushing too quickly to embrace government action doubly in mind, we will now survey the field of *market failure*. While there does not seem to be an authoritative list of the instances of market failure, the four most often cited are *public goods*, *externalities* (especially negative externalities), *information problems*, and *monopolies*. The remainder of this section defines each of these four and provides one or more examples of each drawn from recent headlines. If a government activity cannot be sorted into one of these four categories, then I would argue that is most likely aimed at redistributing income or wealth—the subject of section VI, *infra*.

#### A. *Public Goods*

Even though the technical definition of public goods is quite narrow, as a practical matter this category has morphed into the broadest possible justification for government action. Here's a version of the technical definition:

Unlike private goods that convey benefits directly to individuals with no interdependence in consumption, public goods are jointly supplied to the community as a whole in the sense that benefits accrue collectively to society. They are not appropriable by individuals, that is, they are not divisible into units that can be sold separately. Consumption by one person does not reduce the amount available to others. Thus, no one can be excluded from the benefits.

By their nature, these goods cannot be provided by private enterprise; in a sense, governments initially developed because of the recognition that persons desired certain goods that could be provided only through an organization representing society as a whole and having powers of coercion. Private enterprise cannot provide the goods

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<sup>96</sup> For a compendium of government failures, see PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* (2014). This book was widely reviewed. One of my favorite reviews is David R. Henderson, *Why Isn't Peter Schuck a Libertarian?*, *REGUL.*, Summer 2014, at 66, 66–68.

<sup>97</sup> HENRY SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 414 (3d ed. 1901) (emphasis omitted).

because it cannot sell them to individuals; if the goods are produced, no one can be denied benefits from them. No individual is willing to pay for the services because he knows that his willingness to pay will not result in the services being provided if other persons are not willing to pay; and if the services are provided he will benefit from them whether he pays or not.<sup>98</sup>

A true public good, then, exhibits two key aspects: non-excludability (non-contributing persons enjoy the benefits anyway) and non-rivalrous consumption (the addition of another person to the enjoyment of the good does not reduce the benefits enjoyed by others).<sup>99</sup> Government provision solves the non-excludability problem by taxing people who would otherwise take a free ride on the efforts of others. To overcome the human desire to free ride the neighbors, the threat of government prosecution and, ultimately, imprisonment for nonpayment of taxes, is a key component of any tax system.

National defense is the classic example of a public good. If it is not provided by the government—which can compel each of us to pay our “fair share” of its costs—then it will not be provided at all.<sup>100</sup> National defense is a “pure” public good—one that fits the definition very closely.<sup>101</sup>

Because the definition is so demanding, it is very hard to come up with other government activities that qualify for the label. (Spraying a neighborhood to kill mosquitoes?) But because people want government to do many other things, many of them will be characterized as public goods. For example, proponents sometimes argue as if government provision of “infrastructure, education, security, and fire and environmental protection”<sup>102</sup> qualify as public goods. Each of these categories may have a “public” feel to them, but they do not fit the definition of public good as closely as national defense. And each of them can be, and often are, provided in the private sector: private streets and toll roads and bridges, private K-12 schools and colleges, private alarm systems and security guards, volunteer fire protection.<sup>103</sup> We defer consideration of environmental protection and education to the discussion of externalities, *infra*.<sup>104</sup>

<sup>98</sup> JOHN F. DUE & ANN F. FRIEDLAENDER, *GOVERNMENT FINANCE: ECONOMICS OF THE PUBLIC SECTOR* 38 (5th ed. 1973).

<sup>99</sup> Tyler Cowen, *Public Goods*, ECONLIB, <https://www.econlib.org/library/Enc/Public-Goods.html> [<https://perma.cc/33DC-3P2N>] (last visited Feb. 22, 2025).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Julian Reiss, *Public Goods*, STAN. ENCYCLOPEDIA PHIL. (Jul. 21, 2021), <https://plato.stanford.edu/entries/public-goods/> [<https://perma.cc/644T-7YWQ>].

<sup>103</sup> Self-test: is “public broadcasting” a public good?

<sup>104</sup> See discussion *infra* Section V. Part B.

Before we consider the problems presented by near-public goods, let's take a longer look at national defense. The need for it seems inarguable. Indeed, it is easy to imagine that a straight up-or-down vote on national defense would come closer to satisfying Pareto's unanimity requirement than any other public policy. In spite of this, however, two problems remain. First, the government's notorious inability to control costs when it is directly providing a good or service—the bureaucratic rule of two described in Part II—means that the design and construction of weapons systems and the like should be contracted out to for-profit firms whenever possible. Second, the rational ignorance of the public regarding the proper size and features of our national defense means that voters will be unable to discipline government officials who adopt poor defense policies.<sup>105</sup> Both of these problems are serious, but neither means that government should not provide national defense. It would be very nice if national defense were to be efficiently provided, but overly generous contracts with defense suppliers, poor oversight of contractual performance, and internal Pentagon politics—to name just three problem areas—will likely always be with us, to one degree or another. Working to make marginal improvements in the provision of national defense is a worthy goal, and the work of many years.<sup>106</sup>

Similar problems plague such near-public goods as infrastructure projects. Although such projects would garner less overwhelming public support than national defense would enjoy, such projects often have at least a surface appeal. The problem is that no one is likely to research whether any particular infrastructure project makes economic sense (i.e., passes a cost-benefit analysis). Near my home, the city and county governments are building a roundabout to replace a stop sign and yield

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<sup>105</sup> For example, although defense procurement has been subjected to intense criticism for many years, it is still far from optimal—at least according to critics. Michael Hochberg et al., *How to Make the DOD a Better Customer*, LAW & LIBERTY (Sept. 12, 2024), <https://lawliberty.org/how-to-make-the-dod-a-better-customer/> [<https://perma.cc/T9WP-235C>] (describing the existing defense procurement system as “highly bureaucratic, antiquated,” and suggesting reforms including “transparent pricing, open competition, enforceable contracts, and supply-demand dynamics”).

<sup>106</sup> In its July 2024 final report to Congress and the President, the Commission on the National Defense Strategy also sounded the alarm concerning the present condition of private defense contractors that supply the military. Jane Harman et al., *Report of the Commission of the National Defense Strategy*, COMM'N ON NAT'L DEF. STRATEGY (July 29, 2024), [https://www.rand.org/content/dam/rand/pubs/misc/MSA3057-4/RAND\\_MSA3057-4.pdf](https://www.rand.org/content/dam/rand/pubs/misc/MSA3057-4/RAND_MSA3057-4.pdf) [<https://perma.cc/RC8V-JGM9>]. The “[Defense Industrial Base [has] too few people, too few companies, declining and unstable financial support, and insufficient production capacity to meet the needs of the [U.S. military] in both peacetime and wartime.” *Id.*



sign.<sup>107</sup> The project is expected to cost \$2.5 million.<sup>108</sup> This sounds high to me, but what do I know? Further, what will I (or anyone) do to find out more about this? (Answer: nothing.) Cost-benefit analysis of road projects focuses on the value of time saved and accidents reduced by faster and safer roadways. Will this roundabout generate more than \$2.5 million in such benefits? Was this question ever asked by the city and county officials involved?

On the other side of Jefferson County, work continues on the early stages of an eventual 52-mile limited-access ring road called the Northern Beltline.<sup>109</sup> If it is ever completed, it will mirror Interstate 459 on the county's southern side. The current estimate of its eventual cost seems to be in the vicinity of \$5 billion.<sup>110</sup> Much of this cost will be paid with federal appropriations.<sup>111</sup> Will the project generate more benefits than costs?

One more Alabama example: the Tennessee-Tombigbee waterway was built by the U.S. Army Corps of Engineers (bureaucratic rule of two alert!). When completed in 1984, the waterway "was the largest public works project in the [country]."<sup>112</sup> Its cost of nearly \$2 billion (in 1984 dollars) translates to roughly \$5.87 billion in 2023 dollars.<sup>113</sup> The idea behind the project was to open a shorter water route from the middle of the country to the Gulf of Mexico that did not involve travel on the Mississippi River.<sup>114</sup> This shorter route benefits those who use

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<sup>107</sup> Kyra Purvis, *Construction Begins on Sicard Hollow Road Roundabout in Jefferson County*, AB 3340 NEWS, <https://abc3340.com/news/local/construction-begins-on-sicard-hollow-road-roundabout-in-jefferson-county-blue-lake-drive-cahaba-heights-vestavia-hills-traffic-delays> [https://perma.cc/X6AP-N5R8] (Mar. 18, 2024, 8:18 AM).

<sup>108</sup> *Id.*

<sup>109</sup> Supporters of the project maintain a website at *The Road Ahead: Birmingham's Northern Beltline*, BIRMINGHAM N. BELTLINE, <https://betterbeltline.com/> [https://perma.cc/37QM-6MED] (last visited Feb. 22, 2025).

<sup>110</sup> Dennis Pillion, *Environmental Groups Sound Alarm over \$5 Billion Birmingham Northern Beltline Project*, AL.COM, <https://www.al.com/news/birmingham/2023/06/environmental-groups-sound-alarm-over-5-billion-birmingham-northern-beltline-project.html> [https://perma.cc/9P6J-T5K8] (June 23, 2023, 2:18 PM).

<sup>111</sup> *Id.*

<sup>112</sup> Ray Van Dusen, *A River Runs Through It: Tennessee-Tombigbee Waterway Commemorates 30th Anniversary of Dedication*, MONROE J., [https://www.djournal.com/monroe/news/a-river-runs-through-it-tennessee-tombigbee-waterway-commemorates-30th-anniversary-of-dedication/article\\_9c77fef8-f2f9-5e05-b4b0-25cb44e553c3.html](https://www.djournal.com/monroe/news/a-river-runs-through-it-tennessee-tombigbee-waterway-commemorates-30th-anniversary-of-dedication/article_9c77fef8-f2f9-5e05-b4b0-25cb44e553c3.html) [https://perma.cc/8T3Y-E96Z] (May 5, 2017).

<sup>113</sup> *History*, TENN.-TOMBIGBEE WATERWAY, <https://www.tenntom.org/history-2/> [https://perma.cc/Q5TQ-6KLA] (last visited Feb. 22, 2025); MEASURINGWORTH, <https://measuringworth.com/calculators/uscompare/relativevalue.php> [https://perma.cc/97AB-RC4L] (last visited Feb. 22, 2025).

<sup>114</sup> *History*, *supra* note 113.

it. The waterway has other uses, especially recreational. The question is, of course, does the waterway generate benefits that exceed the cost of construction? Opinions vary.

In 2009, U.S. Senator Roger Wicker (R.-Miss.) praised the waterway and cited an internal study that claimed it had generated “nearly \$43 billion [in benefits] since 1996.”<sup>115</sup> Other studies have concluded that the waterway flunks a cost-benefit test.<sup>116</sup> Certainly the hope that the waterway would catalyze dramatic economic development in the region it traverses has not been realized.<sup>117</sup> A citizen looking into this question might find it hard to pronounce judgment.

Thinking about government infrastructure spending spotlights an underappreciated aspect of rational ignorance with respect to government in general. Most of the time we don’t know whether—or to what extent—government programs succeed. (By contrast, businesses can be judged by their bottom line.) For example, has the Affordable Care Act (a.k.a. “Obamacare”) been successful? At what cost? Who would know? The vast majority of voters, of course, have no idea how to even begin answering these questions. Most seem to rely on what politicians of their party say about the effectiveness of government programs.

