

3-31-2022

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### Recommended Citation

Edward Lee, *Informal Governance of the United States*, 36 BYU J. Pub. L. 199 (2022).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol36/iss2/4>

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# Informal Governance of the United States

*Edward Lee\**

## INTRODUCTION

A formalist account of a democratic government concentrates the government in a body of elected officials, for example, Congress and the President. Under this view, public governance is the responsibility of the branches of government and government officials. Yet the Constitution also recognizes an ideal of self-governance in “We the People.”<sup>1</sup> How self-governance is achieved through an institutional government is a question worthy of centuries of debate. Under one influential theory, self-governance is achieved by a representative or republican form of government in which elected officials carry out the will of the people by the laws the officials enact and policies they adopt, thereby furthering the goal of self-governance.<sup>2</sup> The elected officials are the representatives of the people, and, by their consent, the officials must act in the people’s best interest. If the representatives don’t, the people can vote them out.

Of course, this lofty ideal of self-governance is difficult, if not impossible, to achieve in practice, particularly in a climate of polarization and gridlock (not to mention high incumbency rates<sup>3</sup>), which continues to give credence to the view of many Americans that our government is

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1. U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 820–21, 821 n.31 (1995) (“Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people.”).

2. *See, e.g.*, THE FEDERALIST NO. 39 (James Madison) (“It is evident that no other form [of government besides a republican form] would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.”).

3. *See Reelection Rates Over the Years*, OPENSECRETS.ORG, <https://www.opensecrets.org/elections-overview/reelection-rates> (last visited Apr. 19, 2022). High incumbency rates make it difficult to bring change or reform in government.

broken.<sup>4</sup> The conventional account of representative government also ignores the possibility that self-governance is neither linear nor binary. It may be far more dynamic and diffuse, based on complex relationships or networks in which citizens periodically get involved in public governance in ways beyond voting. “Governance,” in other words, may not be the exclusive domain of the government; it does not have to operate from the top down. Moreover, self-governance is not necessarily achieved by the acts of the federal, state, or local governments. Instead, more fluid and complex relationships of governance by people from the public and private sectors may arise, especially in response to the failings of institutional governments—of which there are many. This type of governing—informal governance—is the focus of this Article.

This Article examines informal governance of the United States, meaning situations in which informal governance occurs on a national scale affecting all Americans. Take, for example, the informal group of U.S. health experts self-described as the “Wolverines” (in a reference to the 1980s movie *Red Dawn*, depicting World War III): they not only foresaw the seriousness of the COVID pandemic, including asymptomatic spread, in early January 2020 but also helped devise the U.S. response to the pandemic, including social distancing and sheltering in place, notwithstanding the Trump Administration’s meager efforts.<sup>5</sup> Without the Wolverines, the fate of the U.S. would likely have been far worse from a public health standpoint. But the precise legal status of the Wolverines is unclear. Although three members of the group held positions in federal agencies, other members were from the private sector, academia, or nonprofit organizations.<sup>6</sup> In his book, Michael Lewis chronicles the behind-the-scenes work of these physicians, who formed an informal working group to respond to biological threats dating back to George W.

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4. See, e.g., LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* (2020); KATHERINE M. GEHL & MICHAEL E. PORTER, *THE POLITICS INDUSTRY: HOW POLITICAL INNOVATION CAN BREAK PARTISAN GRIDLOCK AND SAVE OUR DEMOCRACY* (2020); LAWRENCE LESSING, *THEY DON’T REPRESENT US: RECLAIMING OUR DEMOCRACY* (2019); see also Philip Elliott, *Think the System Is Broken? You’re Not Alone*, TIME (Mar. 31, 2021, 3:18 PM), <https://time.com/5951631/pew-survey-faith-in-political-system/>; David Frum, *The American System Is Broken*, THE ATLANTIC (Nov. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/american-system-broken/616991/>; Jacob S. Hacker & Paul Pierson, *The Republic Devolution: Partisanship and the Decline of American Governance*, FOREIGN AFFAIRS (July–Aug. 2019), <https://www.foreignaffairs.com/articles/2019-06-11/republican-devolution>; David Rothkopf, Opinion, *Our Government Is Broken. President Biden Must Fix That.*, DAILY BEAST (Sept. 13, 2020, 4:55 AM), <https://www.thedailybeast.com/our-government-is-broken-president-biden-must-fix-that>.

5. See MICHAEL LEWIS, *THE PREMONITION: A PANDEMIC STORY* (2021).

6. *Id.* at 163–164.

Bush's Administration.<sup>7</sup> Led by Dr. Carter Mecher, a senior medical advisor for the Department of Veterans Affairs, the initial group of seven physicians all had U.S. military experience except for Dr. Rajeev Venkayya, who oversaw the creation of the National Strategy for Pandemic Influenza in Bush's Administration.<sup>8</sup> During the COVID pandemic, the group enlisted two other notable experts: Dr. Charity Dean, the assistant director of California's Department of Public Health, and Joe DeRisi, copresident of the Chan Zuckerberg Biohub, who developed the Virochip, a computer chip containing the DNA sequences of every known virus, and who developed a COVID test during the pandemic.<sup>9</sup> By Lewis's account, the Wolverines helped save the United States from a worse fate from the pandemic in spite of the failings of the Center for Disease Control (CDC), the agency tasked with that important responsibility.<sup>10</sup> Yet the members of the Wolverines were acting as an *unofficial, informal group*—or, as described in Lewis's book, “this rogue group of patriots who were working behind the scenes to save the country.”<sup>11</sup>

In prior scholarship, I have characterized the type of arrangement the Wolverines embodied as a *hybrid agency*, one constituted by members of both the public and the private sectors.<sup>12</sup> In that article I called for the formal creation of a hybrid agency as an oversight body to review appeals of decisions by Google in the European Union regarding requests under the EU right to be forgotten.<sup>13</sup> What is different here is the informality of the hybrid group. Although the Wolverines have existed for more than a decade, their status is informal—more like an ad hoc, working group involving members from government, the private sector, academia, and nonprofits. What's most intriguing about the Wolverines' success is that an informal working group might be *better* than a formal agency—indeed, the federal government itself—in protecting Americans from a virus or

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7. *Id.*

8. *Id.*

9. *Id.* at 273–278.

10. *Id.* at 219; see also Jeneen Interlandi, *Covid Proved the C.D.C. Is Broken. Can It Be Fixed?*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/06/16/magazine/cdc-covid-response.html>; Saad B. Omer, *The CDC is Our Best Defense Against Pandemics. It Needs Reforms—Now.*, WASH. POST (May 19, 2020); Jeffrey Koplan, Julie Gerberding, Richard Besser & Thomas Frieden, *The CDC Was Damaged by Marginalization and Politicization. This Is How Biden Can Fix It*, NBC NEWS (Jan. 14, 2021, 2:30 AM), <https://www.nbcnews.com/think/opinion/cdc-was-damaged-marginalization-politicization-how-biden-can-fix-it-ncna1254135>.

11. LEWIS, *supra* note 5, at 219.

12. Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1083–85 (2016).

13. *Id.* at 1085–86.

biological threat. Lewis's book suggests several reasons: the federal government is inefficient and bureaucratic; federal employees work in silos in which thinking outside the box is not allowed, much less rewarded; the Trump Administration downplayed the virus and punted most of the duties to the states; and the CDC had developed an institutional culture that was paralyzed to act (without further studies), and it was headed by a Trump political appointee.<sup>14</sup> Yet, the informality of the Wolverines group also raises serious concerns about its legitimacy, authority, and transparency. The specter of a "shadow government" is one that looms large in the background of informal governance and must be addressed. That is not to say that the Wolverines were illegitimate, but it is important to identify their status in a constitutional democracy.

Or consider the unlikely alliance between big businesses and labor, Republicans and Democrats, who joined together to help preserve the integrity of the 2020 U.S. election—to address the possible scenario of President Trump losing the election but refusing to concede, which is exactly what occurred.<sup>15</sup> As *Time Magazine* details, "an informal alliance between left-wing activists and business titans" formed to ensure free and fair elections and recognition of the election results determined by the states.<sup>16</sup> On election day, the U.S. Chamber of Commerce and AFL-CIO issued a rare joint statement:

Although we may not always agree on desired outcomes up and down the ballot, we are united in our call for the American democratic process to proceed without violence, intimidation or any other tactic that makes us weaker as a nation. A free and fair election is one in which everyone eligible to cast a ballot can, all ballots are counted consistent with the law and the American people, through their votes, determine the outcome.<sup>17</sup>

For more than a year, the informal group worked on a variety of issues to ensure the integrity of the election; for example, they helped secure funding and information for states to administer secure voting in the pandemic, they called upon social media platforms to address election misinformation, and they enlisted a host of other groups (e.g., Issue One, National Council on Election Integrity, Voting Rights Lab, and IntoAction)

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14. See LEWIS, *supra* note 5.

15. See Molly Ball, *The Secret History of the Shadow Campaign That Saved the 2020 Election*, TIME (Feb. 4, 2021, 5:40 AM), <https://time.com/5936036/secret-2020-election-campaign/>.

16. *Id.*

17. See AFL-CIO, *Chamber of Commerce, National Faith Leaders Call for Votes to Be Counted*, AFL-CIO (Nov. 3, 2020), <https://aflcio.org/press/releases/afl-cio-chamber-commerce-national-faith-leaders-call-votes-be-counted>.

to provide public service announcements about the election to counter misinformation.<sup>18</sup> After the vote was counted, the informal group helped organize the effort that led to a statement issued by 164 CEOs, including Republicans, who called on Trump to concede.<sup>19</sup> Although this informal election group lacked a name, it achieved a massive effort involving many actors, organizations, and businesses that aimed to protect the integrity of the U.S. election. Similarly, to secure voting machines and software, “federal, state, local, tribal, territorial, non-governmental, and private sector partners nationwide worked together in unprecedented ways to combat foreign interference efforts and support election officials, political organizations, campaigns, and candidates in safeguarding their infrastructure.”<sup>20</sup> Christopher Krebs, the director of the Cybersecurity and Infrastructure Security Agency and lifelong Republican, declared the 2020 election “the most secure in American history,” which led to his firing by Trump, who continues to dispute the election result to this day.<sup>21</sup>

The alliance between Republicans and Democrats, business and labor, to preserve the integrity of the 2020 U.S. election illuminates both the promise and peril of informal governance. Given that the Constitution leaves administration of federal elections to the states,<sup>22</sup> facilitating national coordination and information-sharing for election administration among states, especially during a pandemic, were laudable goals. But some conservatives questioned whether the informal group was civic-minded as opposed to a “vast anti-Trump ‘conspiracy.’”<sup>23</sup> The fact that the *Time Magazine* article characterizes Mike Podhorzer, a progressive who is a senior adviser to the president of the AFL-CIO, as the “architect” behind the informal election group may contribute to at least the appearance that

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18. See Ball, *supra* note 15.

19. See Jim Zarroli, *CEOs Urge Trump to Concede: ‘Not a Moment to Waste’ in Fighting COVID-19*, NPR (Nov. 23, 2020, 2:38 PM), <https://www.npr.org/2020/11/23/938009930/ceos-urge-trump-to-concede-not-a-moment-to-waste-in-fighting-covid-19>.

20. *Joint Statement from the Departments of Justice and Homeland Security Assessing the Impact of Foreign Interference During the 2020 U.S. Elections*, DEP’T OF HOMELAND SEC. (Mar. 16, 2021), <https://www.dhs.gov/news/2021/03/16/joint-statement-departments-justice-and-homeland-security-assessing-impact-foreign>.

21. Scott Pelley, *Fired Director of U.S. Cyber Agency Chris Krebs Explains Why President Trump’s Claims of Election Interference Are False*, CBS NEWS (Nov. 30, 2020, 7:40 AM), <https://www.cbsnews.com/news/election-results-security-chris-krebs-60-minutes-2020-11-29/>.

22. U.S. CONST. art I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

23. James Freeman, *The Vast Anti-Trump ‘Conspiracy,’* WALL ST. J. (Feb. 8, 2021, 2:50 PM ET), <https://www.wsj.com/articles/the-vast-anti-trump-conspiracy-11612813840>.

the group had a partisan purpose to defeat Trump.<sup>24</sup> But *Time* describes several aspects of the effort that included Republicans joining Democrats, such as through “the nonpartisan reform group Issue One,” to make public statements about the importance of election integrity and respect for the results after counting all the votes.<sup>25</sup> Likewise, the Chamber of Commerce, which has donated substantially to Republican campaigns,<sup>26</sup> and CEOs of big businesses who are Republicans—including Stephen Schwarzman, CEO of the Blackstone Group, “one of Trump’s biggest financial backers”—joined similar statements supporting election integrity or asking for Trump to concede.<sup>27</sup> Of course, Trump never conceded. But the informal election group’s efforts weren’t for naught as they raised public awareness about the need to respect the final election results in a democracy.

This Article sets forth a theory to explain the constitutional status and legitimacy of informal governance of the United States, while, at the same time, identifying its limitations and possible abuses. Both the Wolverines and the informal election group are examples of informal governance of the United States—they convened to protect Americans from the COVID pandemic and election interference. Informal governance describes situations in which an informal group of actors, potentially from both the public and private sectors, convene to address a problem or issue affecting the public at large—e.g., public health, public safety, elections, etc. Informal governance should be contrasted with political activism. Political activism is a broad term that typically refers to efforts to organize in pursuit of reforms through protests, campaigns, and often grass-roots efforts to bring about political or social change.<sup>28</sup> Political activism aims for change, such as in government policies, whereas informal governance itself involves activities that can be described as forms of governance. Moreover, political activism typically is public and meant to draw the public’s attention, whereas informal governance does not depend on publicity. In fact, it may more commonly operate in secret.

This Article adds to the growing body of scholarship, especially from outside the United States, devoted to exploring the benefits and limits of

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24. See Ball, *supra* note 15.

25. *Id.*

26. See *U.S. Chamber of Commerce*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/us-chamber-of-commerce/totals?id=D000019798>.

27. See Ball, *supra* note 15; Zarroli, *supra* note 19.

28. See Brian Martin, *Activism, Social and Political*, in *ENCYCLOPEDIA OF ACTIVISM AND SOCIAL JUSTICE* 19 (Gary L. Anderson & Kathryn G. Herr eds., 2007), <https://www.bmartin.cc/pubs/07Anderson.html>.

informal governance.<sup>29</sup> As other scholars have recognized, informal governance may be the byproduct of a “surge of ‘wicked problems’ that have prompted this type of leadership, as multiple actors come together to solve policy problems.”<sup>30</sup> Complicated problems may be too difficult for traditional governments to solve. By contrast, informal governance may be nimbler, more collaborative and interdisciplinary, and, ultimately, more innovative at problem solving.<sup>31</sup> At the same time, informal governance raises troubling legitimacy concerns and may itself be open to abuses. The challenge is figuring out how to use informal governance best.

This Article proceeds in four parts. Part I outlines the features of informal governance by studying the two examples of the Wolverines and the informal election group as case studies. This Part identifies characteristics of the type of informal governance embodied in these examples: informal governance occurs when a group (1) lacking an official delegation of authority to act, without formal status as a legal entity or written rules to guide their actions, (2) convenes in a group or dynamic network to address a major problem affecting the public at large, and (3) renders decisions or actions that can be viewed as a form of governance for the common good. The case studies demonstrate several potential advantages of informal governance as a means of tackling complex, intractable problems in a highly polarized political climate. Indeed, informal governance may become essential when institutional governments fail. Part II sets forth a theory to justify some forms of informal governance as legitimate examples of self-governance, a constitutionally protected power or endeavor reserved to the people under the Tenth Amendment. It also traces the development of informal governance back to perhaps the first major use of informal governance: President George Washington’s establishment of the first cabinet, an institution nowhere mentioned in the Constitution or then-existing federal law. Part III discusses the potential abuses of and concerns raised by informal governance, including lack of accountability, lack of transparency, and possible corruption or outright illegality. Part IV

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29. See, e.g., MAREIKE KLEINE, *INFORMAL GOVERNANCE IN THE EUROPEAN UNION: HOW GOVERNMENTS MAKE INTERNATIONAL ORGANIZATIONS WORK* (2013); THOMAS CHRISTIANSEN & CHRISTINE NEUHOLD, *INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE* (2013); Andreas Follesdal, et al., *Informal Governance in the European Union: An Introduction*, SSRN ELEC. J. (2004), [https://papers.ssrn.com/sol3/papers.cfm?Abstract\\_id=1752191](https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=1752191).

30. See Sarah Ayres, *Assessing the Impact of Informal Governance on Political Innovation*, 19 PUB. MGMT. REV. 90, 91 (2017) (discussing ERIK HANS KLIJN & JOOP KOPPENJAN, *GOVERNANCE NETWORKS IN THE PUBLIC SECTOR* (2016)).

31. See *id.* at 90–91.

proposes several measures to make informal governance more accountable to the people.

## I. INFORMAL GOVERNANCE: THEORY AND PRACTICE

Drawing upon the burgeoning literature, Part I defines informal governance and outlines its central characteristics. The Part also applies this understanding to two case studies involving the Wolverines' response group and the informal election group.

