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What Would Madison Say?
Calling Strikes in the Political Ballpark

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What Would Madison Say?
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Abstract Lawful political corruption is a costly feature of modern American politics, and a failure of Madisonian democracy. The propensity of political agents to self-service at the expense of the peoples' well-being may not have changed much since 1787, but that propensity is now applied to a vast government that touches virtually every aspect of our lives. After examining conventional solutions to the problem of political corruption, this paper explores possible Madisonian remedies—that is, remedies invoking rivalrous political institutions. The paper concludes with a proposal for the addition of an “umpire” function to U.S. constitutional structure. Officials performing this function would have the power to veto legislation that significantly reduces aggregate well-being or that produces regressive redistribution. Historical precedents, illustrative details, and impediments are discussed.

Keywords: Madisonian democracy, political economy, constitutional law, corruption, *Citizens United*.

JEL classifications: H1, K1.

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Winston Churchill rather glibly characterized democracy as a terrible system but better than the alternatives.² A democracy is most often defined as a society governed by the will of its people. A people's will is a slippery thing, vague, unobservable, and fickle. It may be more accurate to say that democracy is a society governed by whatever voters will put up with at the moment. That definition encompasses some unattractive but high-performing regimes. What matters to the people, of course, is well-being and justice—life, liberty and the capacity to pursue happiness. A democracy can claim to be “best” only to the extent that it delivers on these objectives.

Democracies are not all alike; some work better than others, and all need adjustment and repair as times (and the people's preferences) change. America's Madisonian democracy is no exception. There is perhaps a natural tendency for the effectiveness of any constitution to deteriorate as technology, economic conditions, and elite politics undermine their structural integrity as social contracts or peace treaties among contending interests.

Thomas Jefferson once expressed the view that the preservation of liberty might require a bloody revolution in each generation and thus a new constitution.³ Jefferson may have meant simply that the performance of a governing elite tends to degenerate as corrupted policies accumulate, while intra-elite collective action failures, uncritical citizen allegiance to founding myths, opportunity costs of participation in political action, and the absence of destabilizing random perturbations in geo-political circumstances tend to retard peaceful evolutionary reformation. An accumulation of economic and political insults to the people then may eventually lead to violent change.

² “Many forms of Government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.” Churchill (1947).

³ Jefferson (1787) at one point apparently favored a revolution and a consequent new constitution for each generation. “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.”

Control of political corruption is among the features of Madisonian democracy in America that have become much less effective as times have changed. While political corruption is widely acknowledged to be a serious problem,⁴ it is seldom addressed from a Madisonian perspective. By “Madisonian” I mean an allocation of constitutional responsibilities among rivalrous institutions, designed to protect the people from tyranny and corruption.

A republican or representative structure is a key feature of Madisonian democracy. This feature represents an “agency” relationship between elected representatives and the voters.

As used here, “agency” is not limited to the relatively well-defined duties of a legal fiduciary. In a Madisonian system, representatives are agents of the people acting in the people’s best interest; this includes protecting the people from their own welfare-reducing impulses.⁵ Agency in economics refers to the relationship between a supplier of services--whose performance, due to information or skill asymmetry, cannot easily be monitored by those who consume the service--and consumers. Agency in this sense is fundamental to the division of labor that permits scarce resources to be employed more efficiently than in a world of autonomous individuals. Absent reliance on specialists, humans would not have progressed much beyond hunting and gathering in small family groups.⁶ Cooperation among individuals, backed by social and cultural institutions, particularly law, is in constant tension with instinctive human self-interest.

⁴ See generally, for example, Fukuyama (2014). Corruption in American politics is largely taken for granted. Opinion polls have long shown that both politicians and political institutions, especially Congress, are widely disrespected.

⁵ It is beyond the scope of this paper to consider the ways in which the public choice incentives of policy-makers, voters, and consumers are usefully generalized by the new behavioral economics. But see Viscusi & Gayer (2015) and Chetty (2015).

⁶ The economic growth literature from the time of Adam Smith has laid great emphasis on the roles of economies of scale, the division of labor (specialization), and the sharing of knowledge and know-how amongst a growing population. See generally Jones & Romer (2010).