This is not to say that there are no net-beneficial infrastructure projects for governments to pursue. Famously, the Erie Canal collected tolls in its first nine years of operation sufficient to cover New York state’s construction debt.<sup>118</sup> But no infrastructure proposal is a guaranteed winner and, as we have seen, the accountability of government officials is quite limited. Privatization should always be considered as an alternative to direct government provision.<sup>119</sup>

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<sup>115</sup> Chris Elkins, *Sen. Roger Wicker: Tenn-Tom Promises Benefits for the Coming Generations*, NEMS DAILY J. (May 9, 2009), [https://www.djournal.com/opinion/sen-roger-wicker-tenn-tom-promises-benefits-for-the-coming-generations/article\\_a0450c40-f9ce-5dbf-8208-90fe672baa94.html](https://www.djournal.com/opinion/sen-roger-wicker-tenn-tom-promises-benefits-for-the-coming-generations/article_a0450c40-f9ce-5dbf-8208-90fe672baa94.html) [<https://perma.cc/6727-R3M2>].

<sup>116</sup> See, e.g., Nathan Horn, *Changing Currents: Interpreting the Promise of the Tennessee-Thombigbee Waterway 62* (Aug. 2009) (M.A. thesis, Mississippi State University) (on file with the Mississippi State University Libraries).

<sup>117</sup> Jay Reeves, *\$2B Waterway Through Deep South Yet to Yield Promised Boom*, ASSOCIATED PRESS (Sept. 16, 2019, 1:37 PM), <https://apnews.com/article/ee9c726251104e0a86f74278ce391d79> [<https://perma.cc/WT5P-VU9X>].

<sup>118</sup> CAROL SHERIFF, *THE ARTIFICIAL RIVER: THE ERIE CANAL AND THE PARADOX OF PROGRESS*, 1817-1862 63 (1996).

<sup>119</sup> Economist James Bennett has developed a number of ideas to privatize highway construction and maintenance. See JAMES T. BENNETT, *HIGHWAY HEIST: AMERICA’S CRUMBLING INFRASTRUCTURE AND THE ROAD FORWARD* 241–42 (2022).

### B. Externalities

The terms “externality” and “spillover effects” are interchangeable. Strictly speaking, externalities are present when the production or consumption of a good or service confers “benefits or costs [on] persons other than those who acquire the goods.”<sup>120</sup> “The activities are separable and divisible and can be sold to individuals, but the purchasers either do not receive the sole benefits [i.e., a positive externality] or do not pay for all the costs for which the goods are responsible [i.e., a negative externality].”<sup>121</sup>

Pollution is the classic example of negative externality. For more than fifty years, the United States has had a very complex federal statutory and regulatory regime focused on air and water pollution and other aspects of environmental quality.<sup>122</sup> Beginning in the 1990s, the Environmental Protection Agency published numerous studies showing that the benefits flowing from environmental laws greatly exceeded the large costs they imposed.<sup>123</sup> The idea that environmental regulation easily passes the cost-benefit test became the conventional wisdom, which I repeated for many years in my classes. I am duty-bound, though chagrined, to bring attention to a recent study that calls conventional wisdom into question. It argues that the benefits claimed by EPA “are almost entirely attributable to a single air pollutant – particulate matter (PM) – which accounted for ninety-four to ninety-seven percent of the monetized benefits for the major rules EPA issued during fiscal years 2002 to 2015.”<sup>124</sup>

If this result holds up, it will cast an entirely new light on the rest of the environmental law edifice and raise a critical question: which portions of it are beneficial, and which harmful, to the public interest, on net?

Another interesting aspect of environmental policy making is the consideration of the public’s willingness to pay (WTP) for expensive changes in the law. Evidence is fairly strong that the public puts a much lower value on stricter environmental laws than environmental activists

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<sup>120</sup> DUE & FRIEDLAENDER, *supra* note 98, at 77.

<sup>121</sup> *Id.*

<sup>122</sup> *EPA and a Brief History of Environmental Law in the United States*, EPA, [https://cfpub.epa.gov/si/si\\_public\\_record\\_report.cfm?Lab=NERL&dirEntryId=319430](https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430) [<https://perma.cc/9BCL-E2FF>] (last visited Feb. 23, 2025).

<sup>123</sup> *See, e.g., Benefits and Costs of the Clean Air Act 1990-2020, the Second Prospective Study*, U.S. ENV’T PROTECTION AGENCY, <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study> (last visited Feb. 16, 2025).

<sup>124</sup> David E. Adelman & Amy Sinden, *The Misleading Successes of Cost-Benefit Analysis in Environmental Policy*, 13 MICH. J. ENV’T. & ADMIN. L. 253, 253 (2024).

do. In one 2019 survey, pollsters found that a large majority of Americans were unwilling “to pay [] \$10 more a month in higher electric bills . . . to combat climate change.”<sup>125</sup> If policy makers ignore the WTP evidence, can the majority of voters respond effectively?

Public education is a good example of a government activity that might be justified on the grounds that it generates positive externalities. Most of the benefit from additional schooling is enjoyed by the person in question, of course. But there is some evidence that people value living in areas where their neighbors have had more, rather than less, schooling.<sup>126</sup> If true, this might mean that taxpayer subsidies to education will raise the education level of the locality and produce positive externalities enjoyed by the public at large.

### C. Information Problems

The basic idea here is that sometimes businesses do not provide the optimal level of information to their potential customers. Justice Breyer identified four forms of information inadequacy that might call for government intervention.

“First, the incentives to produce and to disseminate information may be skewed.”<sup>127</sup> The example given is information “requiring detailed research” that “is expensive to produce initially but very cheap to make available once produced.”<sup>128</sup> Breyer notes that “the inadequate incentive to produce information typically leads to a demand not for regulation but for governmental support of production and dissemination.”<sup>129</sup>

“Second, one of the parties to a transaction may seek deliberately to mislead the other, by conveying false information or by omitting key facts.”<sup>130</sup> Examples: “A seller of securities may lie about the assets of

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<sup>125</sup> Emily Elkins, *68% of Americans Wouldn't Pay \$10 a Month in Higher Electric Bills to Combat Climate Change*, CATO INST.: CATO LIBERTY (Mar. 8, 2019, 1:01 PM), <https://www.cato.org/blog/68-americans-wouldnt-pay-10-month-higher-electric-bills-combat-climate-change> [<https://perma.cc/NRY9-WG86>]; see also *Them vs. U.S.: The Two Americas and How the Nation's Elite Is Out of Touch With Average Americans*, COMM. TO UNLEASH PROSPERITY (Jan. 2024), [https://committeetounleashprosperity.com/wp-content/uploads/2024/01/Them-vs-U.S.\\_CTUP-Rasmussen-Study-FINAL.pdf](https://committeetounleashprosperity.com/wp-content/uploads/2024/01/Them-vs-U.S._CTUP-Rasmussen-Study-FINAL.pdf) [<https://perma.cc/57NN-ASA7>] (finding that 72% of the general public would only be willing to pay \$100 or less per year to reduce climate change).

<sup>126</sup> See *How Much Will You Pay To Live Near People Like You?*, SCIENCEDAILY (Sep. 5, 2007), <https://www.sciencedaily.com/releases/2007/08/070830120438.htm> [<https://perma.cc/4NVP-Z9JQ>].

<sup>127</sup> BREYER, *supra* note 94, at 27.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

the company; a seller of a used car may turn back the mileage indicator.”<sup>131</sup>

“Third . . . the buyer may not be able to evaluate the characteristics of the products or services” she is interested in purchasing.<sup>132</sup> Examples: “The layman cannot readily evaluate the competence of a doctor or lawyer. Nor can he, unaided, evaluate the potential effectiveness or dangers of a drug.”<sup>133</sup>

“Fourth, the market may, on the supply side, be insufficiently competitive to provide all the information consumers would willingly pay for.”<sup>134</sup> Examples: “Until the government required disclosure, accurate information was unavailable to most buyers concerning the durability of light bulbs, nicotine content of cigarettes, fuel economy for cars, or care requirements for textiles.”<sup>135</sup>

The information market failure thus fits a wide range of public policy. Let’s take the example of federal securities regulation. A New Deal innovation, the U.S. Securities and Exchange Commission (“SEC”) enforces statutes passed by Congress in 1933 and 1934. Its mission has long been described as mandating businesses seeking to sell securities to the public to disclose information that the government deems useful to investors choosing from a range of investment options.<sup>136</sup>

In March 2024, the SEC adopted a lengthy regulation that will require publicly traded companies to make a new set of disclosures about the climate-related financial risks their operations entail, and how these risks will affect the companies’ future profitability.<sup>137</sup> Opponents of the regulation argue that it primarily serves the Biden Administration’s environmental agenda, rather than the SEC’s traditional investor protection mission.<sup>138</sup> Additionally, opponents estimated that the new rule would double corporations’ costs of complying with the securities

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> BREYER, *supra* note 94, at 28.

<sup>134</sup> *Id.* at 27

<sup>135</sup> *Id.* at 28.

<sup>136</sup> John H. Matheson, *Securities and Exchange Commission*, FREE SPEECH CTR. MIDDLE TENN. STATE. UNIV., <https://firstamendment.mtsu.edu/article/securities-and-exchange-commission/> [<https://perma.cc/2AZG-E3MM>] (Mar. 5, 2025).

<sup>137</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, Exchange Act Release Nos. 33-11275; 34-9978 (Mar. 6, 2024).

<sup>138</sup> Press Release, Comm. on Oversight & Gov’t Reform, Oversight Republicans Slam the Biden Admin.’s SEC Rule to Expand Climate Agenda (May 4, 2022).

laws.<sup>139</sup> Responding to the latter criticism, the SEC dropped the most controversial (and most costly) section of the rule very near the end of the rulemaking process.<sup>140</sup>

Legal challenges to the SEC's adoption of the climate disclosure rule are currently pending in the U.S. Court of Appeals for the Eighth Circuit. In April 2024, "the SEC . . . voluntarily stay[ed] . . . [the] rule[] pending judicial review."<sup>141</sup>

#### D. Monopoly Power

There are two senses in which government action with respect to monopolies may be advisable, (1) the existence of a natural monopoly, and (2) internal growth to monopoly size or conspiracies among multiple businesses to restrain competition among themselves.

A natural monopoly is a single firm that enjoys "sufficient economies of scale relative to the market that its average costs fall over the entire range of potential usage. Only one facility is needed to provide the service in the given market, since sufficient duplication of the facility to ensure competitive behavior would result in excessively high costs."<sup>142</sup> If the natural monopoly is left to its own desires, it will find its optimum rate of output that equates marginal cost and marginal revenue. This will result in a price and quantity combination that is suboptimal from society's point of view: the monopolist will sell too little of the product at a correspondingly high price.

Public policy can address natural monopolies in two ways. The first is for government to own and operate the monopoly—as, for example, with the federal government's operation of the Tennessee Valley Authority and the Power Marketing Administration. A government-owned natural monopoly can set price and quantity at levels (lower and higher, respectively) that come closer to the social optimum. This is not as easy to accomplish as it might seem.