### *A. Definition and Characteristics of Informal Governance*

In the twenty-first century, researchers from various disciplines, ranging from anthropology to sociology to political science, have produced a burgeoning literature on the use of informal governance in both developed and developing countries.<sup>32</sup> The concept has garnered considerable attention in the European Union (EU), given the evolving ways in which informal governance infiltrates EU governance.<sup>33</sup> U.S. legal scholars have not devoted as much attention to informal governance, although the concept has been used episodically and perhaps more expansively to include a wide range of private ordering.<sup>34</sup>

To understand what informal governance is, it may be easier to begin with what it's not. Formal governance "is regulated by rules that have been instituted according to procedures recognized as legal in clearly defined

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32. See, e.g., Ayres, *supra* note 30; Aksana Imailbekova, *Mapping Lineage Leadership in Kyrgyzstan: Lineage Associations and Informal Governance*, ZEITSCHRIFT FÜR ETHNOLOGIE 195 (2018); Anders Themnér & Mats Utas, *Governance Through Brokerage: Informal Governance in Post-Civil War Societies*, 18 CIV. WARS 255 (2016); Alena V. Ledeneva, *Russia's Practical Norms and Informal Governance: The Origins of Endemic Corruption*, 80 SOC. RSCH. 1135 (2013).

33. See sources cited *supra* note 30.

34. See, e.g., Craig Anthony Arnold & Resilience Just. Project Rsch'rs, *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 WM. & MARY ENV'T'L L. & POL'Y REV. 665, 694 (2021) ("Co-governance is one of the forms of 'hybrid' or collaborative governance of green and blue infrastructure, though some treat the term co-governance as a synonym for informal governance and management through collaboration among multiple stakeholders."); Juliet P. Kostriksky, *A Paradigm Shift in Comparative Institutional Governance: The Role of Contract in Business Relationships and Cost/Benefit Analysis*, 2021 WIS. L. REV. 385, 391 (2021) ("By studying the preconditions for the success of informal governance in relational contracts, Macaulay led scholars to see that firms could provide the same kind of information transmission through a party's position in a network, 'reduc[ing] the need for firms to employ costly governance mechanisms."); Paula A. Monopoli, *Women, Democracy, and the Nineteenth Amendment*, 100 B.U. L. REV. 1727, 1742 (2020) ("We have long had tremendous gender disparity in the number of women who write op-eds and letters to the editor, who are quoted as experts by the media, and who are selected as 'talking heads' on television news shows. These are all forms of using one's voice to participate in informal governance.")

contexts.”<sup>35</sup> Formal governance is easy to spot in the United States. For example, President Nixon created the Environmental Protection Agency (EPA) in 1970.<sup>36</sup> The EPA has the authority to promulgate regulations to protect the environment, but those regulations are subject to an elaborate procedure, including notice and comment, under the Administrative Procedure Act (APA).<sup>37</sup> For everything, there are written (formal) laws, regulations, and procedures. By contrast, informal governance has no written rules or procedures.<sup>38</sup> “Informal governance includes . . . structures and processes that are *un-codified, un-documented and have no trace beyond the recollection and perceptions of the actors involved.*”<sup>39</sup> As such, informal governance presents challenges for the public, critics, and researchers because it is difficult to know even when informal governance is occurring. It is not happening in plain view. Indeed, it may be counterintuitive to think that, in a democracy, particularly the United States, governance may occur informally, without any written laws or regulations. Such a prospect raises obvious concerns about legitimacy, a topic discussed below.

For the purposes of this Article, informal governance describes situations in which an informal group of actors convene to address a problem or issue affecting the public at large—e.g., public health, public safety, elections, etc.—and render decisions or actions that affect the public at large. The group is informal in the sense that no law specifically delegates power to the group to undertake such actions, no law organizes the group, and no written rules or procedures govern how the group should act. Thus, unlike the EPA, an informal group is not created by statute and is not subject to the APA. Nor is the group formalized as an organization, such as a nonprofit, with written bylaws or charter. Moreover, the informal group engages in governance when it performs functions that are intended to address a problem or issue that affects the public at large, something

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35. Michael Brie & Erhard Stölting, *Formal Institutions and Informal Institutional Arrangements*, in INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE 19, 19 (Thomas Christiansen & Christine Neuhold eds., 2012).

36. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966–1970), as reprinted in 42 U.S.C. §4321 (1994) and in 84 Stat. 2086 (1970); see Mark A. Ryan, *Abolishing the EPA?*, 31 NAT. RES. & ENV'T 50, 52 (2016).

37. See Marc Melnick & Elizabeth Willes, Comment, *Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances*, 20 ECOLOGY L.Q. 207 (1993); Kelli Hayes, *Sue and Settle: Forcing Government Regulation Through Litigation*, 40 U. DAYTON L. REV. 105, 115–18 (2015).

38. See Sarah Ayres, *A Decentred Assessment of the Impact of 'Informal Governance' on Democratic Legitimacy*, 37 PUB. POL'Y & ADMIN. 22 (2020).

39. *Id.* at 23 (emphasis added).

that might be addressed by formal governance but for some reason is not. Researchers have identified an additional characteristic of informal governance: it is often facilitated by *governance networks* with the inclusion of individuals from various sectors, including the government and private sector.<sup>40</sup> Such networks can result in greater collaboration, cross-fertilization, and innovation and potentially enhance democratic engagement with the inclusion of stakeholders and members of the public in governance, an issue I return to later.<sup>41</sup> Ultimately, informal governance may open up the possibility for greater political innovation.

It is important to underscore that informal governance is not inherently good (or bad). Much depends on the people involved and their motives. Do they possess relevant expertise or qualifications to tackle the problem? Are they dedicated to serving the common good instead of trying to benefit themselves or their political party at the expense of others? Given the lack of formal rules or procedures, informal governance, in the hands of the wrong people, can easily devolve into corruption or a shadow government as researchers have recognized.<sup>42</sup> Yet, so too can formal governance. The challenge is trying to identify the conditions or situations in which informal governance might be particularly well-suited.

As other researchers have recognized, the level of informality or formality of governance structures may be plotted along a spectrum, as can other factors, such as how private or public the governance structures are, how many people are affected by the governance (e.g., national, state, or local), and how long the governance structures last. For example, a government agency, which is an example of a formal governance structure, could enlist private actors to address a specific problem on behalf of the agency. The Obama administration's recruitment of tech savvy programmers from Silicon Valley—the so-called “tech surge”—to fix the botched rollout of the government's website (HealthCare.gov) for signing up for health insurance under the Affordable Care Act provides a good example.<sup>43</sup> The Obama administration's recruitment of tech people

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40. *Id.* at 24–25.

41. *Id.*

42. *See, e.g., Informal Governance*, BASEL INST. ON GOVERNANCE, <https://baselgovernance.org/public-governance/informal-governance> (describing how countries with high levels of corruption may have formal laws and governance structures but are plagued by corruption according to informal governance or unwritten rules) (last visited Mar. 27, 2022).

43. *See* David Morgan & John Whitesides, *Obama Turns to Trusted Aide for “Tech Surge” to Fix Healthcare Website*, REUTERS (Oct. 22, 2013, 8:45 PM), <https://www.reuters.com/article/us-usa-healthcare/obama-turns-to-trusted-aide-for-tech-surge-to-fix-healthcare-website-idUSBRE99K0>

eventually led to a formal unit within Executive Office of the President, the U.S. Digital Service (USDS), which was intended to “institutionaliz[e] the approach that saved the health care site and apply[] it to the work of the government even before disaster strikes.”<sup>44</sup> When the tech surge was first created and only temporary, we might place its involvement in fixing HealthCare.gov more toward the informal governance end of the spectrum. But it evolved into a formal governance structure when the USDS was created, going from about 12 technologists to a team of 180 in 2021.<sup>45</sup>

We should distinguish informal governance from (i) private governance and (ii) private ordering. Although these concepts may sometimes overlap, they are not equivalent. Private governance can be informal, but it also can be formal, embodied in written rules and procedures.<sup>46</sup> Take, for example, the published content moderation policies of internet platforms that govern what type of content the platforms do not permit their users to post.<sup>47</sup> The written policies, along with the procedures the platforms have instituted to enforce them, are private governance structures, yet they are not informal. Indeed, at least today, they have become increasingly formal. For example, Facebook’s establishment of an independent Oversight Body—a.k.a. Supreme Court—for appeals of Facebook’s content moderation decisions is a formal, private governance structure, with elaborate bylaws and rules.<sup>48</sup> Informal governance is also different from private ordering. Private ordering is a broad term that can involve both formal (e.g., written contracts) and informal arrangements, as well as norms as the driver of the

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M220131023; Robinson Meyer, *The Secret Startup That Saved the Worst Website in America*, THE ATLANTIC (July 9, 2015), <https://www.theatlantic.com/technology/archive/2015/07/the-secret-startup-saved-healthcare-gov-the-worst-website-in-america/397784/>.

44. Nancy Scola, *White House Launches ‘U.S. Digital Service,’ with HealthCare.gov Fixer at the Helm*, WASH. POST (Aug. 11, 2014, 5:33 PM), <https://www.washingtonpost.com/news/the-switch/wp/2014/08/11/white-house-launches-u-s-digital-service-with-healthcare-gov-fixers-at-the-helm/>.

45. See Matt Cutts, *The Next Chapter for USDS*, MEDIUM (Apr. 14, 2021), <https://medium.com/the-u-s-digital-service/the-next-chapter-for-usds-2eb6955065f3>.

46. See, e.g., Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENV’T L. & POL’Y 67, 67 (2011) (“Private governance institutions provide governance without government. They are rules and structures by which individuals, communities, firms, civic organizations, and other entities govern their interests without the direct involvement of the state or its subsidiaries.”); see Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 928–30 (2021).

47. See Lee, *supra* note 46.

48. *Id.* at 1040.

ordering.<sup>49</sup> By contrast, informal governance does not involve a formal arrangement, and it does not necessarily require norms as the driver of the governance. Instead, people might convene and figure out a response to a societal problem that lacks any preexisting norm on how to address it.

The other distinction to draw is between informal governance and civil society. Civil society is a contested term,<sup>50</sup> but it typically *excludes* the government or state.<sup>51</sup> Members of civil society, ranging from individuals to nongovernmental organizations, can engage in self-governance in various ways outside of the government.<sup>52</sup> By contrast, informal governance can involve groups composed entirely of government actors; as we shall later discuss, the first example of informal governance of the United States was President George Washington's establishment and reliance on a cabinet, which was not recognized by formal law. Informal governance can overlap with civil society when all the actors involved in informal governance are nongovernmental. But, as the two case studies show, informal governance can involve more fluid relationships or networks that include both governmental and nongovernmental actors. These more fluid relationships can be described as informal governance but not an example of civil society in a strict sense. More generally, the litmus test for informal governance is different from civil society's focus. Informal governance examines the extent to which a governance arrangement or practice *lacks* formal, written authority, organization, or rules. The informality of the governance is key.

One final caveat: informal governance can be applied broadly to cover a welter of situations in which people figure out how to conduct themselves without formal rules. Under this broad conception, families routinely adopt informal governance as a basic feature of their existence. Probably few families codify the rules of the household—or when the kids get grounded.

The focus of this Article, however, is on the situations of informal governance that affect the public at large, especially in areas (e.g., public health, safety, elections) in which governments no doubt have

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49. See, e.g., Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1260 (1998); Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1132–35 (1997).

50. See Benny D. Setianto, *Somewhere in Between: Conceptualizing Civil Society*, 10 INT'L J. NOT-FOR-PROFIT L. 109, 109 (2007).

51. See Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 2 (2000).

52. See Miriam Galston, *Civil Renewal and Regulation of Nonprofits*, 13 CORNELL J. L. & PUB. POL'Y 289, 306–09 (2004).

responsibilities. In other words, this Article seeks to examine when informal governance arises to address a societal problem that governments and formal governance structures are expected to address. I am most interested in analyzing informal governance of the United States, situations involving informal mechanisms that helped to shape governance of the nation.

Why even discuss informal governance in the twenty-first century? At least in the United States, we have a written constitution and a preference for formal governance structures. (Other countries have dispensed with the need for a written constitution, it is worth noting.<sup>53</sup>) Moreover, technology, including the internet and blockchain, makes the promulgation of written rules and recordkeeping trivially easy. Transparency of governance is vital in a democracy. But informal governance can easily hide behind closed doors. We will return to the legitimacy concerns in Part III. For now, suffice it to say that informal governance is potentially problematic, especially if it usurps government functions that require transparency. It would be a mistake, however, to dismiss informal governance out of hand. Researchers have suggested that informal governance might be a byproduct of governments facing more complex or intractable problems,<sup>54</sup> what Erik Klijn and Joop Koppenjan aptly describe as “wicked problems.”<sup>55</sup> Some complex problems are transnational or global, defying an easy solution by a single country.<sup>56</sup> And governments may have fewer resources at their disposal following the global financial crisis to address these problems.<sup>57</sup> Professor Maarten Hajer characterizes the problem as an “institutional void” involving established political institutions being unable to address “pressing problems” on their own.<sup>58</sup> To address these problems, “new political spaces” emerge.<sup>59</sup> In these political spaces, there are no “generally accepted rules,” but instead, “discursive interactions.”<sup>60</sup> Thus, as societal problems in the twenty-first century have become more complex, intractable, and resistant to the approaches of formal

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53. See Brian Christopher Jones, *What's So Great About a Written Constitution?*, ATLANTIC (Oct. 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/written-constitutions/616628/>.

54. See Ayres, *supra* note 30, at 91.

55. ERIK H. KLIJN & JOOP KOPPENJAN, *GOVERNANCE NETWORKS IN THE PUBLIC SECTOR* (2016).

56. See Maarten Hajer, *Policy Without Polity? Policy Analysis and the Institutional Void*, 36 POL'Y SCI. 175, 175–76 (2003).

57. See Ayres, *supra* note 38, at 91.

58. See Hajer, *supra* note 56, at 175–76.

59. *Id.* at 176.

60. *Id.*

governance, policymakers might need to turn to informal governance as an alternative. Indeed, it may be the only option left.

### *B. Two Case Studies*

The next section discusses two recent examples of informal governance that occurred in the United States during the COVID pandemic and the 2020 U.S. election. By using these two examples as case studies, the Article provides a better understanding of informal governance, why it occurred, how it occurred, how effective it was, and whether we can identify any characteristics or factors that suggest when informal governance might be better suited to address a societal problem.

#### *1. The informal group of “Wolverines” and COVID-19*

The first case study involves the Wolverines, the small group of physicians and scientists from government, academia, and nonprofit organizations that formulated the main strategy of community mitigation or interventions (e.g., social distancing, closing of schools, bans on large gatherings, and sheltering in place) in response to the COVID pandemic.

##### *a. The magnitude of the problem*

The COVID pandemic has presented a major public health problem that is still raging around the world. By August 2021, the pandemic had claimed the lives of an estimated 4.2 million people, including more than 630,000 people in the United States.<sup>61</sup> Many commentators have compared it with the 1918 pandemic, the deadliest pandemic of the twentieth century.<sup>62</sup> According to infectious disease experts, the H1N1 virus in the 1918 pandemic never really went away but continues to manifest itself in various strains of flu, including the bird and swine flu.<sup>63</sup> If the “end” of the COVID pandemic is anything like the 1918 pandemic, as many experts expect, the virus “will become endemic—meaning that it will continue to circulate in pockets of the global population for years to come.”<sup>64</sup> Even if

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61. See *COVID-19 Coronavirus Pandemic*, WORLDOMETER (last visited Feb. 10, 2022).

62. See Radhika Chalasani, *Photos: How the 1918 Flu and COVID-19 Pandemics Compare*, ABC NEWS (June 15, 2021, 12:17 PM), <https://abcnews.go.com/International/comparing-contrasting-coronavirus-1918-flu-pandemics-images/story?id=71971264>.

63. See Dave Roos, *Why the 1918 Flu Pandemic Never Really Ended*, HISTORY (Dec. 11, 2020), <https://www.history.com/news/1918-flu-pandemic-never-ended>.

64. Nicky Phillips, *The Coronavirus Is Here to Stay—Here’s What That Means*, NATURE (Feb. 16, 2021), <https://www.nature.com/articles/d41586-021-00396-2>.

vaccinations and treatments reduce the number of deaths of COVID and severity of illnesses, it is fair to say that COVID presents a complex public health problem globally that may persist indefinitely. On a ten-point scale for rating complexity, with ten being the most complex, the COVID pandemic would rank as a ten (if not higher).<sup>65</sup>

*b. The failure or shortcoming of formal governance*

The Centers for Disease Control was founded in 1946 by Dr. Joseph Mountin, then under the name Communicable Disease Center.<sup>66</sup> It evolved from the U.S. Public Health Service's effort to control malaria.<sup>67</sup> Today, the CDC is a part of the Department of Health and Human Services.<sup>68</sup> The CDC describes itself as “[a]s the nation’s health protection agency” that “conducts critical science and provides health information that protects our nation against expensive and dangerous health threats, and responds when these arise.”<sup>69</sup> On its website, the CDC makes “a bold promise to the nation . . . to save American lives by securing global health and America’s preparedness, eliminating disease, and ending epidemics.”<sup>70</sup> The CDC has 21,000 employees spanning all fifty states and more than fifty countries.<sup>71</sup>

By most accounts, the CDC performed poorly in addressing COVID.<sup>72</sup> The CDC had trouble developing COVID tests and getting results in time to help contain the spread of the virus.<sup>73</sup> The CDC also initially advised Americans not to wear masks<sup>74</sup>—a blunder that the CDC repeated when it

65. Cf. LEWIS, *supra* note 5, at 286 (recounting how D.A. Henderson, epidemiologist who led the strategy on smallpox vaccines, criticized the simplistic, hindsight portrayal of Richard Neustadt in *The Swine Flu Affair* of what Henderson characterized as a “complex decision-making process”).