The century-long expansion of central government is explained by changing political and policy preferences on the demand side and changing technologies, economic conditions, and political incentives on the supply side. Taking that expansion as a given, this paper explores from an economic perspective the roots of political corruption and potential remedies for the modern proliferation of corrupt legislation and regulation. The objective is to explore possible evolutionary Madisonian constitutional remedies as alternatives to, or at least as ways to postpone, a potentially radical Jeffersonian reboot. Part I below describes the problem of *lawful* political corruption in greater detail, explaining its role in reducing public well-being and distributive justice.⁷ Part II reviews the relevant objectives of the Framers of the American Constitution. This is a necessary step before attempting to measure the performance of republican governance and also a predicate to designing remedies for poor performance. Part III reviews a variety of commonly discussed remedies for lawful corruption, concluding that most would be ineffective or impracticable. Part IV explores the role of “umpires” in sports and politics, concluding that the addition of an umpire function to the Madisonian branches would improve the performance of government by reducing lawful corruption. Historical precedents and practical impediments are also explored. The Appendix provides some illustrative details of a possible umpire function.

I. The Issue: Lawful Corruption

Congress and much of the federal bureaucracy is now thoroughly corrupt in the sense that officials routinely service well-represented elites without regard to adverse effects on the well-being of the people.⁸ Corruption has always been a camp follower of political power. Jaded political scientists may call it “pluralism,” but corruption is the more

⁷ Lessig (2011) has characterized lawful corruption with adverse welfare consequences as “type 2” corruption. Type 1 corruption is, by definition, unlawful. For other, contrasting, perspectives on corruption, see Teachout (2014) and Kaiser (2009).

⁸ The vast majority of legislation involves low-salience issues or low-salience riders to high-salience bills. It is low-salience legislation that is most likely to reflect corrupt influence and to have adverse welfare or equity effects. An illustrative instance of apparent low-salience corruption that did come to light is detailed by Eric Lipton & Kevin Sack (2013).

accurate word because the public welfare is reduced, often at the expense of non-players—that is, the People. Now that the scope of government extends to every aspect of our daily lives, corruption has become a more serious threat to prosperity and political stability than ever before.

Corruption matters, from an economic perspective, when it prevents the efficient production and allocation of goods and services or when it violates consensus principles of equity. Reduced efficiency shrinks (or fails to expand) the aggregate pie. Following John Rawls, consensus principles of equity are violated when, for example, resources are denied to the poor and redirected to the rich (Rawls 1971).

Expansion of government interventions in America began in the Progressive Era (roughly 1880-1920) partly in response to demands by organized interests and partly because of official desire to create and protect continuing streams of political support.⁹ National elites found it more convenient to turn to federal rather than on state-by-state political influence. Expansions also arose from popular—often populist—demands for protection against “unfair” behavior by others or from various perceived risks to well-being. The Great Depression later greatly magnified these demands.

Some interventions of course can mitigate market and other imperfections in human interactions and thus increase aggregate well-being. But regardless of their original sources of demand, or their authors’ nominal intent, interventions often evolve to serve elite interests by distorting markets and behavior, usually at the expense of ill-organized interests. If over time the number and variety of victims increases, this may encourage a growing undercurrent of dissatisfaction with government and reductions in the productivity of the economy. When progress slows or stops, discontent is inevitable. Expectations are enhanced by media depictions of idealized middle class life and the widespread attention paid to wealthy elites in finance, industry, entertainment and sports. Such expect-

⁹ The “public choice” literature in economics and political science explores the supply and demand for legislative action. See, for example, Stigler (1971).

tations would be out of reach in any case, but today as income inequality appears to be increasing, there may be political repercussions.¹⁰

As the burden of corruption grows, those with poorly represented interests find themselves increasingly frustrated, powerless, open to demagoguery, and attracted to the attentions of opportunistic politicians. Founding myths become ironies. This process tends to produce additional interventions, each of which presents a continuing stream of opportunities for officials to reward elites within programs characterized as remedial. The process is a negative-sum game that, unchecked, may eventually have an unhappy Jeffersonian ending. There can hardly be a barroom in America where one can provoke an argument by claiming that all politicians are crooks.