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<sup>139</sup> Matthew Winden, *The Unconsidered Costs of the SEC's Climate Disclosure Rule*, SEC. AND EXCH. COMM'N (2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132304-302836.pdf> [<https://perma.cc/E5YL-YTTT>].

<sup>140</sup> Lydia Beyoud & Zahra Hirji, *SEC Scales Back New Pollution-Disclosure Rules for Companies*, BLOOMBERG (Mar. 6, 2024, 4:01 PM) [<https://perma.cc/VY6M-TLR2>].

<sup>141</sup> Paul A. Davies & Betty M. Huber, *The Case Against the SEC's Final Climate Rule Begins in Earnest (and What It Means)*, LATHAN & WATKINS LLP (Apr. 8, 2024), <https://www.lw.com/en/insights/the-case-against-sec-final-climate-rules-begins-in-earnest> [<https://perma.cc/J6CJ-5M67>]. For more on the push for additional regulation of corporations' performance with respect to environmental, social, and governance (ESG) issues, see the symposium on corporate governance in the May/June 2024 issue of the *Alabama Lawyer*, including Michael E. DeBow, *ESG and Regulatory Policy*, ALA. LAW., May/June 2024, at 138, 138.

<sup>142</sup> DUE & FRIEDLAENDER, *supra* note 98, at 103.

The government has three choices: price at marginal cost, price at average cost, or price at a level that inversely relates the price to the elasticity of demand. The optimal solution depends upon the nature of the taxes available to the government, but in general, average cost pricing is inferior to either of the other two pricing policies.<sup>143</sup>

In addition to the problems presented with utility pricing, a government owned monopoly will also be susceptible to the problems with government enterprise identified in the discussion of public goods, *supra*.<sup>144</sup> Consistent with the bureaucratic rule of two, investor-owned utilities are more efficient than government-owned utilities.<sup>145</sup> This fact validates the American tendency not to create government-run monopoly firms. In place of government-run utilities, American states exercise some control over investor-owned natural monopolies through rate regulation conducted by state public service commissions.<sup>146</sup>

The second category of market failure via monopoly is addressed by the antitrust laws. The two major federal statutes, the Sherman and Clayton acts, were adopted in 1890 and 1914, respectively. Their overarching purpose is to limit the ability of companies, acting alone or in conspiracy with others, to exercise so-called market power, defined as the ability to raise price above a competitive level by cutting output.<sup>147</sup> The history of antitrust is fascinating; the character of the law as enforced has changed several times due to changes in politics and economics, even though the statutory language has not.

There is fairly strong evidence that Congress was simply mistaken about the seriousness of the danger to the public interest posed by big business.<sup>148</sup> Economist Thomas DiLorenzo showed that from 1880 to

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<sup>143</sup> *Id.* at 104.

<sup>144</sup> See discussion *supra* Section V. Part A.

<sup>145</sup> Zach Stein, *Investor-Owned Utilities (IOUs)*, CARBON COLLECTIVE, <https://www.carboncollective.co/sustainable-investing/investor-owned-utilities-iou> [<https://perma.cc/6AGF-MLE5>] (Oct. 1, 2024).

<sup>146</sup> *Engagement Between Public Utility Commissions and State Legislatures*, NCSL, <https://www.ncsl.org/energy/engagement-between-public-utility-commissions-and-state-legislatures> [<https://perma.cc/F2E6-JRGU>] (Oct. 28, 2019).

<sup>147</sup> Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 2, 6 (Harv. Bus. Sch., Working Paper No. 19-110, 2019).

<sup>148</sup> Another possibility is that politicians realized that monopoly was not a serious threat but chose to embrace the popular opinion of the day. Certainly, the fears of some Americans went well beyond monopoly pricing. A good example of the more paranoid case for antitrust is Justice Harlan's separate opinion in the famous *Standard Oil Co. of New Jersey v. United States* monopolization case (1911):

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from *another kind of slavery*

1900 output grew and prices fell in a dozen industries supposedly dominated by monopolies.<sup>149</sup> This is the opposite of what politicians claimed was happening in the economy (that is, restricting output in order to raise price). It looks as though Justice Holmes was on to something when he wrote a friend that “the Sherman Act is a humbug based on economic ignorance and incompetence.”<sup>150</sup>

Another piece of evidence on Holmes’s side is a famous 1954 study by economist Arnold Harberger.<sup>151</sup> He estimated the amount of harm done to the U.S. economy by monopolies to amount to “only about 0.1 percent of economic output, costing the average American about \$48 in [2009] dollars.”<sup>152</sup> While not a small item in absolute terms—one-tenth of one percent of 2023 GDP is \$27.36 billion—it is certainly possible that the harm from ill-conceived antitrust policy<sup>153</sup> might exceed the gains from properly-conceived antitrust enforcement, especially since market power is always subject to competitive forces that tend to weaken it over time.

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sought to be fastened on the American people; namely, the *slavery* that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life.

221 U.S. 1, 83 (1911) (Harlan, J. concurring in part and dissenting in part) (emphasis added).

<sup>149</sup> Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT’L REV. L. & ECON. 73, 79 (1985).

<sup>150</sup> A.H. Feller, *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932*, 50 YALE L. J. 1311, 1311 (1941). For a broader criticism of anti-business sentiment in the late 19<sup>th</sup> century, see BURTON W. FOLSOM, JR., *THE MYTH OF THE ROBBER BARONS* 121–23 (3d ed. 1996).

<sup>151</sup> Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. PAPERS & PROC. 77, 85–86 (1954).

<sup>152</sup> Hill B. Wellford, *Introduction to Harberger’s Monopoly and Resource Allocation—The Pioneering Article on Deadweight Loss and Empirical Measurement of the Social Costs of Monopoly*, 5 COMPETITION POL’Y INT’L 273, 274 (2009), <https://competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Wellfordweb.pdf> [<https://perma.cc/E4K9-Z4QR>].

<sup>153</sup> Consider the criticisms in David B. McGarry, *The FTC’s Case Against Amazon is a Case Against American Consumers*, AM. INST. ECON. RSCH. (Oct. 9, 2023), <https://www.aier.org/article/the-ftcs-case-against-amazon-is-a-case-against-american-consumers/> [<https://perma.cc/2KAS-78L7>] and Richard Pierce, *Confused Merger Policy at the FTC*, JOTWELL (May 25, 2023), <https://adlaw.jotwell.com/confused-merger-policy-at-the-ftc/> [<https://perma.cc/H9C7-VRHY>].





[PHOTO] *This sculpture, titled, “Man Controlling Trade,” stands outside the headquarters of the Federal Trade Commission in Washington, D.C. Is the Man a good guy (government lawyer) or a bad guy (greedy businessman)? What is he worried that Trade (the Horse) is about to do?*

In 2020, during the Trump Administration, the U.S. Department of Justice sued Google, alleging that it had violated Section 2 of the Sherman Act.<sup>154</sup> This statute makes it a felony to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations.”<sup>155</sup> After extensive discovery and a nine-week bench trial, a federal district judge in Washington, D.C., ruled that 1) Google’s use of certain distribution agreements had had anticompetitive effects, 2) Google’s attempted procompetitive justifications for the agreements were unconvincing, and 3) “Google ha[d] exercised its monopoly power by charging [advertisers] supra-competitive prices for general search text ads.”<sup>156</sup>

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<sup>154</sup> See *Justice Department Sues Monopolist Google For Violating Antitrust Laws*, U.S. DEP’T OF JUST. (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> [<https://perma.cc/YTG2-8SQT>].

<sup>155</sup> 15 U.S.C. § 2.

<sup>156</sup> *United States v. Google LLC*, No. 20-cv-3010, 2024 WL 3647498, at \*4 (D.D.C. Aug. 5, 2024). For a critique of the district court’s decision from a retired DOJ economist, see

The district court will now consider the difficult question of a remedy,<sup>157</sup> and an appeal will certainly follow. We are probably still years away from final resolution of the case.

Google's parent company, Alphabet, is the fifth largest U.S. firm measured by market capitalization, behind only Apple, Microsoft, Amazon, and Nvidia.<sup>158</sup> Americans who have a pension or own shares in a mutual fund are virtually certain to own Google shares indirectly and thus have a personal stake in the outcome of this lawsuit.

## VI. REDISTRIBUTION VIA PUBLIC POLICIES

While the four varieties of market failure can be used to understand much government behavior, they certainly do not account for all government activity. The most important category that falls outside of market failure comprises the many government programs at all levels of American government that redistribute income from one group of citizens to another (typically smaller) group of citizens. Such transfer programs in fact constitute at least half of all federal spending.<sup>159</sup> It seems reasonable, based on what we can observe, to begin with the idea that if a government program cannot be explained in terms of addressing a market failure, then it is probably there to redistribute or transfer income from one group (taxpayers or consumers, in many cases) to another (typically smaller) group or groups (subsets of individuals or businesses).

Sometimes government transfer programs grow out of concern for the less well off, but this is certainly not the only motivation possible for such programs. Indeed, many government transfer programs benefit middle- and upper-income voter groups.<sup>160</sup> This is unsurprising, since there are many more voters in these categories than in the low-income category.

Presidential campaigns offer plentiful support for this observation. In 2024, both major party candidates proposed expensive new entitlement programs within days of one another. In mid-August candidate Harris announced her plan to subsidize first-time homebuyers in the

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Gregory J. Werden, *Harm to the Competitive Process in the Google Case*, MERCATUS WORKING PAPER, MERCATUS CTR. GEORGE MASON UNIV., 17–26 (July 1, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4898050](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4898050) [<https://perma.cc/N68T-EBN7>].

<sup>157</sup> See Werden, *supra* note 156.

<sup>158</sup> One website put Alphabet's market cap at \$2.019 trillion. *Largest Companies by Market cap*, COMPANIESMARKETCAP, <https://companiesmarketcap.com/> [<https://perma.cc/8T2Q-7LRU>] (last visited Feb. 12, 2025).

<sup>159</sup> Dwight R. Lee, *Redistribution*, ECONLIB, <https://www.econlib.org/library/Enc/Redistribution.html> [[perma.cc/TD74-48BU](https://perma.cc/TD74-48BU)] (last visited Feb. 13, 2025).

<sup>160</sup> *Id.*

form of \$25,000 in down-payment “assistance.”<sup>161</sup> The campaign estimated the program would benefit more than 1 million homebuyers per year.<sup>162</sup> If so, the program would increase federal spending by more than \$25 billion annually. In late August, candidate Trump promised that if he wins, “your government will pay for or your insurance company will be mandated to pay for all costs associated with” in vitro fertilization (IVF) treatments.<sup>163</sup> One estimate puts the annual cost of this program at \$7 billion, “about the annual cost of public housing or the Head Start program.”<sup>164</sup> While Harris’s requirement that the recipient be a first-time homebuyer would mean that the recipients are more likely to be lower-middle-income than not, there does not seem to be any qualifying income involved. Trump’s statement was also devoid of express means-testing. Neither candidate has said how these new programs would be funded. Christmas often comes early in presidential election years.