66. See *Our History – Our Story*, CDC, <https://www.cdc.gov/about/history/index.html> (last visited Mar. 27, 2022).

67. See *The History of Malaria, an Ancient Disease*, CDC, <https://www.cdc.gov/malaria/about/history/index.html> (last visited Mar. 27, 2022).

68. *CDC Organization*, CDC, <https://www.cdc.gov/about/organization/cio.htm> (last visited Mar. 27, 2022).

69. *Mission, Role and Pledge*, CDC, <https://www.cdc.gov/about/organization/mission.htm> (last visited Mar. 9, 2022).

70. *A Bold Promise to the Nation*, CDC, <https://www.cdc.gov/about/24-7/index.html> (last visited Mar. 27, 2022).

71. See *What Is the CDC and What Does It Do?*, ATLANTA J.-CONST. (Feb. 26, 2020), <https://www.ajc.com/news/national/what-the-cdc-and-what-does/UIBH7SvtNyY0fk5iNc6BLO/>.

72. See *infra* notes 203-08 and accompanying text.

73. See Brett Murphy & Letitia Stein, *The Coronavirus Test That Wasn't: How Federal Health Officials Misled State Scientists and Derailed the Best Chance at Containment*, USA TODAY (Jan. 26, 2021), <https://www.usatoday.com/story/news/investigations/2020/03/27/coronavirus-test-officials-botched-rollout-derailed-containment/5080781002/>.

74. See Elisabeth Buchwald, *U.S. Health Officials Say Americans Shouldn't Wear Face Masks to Prevent Coronavirus—Here are 3 Other Reasons Not to Wear Them*, MARKETWATCH (Mar. 2, 2020),

revised its mask-wearing guidance in May 2021 and indicated that vaccinated people do not need to wear masks indoors, but then returned to advising the wearing of masks due to the Delta variant in July 2021.<sup>75</sup> Lewis suggests that at least part of the reason for the CDC's failures was the failure of the Director Robert Redfield, a Trump appointee, to maintain independence from the White House and avoid politicization of the pandemic response.<sup>76</sup> The Trump administration abdicated the responsibility to the states to decide what to do to contain the spread of COVID, while Trump himself downplayed the virus.<sup>77</sup> The CDC was plagued by an institutional culture that eschewed taking early actions that might bring the CDC later blame.<sup>78</sup> The CDC operated in the shadow of its biggest public failure: in 1976, CDC Director David Sencer had called for a national vaccination program based on a prediction of a possible swine flu pandemic, given past cycles of the flu and the diagnosis of several soldiers infected with the virus.<sup>79</sup> Some people who were vaccinated developed Guillain-Barre syndrome due to the vaccine, while others experienced illnesses or died not necessarily from the vaccine.<sup>80</sup> But the CDC suspended the vaccination program, and no pandemic ever materialized.<sup>81</sup> The program was perceived as a fiasco and became subject to a scathing book, *The Swine Flu Affair*, by Richard Neustadt and Harvey Fineberg.<sup>82</sup>

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12:47 PM), <https://www.marketwatch.com/story/the-cdc-says-americans-dont-have-to-wear-facemasks-because-of-coronavirus-2020-01-30>; *Transcript for CDC Telebriefing: CDC Update on Novel Coronavirus*, CDC (Feb. 12, 2020), <https://www.cdc.gov/media/releases/2020/t0212-cdc-telebriefing-transcript.html>.

75. See Apoorva Mandavilli, *As Infections Rise, C.D.C. Urges Some Vaccinated Americans to Wear Masks Again*, N.Y. TIMES (Aug. 15, 2021), <https://www.nytimes.com/2021/07/27/health/covid-cdc-masks-vaccines-delta-variant.html>; Zeynep Tufekci, *Opinion, The C.D.C. Needs to Stop Confusing the Public*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/opinion/cdc-covid-guidelines.html>.

76. LEWIS, *supra* note 5, at 279–80.

77. *Id.*; see Gabby Orr et al., *Trump Tosses Coronavirus Shutdowns Back to the States*, POLITICO (Apr. 16, 2020, 7:30 PM), <https://www.politico.com/news/2020/04/16/trump-plan-for-reopening-economy-191073>; Michael D. Shear et al., *Inside Trump's Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html>; Stephen Collinson, *Trump's Stunning Abdication of Leadership Comes as Pandemic Worsens*, CNN (Nov. 12, 2020), <https://www.cnn.com/2020/11/12/politics/donald-trump-coronavirus-leadership/index.html>; David A. Graham, *Trump Has Abdicated in the Face of Disaster*, THE ATLANTIC (Nov. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/president-has-abdicated/617139/>.

78. LEWIS, *supra* note 5, at 40.

79. *Id.* at 280–81.

80. *Id.* at 284.

81. *Id.*

82. *Id.* at 285.

The CDC's performance during the COVID pandemic had many shortcomings. Trump's own Coronavirus Task Force, which included Redfield, Deborah Birx, Director of the National Institute of Allergy and Infectious Disease Anthony Fauci, Surgeon General Jerome Adams, Jared Kushner (Trump's son-in-law), and others, worked behind-the-scenes to provide guidance and recommendations to states.<sup>83</sup> But, as the Select Subcommittee on the Coronavirus Crisis and others have observed, Trump appeared to undermine his own Task Force's recommendations.<sup>84</sup> The existence of the Task Force itself provides further evidence that the CDC, the federal agency whose mission is to protect Americans from epidemics, did not fill the national leadership void left by the Trump Administration.<sup>85</sup> Instead, it was filled by the Wolverines.<sup>86</sup>

*c. The Informal Group or Network*

The origin of the Wolverines traces back to a 2004 book about the 1918 pandemic, the creation of a government pandemic plan in 2005, and a research article published in 2007 that debunked the conventional view about the 1918 pandemic that social interventions failed to stop the spread of the virus. In the summer of 2005, President George W. Bush read John Barry's book *The Great Influenza: The Story of the Deadliest Pandemic in History*.<sup>87</sup> Bush was so alarmed about the possibility of another pandemic that he convened a meeting of officials at the White House that included Dr. Rajeev Venkayya.<sup>88</sup> Bush wanted to know what the U.S. strategy was to deal with a pandemic, but the only plan the government had was a document from the Department of Health and Human Services advising

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83. See *Select Subcommittee Releases Eight Weeks of Coronavirus Task Force Reports Kept Secret by the White House*, SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS (Aug. 31, 2020), <https://coronavirus.house.gov/news/press-releases/select-subcommittee-releases-eight-weeks-coronavirus-task-force-reports-kept>.

84. *Id.*; Joshua Cohen, *President Trump Has Consistently Undermined White House Coronavirus Task Force*, FORBES (Oct. 2, 2020, 9:36 AM), <https://www.forbes.com/sites/joshuacohen/2020/10/02/trump-has-perpetually-undermined-white-house-coronavirus-task-force/>.

85. Lewis quotes a scathing letter sent by former CDC Director Bill Foege to Redfield in which Foege stated: "Despite the White House spin attempts, this will go down as a colossal failure of the public health system of this country. The biggest challenge in a century and we let the country down. The public health texts of the future will use this as a lesson on how not to handle an infectious disease pandemic." LEWIS, *supra* note 5, at 280.

86. See Matthew Mosk et al., *As Coronavirus Threatened Invasion, A New "Red Dawn" Team Tried to Save America*, ABC NEWS (July 28, 2020, 3:05 AM), <https://abcnews.go.com/Health/coronavirus-threatened-invasion-red-dawn-team-save-america/story?id=72000727>.

87. LEWIS, *supra* note 5, at 50.

88. *Id.* at 51.

“to speed up the production of vaccines and stockpile antiviral drugs.”<sup>89</sup> Bush was unimpressed, saying, “[t]his is bullshit.”<sup>90</sup> A new plan would be created, and Dr. Venkayya was tasked with drafting it.<sup>91</sup> In less than two weeks, Dr. Venkayya finished a draft. The first plan was written at a high level of generality.<sup>92</sup>

With a plan completed, Bush secured from Congress \$7.1 billion for shoring up the country’s neglected pandemic strategy.<sup>93</sup> Dr. Venkayya then had the responsibility of assembling a team to draft a more detailed plan to respond to a pandemic. He obtained approval to hire seven people from federal agencies<sup>94</sup> and sought out candidates who were “quick learner[s], good teammate[s], trusted by the top brass inside their agencies,” and “outside the box” thinkers.<sup>95</sup> Two of the members Dr. Venkayya recruited were Dr. Richard Hatchett, who then was doing research at the National Institutes of Health unrelated to pandemics, and Dr. Carter Mecher from the Department of Veterans Affairs.<sup>96</sup> Drs. Hatchett and Mecher were assigned the responsibility of drafting chapter 6, “the strategy for minimizing illness and death[s].”<sup>97</sup> The team completed the plan titled *National Strategy for Pandemic Influenza*, which was more detailed than the first plan but was still pretty general.<sup>98</sup> It did tersely mention the need to “[p]rovide guidance to all levels of government on the range of options for infection-control and containment, including those circumstances where social distancing measures, limitations on gatherings, or quarantine authority may be an appropriate public health intervention.”<sup>99</sup>

Serendipity also led Drs. Hatchett and Mecher to Bob Glass, a scientist at Sandia National Labs.<sup>100</sup> Mecher was dating Bob Glass’s sister. On a visit to her aunt, Laura Glass, the daughter of Bob Glass, described her science fair project to Mecher: she and her father had created a model with a computer program to show how social interventions (e.g., closing

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89. *Id.* at 52.

90. *Id.*

91. *Id.* at 53.

92. *Id.*

93. *Id.*

94. *Id.* at 53.

95. *Id.* at 59.

96. *Id.* at 58–60.

97. *Id.* at 75–76.

98. HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (Nov. 2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf>.

99. *Id.* at 8.

100. LEWIS, *supra* note 5, at 81.

schools) could stop or slow the spread of a virus.<sup>101</sup> Mecher suggested to Laura Glass that she should write an article and try to publish her findings.<sup>102</sup> When Bob Glass learned of the encounter, he emailed Mecher a draft of a paper about the science project that all the journals he had sent it to had rejected.<sup>103</sup> Mecher then investigated the issue of social interventions during the 1918 pandemic. With Glass's model and periodic help, the research assistance of Lisa Koonin, a CDC staffer, and statistical analysis of Harvard epidemiologist Marc Lipsitch, Mecher and Hatchett debunked the conventional wisdom about the ineffectiveness of social interventions in the 1918 pandemic.<sup>104</sup> Contrary to the then-prevailing wisdom, such interventions did not fail during the 1918 pandemic. Based on an empirical analysis of interventions used in seventeen cities, the researchers showed that the key was the *timing* of the public health interventions—they had to come early, before the wide spread of the virus.<sup>105</sup> Their article created quite a stir. By 2020, it became the eighth most cited article in the *Proceedings of the National Academy of Sciences*.<sup>106</sup> But for months after its publication, government and public health officials remained skeptical.<sup>107</sup> Drs. Hatchett and Mecher eventually convinced the skeptics through meetings and lectures culminating in a key December 11, 2006 conference attended by “[p]ublic health officers from around the country . . . along with assorted big shots from the private sector and academia.”<sup>108</sup> The CDC enlisted them to draft a revision to its pandemic strategy to include recommendations for social distancing, school closures, and bans on large gatherings, depending on the severity of the virus.<sup>109</sup> It marked a monumental shift in thinking about pandemic strategy among U.S. public health officials.<sup>110</sup>

The collaboration and close working between Hatchett and Mecher were the genesis of what evolved into the Wolverines. Before discussing

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 96–103.

105. See Richard J. Hatchett, Carter E. Mecher & Marc Lipsitch, *Public Health Interventions and Epidemic Intensity During the 1918 Influenza Epidemic*, 104 PNAS 7582, 7583–84 (2007).

106. LEWIS, *supra* note 5, at 81.

107. *Id.* at 105–08.

108. *Id.*

109. *Id.* at 108.

110. As Lewis recounts Koonin's reflection on the shift: “There was the CDC way of doing things. . . . It was vaccinate and isolate. And this wasn't that.” *Id.* at 99. According to Lewis, “No one in the CDC was thinking about how, in the event of a deadly pandemic, the government might move people apart from each other in this way or that.” *Id.*

the group, it is worth pausing and discussing the dynamic way in which Hatchett and Mecher eventually reached their key insight of social interventions discussed in their paper. First, credit should be given to Dr. Venkayya for recruiting “outside the box” thinkers to work on the pandemic plan, particularly the chapter on mitigation he assigned to Drs. Hatchett and Mecher. What is striking about all of the researchers who contributed to the new thinking on the use of social interventions during a pandemic, which went against years of accepted wisdom of the CDC and public health officials, is the *relative lack* of specialization and expertise in epidemiology, infectious disease, or pandemics among key members of the group at the time. Hatchett trained in internal medicine and did a fellowship in oncology;<sup>111</sup> when Venkayya recruited him, Hatchett was working on research related to cancer treatment through radiation (in the event of a nuclear war).<sup>112</sup> Mecher was a specialist in internal medicine and critical care, who was a senior medical advisor for the VA’s Office of Public Health after having served as its Chief Medical Officer for the Southeast VA Network.<sup>113</sup> Koonin was the only one with a master’s degree in epidemiology and a doctor of public health; at the CDC, she was a low-level staffer who had been working on developing guidance for businesses (e.g., to promote health among their employees) and had only recently been assigned the task of creating a checklist of items for businesses to prepare for a pandemic.<sup>114</sup> Glass was a scientist at Sandia National Labs, which was created in the 1940s to conduct research related to nuclear weapons.<sup>115</sup> Hatchett, Mecher, and Koonin enlisted the help of Harvard epidemiologist Lipsitch for the statistical analysis, plus the credibility of a scholar to publish in a science journal.<sup>116</sup>

Another key characteristic of the group was the lack of any formal government relationship or assignment that motivated their research. Hatchett and Mecher were driven to continue their research on the pandemic *after* they had already written the chapter included in the government’s national pandemic strategy.<sup>117</sup> They spent long hours,

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111. *See Leadership*, CEPI, <https://cepi.net/about/whoweare/> (last visited Mar. 27, 2020) (bio for Richard Hatchett, CEO).

112. LEWIS, *supra* note 5, at 58.

113. *See Carter Mecher MD*, PUB. HEALTH CO., <https://www.phc.health/team-member/carter-mecher-md> (last visited Mar. 27, 2022).

114. LEWIS, *supra* note 5, at 96.

115. *Id.* at 3.

116. *Id.* at 103.

117. *Id.* at 87.

beyond the normal work day, pursuing their research.<sup>118</sup> When Koonin was enlisted to help with the research, she did so at night after her CDC work “without the knowledge of her superiors at the CDC.”<sup>119</sup> She worried about whether they would approve and asked the others to keep it confidential.<sup>120</sup> Lipsitch thought it was “fun” and perhaps “a bit off-the-wall” to be invited to join their research paper.<sup>121</sup> The working relationship of the group resembles more the kind of informal relationship that researchers in academia routinely form when collaborating on a paper than the kind of bureaucratic arrangement one expects in government. It also may have some similarity with a start-up mentality of working long hours to pursue a new, disruptive idea.<sup>122</sup>

From 2008 to 2020, the administrations changed from Bush to Obama to Trump. Dr. Venkayya had left government before the end of Bush’s tenure.<sup>123</sup> Mecher remained in the White House for the Obama administration.<sup>124</sup>

The informal group of Wolverines initially involved seven physicians who periodically exchanged emails to discuss biological threats to the United States:

- (1) Dr. Carter Mecher, senior medical adviser for the VA;
- (2) Dr. Richard Hatchett, Chief Executive Officer of the Coalition for Epidemic Preparedness Innovations;
- (3) Rajeev Venkayya, who had become President of the Global Vaccine Business Unit at Takeda Pharmaceutical Company Ltd.;
- (4) Dr. Matt Hepburn, Defense Advanced Research Projects Agency, Biological Technologies Office, who ultimately led vaccine development for the Trump administration’s Operation Warp Speed;
- (5) Duane Caneva, Chief Medical Officer of the Department of Homeland Security (DHS);
- (6) James Lawler, Associate Professor, Department of Internal Medicine, Director, International Programs and Innovation,

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118. *Id.*

119. *Id.* at 102.

120. *Id.*

121. *Id.* at 103.

122. See Julie Bort, *The Unwritten Rules of Working at a Startup That No One Likes to Talk About*, BUS. INSIDER (Aug. 1, 2016, 3:40 PM), <https://www.businessinsider.com/the-unwritten-rules-of-working-at-a-startup-2016-8>.

123. LEWIS, *supra* note 5, at 112.

124. *Id.*

Global Center for Health Security, Director, Clinical and Biodefense Research; and

- (7) Dave Marcozzi, Assistant Chief Medical Officer for Acute Care; Associate Chair of Population Health & Community Outreach, University of Maryland School of Medicine.