The Framers of the American Constitution were familiar with corruption, which permeated the 18th century British parliament and monarchy. Partly in response, the Framers designed a small federal government with limited powers, which necessarily operated with the available technologies of 1787. That design is no longer adequate to constrain corruption of public officials or to make their incentives reasonably compatible with the interests of the people. What has changed is not the inclination of a typical elected official to seek objectives other than the public welfare. Instead, that inclination is now offered a much wider set of opportunities, often embedded in politically legitimate responses to public demands.

Explaining the roots of massive corruption requires some discussion of James Madison's constitutional design and its objectives. What is needed is attention to the *performance* of the constitutional structure in achieving the Founders' key objectives. Federal officials do, after all, take an oath to "protect and defend" the Constitution. Assessing its and their performance must begin with the Framers' objectives, which remain largely uncontroversial.

¹⁰ The connection between actual or perceived inequality and political upheaval is complex. For a recent discussion, see Gimpelson & Treisman (2015).

II. The Framers' Objectives

The delegates to the 1787 constitutional convention in Philadelphia shared overlapping views of the proper role of government. The Framers' views were derived largely from John Locke and the Scottish Enlightenment, the delegates' own educations in the Greek and Roman classics, their observations of British institutions, and their experience with colonial governance. Many were practical men who appreciated as constraints the economic and political interests of prospective ratifiers in the several states.¹¹ We have clues to their intent, not only in the prevailing Enlightenment climate of opinion, but most famously in the Federalist Papers, and in the Constitution's 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 defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity*, do ordain and establish this Constitution for the United States of America. Constitution of the United States of America, Preamble (drafted 1787, ratified 1788) [Emphasis supplied]

Jefferson's politically popular and pithy statement of the proper role of government, adopted and published a decade earlier by many of the same men who returned to Philadelphia in 1787, offers another excellent clue to the Founders' intent.

... We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That *to secure these rights, Governments are instituted among Men*, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Declaration of Independence (1776) [Emphasis supplied]

Key ideas in the Declaration of Independence still appear in the speeches of modern politicians, but they have become ritualistic. It is clear enough how Madison's Constitu-

¹¹ Maier (2010) describes in some detail the process and the politics of ratification.

tion served the ends of life and liberty. The Preamble says, in different words, the same thing as the quoted paragraph from the Declaration, that the welfare of the people—their capacity to pursue happiness—should be a primary objective of government, no less fundamental than protection of life and liberty.

The Framers accepted the necessity of government in order to protect the people from Hobbesian dangers and to provide essential services, such as national defense and justice. While these functions advance the purposes of government, the Framers also saw two related threats—those of tyranny and of corruption. The larger and more powerful the government, and the broader its scope, the greater the threat of tyranny. Moreover, given the inherent self-interest of public officials—even if only for their own careers—more extensive government implies a greater burden of corruption. Madison and his collaborators for this and other reasons thought that the default option for expansions of federal power should be, “just say no.”

This objective helps explain Madison’s creation of a central government structure that permits or even encourages “gridlock.” In the absence of near unanimity among the interests supporting the branches, each with veto power over the others, the federal government would be prevented from acting quickly or easily.¹² The Framers would also have taken as given the technologies of their times, which themselves limited the roles of central government in a vast and growing nation. Madison could hardly have foreseen or imagined the changes which eventually made unlimited central government inevitable, among them national markets, mass production, the limited liability corporation, and revolutions in communication and transportation. Most important, central government became, to many, the natural panacea for each citizen’s particular discontents.

Most constitutions in the wider world do not last more than a generation or two. The Civil War aside, Madison’s design worked reasonably well for a century. The federal government remained relatively small, did not seek to greatly extend its powers, and dutiful-

¹² As noted below, the Article III courts did not become a full-fledged Madisonian Branch until *Marbury v. Madison* in 1803.

ly promoted commerce. But by the late 19th century fundamental changes were afoot. The Progressive Era brought widespread public demand for government protection from commercial exploitation, leading to The Interstate Commerce Act of 1887 (regulating railroads) and the Sherman Antitrust Act of 1890, legislation that marked a turning point in the role of central government.