#### A. *Helping the poor*

Former Senator Phil Gramm recently calculated that “[m]eans-tested social-welfare spending totaled \$1.6 trillion in 2023.”<sup>165</sup> Such programs include “Medicaid, food stamps, refundable tax credits, Supplemental Security Income, Temporary Assistance for Needy Families, federal housing subsidies and almost 100 other programs whose eligibility is limited to those below an income threshold.”<sup>166</sup> This spending comprised about 26% of the entire 2023 federal budget of \$6.13 trillion.<sup>167</sup>

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<sup>161</sup> Ana Teresa Solá, ‘Starter Home’ Tax Breaks, Aid For First-Time Buyers: What To Know About Harris’ Affordable Housing Proposals, CNBC (Aug. 20, 2024), <https://www.cnbc.com/2024/08/20/what-to-know-about-harris-affordable-housing-economic-proposals.html> [https://perma.cc/FDB2-9QPS].

<sup>162</sup> MJ Lee et al., *Harris To Announce 4-Year Plan To Lower Housing Costs*, CNN (Aug. 15, 2024), <https://www.cnn.com/2024/08/15/politics/kamala-harris-plan-housing-costs/index.html> [https://perma.cc/N7G3-LLX2].

<sup>163</sup> Quoted in Cameron Smith, *Opinion: Not Much for Conservatives to Conserve in November’s Election*, AL.COM (Sept. 13, 2024), <https://www.al.com/opinion/2024/09/cameron-smith-not-much-for-conservatives-to-conserve-in-novembers-election.html> [https://perma.cc/4Z9H-GB4L]. On the boast of forcing insurance companies to pay, see Vanessa Brown Calder, *Trump’s IVF Plan is a Mistake*, CATO INSTITUTE (Sept. 3, 2024), <https://www.cato.org/blog/trumps-ivf-plan-mistake> [https://perma.cc/9595-WGXG].

<sup>164</sup> Vanessa Brown Calder, *Trump’s IVF Plan is a Mistake*, CATO INSTITUTE (Sept. 3, 2024), <https://www.cato.org/blog/trumps-ivf-plan-mistake> [https://perma.cc/9595-WGXG].

<sup>165</sup> Phil Gramm & Jodey Arrington, *Welfare is What’s Eating the Budget*, WALL ST. J. (Sept. 11, 2024), <https://arrington.house.gov/news/documentsingle.aspx?DocumentID=2420> [https://perma.cc/4XE5-SBU9].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

Some left-of-center candidates speak enthusiastically about raising taxes on “the wealthy” so that this group finally pays its “fair share” of taxes. The (assumed) increase in tax revenues would then be appropriated for new transfer programs to help the less well-off. This rhetoric overlooks three critically important considerations:

First, the top 1% of taxpayers paid 45.8% of personal federal income taxes collected in tax year 2021.<sup>168</sup> The top 5% paid 65.6%; the top 10%, 75.8%.<sup>169</sup> The bottom 50% paid only 2.3% of personal federal income taxes.<sup>170</sup> These statistics illustrate the fact that there is no obvious limiting principle when it comes to redistribution. If we raised taxes on the top 1% so that their share of taxes paid went from 65.6% to 75.6%, would that satisfy any of the politicians who inveigh against “millionaires and billionaires” today? Why not five or even ten percent more? When will we have expropriated enough from the expropriators, comrade?

Second, increased tax rates will reduce the incentives people have to save and invest. At some point, the effect of a tax increase will be to reduce the amount of taxes raised because of the overall negative effect higher taxes have on economic growth. This point, and the fact that some liberal politicians do not care about it, were illustrated in a famous Q-and-A between Barack Obama and a TV journalist during the 2008 campaign.

CHARLIE GIBSON, ABC NEWS: All right. You have, however, said you would favor an increase in the capital gains tax. As a matter of fact, you said on CNBC, and I quote, “I certainly would not go above what existed under Bill Clinton,” which was 28 percent. It’s now 15 percent. That’s almost a doubling, if you went to 28 percent. But actually, Bill Clinton, in 1997, signed legislation that dropped the capital gains tax to 20 percent.

OBAMA: Right.

GIBSON: And George Bush has taken it down to 15 percent.

OBAMA: Right.

GIBSON: And in each instance, when the rate dropped, revenues from the tax increased; the government took in more money. And in the 1980s, when the tax was increased to 28 percent, the revenues went down. So why raise it at all, especially given the fact that 100 million people in this country own stock and would be affected?

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<sup>168</sup> Erica York, *Summary of the Latest Federal Income Tax Data*, Tax Found. (Mar. 13, 2024), <https://taxfoundation.org/data/all/federal/latest-federal-income-tax-data-2024/> [https://perma.cc/F6S8-9AZR].

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

OBAMA: Well, Charlie, what I've said is that I would look at raising the capital gains tax for purposes of fairness.<sup>171</sup>

Third, increased tax rates increase the incentives people have to hide assets and income, move them out of the country, and move themselves out of the country. None of these measures will contribute to U.S. economic growth, which is essential to finance America's government spending in the coming years.<sup>172</sup>

In short, it looks like major expansions of government transfer programs are out of reach for the foreseeable future. Indeed, we will be extremely lucky if the current transfer programs can be maintained at current funding levels, adjusted upward for inflation.

### B. *Non-Means-Tested Transfer Programs*

The two largest Federal redistribution programs, Social Security and Medicare, are not limited to helping poor people. Bill Gates and Elon Musk are both entitled to benefits from these programs, if they

<sup>171</sup> Gerald Prante, *Obama and Gibson Capital Gains Tax Exchange*, TAX FOUND. (Apr. 17, 2008), <https://taxfoundation.org/blog/obama-and-gibson-capital-gains-tax-exchange/> [https://perma.cc/W69M-F2YK].

<sup>172</sup> Bluntly, the numbers simply are not there for massive new programs of redistribution to the poor. To see this, consult the chart showing the distribution of household wealth in the U.S. since 1989. See *Distribution of Household Wealth in the U.S. Since 1989*, FED. RSRV. (Dec. 20, 2024), <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/> [https://perma.cc/DF2R-NH99]. In the second quarter of 2024, the wealth of the top 1% of U.S. households was valued at \$46.71 trillion. If a radical U.S. administration confiscated 100% of this wealth and distributed it to, let's say, "the 99%" or 330 million Americans, that would finance a one-time payment of \$141,545. If a more prudent course were followed with that amount managed as an endowment, it would generate an annual payment per person of \$7,077, assuming a 5% rate of return. That's \$28,308 annually for a family of 4. Not exactly winning the lottery, but even this projection is too optimistic for at least two reasons. First, roughly half of the wealth held by the top 1% is in stocks, mutual fund shares, and pension benefits. See *Distributional Financial Accounts*, FED. RSRV. (Dec. 20, 2024), <https://www.federalreserve.gov/releases/z1/dataviz/dfa/compare/chart/> [https://perma.cc/A55A-KM3V]. The act of confiscating these assets would greatly decrease their market value, as the stock markets adjusted to the fact of the confiscatory tax and what it would portend. Second, such a radical tax policy would likely have a destabilizing effect on investor expectations (an effect termed regime uncertainty by Robert Higgs) and make it less likely a 5% return could be realized in the future. The reader is invited to experiment with the Fed's data and imagine even bigger seizures of wealth. This exercise should convince the reader that those who hope to enrich everyone by confiscating the wealth of "the rich" cannot possibly reach their goal. In addition to overestimating how much wealth "the wealthy" hold, most people on the left overestimate the profits earned by corporations. See DeBow, *supra* note 1, at 297–98 (showing that respondents in one survey overestimated profits by a factor of almost five). In January 2024, finance professor Aswath Damodaran calculated the average net profit margin across 5,214 American non-financial businesses to be approximately 7.59%. Aswath Damodaran, *Margins by Sector (US)*, NYU STERN SCH. OF BUS. (Jan. 2024), [https://pages.stern.nyu.edu/~adamodar/New\\_Home\\_Page/datafile/margin.html](https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html) [https://perma.cc/5K3H-8UT3].

choose. Defenders of the status quo of these programs sometimes call them “social insurance,” but this is somewhat misleading. Both programs are financed on a pay-as-you-go basis, with current-year benefits paid for with current-year payroll tax revenues. But payroll taxes no longer suffice, and much of our current deficit financing goes to make up this shortfall. In FY 2023, the shortfall in payroll taxes to fund Social Security and Medicare necessitated federal borrowing of \$555 billion, about 33% of the total.<sup>173</sup> I would like to popularize the phrase “late-stage redistribution” to refer to our present condition,<sup>174</sup> which would require substantial tax increases to repair. According to one estimate, to cover the next 75 years of the shortfall in Social Security and Medicare Part A funding, Congress would have to raise payroll taxes on the median wage earner by \$1,598 and \$168 respectively, annually.<sup>175</sup> Clearly, entitlement reform, if it happens at all, will be difficult.<sup>176</sup>

C. *Rent seeking, corporate welfare, crony capitalism*

It may be shocking to hear that a good deal of government redistribution is designed to benefit the relatively well-off. Governments bestow benefits such as subsidies, favorable tax breaks, and generous government contracts on politically influential businesses and other interests. Special interests seek these benefits through lobbying and related political activities, such as making campaign contributions—a field of action economists call *rent-seeking*.<sup>177</sup> The result of successful rent-seeking is often referred to as *corporate welfare* or *crony capitalism*.<sup>178</sup> From an economic standpoint, most of this redistribution harms the public interest, on balance, and we would be better off without it.<sup>179</sup> Unfortunately, this type of redistribution often confers concentrated

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<sup>173</sup> See Boccia, *supra* note 21.

<sup>174</sup> Thus following the rhetorical lead of leftists who criticize “late-stage capitalism.”

<sup>175</sup> See Boccia, *supra* note 21.

<sup>176</sup> See Editorial, *The Medicaid Scare Campaign*, WALL ST. J., May 26, 2025, [https://www.wsj.com/opinion/the-medicaid-scare-campaign-97bc7aa9?mod=Searchresults\\_pos2&page=1](https://www.wsj.com/opinion/the-medicaid-scare-campaign-97bc7aa9?mod=Searchresults_pos2&page=1), [<https://perma.cc/8QTZ-73RB>].

<sup>177</sup> See David R. Henderson, *Rent Seeking*, ECONLIB, <https://www.econlib.org/library/Enc/RentSeeking.html> [<https://perma.cc/BKX2-MM9A>] (last visited Feb. 11, 2025).

<sup>178</sup> See RANDALL G. HOLCOMBE & ANDREA M. CASTILLO, *LIBERALISM AND CRONYISM: TWO RIVAL POLITICAL AND ECONOMIC SYSTEMS* 8–9, 90–91 (Mercatus Center Geo. Mason Univ. 2013).

<sup>179</sup> The economist Randall Holcombe is doing very interesting work in this area. See RANDALL G. HOLCOMBE, *Political Capitalism*, 35 CATO J. 41 (2015); HOLCOMBE & CASTILLO, *supra* note 178, at 103; see also Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. OF L. & PUB. POL’Y 983 (2013).

benefits on the interest group that are paid for by a larger group of people (e.g., customers, taxpayers). This combination of concentrated benefits and dispersed costs makes it easy for legislators and other office holders to service the interest group at a low political risk to themselves.

However, the market failure and redistribution categories are not hermetically sealed off from each other. Even the most public-spirited program will have distributional effects. Again, there will be winners and losers from government action. These effects may or may not have been a key motivation for some (most?) of the legislators who approved the program. At what point should we conclude that redistribution is the dominant motive behind a particular government program? Take, for instance, the massive federal spending to date to subsidize various forms of “green energy” (windmills, solar farms, etc.) and electric vehicles.<sup>180</sup> Obviously, some businesses have benefitted greatly from these government policies. Do you think these programs are better explained by reference to their redistributive effects or by a public-interest motivation to address the externalities that contribute to climate change?