Later, during the COVID pandemic, the group enlisted the participation of (8) Dr. Charity Dean, a disease control expert, and the assistant director of California's Department of Public Health,<sup>125</sup> and (9) Joe DeRisi, copresident of the Chan Zuckerberg Biohub and creator of the viro-chip.<sup>126</sup>

Although the group apparently did not have a formal chair, Mecher was the driving force behind the group, according to Lewis's book.<sup>127</sup> As Caneva, the chief medical officer of the Department of Homeland Security described, "[m]ost of our calls start off with, 'Carter, what are you thinking?' . . . He's like a savant on all this stuff."<sup>128</sup> The group's emails and their conference calls eventually included other government officials, including Anthony Fauci, other members of the president's coronavirus task force, and White House staffers, although their identities were not always disclosed on the calls.<sup>129</sup> In effect, the federal government's COVID policy was being shaped by more than one network of experts and officials. The Wolverines were one, fairly closely-knit network that interacted with other networks that included, for example, Dr. Fauci and members of the coronavirus task force. The complex relationship might be characterized as one involving "polycentric networks of governance," to borrow Hajer's terminology.<sup>130</sup> Because we lack information on all that happened behind the scenes in the federal government during the pandemic, it is impossible to lay out every network. For example, Dr. Fauci and Dr. Birx were perceived as important figures during the pandemic, but identifying their precise roles and influence in shaping the federal strategy to COVID requires further information that is not yet public.<sup>131</sup> As a result, this review can only be partial.

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125. See *Charity Dean MD, MPH&TM*, PUB. HEALTH CO., <https://www.phc.health/team-member/charity-dean-md-mph-tm-2> (last visited Mar. 27, 2022).

126. See *Joe Derisi, Ph.D.*, CZ BIOHUB, <https://www.czbiohub.org/people/leadership/joe-derisi-ph-d/> (last visited Mar. 27, 2022).

127. See, e.g., LEWIS, *supra* note 5, at 209–10.

128. *Id.* at 165.

129. *Id.* at 209–10.

130. See Hajer, *supra* note 56, at 175.

131. *But see* Damian Paletta & Yasmeen Abutaleb, *Anthony Fauci's Pandemic Emails: 'All Is Well Despite Some Crazy People in This World,'* WASH. POST (June 1, 2021),

*d. The Contributions of the Wolverines to Governance*

Led by Dr. Mecher, the Wolverines were pivotal in advancing the view that social interventions (e.g., social distancing, school closings, sheltering in place, and bans on large gatherings) should be adopted early to stop the spread of COVID.<sup>132</sup> Although the CDC had accepted that fundamental shift in thinking from its past rejection of social interventions, the CDC's guidance it provided to the public was often less definitive in endorsing social interventions in 2020.<sup>133</sup> The CDC was almost paralyzed to act. As Dr. Caneva, the Chief Medical Officer of the Department of Homeland Security (DHS) described the internal meetings in January and February 2020, "[t]he CDC kept saying the response would be data-driven, but they weren't getting any data. And any data they got was going to be a lagging indicator. They were calling the shots, and we needed someone else to call the shots."<sup>134</sup> In March 2020, the CDC deferred to the states on whether people should even get tested for COVID and whether people should shelter in place.<sup>135</sup>

That led the Wolverines to seek an alternative to the federal government to act more swiftly to contain COVID. The plan was simple: convince a state to adopt social interventions that could become a model for other states to follow.<sup>136</sup> On Feb. 6, 2020, Dr. Caneva emailed Dr. Charity Dean in California; the two had a prior encounter and disagreement over the Trump Administration's flying of Mexican immigrants from Texas to California.<sup>137</sup> But Dr. Caneva trusted Dr. Dean

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<https://www.washingtonpost.com/politics/interactive/2021/tony-fauci-emails/>; Monica Alba, *Birx goes on the road to push her pandemic message*, NBC NEWS (Sep. 15, 2020, 11:19 AM), <https://www.nbcnews.com/politics/white-house/birx-goes-road-push-her-pandemic-message-n1241085>.

132. See, e.g., LEWIS, *supra* note 5, at 183–84.

133. See, e.g., *Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19)*, CDC (Mar. 12, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents\\_FINAL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf) [[https://web.archive.org/web/20200316000741/https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents\\_FINAL.pdf](https://web.archive.org/web/20200316000741/https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf)]; *Considerations for School Closure*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/considerations-for-school-closure.pdf> [<https://web.archive.org/web/20200313043517/https://www.cdc.gov/coronavirus/2019-ncov/downloads/considerations-for-school-closure.pdf>]; see Dawn Kopecki, *CDC Recommends Canceling Events with 50 or More People for the Next Eight Weeks Throughout US*, CNBC (Mar. 15, 2020, 7:35 PM), <https://www.cnbc.com/2020/03/16/cdc-recommends-the-cancellation-of-events-with-50-or-more-people-for-the-next-eight-weeks-throughout-us.html>.

134. LEWIS, *supra* note 5, at 184.

135. See Dennis Evanosky, *Stay-at-Home Order Extended to May*, ALAMEDA SUN (Mar. 31, 2020), <https://alamedasun.com/news/stay-home-order-extended-may>.

136. LEWIS, *supra* note 5, at 185.

137. *Id.* at 185–86, 190.

enough to call her to enlist her help.<sup>138</sup> As Dr. Dean recounted in Lewis's book, Dr. Caneva had said, "he belonged to this small, informal, almost secret group of doctors who had once worked in the White House under Bush or Obama and were now scattered to the winds but not without influence."<sup>139</sup> Dr. Caneva asked for her help "in getting what this secret group of doctors had to say to the governor of the nation's most populous state so that it might take the lead for the country, as the White House clearly was not going to."<sup>140</sup> Dr. Dean wondered if what Dr. Caneva was doing was illegal but concluded that it probably wasn't.<sup>141</sup> But, from her perspective, Dr. Caneva was working "*without the White House's permission*, to coordinate some kind of national pandemic response."<sup>142</sup> Dr. Dean even felt that not only Dr. Caneva could get into serious trouble but so could she.<sup>143</sup> Yet Dr. Dean still joined the Wolverines.<sup>144</sup>

Enlisting Dr. Dean into the Wolverines can be viewed as adding a new hub to the network the Wolverines had formed. As a hub, Dr. Dean had connections to the California state government that the other Wolverines lacked. Yet, at least in February 2020 when she first joined, Dr. Dean lacked the kind of pull or authority within the state government the Wolverines had envisioned.<sup>145</sup> To the contrary, Dr. Dean's boss, Sonia Angell, the Director of the California Department of Public Health who had worked for the CDC, "banned" Dean "from using the word 'pandemic' and told her to erase the math and tsunami curve on her whiteboard" that Dean had used to predict the rapid number of deaths that would occur in the pandemic.<sup>146</sup> Even some members of President Trump's coronavirus task force were counting on Dr. Dean's help. According to Lewis's book, Ken Cuccinelli, the acting deputy secretary of homeland security, reportedly told her she "need[ed] to push these things through" because she's "the only one who can do this."<sup>147</sup> On March 6, 2020, Governor Gavin Newsom convened a hundred state officials to develop a strategy for COVID.<sup>148</sup> Angell told Dean not to attend the meeting because she had

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138. *Id.* at 185, 190.

139. *Id.* at 190.

140. *Id.*

141. *Id.* at 190–91.

142. *Id.* at 190 (emphasis added).

143. *Id.* at 190.

144. *Id.*

145. *Id.* at 205.

146. *Id.* at 197.

147. *Id.* at 235.

148. *Id.*

“no role” there, but, according to Dean, Angell conveniently backed out of the meeting that morning and asked Dean to attend in her place.<sup>149</sup> At the meeting, Dr. Dean gave a twenty-minute presentation laying out the expected numbers of infections in the pandemic she had calculated and possible public health responses; she answered questions from Newsom and others for forty-five minutes.<sup>150</sup> From that point forward, Dr. Dean had the attention of high-level officials in California.<sup>151</sup> In August 2020, Angell unceremoniously resigned as Director for Public Health due to a reported “tech glitch” that resulted in the undercounting of COVID infections in the state.<sup>152</sup>

As a hub in the network linking the Wolverines to California’s state government, Dr. Dean quickly increased her connections within California’s state government following the March 6, 2020 presentation to Newsom. By mid-March, 2020 Newsom’s technology adviser Mike Wilkening enlisted Dr. Dean to another informal group, one that the Governor created.<sup>153</sup> Newsom called Todd Park, a prominent entrepreneur who had served as President Obama’s chief technology officer and who had successfully founded three health care technology companies, to help the state figure out a response to the coronavirus.<sup>154</sup> Park drafted two other Obama administration alums, Dr. Bob Kocher, now a venture capitalist, and DJ Patil, the federal government’s first chief data scientist.<sup>155</sup> Patil then recruited “some of the best programmers in Silicon Valley and the team instantly began to collect data that would help them project and predict.”<sup>156</sup> They all worked as volunteers.<sup>157</sup> Park asked Wilkening for the state’s “most kick-ass public health guru.”<sup>158</sup> Wilkening said it was Dr. Dean.

At the mid-March 2020 meeting, Dr. Dean gave her analysis of the expected spread of COVID, with a comparison to the 1918 pandemic.<sup>159</sup> She conveyed some of the insights she obtained in working with the Wolverines, particularly Dr. Mecher’s modeling analysis, although she did

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149. *Id.* at 226.

150. *Id.*

151. *Id.* at 227–28.

152. See Emily Hoeven, *CA Director of Public Health Resigns*, CAL MATTERS (Aug. 10, 2020), <https://calmatters.org/newsletters/whatmatters/2020/08/sonia-angell-resigns-department-of-public-health-newsom/>.

153. LEWIS, *supra* note 5, at 230.

154. *Id.* at 229.

155. *Id.*

156. *Id.*

157. *Id.* at 230.

158. *Id.*

159. *Id.*

not mention the group or her involvement with Park and Patil.<sup>160</sup> Impressed by her presentation, Park described Dr. Dean as the “L6,” meaning she was the “person buried under six layers of organization whose muzzled voice suddenly, urgently needed to be heard.”<sup>161</sup> Park and Patil concluded that they would be most helpful to the state by translating Dr. Dean’s analysis into a model—or, in Park’s words, “to take everything in her brain and get it to the governor.”<sup>162</sup> And that’s what Park’s team did. On March 18, 2020, they presented to Newsom’s senior advisers a new model with projections about the spread of COVID, hospitalizations, and deaths, with and without social interventions.<sup>163</sup> Social interventions would reduce deaths to a tenth of the number of deaths without interventions.<sup>164</sup> The model alarmed Newsom’s advisers.<sup>165</sup> The next day, Governor Newsom announced a stay-at-home order for California, the first in the country.<sup>166</sup> Within just two weeks, forty-two other states (twenty-four with Democratic governors and nineteen with Republican governors) issued stay-at-home orders.<sup>167</sup> The Wolverines’ plan worked.

Of course, the stay-at-home orders drew vocal protests, such as in Michigan where protesters stormed the state capitol armed with guns.<sup>168</sup> But studies of the COVID responses support the effect of such orders in slowing the spread of the virus.<sup>169</sup> Additional studies may shed further light on the efficacy of social interventions, including stay-at-home orders, mask wearing, social distancing, school closures, and bans on large

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160. *Id.*

161. *Id.* at 231.

162. *Id.*

163. *Id.* at 232.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See States That Issued Lockdown and Stay-at-Home Orders in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/States\\_that\\_issued\\_lockdown\\_and\\_stay-at-home\\_orders\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/States_that_issued_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) (last visited Mar. 27, 2020).

168. *See, e.g.*, Katelyn Burns, *Armed Protesters Entered Michigan’s State Capitol During Rally Against Stay-at-Home Order*, VOX (Apr. 30, 2020, 9:04 PM), <https://www.vox.com/policy-and-politics/2020/4/30/21243462/armed-protesters-michigan-capitol-rally-stay-at-home-order>; Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-At-Home Order*, NPR (May 14, 2020, 10:01 AM), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order>.

169. *See, e.g.*, Yevgeniy Feyman, *Effectiveness of COVID-19 Shelter-in-Place Orders Varied by State*, PUBMED.GOV (Dec. 31, 2020), <https://pubmed.ncbi.nlm.nih.gov/33382849/>; Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY AND MORTALITY WKLY. REP. 1198 (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm>.

gatherings. It may well be that, with the benefit of hindsight and such studies, countries rethink their deployment of social interventions for future pandemics. In the United States at least, most of the social interventions faced some opposition from segments of the population, particularly among people who supported Trump. Moreover, “pandemic fatigue” may diminish the public’s willingness to return to stay-at-home or school closures. Finally, one strategy that Mecher and the Wolverines apparently did not seriously consider was universal masking without lockdowns (as Japan adopted during the pandemic<sup>170</sup>). Notably, in their study of the 1918 flu, Hatchett and Mecher were not able to determine the effect of mask ordinances that were implemented in “only . . . a small number of cities, or . . . only late in the epidemic.”<sup>171</sup> Future studies should investigate whether universal masking without lockdowns during the COVID pandemic was effective.

For our purposes, it is not crucial to decide whether the Wolverines’ recommendations for social interventions to address the pandemic proved to be wise or correct. The political controversy over using social interventions is likely to last as long as COVID does. Instead, it is to understand the difference in approach to governance the Wolverines embodied. Table 1 below depicts the main differences between the formal governance of the CDC and the informal governance of the Wolverines.

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170. See Yasutoshi Nishimura, Opinion, *How Japan Beat Coronavirus Without Lockdowns*, WALL ST. J. (July 7, 2020, 7:06 PM), <https://www.wsj.com/articles/how-japan-beat-coronavirus-without-lockdowns-11594163172>.

171. Hatchett et al., *supra* note 105.

TABLE 1. COMPARISON BETWEEN CENTERS FOR DISEASE CONTROL AND WOLVERINES

	<b>CDC</b>	<b>Wolverines</b>
<b>Head</b>	Political appointee	No political appointee and no official head but de facto leader
<b>Total members</b>	10,639 people in 2018	Seven people initially, expanded to nine
<b>Composition</b>	Fixed, with federal government employees	Dynamic and evolving, with federal and state government employees, academics, and corporate employees
<b>Approach</b>	Slow, wait for more studies and data	Urgent, need to act swiftly with social distancing, shelter in place, closing schools before community spread
<b>Governance</b>	Formal	Informal

As indicated above, the CDC is headed by a political appointee of the President.<sup>172</sup> The CDC director used to be a civil servant position, selected without regard to party politics.<sup>173</sup> But that changed during the Reagan Administration, when the position was changed to a political appointee.<sup>174</sup> According to Lewis's account, the change occurred because the White House wanted to control scientific or medical studies that could be

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172. LEWIS, *supra* note 5, at 289.

173. *Id.*

174. *Id.*

sensitive to President Reagan's political base and source of campaign contributions, such as research related to AIDS or aspirin.<sup>175</sup> Lewis contends that the change created a turnover problem at the top and a lack of management experience: "the average tenure of the [CDC] appointees fluctuated between eighteen months and two years."<sup>176</sup> It also created a potentially worse problem: the political appointee selected was often expected to serve "the White House's political operation" and to defer to the White House.<sup>177</sup> Trump's CDC Director Redfield lacked experience heading an agency and lasted about two years until the end of Trump's term.<sup>178</sup> During the pandemic, Redfield was not a prominent figure in the public communications of the president's coronavirus task force, although he did advise the importance of social distancing on Christian conservative radio.<sup>179</sup> According to *Politico*, Trump's political appointees at the Department of Health and Human Services, Michael Caputo and Paul Alexander, emailed Redfield to pressure the CDC to write its Morbidity and Mortality Weekly Reports (MMWR) in a light more favorable to Trump; Alexander's email even instructed Redfield to stop the weekly reports so that Alexander could personally review them before they were published, a request that went against the professional norms and practices of the CDC.<sup>180</sup> Redfield later reportedly instructed his staff to delete Alexander's email, in possible violation of federal record-keeping law.<sup>181</sup>

In contrast with the CDC, the Wolverines, as an informal group, had no official head or political appointment. By Lewis's account, Carter Mecher was the de facto leader of the group.<sup>182</sup> Mecher had been the chief

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175. *Id.*

176. *Id.*

177. *Id.* at 290.

178. Julia Belluz, *The New CDC Director Was Once Accused of Research Misconduct*, VOX (Mar. 22, 2018, 9:59 AM), <https://www.vox.com/2018/3/22/17150322/robert-redfield-cdc-director-trump>; Debra Goldschmidt, *Dr. Robert Redfield Appointed CDC Director*, CNN (Mar. 21, 2018, 5:47 PM), <https://www.cnn.com/2018/03/21/health/redfield-cdc-director-bn/index.html>.

179. See Darius Tahir, *How the CDC Director Became the MAGA Whisperer on Coronavirus*, POLITICO (Apr. 9, 2020, 2:19 PM), <https://www.politico.com/news/2020/04/09/cdc-director-robert-redfield-coronavirus-176247>.

180. See Dan Diamond, *Trump Officials Interfered with CDC Reports on Covid-19*, POLITICO (Sept. 12, 2020, 11:11 AM), <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809> ("[MMWR] reports have historically been published with little fanfare and no political interference, said several longtime health department officials, and have been viewed as a cornerstone of the nation's public health work for decades.")

181. See Dan Diamond, *CDC's Redfield Told Staff to Delete Email, Official Tells House Watchdog*, POLITICO (Dec. 10, 2020, 2:40 PM), <https://www.politico.com/news/2020/12/10/cdc-redfield-email-house-watchdog-444238>.