Madison's federal government structure was designed to minimize the potential cost, in corruption and tyranny, of supplying what were in 1787 considered the essential services of government. It also was designed to appeal to a majority of ratifiers. By the early 20th century the Madisonian structure had come under enormous strain. The ratifiers of 1788 were no longer representative of the popular will. Agricultural, industrial, labor and other easily-organized supply-side interests began to demand added central government protections and compensations in adjusting to the new industrial age. By the time of the New Deal such demands were often framed politically in terms of risk-reduction, particularly protection from economic risks.

Simultaneously, the federal government was no longer impeded by technology in responding to demands for political solutions to economic discontents. Big business had pioneered the development of scientific management and large organizational hierarchies. A professional and reformed civil service, freed of patronage appointments early in the 20th century, faster and cheaper communication and transportation, and national media enabled Congress to offer solutions to the problems of organized interests who could, directly or indirectly, produce votes. Simply put, central government services could now expand to meet the demand. As the Supreme Court has recently noted, the federal government now, a century after the Progressive Movement, "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. 477 (2010) at _____.

Participants in the economy and other interests today have enormous incentives and opportunities to influence the government's actions. Their objectives, broadly, are to advance their own agendas without regard to the impact on other interests or on the economy as a whole by providing financial and other campaign support, or foregoing

such aid to rival candidates. In consequence, of course, organized interests threatened by rivals are obliged to defend themselves in like fashion, if they can. This is often most effectively accomplished by inducing public officials to neglect their obligations to the people as a whole. Public officials, meanwhile, can advance their careers as elective officials or appointed regulators, or later as lobbyists, by servicing these interests. Elected legislators, in fact, may have little choice, even if they hope merely to remain in office, but to promote interests than will support, or at least not oppose, their reelection. In contrast to pre-Depression practice, the Supreme Court no longer resists these expansions of federal jurisdiction and regulation.

Bribery of public officials is commonplace around the world. The cost of such corruption includes criminal theft or waste of tax revenues and other state resources. A greater cost is the reduction of public incentives to work, save and invest. But many forms of corruption are perfectly lawful. Anything that causes a systematic divergence between the interest of the people and the interests of public officials, who are the agents of the people, is (economic) corruption, lawful though it may be. Agents owe a duty of fidelity to the well-being of those they represent. This is the core of political candidates' offer to the voters. Legislators who advance the interests of those who, even tacitly, are necessary to re-election or career advancement are in essence soliciting and accepting bribes, even though the form of the exchange is lawful. It is an indictment of the system as a whole that public officials may have no choice.

Corruption costs also arise from the adverse impact of hundreds of regulatory interventions that impair the efficiency of production and of markets. Many reflect agency compromises among warring elites, reached without regard for the cost imposed on the public. Major costs result from pervasive distortions in the tax system, and from federal procurement decisions that are influenced via the legislature. The more extensive the reach of government in regulating private economic activity, the greater the burden of corruption on the economy as a whole. Madison and friends did not create a structure with this danger in mind. As a result there is no institution in today's government that effectively restrains impositions on economic efficiency or distributional equity resulting from Con-

gress' and agencies' responsiveness to well-organized interests and neglect of adverse effects on ill-organized interests. Within Washington the process of corruption is so familiar and pervasive that it is simply taken for granted.

From the Framers' perspective the consequences of corruption in a small and limited government likely were perceived as a tolerable cost of doing business. Or, to put it the other way around, limited government meant limited opportunities for corruption. Further, many potentially effective anti-corruption measures can easily be seen to conflict with freedoms in the Constitution as well as those introduced by the Bill of Rights in 1791. The *Citizens United* case discussed below makes a perfect example. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

But what may have seemed a tolerable cost in 1787, relative to aggregate economic activity, has today been greatly inflated by the expanded role of government. The burden of corruption increases at least in proportion to the scope of government and more so as the freedom to petition Congress has become the focus of a large professional class.