Let’s consider three examples of redistributive policies that seem primarily the result of rent-seeking—one from local government and two from the federal government.

Local governments are often successfully lobbied by sports teams to provide public (taxpayer) financial assistance for the construction of stadiums and other venues. For example, the proposed new stadium for the Tennessee Titans is projected to cost \$2.235 billion.<sup>181</sup> Apparently, the team owners will pay \$975.6 million—or less than half the total.<sup>182</sup> The remainder will come from state and local taxpayers, ponying up \$500 million and \$760 million, respectively.<sup>183</sup> How should we think about these “investments”? On their face, they look very much like a redistribution to the wealthy (team owners, professional athletes, and so on). A large research literature confirms this initial impression. A recent survey of more than 130 studies done over more

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<sup>180</sup> See *U.S. Doubles Renewable Subsidies to \$15.6 Billion in Last Seven Years, EIA Says*, REUTERS (Aug. 2, 2023 11:12 AM), <https://www.reuters.com/business/energy/us-doubles-renewable-subsidies-156-billion-last-seven-years-eia-2023-08-02/> [<https://perma.cc/9335-CS9M>].

<sup>181</sup> Joylyn Bukovac, *New Nissan Stadium Will Cost More than \$2.2 Billion, Titans to Cover Overages*, WSMV (Sept. 12, 2024, 11:50 AM), <https://www.wsmv.com/2024/09/12/new-nissan-stadium-will-cost-more-than-22-billion-titans-cover-overages/> [<https://perma.cc/DN8V-UJ7J>].

<sup>182</sup> *Id.*

<sup>183</sup> See *id.*

than thirty years concludes that “the large subsidies commonly devoted to constructing professional sports venues are not justified as worthwhile public investments.”<sup>184</sup> Furthermore, “[e]ven with added non-pecuniary social benefits from quality-of-life externalities and civic pride, welfare improvements from hosting teams tend to fall well short of covering public outlays.”<sup>185</sup>

Turning to the federal government, one researcher calculated that as of July 24, 2024, the federal government has “forgiven” more than \$406 billion in student loan debt—\$25 billion in the Trump Administration and the remainder during the Biden Administration.<sup>186</sup> These loans are federal government assets, and the forgiveness policy in effect gives these assets, which belong in a sense to all citizens, to the borrowers, a much smaller subset of citizens.<sup>187</sup> Obviously, this will be especially popular with voters whose loans are forgiven.

Conservative state attorney generals challenged the Biden Administration’s policies as beyond the statutory authority of the Secretary of Education, and in June 2023 the Supreme Court agreed with the challengers.<sup>188</sup> Apparently unfazed by this decision, President Biden directed the program be redesigned and attempted once again.<sup>189</sup> As he explained in a February 2024 speech, “[e]arly in my time I announced a major plan to provide millions of families with relief for their college student debt . . . . But MAGA Republican hands in congress, elected officials[,] and special interests stepped in and sued me and *the supreme court blocked it, but that didn’t stop me.*”<sup>190</sup>

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<sup>184</sup> John Charles Bradbury et al., *The Impact of Professional Sports Franchises and Venues on Local Economies: A Comprehensive Survey*, 37 J. ECON. SURV. 1389 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4022547](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4022547) [<https://perma.cc/J4BB-DPU3>].

<sup>185</sup> *Id.*

<sup>186</sup> Nat Malkus, *Student Debt Forgiveness Tracker*, AEI (last visited Feb. 12, 2025), <https://www.aei.org/studentdebtforgivenesstracker/> [<https://perma.cc/EEY4-XY92>].

<sup>187</sup> See Sean Ross, *Who Actually Owns Student Loan Debt?*, Investopedia (Mar. 3, 2024), <https://www.investopedia.com/articles/personal-finance/081216/who-actually-owns-student-loan-debt.asp> [<https://perma.cc/ZMB4-LYX3>].

<sup>188</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2365, 2376 (2023). The Court also held that the loan forgiveness program offended the major questions doctrine. See *infra* Appendix I.B.

<sup>189</sup> See Clara Harter, *Biden Announces \$1.2 Billion of Student Debt Relief in Culver City Speech*, L.A. Daily News (Feb. 21, 2024, 5:14 PM), <https://www.dailynews.com/2024/02/21/biden-announces-1-2-billion-of-student-debt-relief-in-culver-city-speech/> [<https://perma.cc/Q99B-FP5B>] (discussing Biden’s back-up plan, the SAVE plan, after the Court struck down his initial proposal for cancelling student debt).

<sup>190</sup> Harter, *supra* note 189 (emphasis added).



Legal challenges to the rebooted loan forgiveness program are currently pending in the U.S. Court of Appeals for the Eight Circuit.<sup>191</sup> In the meantime, a survey conducted for Credit Karma in August 2024 found that 36% of respondents said that “they are not making consistent on-time payments toward their [student] loans in hopes that their debt will be forgiven.”<sup>192</sup>

To give equal time to a Republican president, let’s consider Donald Trump’s record on tariffs. As a candidate in three election cycles, Trump has strongly advocated for higher tariffs as a way to protect American workers and American businesses.<sup>193</sup> In his pitch to voters, Trump consistently claims that American consumers do not pay any portion of a U.S. tariff. For example, in August 2024 he told a rally audience that “a tariff is a tax on a foreign country. A lot of people like to say it’s a tax on us. No, . . . *it’s a tax that doesn’t affect our country.*”<sup>194</sup> This statement is flatly wrong (as anyone who has had a basic economics course will recognize). Foreign sellers treat the tariff as a cost of doing business and will pass it along to American buyers who continue to purchase the good in question after the tariff is raised. During the Trump administration, heavy tariffs were levied on “imported solar products, washing machines, steel, aluminum, and about 70 percent of all products from China.”<sup>195</sup> One study estimated that the China tariffs alone cost the average American household \$831 annually in the form of price increases and deadweight efficiency losses caused by the distortions introduced by the tariffs.<sup>196</sup> Studies show consistently that

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<sup>191</sup> *Missouri v. Biden*, 112 F.4th 531, 534 (8th Cir. 2024) (granting injunction pending appeal, “preventing the United States Secretary of Education from implementing a plan to forgive approximately \$475 billion in federal-student-loan debt”).

<sup>192</sup> *One-in-Five Borrowers Have Made Zero Payments Toward Their Student Loans, as Many Hold Out for Loan Forgiveness*, CREDIT KARMA (Sept. 5, 2024), <https://www.creditkarma.com/about/commentary/one-in-five-borrowers-have-made-zero-payments-toward-their-student-loans-as-many-hold-out-for-loan-forgiveness> [https://perma.cc/N73Y-RFM7].

<sup>193</sup> See e.g., Geoffrey Gertz, *Did Trump’s Tariffs Benefit American Workers and National Security?*, Brookings (Sept. 10, 2020), <https://www.brookings.edu/articles/did-trumps-tariffs-benefit-american-workers-and-national-security/> [https://perma.cc/GP8Z-HTE6].

<sup>194</sup> Clark Packard et al., *Americans Paid for the Trump Tariffs—and Would Do So Again*, CATO INSTITUTE (Aug. 19, 2024, 5:24 PM), <https://www.cato.org/blog/americans-paid-trump-tariffs-would-do-so-again> [https://perma.cc/2BX3-WMKH] (emphasis added).

<sup>195</sup> *Id.*

<sup>196</sup> Mary Amity et al., *New China Tariffs Increase Costs to U.S. Households*, LIBERTY STREET ECONOMICS (May 23, 2019), <https://libertystreeteconomics.newyorkfed.org/2019/05/new-china-tariffs-increase-costs-to-us-households/> [https://perma.cc/SD64-HGFY]. Sixteen other studies of the effects of the Trump tariff are summarized in Packard, et al., *supra* note 194. Missing from Packard’s list is Geoffrey Gertz, *Did Trump’s tariffs benefit American workers and national security?*, BROOKINGS INSTITUTION (Sept. 10, 2020),

the losers from high tariffs are harmed more than the winners are benefited.<sup>197</sup> It is a net negative public policy.

## VII. CONCLUSION

Following Isaiah Berlin's lead,<sup>198</sup> let's say that there are two kinds of people in the world: those who believe a proposed new government program would likely be a good idea, and those who believe it would likely not be a good idea.<sup>199</sup> In the past, these attitudes would correspond to liberals and conservatives, respectively. In the current political climate, that is not as true as it once was, as some on the right now seek greater government activism in terms of tariffs and other trade protectionism, industrial policy, and the like. Perhaps we are at a point where both liberals and conservatives support more government power in our lives—but only when their party is in power, not when the other side is in power. Unfortunately, the accretion of government power does not work this way. Instead, Americans see a one-way ratchet, which only ever produces more and more government power.

As a group, lawyers are politically to the left of the general public.<sup>200</sup> It stands to reason that law students are, too, by extension. So, for the average law student reader who has made it this far, this article may be somewhat challenging, even off-putting. If this describes you, I appreciate your patience in getting this far. I would like to reiterate my hope that this material is useful to you in taking elective courses that I listed on page 2.

If I might make a final suggestion: please consider using the concepts described in this article to think through the question whether the burden of proof should be on the proponents of a new government policy or program, or on the opponents of the same. That is, should you

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<https://www.brookings.edu/policy2020/votervital/did-trumps-tariffs-benefit-american-workers-and-national-security/> [https://perma.cc/8YVD-JAWB].

<sup>197</sup> Erica York, *Separating Tariff Facts From Tariff Fictions*, CATO INST. (Apr. 16, 2024), <https://www.cato.org/publications/separating-tariff-facts-tariff-fictions#who-actually-pays-tariffs> [https://perma.cc/8G8X-H6PD].

<sup>198</sup> Isaiah Berlin proposed that people are either hedgehogs (who know “one big thing”) or foxes (who know “many things”). Isaiah Berlin, *The Hedgehog and the Fox An Essay on Tolstoy's View of History*, 1,1 WEIDENFELD & NICOLSON LTD. (1953). Berlin said he “meant it as a kind of enjoyable intellectual game, but it was taken seriously.” Ramin Jahanbegloo, CONVERSATIONS WITH ISAIAH BERLIN 188 (1992).

<sup>199</sup> One economist has described such a division among economists. Robert Higgs, *Two Ideological Ships Passing in the Night*, 12:1 ECON J. WATCH 36, 37–38 (2015).

<sup>200</sup> See Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8:2 J. OF LEGAL ANALYSIS 277, 292 (2016); see also John O. McGinnis, *Lawyers for Radical Change*, CITY JOURNAL (2022), <https://www.city-journal.org/lawyers-for-radical-change> [https://perma.cc/Z3MB-K5TM].

adopt a presumption for, or against, any proposal that involves growing the role of government in this country? And how heavy should that burden, and how strong should that presumption be?

At this point it is probably no mystery what my opinion is on this matter.<sup>201</sup> You have the opportunity in the remainder of your time in law school to develop your own opinion. Best wishes to you!

Resources for further study and keeping up with new developments in public policy can be found in Appendix II.