182. LEWIS, *supra* note 5, at 165.

medical officer for the VA Southeast Network in Atlanta.<sup>183</sup> In October 2005, the VA selected Mecher as its representative to fulfill the Bush White House's request for an "outside the box" thinker.<sup>184</sup> That led to Mecher's involvement in the drafting of Bush's pandemic plan.<sup>185</sup> Mecher served as the Director of Medical Preparedness Policy at the White House Homeland Security Council and National Security Staff.<sup>186</sup> Mecher stayed in that position during the first term of the Obama administration and then returned to the VA as a senior medical adviser.<sup>187</sup> The role gave Mecher considerable freedom to decide his own agenda.<sup>188</sup> During Trump's administration, Mecher had no role in the White House or Homeland Security, but he, along with Richard Hatchett, Rajeev Venkayya, and four other doctors who had worked with Mecher when he was at Homeland Security, continued to follow and discuss biological threats in a small group known as the Wolverines.<sup>189</sup> What is striking about the Wolverines is their lack of partisanship. The fact that Mecher could work for both the Bush and the Obama White House speaks volumes.

Two members of the group were part of the Trump administration: Dr. Hepburn, Vaccine Lead for Operation Warp Speed; and Dr. Caneva, Chief Medical Officer of the Department of Homeland Security (DHS).<sup>190</sup> Although Hepburn and Caneva were political appointees, the Wolverines, as an informal group, appeared to be somewhat insulated from political pressure from the White House. The fact that six members of the group had prior experience in the military, which prohibits soldiers from engaging in partisan political activities,<sup>191</sup> is also noteworthy.<sup>192</sup> As Mecher described, "We weren't doing this for the federal government. We were doing it for *each other*."<sup>193</sup>

Another advantage of the Wolverines was its innovative ethos. As explained above, the informal group operated a dynamic network enlisting

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183. See PUB. HEALTH. CO., *supra* note 113.

184. LEWIS, *supra* note 5, at 74.

185. *Id.* at 74–75.

186. See PUB. HEALTH. CO., *supra* note 113.

187. LEWIS, *supra* note 5, at 160–61.

188. *Id.* at 161–62.

189. *Id.* at 163–64.

190. See Mil. Health Sys. Comm'n's Off., *Hepburn: DOD Role in Operation Warp Speed Was Transformative*, HEALTH.MIL (Dec. 11, 2020), <https://health.mil/News/Articles/2020/12/11/Hepburn-DOD-role-in-Operation-Warp-Speed-was-transformative>; Duane Caneva, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/person/duane-caneva> (last updated July 17, 2021).

191. LEWIS, *supra* note 5, at 163–64.

192. *Id.* at 163.

193. *Id.* at 175.

other experts, such as DeRisi and Dr. Dean, as needed. The dynamic nature of the group enabled it to benefit from expertise not only in the federal government, but also in state government, nonprofits, and the private sector. The Wolverines operated more like a startup company to address biological threats. Mecher and Hatchett were able to rethink decades of conventional wisdom about the 1918 pandemic and efficacy of social interventions by carefully examining the data related to interventions used in the 1918 pandemic (though with insufficient data on universal masking without lockdowns, as noted above).<sup>194</sup> Their findings emphasized the importance of the *timing* of social interventions—they must be early or they would be too late.<sup>195</sup> Mecher had started tracking the novel coronavirus reported in China on approximately January 9, 2020.<sup>196</sup> Mecher scoured the internet for all available data on reported COVID cases and deaths in China and elsewhere, and compiled a spreadsheet with rough projections of the spread of COVID based on a comparison with the SARS virus of 2003.<sup>197</sup> Mecher knew that the reported cases belied the magnitude of spread, in China, the United States, and other countries.<sup>198</sup> In early February 2020, Mecher had already flagged the asymptomatic spread of COVID and lack of testing of asymptomatic individuals.<sup>199</sup> In an email to the Wolverines in early 2020, Mecher lamented the CDC’s lack of testing and the federal government’s lack of urgency to stop the spread of the “fire.”<sup>200</sup>

By contrast, the CDC in 2020 had become a sprawling, bureaucratic agency with an institutional culture that tended to avoid proactive measures to fight a pandemic, especially if they were not in line with the White House’s agenda or could lead to the kind of political fallout that occurred in 1976, when the CDC had instituted a national vaccination program for a swine flu pandemic that never materialized.<sup>201</sup> If the Wolverines operated like a startup, the CDC was more like a multinational corporation set (or stuck) in its own ways.<sup>202</sup> To draw an analogy, the Wolverines were Tesla, while the CDC was GM. According to an investigative report by *USA Today*, based on “42,000 pages of emails and

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194. *See supra* text accompanying note 171.

195. *See* Hatchett et al., *supra* note 105.

196. LEWIS, *supra* note 5, at 164–65.

197. *Id.* at 169.

198. *Id.* at 169–70.

199. *Id.* at 180–81.

200. *Id.* at 170.

201. *Id.* at 283–84.

202. *See generally* CLAYTON CHRISTENSEN, *THE INNOVATOR’S DILEMMA* 61–63 (rev. ed. 2003).

memos obtained from health departments and interview[s with] more than 100 community leaders and public health experts, including current and former CDC officials,” the CDC downplayed the seriousness of the COVID virus in January through April 2020.<sup>203</sup> “[P]aralyzed by bureaucracy, [the CDC] failed to consistently perform its most basic job: giving public health authorities the guidance needed to save American lives during a pandemic.” As *USA Today* recounts, state “[h]ealth officials flooded the CDC with hundreds of phone calls and emails. Many questions went unanswered. In other cases, the agency response amounted to *you decide*.”<sup>204</sup>

It goes beyond the scope of this Article to conduct a full review of the CDC’s response to the pandemic. By most, if not all, accounts, the CDC failed on multiple levels, including its botched test kits,<sup>205</sup> initial public recommendation against masks,<sup>206</sup> guidance against testing asymptomatic persons and lack of recognition of asymptomatic spread,<sup>207</sup> and early downplaying of the spread and seriousness of the virus and overall lack of national leadership in fighting COVID.<sup>208</sup> The Wolverines operated within—and perhaps in response to—the leadership vacuum created by the CDC’s lack of national leadership. In April 2022, Biden’s CDC Director, Dr. Rochelle Walensky, announced the CDC was undertaking a review to figure out how to revamp and modernize the structure of the agency, which many had criticized during the pandemic.<sup>209</sup>

Of course, the kind of aggressive social interventions the Wolverines recommended were not free of controversy. The shelter-in-place orders and school closures especially drew intense objections from

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203. See Brett Murphy & Letitia Stein, *How the CDC Failed Public Health Officials Fighting the Coronavirus*, USA TODAY NEWS (Jan. 26, 2021, 4:02 PM), <https://www.usatoday.com/in-depth/news/investigations/2020/09/16/how-cdc-failed-local-health-officials-desperate-covid-help/3435762001/>.

204. *Id.*

205. See Murphy & Stein, *supra* note 73.

206. See Buchwald, *supra* note 74.

207. See Will Feuer, *CDC Quietly Revises Coronavirus Guidance to Downplay Importance of Testing Asymptomatic People*, CNBC (Aug. 26, 2020, 5:28 PM), <https://www.cnbc.com/2020/08/26/cdc-quietly-revises-coronavirus-guidance-to-downplay-importance-of-testing-for-asymptomatic-people.html>; LEWIS, *supra* note 5, at 176 (discussing how Redfield ordered no COVID testing of 57 Americans repatriated from Wuhan).

208. See sources cited *supra* note 10.

209. Lena H. Sun, *CDC, Under Fire for Covid Response, Announces Plans to Revamp Agency*, WASH. POST, (Apr. 4, 2022, 6:45 PM), <https://www.washingtonpost.com/health/2022/04/04/walensky-cdc-revamp-pandemic/>.

predominantly Trump supporters.<sup>210</sup> California Governor Newsom was subject to an unsuccessful recall vote, “the result of a political uprising largely driven by angst over state coronavirus orders that shuttered schools and businesses and upended life for millions of Californians.”<sup>211</sup> Moreover, future studies of the COVID pandemic should evaluate the efficacy and respective tradeoffs of lockdowns versus universal masking without lockdowns. Assuming the social interventions the Wolverines recommended saved American lives, we must still examine whether the influence of an informal group in shaping what turned out to be the strategy adopted by forty-three states should be viewed as a legitimate exercise of informal governance, a question analyzed in Parts II and III.

## *2. Informal election group during the 2020 U.S. election*

The second case study involves the informal election group or network that formed to protect the integrity of the 2020 U.S. election.<sup>212</sup> As *Time Magazine* describes the group:

The handshake between business and labor was just one component of a vast, cross-partisan campaign to protect the election—an extraordinary shadow effort dedicated not to winning the vote but to ensuring it would be free and fair, credible and uncorrupted. For more than a year, a loosely organized coalition of operatives scrambled to shore up America’s institutions as they came under simultaneous attack from a remorseless pandemic and an autocratically inclined President. Though much of this activity took place on the left, it was separate from the Biden campaign and crossed ideological lines, with crucial contributions by nonpartisan and conservative actors. The scenario the shadow campaigners were desperate to stop was not a Trump victory. It was an election so calamitous that no result could be discerned at all, a failure of the central act of democratic self-governance that has been a hallmark of America since its founding.<sup>213</sup>

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210. See Toluse Olorunnipa et al., *Rallies Against Stay-at-Home Orders Grow as Trump Sides with Protesters*, WASH. POST (Apr. 17, 2020), [https://www.washingtonpost.com/national/rallies-against-stay-at-home-orders-grow-as-trump-sides-with-protesters/2020/04/17/1405ba54-7f4e-11ea-8013-1b6da0e4a2b7\\_story.html](https://www.washingtonpost.com/national/rallies-against-stay-at-home-orders-grow-as-trump-sides-with-protesters/2020/04/17/1405ba54-7f4e-11ea-8013-1b6da0e4a2b7_story.html); Grant Smith & Chris Kahn, *Despite Scattered Protests, Most Americans Support Shelter-in-Place*, REUTERS/*Ipsos Poll Shows*, REUTERS (Apr. 21, 2020, 4:17 PM), <https://www.reuters.com/article/us-usa-election-poll/despite-scattered-protests-most-americans-support-shelter-in-place-reuters-ipsos-poll-shows-idUSKCN22336P>.

211. See Michael R. Blood & Kathleen Ronayne, *California Sets Date for Recall Election Targeting Newsom*, AP NEWS (July 1, 2021), <https://apnews.com/article/california-governor-gavin-newsom-recall-a2326a90364bf7ce502fa9f8e64532e9>.

212. See Ball, *supra* note 15.

213. *Id.*

*a. The magnitude of the problem*

The informal election group sought to protect the integrity of the U.S. election. In 2020, two special problems arose. First, a pandemic was still raging, so measures would need to be taken to ensure people could vote safely.<sup>214</sup> But the bigger problem: the possibility that President Trump would not accept the election results if he lost.<sup>215</sup> That fear had been festering since the 2016 presidential debate with Hillary Clinton in which Trump refused to commit to accepting the election results in a response to a question by Chris Wallace, which he asked Trump because he had already declared that the election was rigged even before Election Day.<sup>216</sup> In response, Clinton warned:

You know, every time Donald thinks things are not going in his direction, he claims whatever it is is rigged against him. He lost the Iowa caucus. He lost the Wisconsin primary. He said the Republican primary was rigged against him. Then Trump University gets sued for fraud and racketeering; he claims the court system and the federal judge is rigged against him. There was even a time when he didn't get an Emmy for his TV program three years in a row and he started tweeting that the awards were rigged against him.<sup>217</sup>

During the 2020 campaign against Joe Biden, Trump again refused to commit to accepting the election results, this time in an interview with Wallace.<sup>218</sup> The informal election group's fear of what would happen if Trump refused to accept the election results turned out to be justified. Even after Congress certified the election results declaring Biden the winner, following a failed insurrection by Trump supporters on the Capitol to stop the certification on January 6, 2021 that resulted in several deaths, plus many failed legal challenges by Trump to contest the election results in

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214. *Id.*

215. *Id.*

216. See PBS Newshour, *Trump on Whether He'll Accept the Election Outcome*, YOUTUBE (Oct. 19, 2016), <https://www.youtube.com/watch?v=IXysnUQwy6U>; Sarah Wheaton, *Clinton Mocks Trump for Saying Emmys are Rigged*, POLITICO (Oct. 19, 2016, 10:25 PM), <https://www.politico.com/story/2016/10/trump-emmys-rigged-2016-debate-230039>; Patrick & Jonathan Martin, *Donald Trump Won't Say if He'll Accept Result of Election*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html>.

217. See Rebecca Speare-Cole, *Hillary Clinton's 2016 Warning That Trump Always Claims System Is Rigged When Losing Watched 3 Million Times*, NEWSWEEK (Nov. 6, 2020, 8:24 AM), <https://www.newsweek.com/hillary-clinton-warning-trump-system-rigged-against-him-video-2016-1545463>.

218. See Will Feuer, *President Trump Won't Agree to Accept 2020 Election Results as Biden Leads in Polls – 'I Have to See'*, CNBC (July 20, 2020, 3:39 PM), <https://www.cnbc.com/2020/07/19/president-trump-wont-agree-to-accept-2020-election-results-as-biden-leads-in-polls.html>.

swing states, Trump still hasn't accepted the election results of the 2020 election.<sup>219</sup> Many Trump supporters even believe he will be restored as the rightful President.<sup>220</sup>

*b. The failure or shortcoming of formal governance*

Unlike the pandemic itself, for which the federal government had prepared the outline of a national strategy under the Bush administration, the federal government had no plan or playbook for how to vote safely during a pandemic, let alone for how to handle a losing incumbent candidate who simply refused to accept the final election results.

Election administration for federal elections in the United States is notoriously bad.<sup>221</sup> The main challenge is that, even for federal elections, election administration is balkanized. There is no uniformity. Nearly everything is left to each state to decide under its own system of balloting, voting technology, and counting and recounting methods.<sup>222</sup> States can even delegate the responsibility to different localities, producing even more balkanization.<sup>223</sup> This decentralized approach creates many different election systems, state by state, if not county by county.<sup>224</sup> The Elections Clause in the U.S. Constitution contemplates that the states bear the primary responsibility of prescribing “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” but it also allows Congress to “at any time by Law make or alter such [state] Regulations.”<sup>225</sup>

For the most part, Congress has deferred to the states. In 2002, Congress passed the Help America Vote Act (HAVA), which created the

219. See Don Gonyea, *Trump Yanks Endorsement of Alabama Senate Candidate Brooks, Who Said to Get Past 2020*, NPR (Mar. 23, 2022, 4:30 PM), <https://www.npr.org/2022/03/23/1088264503/donald-trump-mo-brooks-withdraws-alabama-endorsement>; Todd J. Gillman, *CPAC: Donald Trump Spins Tales of Rigged Election, Papers Over Jan. 6 Riot, Hints at 2024 Comeback*, DALL. MORNING NEWS (July 11, 2021, 3:22 PM), <https://www.dallasnews.com/news/politics/2021/07/11/cpac-donald-trump-spins-tales-of-rigged-election-papers-over-jan-6-riot-thrills-conservatives/>.

220. See Jerry Davich, Opinion, *Column: The Latest Conspiracy: Trump is Returning as President on Thursday. Friday's Reality Won't Dissuade His Zealots.*, CHIC. TRIB. (Mar. 2, 2021, 2:43 PM), <https://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-davich-march-4-president-trump-return-to-office-conspiracy-st-0-20210302-tsgglzszxbggtl2ssnli3ixnxa-story.html>.

221. See Anthony J. Gaughan, *Ramshackle Federalism: America's Archaic and Dysfunctional Presidential Election System*, 85 *FORDHAM L. REV.* 1021, 1031–33 (2016).

222. *Id.* at 1031–32.

223. *Id.*

224. *Id.*

225. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

U.S. Election Assistance Commission (EAC), “an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration.”<sup>226</sup> In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which included \$400 million for state grants to pay for COVID precautions.<sup>227</sup> The EAC also served as a clearinghouse for best practices in COVID precautions during the election, which included information from the CDC, Homeland Security, and several states.<sup>228</sup> But, according to *Time*, the \$400 million in state grants wasn’t nearly enough.

An even larger problem than the decentralization of election administration was the possibility that the 2020 election results would not be accepted by Trump, a concern that raised fears of violence. The Twelfth Amendment lays out, in great detail, the process for determining who is President based on the votes of the Electors from each state.<sup>229</sup> But neither the Constitution nor federal law speaks to what happens if the losing candidate simply refuses to accept the election results but continues to contest it even after Congress has certified the vote. In the past, norms or customs helped to ensure the finality of the election results. Dating back to 1896 with William Jennings Bryan’s concession to Republican William McKinley, every presidential candidate who lost the election accepted the results and conceded.<sup>230</sup> However, people feared that Trump would never accept the results if he lost. That possibility presented a problem that formal governance did not address.

*c. The Informal Election Group or Network*

The informal election group or network was much larger than the close-knit Wolverines. Although there may have been a core group of people, the *Time Magazine* article describes a very loose collection of contributors from various sectors who got involved in different aspects of

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226. See *About the U.S. EAC*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about-the-useac> (last visited Mar. 27, 2022).

227. See *2020 Cares Act Grants*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/payments-and-grants/2020-cares-act-grants> (last visited Mar. 27, 2022).

228. See *Coronavirus (COVID-19) Resources*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/election-officials/coronavirus-covid-19-resources> (last visited Mar. 27, 2022).