Even an admirer of James Madison is not bound today by Madison's approach or by what he might have said or done, had he anticipated our present difficulty. Still, it is instructive to consider how an effective constraint on political corruption could fit into the Madisonian structural framework. The more urgent point is that, if we do not find a less dangerous solution to modern demands for an administrative state, we may be left with the Jeffersonian default:

[I]t is the Right of the People to alter or to abolish [government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. *[Declaration]*

III. Potential Remedies for Political Corruption

It is useful to begin with proposals to control political corruption that are not especially Madisonian. These are mostly well-known and often advocated, but nevertheless unsatisfactory in various respects.

A. Campaign finance reform

There is a widespread appreciation that campaign contributions, in cash or kind, are a way to buy influence with elected officials or, when offered to a candidate's opponent, a way to punish officials who oppose the contributor's aims. Most officials will admit that large contributions will buy access—significant contributors typically can easily communicate their views to an elected official, and those views are likely to be received respectfully. Access to executive and agency officials follows the lines of membership on congressional appropriations and oversight committees.

This exchange—money for access—is very much like a bribe. However, the official generally does not explicitly agree to vote or otherwise act in the donor's interest. If the official would prefer to act in a way that is at odds with the contributor's interests, she will take pains to explain why she cannot support the donor's position. She will strive to find concessions, compromises, or perhaps side payments on unrelated matters. This interaction is very much like explicit bargaining over the price of (continued) support. But because the interaction between officials and supporters is a "repeated game," there is no need for explicit agreement. The large special interest contributor, unlike the typical voter, is able to monitor the representative's performance of the tacit agreement.

On the other hand, the logic representative government relies on representatives' having accurate information about the problems and preferences of the electorate. Direct communication between citizens, their organizations, and representatives is an important means of acquiring such information. Indeed, such communication is protected by the Petition Clause of the First Amendment. How can protected communications, accompanied by support of the candidate for election or re-election, be distinguished from actual or attempted bribery? The Supreme Court faced this issue in the *Citizens United* case, which focused on "independent" campaign expenditures in support of a candidate, as opposed to contributions made directly to a candidate. The Court had previously upheld most statutory limitations on direct contributions as well as reporting requirements. In *Citizens* the court had to balance the public's interest in clean politics against the First

Amendment freedoms to speak and to petition Congress. The Court decided to come down on the side of preserving First Amendment rights simply by announcing that:

[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. (*Citizens* slip op at 42)

Perhaps this announcement was intended simply as an appeal to the legal definition of bribery. If so, it begs the question. If it is intended to announce a fact, the claim defies common sense and lacks empirical basis. Nevertheless, it is difficult to fault the Court for its choice to promote free expression at the necessary expense of corruption that in any case would not be much reduced by regulation of political spending.

The Congress has enacted (and the Supreme Court has generally tolerated) a succession of regulations on direct campaign contributions. Notoriously, each has been evaded by candidates and contributors. There is almost always a lawful way around any regulatory constraint, although generally at some cost. Often a means of enforcing a regulation is lacking. Given that these regulations are established by the very politicians targeted by the regulations, any other result would be surprising. Further, even if all elections were conducted at the expense of the state and if independent expenditures were not permitted, other means of influence would remain.

Campaign finance reform, even if it “succeeded,” would not solve the problem posed by political representatives whose incentives are at odds with the interests of the people. Well-organized and well-financed interests would still be able to influence officials through, for example, the “revolving door” that produces trusted lobbyists and their control of the information that reaches officials.

B. Regulation of lobbying

Although statutes require Washington lobbyists to register, identify clients and report contributions, there is little chance that such regulation will reduce corrupted legislation. After all, the First Amendment encourages lobbying. If lobbying were effectively ended, isolated elected officials would have less information about legitimate (welfare-enhancing) legislation. Moreover, restrictions on access by current lobbyists does not

address the underlying problem, which is that important unorganized interests lack the means to hire professional lobbyists. In other words, lobbying is not the problem; the problem is *unbalanced* lobbying.