## APPENDIX I

### U.S. CONSTITUTIONAL STRUCTURE AND HISTORY: A PRIMER

#### A. *A civics refresher.*

The architecture of the original U.S. Constitution (1787) depended upon four interlocking ideas. *First*, there would be a division of powers between the Federal and state governments—a feature called *federalism*.<sup>202</sup> *Second*, the powers of the Federal government would be allocated among its three branches (legislative, executive, and judicial)—a feature called the *separation of powers*.<sup>203</sup> *Third*, the legislative powers of Congress would be limited to the items listed in Article I, section

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<sup>201</sup> For my last footnote I offer a blatant appeal to authority: a quote from Ronald Coase, the 1991 Nobel laureate in economics and the intellectual father of the law and economics movement:

“When I was editor of *The Journal of Law and Economics*, we published a whole series of studies of regulation and its effects. Almost all the studies—perhaps all the studies—suggested that the results of regulation had been bad, that the prices were higher, that the product was worse adapted to the needs of consumers, than it otherwise would have been. I was not willing to accept the view that all regulation was bound to produce these results. Therefore, what was my explanation for the results we had? I argued that the most probable explanation was that the government now operates on such a massive scale that it had reached the stage of what economists call negative marginal returns. Anything additional it does, it messes up. But that doesn’t mean that if we reduce the size of government considerably, we wouldn’t find then that there were some activities it did well. Until we reduce the size of government, we won’t know what they are.”

Thomas W. Hazlett, *Looking for Results: An Interview with Ronald Coase*, REASON (Jan. 1997), <https://reason.com/1997/01/01/looking-for-results/> [<https://perma.cc/56M5-NDQ7>] (emphasis added).

<sup>202</sup> *Federalism*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/federalism> [<https://perma.cc/RR2R-ZZKH>].

<sup>203</sup> *Intro. 7.2 Separation of Powers Under the Constitution*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/intro.7-2/ALDE\\_00000031/](https://constitution.congress.gov/browse/essay/intro.7-2/ALDE_00000031/) [<https://perma.cc/J93Z-WLVD>].

8—a feature called *enumerated powers*.<sup>204</sup> *Fourth*, no branch of the Federal government could “delegate”—hand over—its powers to another branch.<sup>205</sup> That is, Congress would legislate, the President would execute, and the Federal courts would adjudicate—and no one in the government could properly give away his authority or responsibility to anyone else. This feature is known as the *non-delegation doctrine*.<sup>206</sup>

The Constitution reflects a realistic, unromantic understanding of human nature, one significantly influenced by the writers of the Scottish Enlightenment. James Madison’s famous passage in Federalist No. 51 speaks in a strong Scots accent:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>207</sup>

Accordingly, Madison sought to create in the Federal government an internal tension that would keep the separated powers separate.<sup>208</sup> He hoped that the men who staffed each of the three branches would jealously guard the turf of their branch, partly because of their own political or career ambitions.<sup>209</sup> In this way, “[a]mbition [would] be made to counteract ambition. The interest of the man [thus] connected with the constitutional rights of [his branch].”<sup>210</sup> The importance of maintaining the separation of powers is reflected in Madison’s famous observation in Federalist No. 47: that the accumulation of all political power in the same hands was “the very definition of tyranny.”<sup>211</sup>

To this end he hoped state government officials would jealously guard their prerogatives against Federal encroachment.<sup>212</sup> Federalism would be greatly assisted by the fact that the subject areas amendable to Federal legislation were to be limited to those expressly listed in Article I, Section 8. Madison explained all this in Federalist No. 45, the most important passage being:

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<sup>204</sup> *Enumerated Powers*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/enumerated\\_powers](https://www.law.cornell.edu/wex/enumerated_powers) [<https://perma.cc/T5JJ-ENA2>].

<sup>205</sup> See U.S. Const. art. 1, § 1.

<sup>206</sup> *Id.*

<sup>207</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>212</sup> *Id.*

The powers delegated by the proposed Constitution to the federal government are *few and defined*. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on *external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected*. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>213</sup>

The legislative authority of Congress was thus limited to those subjects expressly listed in the Constitution—subjects were primarily in the realm of national defense and foreign relations. (This is a good point to review the text of Article I, Section 8.<sup>214</sup>)

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<sup>213</sup> THE FEDERALIST NO. 45 (James Madison) (emphasis added).

<sup>214</sup> The Congress shall have Power:

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the

As a result, once the Constitution was ratified, the state governments were to retain the very broad scope for legislation that they had always enjoyed. As Madison put it in the quote above, the states' powers, "numerous and indefinite," were to "extend to all the objects which . . . concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."<sup>215</sup> This very broad power was relabeled the *police power* in the early 19<sup>th</sup> century and is routinely described today as the state governments' power to legislate with respect to the "public health, safety, morals, or general welfare."<sup>216</sup> The police power is limited only by the terms of the Federal and state constitutions, and by electoral politics. Whatever the dangers inherent in this nearly unlimited legislative power,<sup>217</sup> it is clear

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Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;- And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

<sup>215</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>216</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). According to one scholar, the term first appeared in Chief Justice Marshall's opinion in *Brown v. Maryland*, 25 U.S. 419, 442–43 (1827). Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 745 (2007). Notable judicial opinions in this area include *Commonwealth v. Alger*, 61 Mass. 53, 53 (1851) and *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 142 (1854). For additional scholarly discussion, see Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 NYU J. L. & LIBERTY 662, 663 (2015); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 429 (2004); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1–2 (U. N. Carolina 1996); JONATHAN R. T. HUGHES, *THE GOVERNMENTAL HABIT REDUX: ECONOMIC CONTROLS FROM COLONIAL TIMES TO THE PRESENT* 3 (Princeton U. Press, 2d ed. 1991).

<sup>217</sup> As the Court explained in *Euclid*, "[t]he line which in [the] field [of the police power] separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." 272 U.S. at 387. State and local government regulations adopted during the COVID pandemic were grounded in the police power and generated a great deal of pushback from the public. For a recent survey of the litigation around these regulations, see Michelle M. Mello et al., *Judicial Decisions Constraining Public Health Powers During COVID-19: Implications for Public Health Policy Making*, 43 HEALTH AFFAIRS 759 (June 2024) (analyzing 112 state and federal court decisions in which the challenger prevailed). Readers interested in this subject should also consult W. Kip Viscusi, *Economic lessons for COVID-19 pandemic policies*, 87 S. ECON.

that the state governments retained it at the founding. It is also clear that the Framers did not intend for the federal Congress to wield the police power.<sup>218</sup> However, as briefly sketched below, the original Constitutional framework has been so compromised by subsequent political and legal history that Congress today exercises legislative powers that are practically indistinguishable from the police power.

An illustration of this fact may be useful here. In July 2023, the Commerce Committee of the U.S. Senate approved S. 1669, the “AM Radio for Every Vehicle Act of 2023” and recommended favorable action by the full Senate.<sup>219</sup> To date, the measure has not received a vote in either chamber, despite the fact that it boasts more than enough cosponsors to pass.<sup>220</sup> If eventually passed, the bill will require “the Department of Transportation (DOT) to issue a rule that requires all new passenger motor vehicles to have devices that can access AM broadcast stations installed as standard equipment.”<sup>221</sup>

Put aside for the moment the question of whether such government regulation of product design is a good idea. Ask instead if Congress has the authority, under Article I, section 8, to pass such a bill. If you have taken a course in Constitutional Law, you know that the sponsors would argue that the act fits within the so-called “commerce clause,” that Congress may “regulate Commerce . . . among the several States.”<sup>222</sup> And they would have a winning argument in light of the current Supreme Court caselaw dealing with the commerce clause. In fact, it is hard to imagine any form of commercial regulation that is beyond Congress’s commerce power as it is currently defined.<sup>223</sup>

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J. 1064 (2021) (providing a cost-benefit analysis of the public health reaction to COVID by one of the most respected practitioners of cost-benefit analysis).

<sup>218</sup> *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[T]he Founders denied the National Government [the police power] and reposed [it] in the States.”); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”). Justice Thomas’s concurrence in *Lopez* lays out the debates over the adoption of the commerce clause and the history of the Supreme Court’s interpretation of the clause. *Lopez*, 514 U.S. at 584–99 (Thomas, J., concurring).

<sup>219</sup> S. 1669, 118th Cong. (2023) is sponsored by Sen. Edward Markey (D-MA), but its 62 cosponsors (as of June 9, 2024) include 23 additional Democrats, 33 Republicans, and 3 Independents: King (ME), Sanders (VT), and Sinema (AZ). The companion bill in the House, H.R. 3413, 118th Cong. (2023), has 270 cosponsors—142 Republicans and 128 Democrats. The bipartisan support for this bill might lead one to question Congressional Republicans’ dedication to the ideal of “limited government.”

<sup>220</sup> See S. 1669, 118th Cong. (2023); H.R. 3413, 118th Cong. (2023).

<sup>221</sup> S. 1669, 118th Cong. (2023).

<sup>222</sup> U.S. CONST. art. I, § 8.

<sup>223</sup> See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (arguing that the original meaning of the term “Commerce” was much

It should be noted at this point that the founders would probably not consider the regulation of auto design beyond the power of the state governments' reach under the police power. Accordingly, if the State of California, say, wished to regulate the kind of radios available in cars sold in that state, it would likely be able to do so pursuant to its police power.<sup>224</sup>

Just because the present-day Federal government *can* act on this issue does not, of course, mean that it *should* act. Similarly with state governments, they hold the police power but that does not mean they should use it. The critical question that remains is "does the public interest require that government supervise the design decisions of auto manufacturers in this way?"

*B. Some relevant history.*

And you may find yourself behind the wheel of a large automobile  
And you may find yourself in a beautiful house, with a beautiful wife  
And you may ask yourself, 'Well, how did I get here?'<sup>225</sup>

The formal structure set out in the 1787 Constitution held together remarkably well for a remarkably long time—longer than some Framers expected. Ultimately, the Civil War, and the three Constitutional amendments that followed it, substantially redefined the relationship between the Federal and state governments. Most significantly, the Fourteenth Amendment put the Federal courts in the position of deciding lawsuits that claimed that a state statute had deprived someone "of life, liberty, or property, without due process of law," or denied a person "the equal protection of the laws."<sup>226</sup> This introduction of federal judicial review over state assertions of the police power gave rise to

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narrower than the meaning found in today's caselaw). Landmark decisions on the way to our current meaning include *Nat'l. Lab. Rels. Bd. v. Jones & Laughlin Steel Corp.*, U.S. 301 U.S. 1 (1937) and *Wickard v. Filburn*, 317 U.S. 111 (1942). In addition to the commerce clause, we should note two other phrases in Article I, section 8, that have also proven to be quite elastic—the terms "general welfare" and "necessary and proper." The current, ahistorical judicial reading of both these terms also supports the huge expansion of Federal power over the last century or so.

<sup>224</sup> Would the auto companies prefer to deal with a single Federal regulation or numerous state regulations?

<sup>225</sup> TALKING HEADS, ONCE IN A LIFETIME (Sire 1980).