229. U.S. CONST. amend. XII.

230. Amy McKeever, *No Modern Presidential Candidate Has Refused to Concede. Here’s Why That Matters*, NAT’L GEOGRAPHIC (Nov. 8, 2020), <https://www.nationalgeographic.com/history/article/no-modern-presidential-candidate-refused-to-concede-heres-why-that-matters>.

the efforts to preserve election integrity. For simplicity, I will refer to the contributors as the informal election group, with the caveat that the group was embodied by various groups, networks, and individuals working on election issues. The *Time* article does not identify every member that contributed to the informal election network, so the information available is incomplete. Listed in Table 2 below are the names of the individuals and nonprofits that contributed to the efforts that the election group helped to organize, with political leaning where self-identified.

TABLE 2. INDIVIDUALS AND ENTITIES CONTRIBUTING TO INFORMAL ELECTION GROUP

<b>Name</b>	<b>Self-identified political leaning</b>
Chamber of Commerce	Nonprofit
AFL-CIO	Nonprofit
Issue One	Nonprofit
22 Democrats and 22 Republicans on the National Council on Election Integrity	Bipartisan
Protect Democracy with bipartisan election task force	Nonprofit
Fight Back Table	Democrat
Democracy Defense Coalition	Democrat
Analyst Institute	Progressive
Planned Parenthood	Nonprofit
Greenpeace	Nonprofit
Indivisible	Progressive
MoveOn	Progressive
Chan Zuckerberg Initiative	Nonprofit
National Vote at Home Institute	Nonprofit
Leadership Conference on Civil and Human Rights	Nonprofit
Voter Participation Center	Nonprofit
All Voting Is Local	Nonprofit

Leadership Conference on Civil and Human Rights	Nonprofit
Voting Rights Lab	Nonprofit
IntoAction	Nonprofit
“Protect the Results” coalition	150 liberal groups
Detroit Will Breathe	Nonprofit
Fems for Dems	Democrat
We the People Michigan	Nonprofit
Voter Protection Program	Nonprofit
Progressive data geeks and strategists	Progressive
Representatives of donors and foundations	Not provided
State-level grassroots organizers	Not provided
Racial-justice activists	Not provided
Mike Podhorzer	Democrat
Zach Wamp	Republican
Dick Gephardt	Democrat
Anat Shenker-Osorio	Democrat
Maurice Mitchell	Progressive
Amber McReynolds, National Vote at Home Institute	Not provided
Tom Lopach, Voter Participation Center	Democrat
Hannah Fried, All Voting Is Local	Democrat
Vanita Gupta, president and CEO of the Leadership Conference on Civil and Human Rights	Democrat
Laura Quinn, a veteran progressive operative who co-founded Catalist	Progressive
Nelini Stamp, the Working Families Party’s national organizing director	Progressive
Neil Bradley, the Chamber of Commerce’s executive vice president and chief policy officer	Republican
Chamber of Commerce CEO Thomas Donohue	Republican
AFL-CIO president Richard Trumka	Democrat

Heads of (i) National Association of Evangelicals and (ii) National African American Clergy Network	Not provided
Angela Peoples, director for the Democracy Defense Coalition	Progressive
Art Reyes III	Democrat
Mike Rogers	Republican
John Engler	Republican
Rick Snyder	Republican
Jennifer Granholm	Democrat
Richard Primus, a law professor at the University of Michigan	Not provided
Norm Eisen	Democrat

There was no formal head to the election group. However, Mike Podhorzer, senior adviser to the president of the AFL-CIO, is described by the *Time Magazine* article as the “architect” behind much of the group’s effort.<sup>231</sup> In March 2020, Podhorzer drafted a three-page memo that detailed what he perceived to be the “[t]hreats to the 2020 Election.”<sup>232</sup> With clairvoyance, the memo predicted: “Trump has made it clear that this will not be a fair election, and that he will reject anything but his own re-election as ‘fake’ and rigged. On November 3, should the media report otherwise, he will use the right-wing information system to establish his narrative and incite his supporters to protest.”<sup>233</sup> Podhorzer’s memo identified four potential problems: “[A]ttacks on voters, attacks on election administration, attacks on Trump’s political opponents and ‘efforts to reverse the results of the election.’”<sup>234</sup> In April 2020, Podhorzer began holding weekly Zoom meetings with hundreds of people from progressive circles.<sup>235</sup> As *Time* described, “[t]he meetings became the galactic center for a constellation of operatives across the left who shared overlapping goals but didn’t usually work in concert. The group had no name, no leaders and no hierarchy, but it kept the disparate actors in sync.”<sup>236</sup> The network expanded to include Republicans, the Chamber of

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231. See Ball, *supra* note 15.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

Commerce, and big businesses, especially in the efforts to instill respect for the voting and counting process, and the ultimate election results.<sup>237</sup>

*d. The contributions of the informal election group or network to informal governance*

The informal election group was different from the Wolverines, not only in terms of size but also in terms of its strengths or contributions to governance. The informal election group was less about innovation. There was no novel rethinking of decades' worth of policy or administration. Instead, the election group was more about national organization and coordination to fill two big gaps: (1) a shortfall in funding for COVID-related precautions during voting and (2) the lack of a formal mechanism to respond to a candidate's refusal to accept the election results or desperate attempts to reverse the results through whatever means.<sup>238</sup>

First, "[l]ed by the Leadership Conference on Civil and Human Rights, more than 150 organizations signed a letter to every member of Congress seeking \$2 billion in election funding."<sup>239</sup> After Congress allocated less than half the amount needed, donations from private foundations, including the Chan Zuckerberg Initiative, filled the gap.<sup>240</sup> In addition, the National Vote at Home Institute, a nonprofit, "helped 37 states and D.C. bolster mail voting."<sup>241</sup> Meanwhile, "[n]ational civil rights groups worked with local organizations to get the word out that [in-person voting] was the best way to ensure one's vote was counted."<sup>242</sup> In Philadelphia, "'voting safety kits' containing masks, hand sanitizer and informational brochures" were distributed.<sup>243</sup>

Second, the informal election group developed a strategy to respond to Trump's unfounded claims that mail-in voting would lead to voter "fraud like you've never seen"<sup>244</sup> and that the election was rigged. After the election was over and the results in, Attorney General William Barr disputed Trump's allegations and said the Attorney General found no such

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Nicholas Riccardi, *Here's the Reality Behind Trump's Claims About Mail Voting*, AP NEWS (Sept. 30, 2020), <https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348ce3719d4bc7182146b582>.

evidence.<sup>245</sup> Or, as Barr put it, “[i]t was all bullshit.”<sup>246</sup> Yet Trump never conceded the election, much less stopped his claims that the election was rigged. This is a gap or shortcoming in formal governance. Beyond the century-old tradition of losing presidential candidates conceding to the victor, there is nothing to keep losing candidates from trying to undermine the election results and cast doubt on the legitimacy of the person elected. As Noah Feldman explains, concessions are important to maintaining the legitimacy of democracy and renouncing “open resistance” to the election results.<sup>247</sup> If a candidate can just claim the election was “rigged” and have his supporters believe it, then the overall faith in democracy is likely diminished.

The informal election group used multiple tactics to try to instill respect in the election results. During and after the counting of votes, the group undertook several initiatives. (1) “They executed national public-awareness campaigns that helped Americans understand how the vote count would unfold over days or weeks, preventing Trump’s conspiracy theories and false claims of victory from getting more traction.”<sup>248</sup> For example, the group explained how the “blue shift” from counting mail-in ballots would likely shift the vote count toward Democrats.<sup>249</sup> On Election Day, U.S. Chamber of Commerce CEO Thomas J. Donohue, National Association of Evangelicals President Walter Kim, AFL-CIO President Richard L. Trumka and National African American Clergy Network Co-Convener Dr. Barbara Williams-Skinner issued a rare joint statement to instill respect for the process.<sup>250</sup> The nonprofit Issue One and its bipartisan National Council on Election Integrity, composed of twenty-two Republicans and twenty-two Democrats, “launched the ‘Count Every Vote’ campaign, a \$15 million public effort to defend the legitimacy of our elections, call for patience from the American electorate while every vote is counted, and advocate for state and local election officials to have more

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245. See Jemima McEvoy, *Bill Barr Says He Suspected Trump’s Election Fraud Claims Were ‘Bullsh-t’ from the Start*, FORBES (June 27, 2021, 10:16 AM), <https://www.forbes.com/sites/jemimamcevoy/2021/06/27/bill-barr-says-he-suspected-trumps-election-fraud-claims-were-bullsh-t-from-the-start/?sh=1260543f46eb>.

246. See Jonathan D. Karl, *Inside William Barr’s Breakup With Trump*, THE ATLANTIC (June 27, 2021), <https://www.theatlantic.com/politics/archive/2021/06/william-barrs-trump-administration-attorney-general/619298/>.

247. See Noah Feldman, Opinion, *Why Losing Candidates Should Concede*, BLOOMBERG (Oct. 21, 2016, 11:34 AM), <https://www.bloomberg.com/opinion/articles/2016-10-21/why-losing-candidates-should-concede>.

248. See Ball, *supra* note 15.

249. *Id.*

250. See AFL-CIO *supra* note 17.

support to hold safe and secure pandemic elections.”<sup>251</sup> Likewise, “[t]he Voting Rights Lab and IntoAction created state-specific memes and graphics, spread by email, text, Twitter, Facebook, Instagram and TikTok, urging that every vote be counted.”<sup>252</sup> (2) As the votes were being certified in the key battleground state of Michigan, activists mobilized in person at the state canvassing board and on social media to emphasize “their message of respecting voters’ wishes and affirming democracy rather than scolding the officials.”<sup>253</sup> (3) “Hundreds of major business leaders, many of whom had backed Trump’s candidacy and supported his policies, called on him to concede.”<sup>254</sup> (4) On January 6, 2020, the group advised everyone to stand down and not attempt to respond to the violent Trump supporters who stormed the Capitol.<sup>255</sup>

How successful the informal election group was in instilling respect for the election results is debatable. Trump never conceded but continued to call the election “rigged” even as late as April 2022,<sup>256</sup> more than a year after Biden was inaugurated President on January 20, 2021. Some Trump supporters, including Sen. Josh Hawley who challenged the certification of votes for Biden in the Senate on January 6, admitted that Biden is the “duly-elected President.”<sup>257</sup> However, according to an April 2021 poll, “60% of Republicans . . . believe Trump’s claims that Biden’s win was due to widespread voter fraud despite a lack of credible evidence.”<sup>258</sup> Then again, perhaps without the informal election group’s efforts to promote election integrity, the number of people who believe the election was somehow rigged would be even higher.

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251. See *Protecting Elections: Our Work for Safe, Secure, and Transparent Elections*, ISSUE ONE, <https://www.issueone.org/election-integrity/> (last visited July 20, 2021).

252. See Ball, *supra* note 15.

253. *Id.*

254. *Id.*

255. *Id.*

256. See Dave Boucher *et al.*, *Trump Hammers at False Claims of Voter Fraud in Return to Michigan*, DETROIT FREE PRESS (Apr. 2, 2022, 11:25 PM), <https://www.freep.com/story/news/politics/2022/04/03/donald-trump-holds-rally-macomb-county/7208593001/>; see also Eleanor Dearman, *Trump Repeats Call for a Border Wall, Says Election ‘Rigged’ at CPAC Speech in Dallas*, FORT WORTH STAR-TELEGRAM (July 11, 2021, 9:36 PM), <https://www.star-telegram.com/news/politics-government/article252714878.html>.

257. See Steph Bazzle, *WATCH: Josh Hawley Forced to Admit on the Record “Joe Biden is the Legitimately-Elected POTUS,”* HILL REP. (July 16, 2021), <https://hillreporter.com/watch-josh-hawley-forced-to-admit-on-the-record-joe-biden-is-the-legitimately-elected-potus-107016>.

258. See Alison Durkee, *More Than Half Of Republicans Believe Voter Fraud Claims And Most Still Support Trump, Poll Finds*, FORBES (Apr. 5, 2021, 9:59 AM), <https://www.forbes.com/sites/alisondurkee/2021/04/05/more-than-half-of-republicans-believe-voter-fraud-claims-and-most-still-support-trump-poll-finds/?sh=39f40ccf1b3f>.

### *3. Advantages of informal governance*

These two case studies suggest several potential advantages of informal governance. First, in times of national crisis or emergency, informal governance may be more responsive to the particular problem the country faces. Precisely because of its lack of formality or predefined contours, informal governance is nimbler and more innovative in tackling or responding to the problems at hand. In other words, the informal governance can be designed or adapted to fit the specific needs presented by a pressing problem. The right people can be enlisted in an evolving network to address the problem. The network can enable collaboration, cross-fertilization across different disciplines and areas of expertise, and creative, “outside the box” thinking. Informal governance may also be better suited to addressing a gap or shortcoming of formal governance, whether due to the complete absence of any formal governance to address the problem (e.g., respecting the ultimate election results) or due to the abdication or failures of formal governance (e.g., the Trump administration’s and CDC’s abdication of pandemic responses to the states). Finally, informal governance may foster nonpartisanship or bipartisanship among those involved, not only because it operates outside of existing bureaucracies and entrenched partisanship, but also because the success of the informal governance may depend on putting aside purely partisan interest. The Wolverines based their recommendations on medical science and what they believed to be the best way to fight the spread of the coronavirus. Even if social interventions were politically controversial, the Wolverines weren’t making their recommendations based on politics. The informal election group enlisted both Republicans and Democrats to join the effort to promote respect for the election results in a democracy. Critics may disagree with their approaches and methods, but their respective goals of trying to save lives in a pandemic and to protect election integrity against efforts to undermine the final result should be unassailable.

## II. A THEORY OF INFORMAL GOVERNANCE AS SELF-GOVERNANCE

This Part addresses the legitimacy question for informal governance and sets forth a theory to explain informal governance as expanding opportunities for self-governance.

*A. The Legitimacy Question for Informal Governance*

Can informal governance be legitimate in the United States, with so much primacy given to a written constitution and the rule of (written) law? More generally, “[c]an informal governance ever be legitimate?”<sup>259</sup> At first blush, the answer seems to be no. As Mareike Kleine aptly put it:

An intuitive answer to this question is probably no. The term informality reminds one of smoke-filled backrooms, mobsters, and illicit business. It holds an aura of the covert, exclusive, if not illegal, all of which is difficult to square with the ideal of a democratic process that is inclusive, deliberative, and transparent. Informality, it seems, is the symptom of a pathological political order whose legitimacy is eroding.<sup>260</sup>

However, this conventional wisdom masks indiscriminate uses of the term “informal governance.”<sup>261</sup> Scholars have attempted to show that, at least in some circumstances, informal governance can be legitimate. Kleine offers three scenarios in which informal governance may be legitimate: (1) when it enhances the participation of citizens with a deep interest in the issue who otherwise would have been ignored (i.e., input legitimacy), (2) when it enables politicians to be persuaded by better arguments (i.e., throughput legitimacy), and (3) when it allows governments “to achieve a level of cooperation that would otherwise be unsustainable” (i.e., output legitimacy).<sup>262</sup>

But, as Kleine notes, informal governance is always susceptible to “manipulation and abuse.”<sup>263</sup> Informal governance is fraught with the potential to become anti-democratic because “informal processes avoid accountability requirements—they are not officially coded, making it difficult to provide assurances of transparency, accountability, and legitimacy.”<sup>264</sup> Yet scholars also recognize that informal governance can promote “creativity and innovation” in policymaking, at least in the short term,<sup>265</sup> and “might . . . be employed as a tool to complement formal institutional arrangements and rules—essentially ‘greasing the wheels’ of

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259. Mareike Kleine, *Informal Governance and Legitimacy in EU Politics*, EUROPEAN U. INST. 1, 2 (2018), [https://cadmus.eui.eu/bitstream/handle/1814/56645/KLEINE\\_IG\\_and\\_legitimacy.pdf?sequence=2&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/56645/KLEINE_IG_and_legitimacy.pdf?sequence=2&isAllowed=y).

260. *Id.*

261. *Id.*

262. *Id.* at 13.

263. *Id.*

264. *See* Ayres, *supra* note 38, at 27.

265. *Id.*

the formal bureaucracy.”<sup>266</sup> Therefore, it is important to institute “additional mechanisms” to “help all governments distinguish between legitimate and nonlegitimate demands for a more accommodating treatment of each other.”<sup>267</sup>

Much of the literature on informal governance focuses on practices in the EU. Perhaps this focus should not be surprising given the EU’s more recent creation in 1993 and continued evolution. The EU is a unique political system involving twenty-seven member states.<sup>268</sup> It is open to question whether the same justifications would necessarily apply in the United States, which may give greater primacy to a written constitution and formal governance.

### *B. Informal Governance and Self-Governance*

This section makes the case for why some forms of informal governance should be considered legitimate forms of self-governance.

#### *1. Historical practice of informal governance of the United States*

The starting point is the first example of informal governance of the United States. President George Washington routinely relied on informal advisers, including John Jay as well as government officials he consulted by letters not “officially” but in an “informal manner.”<sup>269</sup> Even more, Washington’s establishment and utilization of the first Cabinet can itself be viewed as a form of informal governance, perhaps the first example for the newly formed United States. Washington appointed four department heads: Secretary of State Thomas Jefferson, Secretary of Treasury Alexander Hamilton, Secretary of War Henry Knox, and Attorney General Edmund Randolph.<sup>270</sup> The Constitution does not speak to, much less, create a Cabinet.<sup>271</sup> All that Article II says is that the President “may require the Opinion, *in writing*, of the principal Officer in each of the executive Departments, *upon any Subject relating to the duties of their*

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266. *Id.*

267. Kleine, *supra* note 259, at 13.

268. See generally Introduction: *The EU – A Political System, but not a State*, CARLETON, <https://carleton.ca/ces/elearning/politics/introduction-the-eu-a-political-system-but-not-a-state/> (last visited Mar. 27, 2022).