C. Congressional reform

Congressional reform could be a path to mitigation of corrupt legislation. Congress has on several occasions found the means to impose discipline upon itself and its members. For example, a legislative branch agency, the Congressional Budget Office (CBO), “scores” proposed legislation with respect to impact on budget deficits. The result has generally been accepted as an authoritative bipartisan constraint on deficit spending. Another reform permits a suspension of normal procedure for trade bills, the so-called “fast-track” for ratification of trade agreements. Similarly, the Base Closing Commission (BCC) reviews proposed retirements of domestic military facilities. The BCC produces a list of recommended closings, and the Congress votes on the package as a whole, rather than on individual bases. Finally, both houses of Congress have rules restricting non-germane amendments to bills on the floor. But these rules are not effective. Corrupt bills often become law by riding the coat tails of “veto-proof” spending bills in the form of non-germane amendments.

The problem with many, perhaps all, congressional reforms is that Congress cannot bind itself to follow its own rules next week, much less bind future Congresses. Party leaders can decide with impunity to ignore Congressional rules. No court or police agency can intervene. For example, party leaders are in continuing negotiations with members of their caucuses to gain support for legislation that advances party objectives. A crucial bargaining tool in the negotiations is the leaders’ ability to include bills favored by particular members (and the interests that member supports) in the portfolio of must-pass party legislation. This mechanism is necessary to party discipline and congressional leaders are unlikely to let procedural rules prevent its use.

D. The Westminster System

One of the remarkable features of Madisonian democracy is its competing independent branches. Most democracies use a parliamentary system. In the British Westminster

system, the Prime Minister is both head of government and the leader of the majority party in the legislature. The Prime Minister's party controls the legislative agenda and executes the resulting law, directing a permanent professional civil service. Gridlock normally is absent from such a system.

When it comes to the role of well-organized interests and lobbyists, the situation in Britain and other parliamentary democracies is no different than in the United States. Corrupt influences, corrupt practices, and important ill-organized interests exist everywhere. Party leaders still need to negotiate with members of parliament, and both candidates and parties crave financial career support from interest groups.

The chief relevant difference between Washington and Westminster is that in Britain there is no ambiguity about assigning responsibility for policy and performance to the current majority party, which may give voters a clearer basis for their decisions in the next parliamentary election. While a parliamentary system might alleviate the frustrations associated with Washington "gridlock," it is far from clear that it would significantly reduce corrupt laws or corrupt law enforcement by administrative agencies in non-salient matters. The party in power and sometimes the minority would, in general, retain incentives and numerous opportunities to cater to elite interests without regard to the public welfare. Finally, pursuit of a parliamentary structure in the United States would almost certainly require a massive constitutional amendment or a constitutional convention under Article V, a difficult and perhaps dangerous undertaking.¹³

E. The Presidential Veto and the Unitary Executive

Why doesn't the president simply veto corrupt welfare-reducing legislation? Most presidents have wielded their veto power sparingly. This is not difficult to understand. First, Congress and the Supreme Court have denied the president line-item veto power. That

¹³ Although beyond the scope of this paper, constitutional reform in the U.S. is hampered by the grave difficulty of amending the constitution. Article V offers two methods: congressional legislation ratified by a super majority of the states, or a constitutional convention, for which the only precedent is the Philadelphia convention of 1787. As noted above, tacit amendment by the Supreme Court is far more common than the formal routes.

enables Congress to package corrupt legislation in bills that the president cannot veto without endangering his own agenda or even the Republic. Further, presidents are in much the same position as congressional party leaders—they are in continuing negotiations, a repeated game, with Congress, its leaders and its members as they seek to advance their own legislative agendas. If they adopted a policy of vetoing corrupt legislation they might forestall the passage of such legislation but only at the price of depriving themselves of a key negotiating tool. Also, presidents themselves often are beholden to the same interest groups that influence Congress. Even presidents who cannot succeed themselves have loyalties to aides, appointees (and nowadays family members) with political ambitions requiring elite interest support.