<sup>226</sup> U.S. CONST. amend. XIV.



much litigation and elevated federal over state policymaking in many areas.<sup>227</sup>

The post-Civil War Congress's creation of federal benefit programs assisting Union Army veterans and their widows marked the birth of federal social policy in the United States, according to one prominent scholar.<sup>228</sup> Gilded-age populist politics resulted in the federal government entering the direct regulation of business in a big way—with the passage of the Interstate Commerce Act (1887) and the Sherman Act (1890).<sup>229</sup>

In the same time frame, a strong critique of the U.S. Constitutional system began to be heard—heralded by “Progressive” American academics trained in political science, sociology, and economics at German universities.<sup>230</sup> The critics considered the Constitution old-fashioned and outmoded, unable to come to grips with the problems of an increasingly urban and industrialized nation.<sup>231</sup> Legislatures were amateurish affairs, and corrupt to boot. The public interest would be much better served by public policies adopted and implemented by “experts.” Better a group of scientists, engineers, and professionally trained managers, than a group of hayseed politicians sent to the state capitol to trade favors and serve the status quo.

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<sup>227</sup> To cite a well-known example, in *Roe v. Wade*, 410 U.S. 113, 164 (1973), the Supreme Court invalidated the Texas abortion statute on the grounds that it denied the plaintiff her right to liberty in violation of the Fourteenth Amendment. In 2022, the Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). For another recent far-reaching decision grounded in the Fourteenth Amendment, see *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (finding state governments that did not recognize same-sex marriages violated both the equal protection and due process clauses).

<sup>228</sup> THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 8–10 (Belknap Press, 1995).

<sup>229</sup> See Will Kenton, *Sherman Antitrust Act: Definition, History, And What It Does*, INVESTOPEDIA (Apr. 21, 2024) <https://www.investopedia.com/terms/s/sherman-antitrust-act.asp> [<https://perma.cc/9BR9-SC2J>].

<sup>230</sup> See Richard M. Reinsch II and Bradley C.S. Watson, *How The Academics Made Progressivism All-American*, LAW & LIBERTY (May 1, 2020) <https://lawliberty.org/podcast/how-the-academics-made-progressivism-all-american/> [<https://perma.cc/4HCV-STG4>].

<sup>231</sup> RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (Cato Institute 2006).



[PHOTO] *A limited government pastoral. President Taft's cow, Pauline, grazes on the White House grounds, in front of the building now known as the Eisenhower Executive Office Building. When it opened in 1888, it housed the departments of state, war, and the navy.*

The heyday of Progressivism and the idea of government-by-experts ran from roughly 1880 to the 1920s.<sup>232</sup> First adopted by state governments, Progressivism gradually moved on to the national political stage, making common cause from time to time with political movements such as Populism.<sup>233</sup> The most famous exponent of the idea that the original understanding of the U.S. Constitution must give way to the exigencies of the moment was Woodrow Wilson, the only President to date to hold a Ph.D. (in political science, from Johns Hopkins University).<sup>234</sup>

Wilson's inauguration in 1913 was only one of several momentous events in that year. The 16<sup>th</sup> Amendment's ratification in that year cleared the way for the introduction of the Federal income tax; the 17<sup>th</sup>

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<sup>232</sup> William A. Schambra & Thomas West, *The Progressive Movement and the Transformation of American Politics*, HERITAGE FOUNDATION (July 18, 2007), <https://www.heritage.org/political-process/report/the-progressive-movement-and-the-transformation-american-politics> [<https://perma.cc/WAE2-6PPE>].

<sup>233</sup> For a concise overview, see Schambra & West, *supra* note 232 and EPSTEIN, *supra* note 231, at 2.

<sup>234</sup> For a very readable history of the 1912 presidential campaign, see JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT, AND DEBS – THE ELECTION THAT CHANGED THE COUNTRY 6 (Simon & Schuster 2004).

Amendment divested the state legislatures of their power to select U.S. Senators and made these offices popularly elected, and the Federal Reserve Act greatly expanded the Federal government's role in the national economy.

And yet, the original framework provided by the Constitution was viable enough in the nineteen-teens for prohibitionists to campaign for the Constitutional Amendment—the Eighteenth—to institute nationwide alcohol prohibition. That is, in 1917 it was clear to everyone that Congress did not have the authority—either through the commerce clause, or the necessary and proper clause, or the spending clause—to legislate prohibition. However, America's involvement in World War I during 1917 and 1918 seems to have conditioned many people to accept—or even expect—a greatly expanded role for the federal government.<sup>235</sup>

In the next two decades the original understanding was utterly forsaken. The chief impetus was, of course, the Great Depression. Franklin Roosevelt's New Deal recognized no parchment boundaries;<sup>236</sup> it also enjoyed enthusiastic, overwhelming public support.<sup>237</sup> In the face of it, the Supreme Court was incapable of salvaging the original meaning of the Constitution.<sup>238</sup> All four of the primary structural features of the document—federalism, separation of powers, enumeration of

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<sup>235</sup> See ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 1, 123 (1987).

<sup>236</sup> To see this clearly, see JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). Landis was a key member of FDR's "brains trust" while on leave from the deanship of Harvard Law School. He frankly asserted "the inadequacy of a simple tripartite form of government [that is, the one specified in the U.S. Constitution] to deal with modern problems." *Id.* at 1. For Landis, it was obvious that experts such as himself should remake American government "not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization." *Id.* at 12.

<sup>237</sup> Some scholars, including Yale's Bruce Ackerman, argue that most Americans intended or at least understood the New Deal to be a high "constitutional moment[]" that effectively rewrote the constitution. See Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 607–9 (2003), <https://scholarship.law.wm.edu/wmlr/vol45/iss2/5/> [ <https://perma.cc/K3T2-3H8B>]. For evidence *contra* this view, see Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 603 (2003), <https://scholarship.law.wm.edu/wmlr/vol45/iss2/5/> [ <https://perma.cc/K3T2-3H8B>]; Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 8–9 (2002), <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol50/iss1/4/> [ <https://perma.cc/8CQQ-X348>].

<sup>238</sup> There is a large literature on the showdown between FDR and the Supreme Court during 1936–37. A good source is Barry Cushman, *Inside the "Constitutional Revolution" of 1937*, 2016 SUP. CT. REV. 367 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3036658](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036658) [ <https://perma.cc/2WNA-WL3>].

legislative powers, and the non-delegation doctrine—were mere shadows of their former selves by 1937.<sup>239</sup>

Post-World War II legislation greatly expanded the scale and scope of Federal authority. The most important events in this continuing story include:

- President Lyndon Johnson’s “Great Society” legislative agenda, particularly in 1964 and 1965, can be seen as a sort of second act of the New Deal.<sup>240</sup> Landmark enactments included the Civil Rights Act of 1964, which established, *inter alia*, federal antidiscrimination rules in private employment, and the legislation that created the Medicare and Medicaid programs (1965).<sup>241</sup>
- The Nixon Administration saw a spate of health-and-safety statutes passed by Congress, including most significantly the Occupational Safety and Health Act of 1970, and the Clean Air and Water acts of 1970 and 1972, respectively, which transformed environmental law in the United States.<sup>242</sup>
- The Obama Administration pushed hard for the passage of the Affordable Care Act in 2010 and succeeded on a razor-thin

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<sup>239</sup> It seems clear to me that the Depression and the New Deal still loom very large in the present-day attitude of Americans toward their government, particularly in the exaltation of the presidency. It is equally clear to me that the conventional wisdom about the New Deal—namely, that the federal government rescued the country from economic, political, and social collapse—is seriously mistaken. Therefore, I offer the following articles for students who wish to learn about the critical assessment of the New Deal. See William F. Shughart II, *Bending before the Storm: The U.S. Supreme Court in Economic Crisis, 1935-1937*, 9 INDEP. REV. 55 (2004), <https://www.independent.org/publications/tir/article.asp?id=214/> [<https://perma.cc/FDK4-QGLC>]; Robert Higgs, *Regime Uncertainty: Why the Great Depression Lasted So Long and Why Prosperity Resumed after the War*, 1 INDEP. REV. 561 (1997), <https://www.independent.org/publications/tir/article.asp?id=430/> [<https://perma.cc/7457-LP79>]; Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5 (1988), [https://chicagounbound.uchicago.edu/journal\\_articles/1285/](https://chicagounbound.uchicago.edu/journal_articles/1285/) [<https://perma.cc/8A99-8U4H>]; LAWRENCE W. REED, GREAT MYTHS OF THE GREAT DEPRESSION (2016) (ebook), <https://fee.org/ebooks/great-myths-of-the-great-depression/> [<https://perma.cc/T9XT-W37W>]. For a more technical analysis by two UCLA economists, see Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004), <https://www.leeeohanian.com/selected.html> [<https://perma.cc/7Q92-75TZ>]. Important books include BURTON FOLSOM, JR., NEW DEAL OR RAW DEAL: HOW FDR’S ECONOMIC LEGACY HAS DAMAGED AMERICA (2008); AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION (2007).

<sup>240</sup> See AMITY SHLAES, GREAT SOCIETY: A NEW HISTORY 2 (2019).

<sup>241</sup> 42 U.S.C. § 2000e-2.

<sup>242</sup> See Ken Hughes, *Richard Nixon: Domestic Affairs*, MILLER CENTER, <https://miller-center.org/president/nixon/domestic-affairs> [<https://perma.cc/9AP7-CH5W>].

Congressional margin.<sup>243</sup> The apotheosis of unlimited Congressional authority might have been reached during the debate over the Act (a.k.a. “Obamacare”). An intrepid reporter asked House Speaker Nancy Pelosi (D-CA) to identify the source of Congress’s authority to pass such a statute.<sup>244</sup> Her shocked response, “Are you serious? Are you serious?” is preserved on YouTube.<sup>245</sup>

It is very hard to say that Speaker Pelosi was mistaken. As a result of this history, Congress’s legislative power is no longer limited to the areas enumerated in the constitution. Its power is as unlimited as the states’ police power, even if it does not bear that label.

Federalism in any robust sense also looks to be a dead letter. State governments, eager to receive federal money for all sorts of projects, now function mostly as administrative extensions of Washington.

Separation of powers inside the Federal government is shot to pieces as well. Members of Congress have not jealously guarded their turf against Presidential or judicial incursions. Instead, Congress routinely delegates huge amounts of quasi-legislative authority to the President, or to agencies of the Executive Branch, secure in the knowledge that voters will not know enough about the political game being played to punish the players. Madison’s design, sadly, was not sufficient.

Furthermore, the Federal courts have proved incapable of enforcing the non-delegation doctrine on the political branches in an effective manner. Justice Scalia summed up the situation in a 1989 dissent:

It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: . . . the basic policy decisions governing society are to be made by the Legislature. . . . But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.<sup>246</sup>

In fact, in only two cases in American history did the Supreme Court strike down Federal statutes on non-delegation grounds—both in 1935.<sup>247</sup> Both decisions struck down elements of the National Industrial Recovery Act, the centerpiece of the so-called “First New Deal.”

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<sup>243</sup> *The Affordable Care Act*, THE POLICY CIRCLE <https://www.thepolicycircle.org/briefs/the-affordable-care-act/> [<https://perma.cc/EU2N-6EH6>] (last visited Feb. 22, 2025).

<sup>244</sup> *Obamacare Mandate Constitutional? Pelosi: “Are you serious?”*, YOUTUBE (Dec. 14, 2010), <https://www.youtube.com/watch?v=08uk99L8oqQ> [<https://perma.cc/ZLF2-5CFR>].