269. See E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 190–91, 222–23 (2018).

270. LINDSAY CHERVINSKY, *THE CABINET: GEORGE WASHINGTON AND THE CREATION OF AN AMERICAN INSTITUTION*, 5 (2020).

271. *Id.*

*respective Offices.*”<sup>272</sup> Read as a limitation or as a part of an exclusive list of enumerated powers, the clause might suggest that the President is *limited* to written advice of the department heads and can consult them on matters only relating to “the Duties of their respective Offices.”<sup>273</sup>

Washington, however, found this power far too limited. Instead of merely soliciting writings, halfway into his presidency, he convened meetings with his department heads as a Cabinet and consulted with them on matters beyond the duties of their respective offices, as historian Lindsay Chervinsky documents in her recent book *The Cabinet*.<sup>274</sup> These first Cabinet meetings were not expressly authorized by the Constitution or any federal law.<sup>275</sup> Washington established the practice and what became a presidential institution known as the Cabinet. He “embraced frequent cabinet meetings as a central part of executive practice.”<sup>276</sup>

*a. The magnitude of the problem*

As we have already seen with the two case studies, informal governance arose due to a shortcoming of formal governance in responding to national problems. Notably, Washington formed a Cabinet in response to several national crises. In the first two years of presidency, Washington did not have a Cabinet. But, when possible war with France and Great Britain and a domestic insurrection arose, Washington extensively relied on his Cabinet.<sup>277</sup> As Chervinsky recounts:

So where did the cabinet come from? Washington designed the cabinet to provide advice and support during crucial diplomatic crises and constitutional conundrums. He did not enter the presidency intending to create the cabinet, and he explored many alternatives before establishing this new institution. In fact, Washington did not convene the first cabinet meeting until November 26, 1791—more than two and a half years into his administration. Yet as he grappled with the threat of international invasion, domestic insurrection [the Whiskey Rebellion], and challenges to presidential authority, Washington became convinced that the options outlined in the Constitution were insufficient to get the

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272. U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

273. See CHERVINSKY, *supra* note 270, at 4–6.

274. *Id.* at 4.

275. *Id.* at 4–5.

276. *Id.* at 192.

277. *Id.* at 5.

job done. The first cabinet developed organically in response to these governing challenges.<sup>278</sup>

*b. The failure or shortcoming of formal governance*

This early historical example of informal governance of the United States supports the modern theory that informal governance arises in the face of intractable problems that defy easy solution by formal governance. Of course, Washington could have tried to resolve all the national crises on his own without the formation of a Cabinet. But he did not. When the national crises mounted in the latter half of his presidency, he relied on the informal advisory group, now known as the Cabinet, even more. The formal law—stated in Article II of the U.S. Constitution—had a gap or shortcoming that Washington addressed on his own initiative and ingenuity. Perhaps, in hindsight, Washington’s establishment of the Cabinet as an informal advisory group seems banal, but, as Chervinsky’s book shows, the Cabinet was not the only option Washington had contemplated; for example, Washington considered, but ultimately rejected consultations with the Senate or Supreme Court.<sup>279</sup> Moreover, in the beginning of his presidency, Washington stuck with the *written* consultations with the department heads set forth in Article II of the Constitution.<sup>280</sup> But Washington ultimately found the formal governance envisioned by the Constitution insufficient, especially in responding to national crises.

*c. Constitutionality of informal governance by presidents*

The general practice of the President relying on informal advisers, although not mentioned in the Constitution, is constitutional. The Appointments Clause regulates the appointment of “Officers of the United States” and “inferior Officers.”<sup>281</sup> But it does not bar or preempt the use of informal advisers in the federal government.<sup>282</sup> As the D.C. Circuit explained:

[T]he President[] [has the] capacity to solicit direct advice on *any* subject related to his duties from a group of private citizens, separate from or

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278. *See id.* at 5.

279. *Id.* at 164, 166–69.

280. U.S. CONST. art. II, § 2, cl. 2.

281. *Id.*

282. *See Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908–09 (D.C. Cir. 1993).

together with his closest governmental associates. That advice might be sought on a broad range of issues in an informal or formal fashion. Presidents have created advisory groups composed of private citizens (sometimes in conjunction with government officials) to meet periodically and advise them (hence the phrase “kitchen cabinets”) on matters such as the conduct of a war. Presidents have even created formal “cabinet committees” composed in part of private citizens.<sup>283</sup>

With the passage of the Federal Advisory Committee Act (“FACA”) in 1972, Congress has regulated how advisory committees with at least one member who is not a federal employee operate.<sup>284</sup> But there is nothing in the Constitution that prohibits an informal advisor or ordinary citizen providing assistance or input to the President or any other federal officer. From the citizen’s perspective, such participation in government is a valid exercise of self-governance, as discussed further below.

## 2. *The Tenth Amendment’s reservation of power to the people*

Outside of presidents relying on informal governance, a harder question is whether informal governance by ordinary citizens or government employees can be justified as a constitutional practice. The President arguably has inherent power under Article II to rely on informal governance not specifically set forth in the Constitution or federal laws.<sup>285</sup> So, under the President’s inherent powers, Washington’s creation of a Cabinet or reliance on informal governance does not violate the Constitution. But what about ordinary citizens or government employees? Can informal governance by citizens and government employees who are not acting upon the President’s instruction be justified under the Constitution? For example, neither the Wolverines nor the informal election group were acting at the behest of President Trump. Can their conduct and participation in informal governance be viewed as legitimate under the Constitution?

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283. *Id.* at 908.

284. See *Federal Advisory Committee Management*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/execsec/faca> (last visited Mar. 27, 2022).

285. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”).

One theory in favor of the constitutionality of such practices derives from the concept of self-governance. The U.S. Constitution is hailed as the embodiment of self-governance.<sup>286</sup> As the Framers declared in the preamble,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>287</sup>

The Constitution established a republican form of government in which citizens would decide their representatives and senators in Congress, which the Constitution entrusts with enumerated, but limited, powers.<sup>288</sup> As the Supreme Court has explained,

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which ‘The people, not the government, possess the absolute sovereignty.’ The structure of the government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels. This form of government was ‘altogether different’ from the British form, under which the Crown was sovereign and the people were subjects.<sup>289</sup>

The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>290</sup> The Tenth Amendment further states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>291</sup>

It is not obvious under the Constitution what rights and powers are reserved to the people. The Supreme Court has not clarified the issue, largely ignoring “the people” and focusing instead on powers reserved to the states in its Tenth Amendment jurisprudence.<sup>292</sup> In dissents or

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286. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (“Conventional wisdom acknowledges that the original Constitution proposed by the Philadelphia convention focused primarily on issues of organizational structure and democratic self-governance . . .”).

287. U.S. CONST. pmbl.

288. See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 750–51 (1994).

289. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964).

290. U.S. CONST. amend. IX.

291. U.S. CONST. amend. X.

292. See Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1937 (2003).

concurrences, Justice Thomas has provided his interpretation of the Tenth Amendment's reservation of power to either the states or the people:

In each State, the remainder of the people's powers—"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States," Amdt. 10—are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government.<sup>293</sup>

Although Justice Gorsuch appears to agree with Justice Thomas's interpretation, the Court has yet to squarely decide the meaning of "the people" in the Tenth Amendment. The Ninth Amendment has fared even worse, soliciting the Court's avoidance.<sup>294</sup> (The Supreme Court has also interpreted the First Amendment's right of the people "to petition the Government for a redress of grievances" into a mere formality.<sup>295</sup>) Akhil Amar contends that the references to "the people" in the preamble, and Ninth and Tenth Amendments, as well as Article IV's indirect reference to the people, embody "first principles of popular sovereignty and self-rule by the people."<sup>296</sup> These clauses are "embodiments of the Constitution's unitary structure and overarching spirit of popular sovereignty—of the people's right to 'ordain' and 'establish,' and their 'reserved' and 'retained' rights to alter or abolish, their Constitution" by a majority vote.<sup>297</sup> Amar's focus is on the people's right to change the Constitution.

My theory is that the references to "the people" in the Constitution—including the Tenth Amendment's reservation of "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, ... to the States respectively, or to the people"<sup>298</sup>—should be interpreted to recognize the ability of ordinary citizens *to participate in*

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293. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 847 (1995) (Thomas, J., dissenting); see *Chiafalo v. Washington*, 140 S. Ct. 2316, 2333 (2020) (Thomas, J., concurring) ("When the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment.")

294. See Samuel J. Levine, *Of Inkblots and Omnisignificance: Conceptualizing Secondary and Symbolic Functions of the Ninth Amendment*, in *A Comparative Hermeneutic Framework*, 2009 MICH. ST. L. REV. 277, 280 (2009).

295. See John Inazu & Burt Neuborne, *Right to Assemble and Petition*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267> (last visited Mar. 27, 2022).

296. U.S. CONST. amend. I; Amar, *supra* note 288, at 760.

297. Amar, *supra* note 288, at 760. *But see* Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty and Supermajority Rules*, 2 U. PA. J. CONST. L. 609 (2000) (disputing the accuracy of Amar's history and criticizing his theory).

298. See Sullivan, *supra* note 292, at 1941.

*governance*, without being elected, in areas not preempted by the Constitution. In other words, a power reserved to the people under the Tenth Amendment is the basic ability to engage in self-governance or to participate in governance on matters not preempted by the Constitution, whether at the national, state, or local level. Indeed, the power to engage in self-governance might be characterized as the primordial power of the people or the precondition that gave rise to the Constitution itself. Without that basic power, the whole project of drafting and ratifying a new constitution would be null and void. By ratifying the Constitution, the people ceded limited powers to the federal government as enumerated in the Constitution. But, as the Tenth Amendment recognizes, the people did not thereby cede all of their powers to engage in self-governance. They continue to hold the power to amend the Constitution, for example, as Amar points out. And they continue to hold the power to participate in governance in areas not preempted by the Constitution.

For example, Article II recognizes that the President shall give to Congress the State of the Union and “recommend to their Consideration such Measures as he shall judge necessary and expedient.”<sup>299</sup> This responsibility requires the President to give the State of the Union, but it does not preempt a citizen’s ability to deliver speeches, including before Congress, describing the injustices or failings of the country and calling for an amendment to the Constitution to recognize women’s right to vote.<sup>300</sup> By contrast, the President is the Commander in Chief.<sup>301</sup> A military officer (or a citizen) could not give the military an order that went against an order by the President. That is an exclusive power the President holds as Commander in Chief under the Constitution. Any order contrary to the President’s order would be preempted. Since states have no power to regulate at the national level, the Tenth Amendment protects citizens’ ability to participate in matters of national governance that are not preempted by federal law. This power of the people extends to participating in informal governance of the United States—situations lacking written rules or formal positions.

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299. U.S. CONST. art. II, § 3.

300. See, e.g., *Susan B. Anthony calls for Women’s Suffrage*, DIGITAL HISTORY (1884), [https://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=1064](https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1064); *Address of Susan B. Anthony (1872)*, <http://law2.umkc.edu/faculty/projects/frivals/anthony/anthonyaddress.html>.

301. U.S. CONST. art. II, § 2, cl. 1.

3. *Revisiting informal governance by the Wolverines and informal election group*

If we apply this constitutional theory to the two case studies, both examples of informal governance can be justified as self-governance. First, the Wolverines involved a mix of federal employees, a state employee, and members from the private sector, academia, and nonprofits. The informal group can be described as an advisory group that provided guidance to other members of the federal government and the state of California. Although they were not established by President Trump, their original formation traces back to President Bush's Administration. Members of the Trump administration reportedly sat in on some of the Wolverines' phone meetings. Under my interpretation of the Tenth Amendment, this kind of informal advisory group is a valid exercise of self-governance. Although the CDC has statutory authority to deal with infectious diseases and protect America from public health threats, neither the CDC nor the federal government has exclusive authority in this area.<sup>302</sup> Importantly, the states have broad authority to handle public health threats within their borders.<sup>303</sup> Moreover, even within the federal government, multiple actors are involved in addressing public health concerns (e.g., NIH, Surgeon General, DHHS, Homeland Security). If the Wolverines had been a nonprofit organization, there would be nothing constitutionally suspect about their development of a strategy for social interventions during a pandemic.<sup>304</sup> The fact that some of the members of the informal group were federal employees does not alter the analysis. The group's recommended strategy of social interventions did not contradict the CDC guidance or any order of the President.

Likewise, the informal election group contributed funding for election administration in the states, tool kits for enabling voting during the pandemic, public service announcements, and other measures to protect the integrity of the election and the result. The Constitution does not preclude citizens from getting involved in this electoral process. Indeed, participation in helping to secure the integrity of an election arguably is one of the most important contributions citizens can make. Moreover,

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302. See Katy M. Jobe, Comment, *The Constitutionality of Quarantine and Isolation Orders in an Ebola Epidemic and Beyond*, 51 WAKE FOREST L. REV. 165, 179 (2016); James J. Misrahi, *The CDC's Communicable Disease Regulations: Striking the Balance Between Public Health & Individual Rights*, 67 EMORY L.J. 463, 466 (2018).

303. See Jobe, *supra* note 302, at 174–76.

304. I put aside the question whether the Wolverines fall within FACA and should have been subject to its statutory requirements.

because the Constitution leaves unregulated the practice of whether a losing candidate concedes, the efforts of the informal election group to convince the losing candidate to follow the tradition of giving a concession filled a gap left open by the Constitution and federal law. The group's provision of additional funding for election administration and safety precautions during the pandemic can also be viewed as filling the gaps created by the balkanized system of voting among the states that is created by the Constitution.

### III. POTENTIAL ABUSES AND CONCERNS WITH INFORMAL GOVERNANCE

Even if participation in informal governance is a reserved power of the people under the Tenth Amendment or otherwise constitutionally permissible, informal governance, like formal governance, is not immune from corruption or abuses. Part III describes several potential abuses that informal governance may enable.

#### *A. Rogue Operations, Corruption, and a Shadow Government*

The worst-case scenario is that informal governance involves corruption or even illegality. Fears of backdoor deals, black bag or rogue operations, and a shadow government lurk in the background of informal governance. The Basel Institute on Governance, University College London, and SOAS studied how corruption occurred in seven developing countries in East Africa and Eurasia, where the written laws were routinely ignored in favor of “mostly unwritten and rarely openly articulated” practices involving corruption.<sup>305</sup> As the Basel Institute concluded: “The research uncovered the centrality of informal social networks that operate at all levels, linking up political elites, business interests and ordinary citizens. The practices of the networks are associated with the prevalence of high levels of corruption but are also useful to ‘get things done’ and as a result become entrenched.”<sup>306</sup> Informal governance can operate as a dual-edged sword—as an innovative way to address intractable problems that

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305. *See Informal Governance*, BASEL INST. ON GOVERNANCE, <https://baselgovernance.org/public-governance/research-projects/informal-governance> (last visited Mar. 27, 2022).

306. *About informal governance*, BASEL INSTITUTE OF GOVERNANCE, <https://baselgovernance.org/public-governance/research-projects/informal-governance/about-informal-governance> (last visited Mar. 27, 2022).

escape solutions by traditional governments, but also as device for corruption or skirting the law without public scrutiny.<sup>307</sup>

Whether corruption through informal governance is diminished in an advanced country like the United States, with its long tradition of written laws and the rule of law, is hard to determine. History suggests not. The Central Intelligence Agency (CIA) and National Security Agency (NSA) are notorious for carrying out “black bag” and clandestine operations, including the massive surveillance program (PRISM) disclosed by Edward Snowden that captured the emails and metadata of U.S. citizens.<sup>308</sup> The PRISM surveillance program was clandestine and carried out via Facebook, Google, Microsoft, Yahoo!, AOL, Skype, and Apple,<sup>309</sup> unbeknownst to their users, but it had been approved by the secret Foreign Intelligence Surveillance Court under an expansive reading of the FISA Amendments Act.<sup>310</sup> Therefore, technically speaking, PRISM was not informal governance because the government had putative legal authority to conduct its clandestine operation under written law. After Snowden’s disclosure of PRISM, the NSA reportedly ceased the program,<sup>311</sup> and Congress amended FISA to prohibit bulk collection of phone metadata after Nov. 28, 2025.<sup>312</sup> In 2020, the Ninth Circuit ruled that PRISM’s collection of telephone metadata of U.S. citizens violated FISA and may have also violated the Fourth Amendment.<sup>313</sup> Notwithstanding the Ninth Circuit’s decision in 2020, I would still classify the NSA’s PRISM program as formal governance since it was instituted under the putative authority of a statute and had the approval of the FISA Court. Had there been no plausible statutory basis for PRISM and no court approval, the operation

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307. See Ayres, *supra* note 30, at 90 (“On the one hand, informal governance can assist in solving political and policy problems which cannot easily be solved by traditional government institutions, leading to more effective and innovative decision-making. On the other, it may weaken transparency, accountability and legitimacy by undermining traditional (more formal) administrative structures.”) (citation omitted).

308. See Juli Weiner, *Edward Snowden Shares \$52.6 Billion Intelligence “Black Budget” with the Washington Post*, VANITY FAIR (Aug. 29, 2013), <https://www.vanityfair.com/news/2013/08/edward-snowden-shares-52-6-billion-intelligence-black-budget-with-the-washington-post>.

309. See Dan Seifert, *Secret Program Gives NSA, FBI Backdoor Access to Apple, Google, Facebook, Microsoft Data*, THE VERGE (June 6, 2013, 6:04 PM), <https://www.theverge.com/2013/6/6/4403868/nsa-fbi-mine-data-apple-google-facebook-microsoft-others-prism>.

310. See *Are They Allowed to Do That? A Breakdown of Selected Government Surveillance Programs*, BRENNAN CTR. FOR JUST. (July 15, 2013), <https://www.brennancenter.org/sites/default/files/analysis/Government%20Surveillance%20Factsheet.pdf>.

311. See Charlie Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/us/politics/nsa-phone-records-program-shut-down.html>.

312. USA Freedom Act, Pub. L. No. 114-23, 129 Stat. 268 (codified at 50 U.S.C. § 1861).

313. See *United States v. Moalin*, 973 F.3d 977, 992–93, 996 (9th Cir. 2020).

could be considered informal governance (not to mention a rogue operation).

A clearer example of informal governance that led to corruption was the Iran-Contra affair during the Reagan Administration: National Security Adviser Robert McFarlane and other officials concocted a scheme to sell arms to Iran in an effort to get the return of seven American hostages held by Iranian terrorists in Lebanon.<sup>314</sup> In contravention of U.S. law, Lieutenant Colonel Oliver North of the National Security Council diverted \$18 million of the funds from the arms sale to Iran to provide support to the Contras, who were fighting the Cuban-backed Sandinistas in Nicaragua.<sup>315</sup> After the illegal operation became known, Congress investigated the operation and concluded that several federal laws were violated, including the Constitution: “That operation, known as ‘The Enterprise,’ was contrary to the Constitution and ‘the decision to use the Enterprise to fight a war with unappropriated funds was a decision to combine the power of the purse and the power of the sword in one branch of government.’”<sup>316</sup>

More recently, in July 2021, a Senate investigation found that the Commerce Department’s Investigations and Threat Management Service (ITMS) had operated as “a rogue, unaccountable police force” outside of its statutory authority, targeting Asian-American employees.<sup>317</sup> The Senate report described what can be classified as an informal governance arrangement, with the lack of written policies or procedures by which ITMS operated:

For nearly sixteen years, abuse of the Special Deputation program involved engagement in a variety of criminal and counterintelligence investigations, including ancillary activities like permitting agents to carry firearms, monitor electronic and wire communications, and conduct warrantless searches of office space and personal lockers on Department grounds. The unit even maintained a database to store information on foreign nationals and U.S. citizens.

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314. See *The Iran-Contra Affair*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reagan-iran/> (last visited Aug. 4, 2021).

315. *Id.*

316. See Judi Hasson, *Iran-Contra Report: At Least Four Laws Broken*, UPI (Nov. 18, 1987), <https://www.upi.com/Archives/1987/11/18/Iran-Contra-report-at-least-four-laws-broken/9088564210000/>

317. U.S. SENATE COMM. ON COM. SCI. & TRANSP., COMMITTEE INVESTIGATION REPORT: ABUSE AND MISCONDUCT AT THE COMMERCE DEPARTMENT, 4 (July 2021) [hereinafter REPORT ON MISCONDUCT].

In addition, the unit lacked internal policies defining the scope of its investigative authorities for most of its existence, which allowed it to become what whistleblowers described as a “gestapo.”<sup>318</sup>

The lack of internal policies and procedures, along with the lack of recordkeeping of its investigations, led to many abuses over sixteen years.<sup>319</sup> As the Senate report concluded: “For sixteen years, the Investigations and Threat Management Service operated within the Department of Commerce without proper authority or meaningful oversight. The unit regularly disregarded the rule of law, committing gross abuses of power and misusing taxpayer funds to perform missions the unit lacked authorization to undertake.”<sup>320</sup> Although the same abuses could have occurred even if the unit had written policies or rules in place, the absence of such policies may have made it easier for members to do whatever they wanted—to go rogue.

### *B. Other Concerns*

Even when informal governance does not break the law or involve outright corruption, it can raise problems for democracy. The two most salient problems are the lack of transparency and lack of accountability, as discussed below. It is difficult for people to know even when informal governance is occurring, much less what it entails. For example, without the Lewis book and *Time Magazine* article, it seems doubtful the public would have had any information about the work of the Wolverines and the informal election group. One might suspect that many other instances of informal governance occur in the United States without public knowledge or scrutiny.

#### *1. Lack of transparency*

When informal governance operates completely in secret, it runs counter to an open democracy. For self-governance to work, citizens need to know what the government is doing to evaluate the policies and conduct of their officials. As Madison famously wrote: “A popular government, without popular information, or the means of requiring it, is but Prologue

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318. *Id.* at 7.

319. *Id.* See also Catie Edmondson, ‘Rogue’ U.S. Agency Used Racial Profiling to Investigate Commerce Dept. Employees, *Report Says*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/us/politics/commerce-department-senate-report.html>.

320. REPORT ON MISCONDUCT, *supra* note 317, at 36.

to a Farce or a Tragedy, or, perhaps, both.”<sup>321</sup> Of course, the inner workings of the White House, administrative agencies, and congressional offices are not generally open to the public (although the President and agencies are subject to public records laws). So it is facile to think that the public is entitled to access or know everything involving governance that happens behind closed doors. Indeed, Madison and the Framers drafted the Constitution in secret proceedings.<sup>322</sup>

## 2. *Lack of accountability*

Related to the lack of transparency is the problem of lack of accountability. Informal governance may involve interactions in which the authority for the conduct undertaken is ambiguous. Moreover, the loose networks and lack of formal oversight in informal governance situations may make it hard to identify who (if anyone) is responsible for what. Instead of a formal governance structure, such as an administrative agency with an official head, an informal group or network diffuses or deflects accountability.

## C. *Evaluation of Two Case Studies*

If we scrutinize the informal groups discussed in the two case studies, some of the above concerns seem relevant.

It does not appear that either group was involved in any corruption. The Wolverines advanced a novel view of what they believed was the right public health strategy involving social interventions to fight the pandemic based on the prior, published research of Mecher and Hatchett.<sup>323</sup> The Wolverines presented their views to the CDC, members of the Trump Administration and other federal agencies, and Governor Newsom, but the Wolverines were not responsible for making the decisions of the CDC, Trump Administration, or state of California. Although some Republicans and Trump supporters still disagree with the use of social interventions, the disagreement over policy is not evidence of corruption. Likewise, the informal election group helped to secure private donations for election

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321. Letter from James Madison to W.T. Barry, in 9 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 1819–1836, 103 (Gaillard Hunt ed., 1910).

322. See *Transparency, within reason*, THE HERITAGE FOUND. (MAR. 14, 2005), <https://www.heritage.org/government-regulation/commentary/transparency-within-reason>.

323. See *supra* note 105 and accompanying text.

administration during the pandemic and organized public service announcements and public responses from various groups that were meant to preserve the integrity of the elections and respect for the election results.

A tougher question is whether the Wolverines should be classified as an advisory committee under the Federal Advisory Committee Act (FACA) and, therefore, have been subject to the “administrative guidelines and management controls for advisory committees established by [the relevant] agency,” here, presumably DHHS or the CDC.<sup>324</sup> Based on my reading of the Lewis account, the Wolverines were not officially treated as such, although I cannot rule out the possibility they were. FACA defines “advisory committee” broadly:

The term “advisory committee” means any committee, board, commission, council, conference, panel, task force, or *other similar group*, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as “committee”), which is—

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) *established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and*
- (D) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.<sup>325</sup>

Since Trump didn’t establish the Wolverines, it cannot be considered a Presidential advisory committee. Instead, the question is whether the group was an agency advisory committee for DHHS, CDC, or Homeland Security. Arguably, the Wolverines were at least “utilized by one or more agencies” for the group’s recommendations on social interventions. The group evolved on its own from prior relationships starting with work in the Bush White House, so it would be harder to say it was “established” by a federal agency. Because several members were not federal employees at the time, the Wolverines do not fall within the exception for “any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.”

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324. 5a U.S.C. § 8(a).

325. Federal Advisory Committee Act, 5a U.S.C. § 3(2) (2012) (emphasis added).

At least from the *Time* article, the informal election group did not provide recommendations to a federal agency. Instead, the group provided guidance to secretaries of state and local election officials, who are not regulated by FACA.<sup>326</sup>

Nonetheless, for both the Wolverines and the informal election group, it is worth asking whether there should have been greater transparency of the groups *contemporaneous* to the activities they engaged in. People may have differing views in answering that question. The Wolverines chose to work largely behind the scenes to convince the actual decisionmakers of the best strategy to stop the spread of COVID. They predicted, in early January 2020, how quickly the virus would spread, including through asymptomatic infection.<sup>327</sup> It is impossible to know if the outcome would have been significantly different or better for the United States if members of the group attempted to speak publicly about their views in January 2020. But, for the federal employees in the group, they would not likely have been authorized to make such public statements. The efforts of the informal election group were often public and are, in any event, less problematic because, unlike the situation with the CDC and President's coronavirus task force, there was no agency tasked with trying to convince candidates or the public to respect the election results.

#### IV. MEASURES TO MAKE INFORMAL GOVERNANCE MORE ACCOUNTABLE

Part IV proposes some measures to make informal governance more accountable. Short of converting informal governance into formal governance structures, subject to written rules and procedures, the challenge is to figure out ways that foster the benefits of informal governance—innovation and problem-solving—while adding safeguards to reduce the risk of corruption.

##### *A. Ethics, Nonpartisanship, and the Common Good*

The starting point for reducing corruption lies in the ethics of the people involved, a basic ingredient for both formal and informal governance. In today's highly polarized climate, perhaps relying on ethics sounds Pollyannish. But there is simply no way around the need for ethics among those involved in governance situations. Any political system or

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326. See Ball, *supra* note 15.

327. See LEWIS, *supra* note 5, at 166–70.

structure, formal or informal, can be corrupted if the people involved are corrupt. As Madison wrote:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.<sup>328</sup>

The notion of pursuing “the common good of the society” might sound quaint, but political theorists have long recognized its importance to governance.<sup>329</sup> Of course, ethics are no guarantee to prevent abuses of informal government. Especially with complex problems that require immediate action, people may not have the luxury of time to figure out all the ethical and legal nuances of their work.

Likewise, the ability to act in a nonpartisan or at least bipartisan manner when considering the common good of society is an important trait. Indeed, it may be worthwhile for the group to discuss the importance of nonpartisanship and agree to abide by a principle of nonpartisanship in their work.<sup>330</sup> There may be some situations of governance where acting in a partisan manner may not be troubling, but, often, partisan politics may get in the way of acting for the common good. For example, just imagine the Wolverines were all Republicans, and they only worried about the health of Republicans, especially in red states. If Democrats were infected by the coronavirus, the group simply didn’t care—or, even worse, were fine with more Democrats getting infected and dying. Instead of basing its pandemic strategy on science, imagine the group let partisan politics shape its pandemic recommendations. This hypothetical example sounds horrific, but some press accounts have indicated the Trump White House may have done exactly that when COVID initially affected people in traditionally Democratic states more so than in Republican states in 2020.<sup>331</sup> By contrast, by Lewis’s account, the Wolverines did not act in a

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328. FEDERALIST PAPERS NO. 57 (1776) (Madison).

329. See, e.g., JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 79 (1862) (citizen is “called upon . . . to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good”); James T. Kloppenburg, *To Promote the General Welfare: Why Madison Matters*, 2019 SUP. CT. REV. 355, 357, 359 (2019) (discussing Rousseau’s theory of general will that informed Madison, Wilson, and framers of Constitution in their understanding of common good).

330. Cf. Lee, *supra* note 46, at 1024–28.

331. See Matt Stieb, *Trump’s Disregard for Blue States Is at the Heart of His Shoddy COVID Response*, NEW YORK (July 31, 2020), <https://nymag.com/intelligencer/2020/07/trumps-war-on-blue-states-is-worse-than-previously-thought.html>.

political or partisan manner. Instead, they were trying to develop a strategy for the good of the United States from a medical standpoint. All the original Wolverines had U.S. military or government service.<sup>332</sup> Beyond that experience, all were physicians subject to professional ethical responsibilities, including “special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.”<sup>333</sup> The individual’s personal ethics and character can provide an internal check against corruption.

*B. Channeling to Other Decisionmakers Who Are Democratically Accountable*

As Madison recognized, it is also important “to take the most effectual precautions for keeping [people] virtuous whilst they continue to hold their public trust.”<sup>334</sup> During the drafting of the Constitution, Madison was most concerned about the formal structures of the federal government. The same concern can be applied to informal governance. The challenge is figuring out safeguards that do not convert informal governance into formal governance at the risk of losing the benefits of innovation that informal governance may yield.

One safeguard is removing the ultimate decision-making power from informal governance. In other words, informal governance can develop and propose policies, and organize fundraising, but the ultimate decisions on whether to adopt such policies or how to use such funds should be left to officials who are a part of formal governance and who are subject to written rules or procedures. One might describe this arrangement as informal governance that ultimately filters or channels through formal governance. There is, in other words, a formal check on informal governance when the ultimate decision lies in the hands of officials who are democratically accountable, as was the case with the Cabinet to President Washington. Likewise, the Wolverines developed a recommended policy of social interventions to fight the coronavirus, but their recommendations had to be filtered through the CDC and the Trump Administration at the federal level and through Gov. Newsom’s Administration for the state of California. Similarly, the informal election group presented guidance on voting during the pandemic to secretaries of

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332. See *supra* note 8 and accompanying text.

333. *Medical Definition of Hippocratic Oath*, MEDICINENET, [https://www.medicinenet.com/hippocratic\\_oath/definition.htm](https://www.medicinenet.com/hippocratic_oath/definition.htm) (last visited Mar. 27, 2022).

334. FEDERALIST PAPERS NO. 57 (1776) (Madison).

state and local election officials. The election group's enlisting of nonprofit organizations for public service announcements had its own external check: federal law prohibiting tax exempt nonprofits from engaging in political campaigns.<sup>335</sup>

Eventually, the informal governance structure can be made formal, as with Obama's creation of the U.S. Digital Service.<sup>336</sup> But one fear in institutionalizing a practice that operated as informal governance in the past is losing the flexibility and innovativeness of informal governance.

### *C. Scrutiny: Internal Review, Outside Audits, and Transparency Reports*

Another check that may mitigate some of the concerns about the lack of transparency associated with informal governance is the inclusion of an opportunity for review of an informal group's work. The review could be an internal review (e.g., by a third-party in the same agency but not a part of the informal group), an outside audit (e.g., by an outside entity or experts in the relevant field),<sup>337</sup> or public disclosure of their work. Groups involved in informal governance can even publish their own transparency report detailing their work. Some of the nonprofit organizations involved in efforts organized by the informal election group have published summaries of their election work on their websites.<sup>338</sup> Just as in the case of agreeing to a principle of nonpartisanship, an informal group would be well-served by discussing what form of review it should adopt as a means of ensuring accountability of the group.

Notably, both the Wolverines and the informal election group publicly disclosed their work in interviews by the authors of the book and magazine article that detailed their work. Indeed, the *Time Magazine* article indicates that some members of the informal election group felt it was important that the American people know what the group did and realize that "[d]emocracy is not self-executing."<sup>339</sup> Likewise, when Lewis's book was published, key members of the Wolverines also sat down for interviews

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335. See 26 U.S.C. § 501(c)(3).

336. See *supra* text accompanying notes 43–45.

337. Cf. LAURA W. MURPHY, FACEBOOK'S CIVIL RIGHTS AUDIT – FINAL REPORT (July 8, 2020), <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>.

338. See, e.g., *supra* note 252 and accompanying text (Issue One's discussion of election efforts); *The Associated Press Election Transparency Project*, PROTECT DEMOCRACY, <https://protectdemocracy.org/project/the-associated-press-election-transparency-project/> (last visited Mar. 27, 2022).

339. Ball, *supra* note 15 (quoting Ian Bassin, co-founder of Protect Democracy).

with *60 Minutes*.<sup>340</sup> These publications have enabled others, myself included, to scrutinize the groups' work. Although any reviews are too late to change the past work of these groups, the reviews can provide invaluable guidance for future work of the groups and any others who engage in informal governance of the United States.

#### CONCLUSION

The United States is known for its Constitution and adherence to the rule of law. Typically, this arrangement is understood in a formalist way, which prizes written laws and clearly prescribed regulations and sources of authority. Yet the Constitution and federal laws do not explain the various ways in which people can participate in informal governance situations that are not expressly authorized by any law, but that shape, sometimes in profound ways, the national policies and governance of the United States. President George Washington's creation and reliance on a Cabinet, nowhere mentioned in the Constitution or then federal law, provides an early example of such informal governance Washington used to respond to national crises, including potential war and domestic insurrection. To better understand informal governance of the United States, this Article examines two recent examples of informal governance during the COVID pandemic and 2020 U.S. election. The Article sets forth a theory to justify citizens' engagement in informal governance as a form of self-governance reserved to the people under the Tenth Amendment. However, given the possibility for abuses and corruption in informal governance, which lacks written rules or laws authorizing or regulating such activities, the Article recommends the adoption of several checks to reduce the possibility of corruption. In this way, informal governance can operate with greater safeguards without sacrificing the innovation and advantages it offers in addressing intractable problems of the twenty-first century.

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340. See John Dickerson, *Doctors, Scientists Who Warned Officials About Oncoming Pandemic Focus of New Michael Lewis Book*, 60 MINUTES (May 2, 2020), <https://www.cbsnews.com/news/michael-lewis-premonition-60-minutes-2021-05-02/>.