<sup>245</sup> *Id.*

<sup>246</sup> *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

<sup>247</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

The Act granted *carte blanche* to the President to deal with the “national emergency” caused by the Great Depression.<sup>248</sup> The Court, 8-1 in the first case and unanimously in the second, held that the Act amounted to an unconstitutional delegation of legislative power to the President.<sup>249</sup>

That was the last time the non-delegation doctrine had any bite. This perhaps should not come as a surprise. It is very hard to frame a test for judges to use in hearing such challenges, especially because it is very difficult to draw a sharp line between legislation and execution/administration. In 1928, the Supreme Court declared that the doctrine requires Congress only to provide “an intelligible principle” for the persons being given quasi-legislative authority to follow.<sup>250</sup> If Congress does this, the argument goes, it has discharged its Constitutional responsibility and the government agency that receives Congress’s mandate will then only “fill any gap . . . left by Congress.”<sup>251</sup> Of course, the problem remains how large a gap can properly be filled by the unelected agency.

The chief problem with the “intelligible principle” standard is obvious: a lazy and responsibility-averse Congress may not wish to make difficult choices and thus will fail to provide much guidance to Federal agencies beyond “do the right thing” or “serve the public interest.” The heavy lifting and the negative publicity are thus left to the agencies. That has happened many times. To take just one example, the Federal Communications Act of 1934 directs the FCC to grant broadcast licenses if “public interest, convenience, or necessity will be served thereby.”<sup>252</sup> This statute survived a non-delegation challenge in a 1943 Supreme Court decision.<sup>253</sup> This is akin to handing Salvador Dali a photograph and asking him to interpret it according to his artistic vision.

In addition to being hard to specify, a strong non-delegation standard would be hard for the courts to enforce over time against the will of the political branches and a majority (or majorities) of voters, however imperfectly represented. Moreover, the courts have neither the staffs nor the budgets to function as a serious check on Federal agencies. The Federal courts’ budget request for salaries and expenses for

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<sup>248</sup> See Michal R. Belknap, *The New Deal and The Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 68 (1983).

<sup>249</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>250</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>251</sup> See *Chevron U.S.A Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>252</sup> 42 U.S.C. § 310(d).

<sup>253</sup> *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

FY 2025 came to just under \$6.5 billion.<sup>254</sup> The budget request of just one administrative agency, the EPA, amounted to almost \$11 billion that year.<sup>255</sup> Comparing these budgets sheds new light on Alexander Hamilton's description of the judiciary as "the least dangerous" branch.<sup>256</sup>

Conservatives lament the fact that the ineffectiveness of the non-delegation doctrine enables Congress to pass off responsibility to (unelected) bureaucrats and thus drastically limit accountability to the public. A bit of realism, particularly with respect to voters' (rational) ignorance of the details of the Federal Leviathan,<sup>257</sup> suggests that this concern with accountability is somewhat naive. Voters are not likely to do an effective job of overseeing the Federal government's operation, non-delegation or no non-delegation.<sup>258</sup>

Nonetheless, many conservatives have been encouraged by recent Supreme Court decisions in the realm of administrative law. In particular, the Court's adoption of the "major questions doctrine" in 2022<sup>259</sup> and its overruling of the *Chevron* doctrine in 2024<sup>260</sup> appear to mean a much larger role for the Federal courts in the future operation of the administrative state. Some conservative scholars are very enthused by these decisions, including Adam White:

Vindicating the founding generation's constitutional vision and vindicating modern thinkers' ideas of how to restore the Constitution today, will have profound effects on the administrative state. To be sure, even these great decisions will have further consequences we cannot necessarily envision, for as all conservatives know, the law of unintended consequences is one of the few immutable realities of our imperfect world. But the decisions' immediate consequences are clear, crucial, and excellent. *Loper Bright* [overruling the *Chevron* doctrine] exemplifies the Founders' ideal of good, constitutional government.<sup>261</sup>

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<sup>254</sup> ADMIN. OFF. OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2025 CONGRESSIONAL BUDGET SUMMARY (2024).

<sup>255</sup> U.S. ENV'T PROT. AGENCY, FY 2025 BUDGET (2024).

<sup>256</sup> THE FEDERALIST No. 78, at 1 (Alexander Hamilton) (McClean ed., 1788).

<sup>257</sup> For more, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 2 (2d ed. 2016); BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 1–2 (Princeton University Press, 2007).

<sup>258</sup> See *supra* discussion Part IV.

<sup>259</sup> For a quick summary, see KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE (2022).

<sup>260</sup> The decisions are *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) and *Loper Bright*, 603 U.S. at 412. Both were decided by 6–3, party-line votes.

<sup>261</sup> Adam J. White, *The Supreme Court vs. the Administrative State*, COMMENTARY (Sept. 2024), <https://www.commentary.org/articles/adam-white/supreme-court-administrative-state/> [https://perma.cc/9V6M-9EYU]. For contrary views, see Cary Coglianese, *A Legal Earthquake*, THE REGUL. REV. (Aug. 8, 2024), <https://www.theregreview.org>

There are, of course, reasons to question the likely effects of these decisions on the actual functioning of the Federal apparatus. First, the decisions do nothing to expand the judiciary's capacity to engage in active oversight of administrative agencies. Second, whether these decisions will increase the political salience of administrative law is far from clear. It will continue to be very difficult to engage the public in caring about this subject, let alone acting on it in an informed fashion. Finally, an increased role for the courts is a good or bad thing, at least in part, depending on the philosophical divisions among federal judges. In the current setting, a Republican majority on the Court can act as a check on administrative actions during a Democratic presidential administration. But the obverse would be true as well (a Democratic majority on the Court during a Republican administration).

The changes in administrative law wrought by the Roberts Court may or may not mean we are beginning to now return to the Constitutional ideal. Unfortunately, our politics are so far removed from the original Constitution that it is probably impossible for us to answer this question definitively. The words of one contemporaneous critic of the New Deal sound a cautionary note. In 1938, the very conservative journalist Gareth Garrett prophesied, "[t]here are those who still think they are holding the pass against a revolution that may be coming up the road. But they are gazing in the wrong direction. The revolution is behind them. It went by in the Night of Depression, singing songs to freedom."<sup>262</sup>

Still, it is probably best to heed the wisdom of Yogi Berra, who explained that "[i]t's tough to make predictions, especially about the future."<sup>263</sup> It should be very interesting to see where the Roberts Court's recent decisions take us.

#### APPENDIX II—ONLINE RESOURCES RE: PUBLIC POLICY

##### U.S. Government Websites

*Federal Register*, NAT'L ARCHIVES, <https://www.federalregister.gov/> (also at <https://www.archives.gov/federal-register>).

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<sup>262</sup> Gareth Garrett, *The Revolution Was*, MISES DAILY, Jan. 26, 2008, at 1 (a sly reference to Woody Guthrie?).

<sup>263</sup> 15.5.1 *Visions of future past*, Watson, <http://watson.latech.edu/book/future/futurePredictions1.html> [https://perma.cc/D4Q2-9MQU].



*Code of Federal Regulations*, NAT'L ARCHIVES, <https://www.ecfr.gov/>.

*Office of Management & Budget, Office of Information & Regulatory Affairs*, EXEC. OFF. OF THE PRESIDENT, <https://www.reginfo.gov/public/>.

*Your Voice in Federal Decision-Making*, REGULATIONS.GOV, <https://www.regulations.gov/>.

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*A Guide to the Rulemaking Process*, FEDERAL REGISTER (2011), <https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf>.

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*Section of Administrative Law & Regulatory Practice*, AM. BAR ASS'N, [https://www.americanbar.org/groups/administrative\\_law/](https://www.americanbar.org/groups/administrative_law/).

*Research Portal, Section of Administrative Law & Regulatory Practice*, AM. BAR ASS'N, [https://www.americanbar.org/groups/administrative\\_law/resources/](https://www.americanbar.org/groups/administrative_law/resources/).

*Notice and Comment*, YALE J. ON REGUL., <https://www.yalejreg.com/nc/>.

*Penn Program on Regulation*, UNIV. PA., <https://pennreg.org/>.  
*The Regulatory Review*, PENN PROGRAM ON REGUL., <https://www.theregreview.org/>.

*Penn Program on Regulation*, YOUTUBE, [https://www.youtube.com/channel/UCyKTORP-sn8W89ivvN\\_BPfw](https://www.youtube.com/channel/UCyKTORP-sn8W89ivvN_BPfw).

*C. Boyden Gray Center for the Study of the Administrative State*, ANTONIN SCALIA L. SCH. GEORGE MASON UNIV., <https://administrativestate.gmu.edu/>.

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*Center on Regulation and Markets*, BROOKINGS, <https://www.brookings.edu/centers/center-on-regulation-and-markets/>.

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EightiesJukebox, *Tears for Fears – Everybody Wants to Rule the World*, ORIGINAL VIDEO, YOUTUBE (Oct. 19, 2010), <https://www.youtube.com/watch?v=ST86JM1RP10> [<https://perma.cc/LPK6-NVQH>].

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Parting Words of Wisdom about Public Policy

“The great and chief end . . . of men[] uniting into commonwealths, and putting themselves under government, is the preservation of their property.”<sup>264</sup>

- John Locke (1690)

“[T]he typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests. He becomes primitive again. His thinking becomes associative and affective. And this entails two further consequences of ominous significance. First, even if there were no political groups trying to influence him, the typical citizen would in political matters tend to yield to extra-rational or irrational prejudice and impulse. Second, . . . the weaker the logical element in the processes of the public mind and the more complete the absence of rational criticism and of the rationalizing influence of personal experience and responsibility, the greater are the opportunities for groups with an ax to grind.”<sup>265</sup>

- Joseph A. Schumpeter

“We may, as a society, lack the resources, the skill, and the sophistication to carry into effect all of the [governmental] policies we have adopted. When the desirability of a policy is debated, we tend not to weigh in the balance the distortions that will be introduced by the workings of institutions that must interpret and apply the policy. Law that seems preferable, in the abstract, to unregulated social and economic processes is all too likely, given our frequent inability to apply policy without deforming it, to produce results different from, if not opposed to, those we intended.”<sup>266</sup>

- Robert Bork

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<sup>264</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 62 (C.H. Wilson and R.B. McCallum eds., Blackwell's Political Texts 1948).

<sup>265</sup> JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 262-63 (Harper Colophon Books, 3rd ed. 1975).

<sup>266</sup> ROBERT BORK, THE ANTITRUST PARADOX 417 (Basic Books, 1st ed. 1978).

“The curious task of economics is to demonstrate to men how little they really know about what they imagine they can design.”<sup>267</sup>

- Friedrich Hayek.

“The first lesson of economics is scarcity: there is never enough of anything to fully satisfy all those who want it. The first lesson of politics is to disregard the first lesson of economics.”<sup>268</sup>

- Thomas Sowell

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<sup>267</sup> Todd Zywicki, *F.A. Hayek and the Pretense of Knowledge*, WASH. POST (Oct. 13, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/f-a-hayek-and-the-pretense-of-knowledge/> [<https://perma.cc/BPL2-269P>].

<sup>268</sup> Per Bylund, *Wanted: Economic Literacy*, DAILY ECON. (Sep. 14, 2022), <https://thedailyeconomy.org/article/wanted-economic-literacy/> [<https://perma.cc/YuJ6-Y9CR>].