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

The premise of the Unitary Executive (which Kagan calls Presidential Administration) is that most so-called “independent agencies” such as the Federal Communications Commission (FCC) or the Securities and Exchange Commission (SEC) are in thrall to the interests they regulate, producing rules and regulations harmful to public well-being. During the Ford and Carter administrations many regulatory agencies were abolished or greatly pared back, partly because of activism by the Senate Judiciary Committee, then chaired by Senator Ted Kennedy. In almost every case, the result of deregulation was to improve consumer welfare through lower prices or better service.¹⁴

The evidence from this episode is consistent with the premise for abolition of the independent administrative agency system more generally. Kagan’s suggestion is for the president simply to assume the duties of the independent agencies under Article II of the Constitution. For this to succeed the Supreme Court would have to reverse or distin-

¹⁴ Winston, (1993) surveys studies of the effects of deregulation. The Reagan Administration and others later rolled back banking regulation including, unfortunately, financial institution risk taking.

guish its holding in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), a Depression era decision upholding Congress' right under Article I to delegate some of its powers to the agencies without thereby granting supervisory power to the president. Members of Congress would then have reduced influence on policy making by the agencies.

Giving the president responsibility for the work of the independent administrative agencies runs into the same difficulty as relying on the president to veto corrupt legislation. The president has political reasons to permit some corrupt activity that a disinterested umpire would lack. Further, there are many agencies, parts of the executive branch, where congressional influence exercised through oversight and appropriations dominates presidential control.

F. Direct Democracy¹⁵

The system of government in the city of Athens in its golden age employed direct democracy. All citizens could vote on matters of policy, and all functionaries, including military leaders, were either directly elected or selected at random from the citizenry for very brief terms. This system was and still is much admired by political philosophers. It eliminates or at least reduces to an irreducible minimum the problem of agent corruption. The Athenian system was flawed, however, in several ways. It was not inclusive—noncitizen residents, women and slaves could not participate. The Assembly suffered from the natural defects of “crowd-sourcing”—a weakness for impulsivity and a tendency to be guided by emotion and demagoguery rather than logic and knowledge. The standard example is the Athenian Assembly's disastrous decision to invade Sicily in 415 BC.

Direct democracy has avid advocates even today. Modern technology offers potential solutions to the problem of voter numerosity. Political scientists, e.g., Fishkin (2011),

¹⁵ For surveys of the literature on direct democracy, especially the cognitive challenges associated with voting in complex referenda, see Bowler & Donovan (2000) and Lupia & Matsusak (2004).

have offered methods (and some evidence from experiments with a “deliberative” decision process) designed to overcome voter ignorance, emotional motivations, and free rider incentives. Of course, any direct process is subject to (and would rely in part upon) persuasive advocacy by well-organized and well-funded interests. The result is likely to be biased in favor of elite interests.

Following the Athenian model, others have suggested reliance on a system of selecting legislative representatives at random from among eligible citizens. That may preserve the advantages of having full-time representatives while eliminating corrupting incentives related to election and re-election campaigns. It would not, however, eliminate corrupting influences arising from unbalanced interest group lobbying. A citizen selected at random for a brief term in Congress, with no chance of serving a second term, would be particularly dependent on interest-group sources of information and professional advocacy.

IV. Umpires in Sports and Politics

The preceding selection of possible remedies for political corruption focuses on the selection and regulation of elected representatives. None of these remedies have been (or would appear to be) effective or, in some cases, practicable.

In a Madisonian government the most natural way to interdict corruption (and thereby to deter its initiation) is to assign another Branch the responsibility and power to monitor and constrain the outcomes of processes that have been corrupted within the other Branches. In effect what is needed is an “independent” umpire with the power to assess and veto legislation and agency policy that fails substantively to advance the aims of government set out in the Preamble to the Constitution.

The American people are familiar with the roles of umpires, referees and officials in sports contests. And, while umpires strive to ensure that pitches and runs are scored correctly, their task is to look at plays, not the recruitment of players or their athletic form. The rulings of umpires and refs are often questioned by partisans, and sports officials are sometimes found to have been bribed or to have bet on the outcome of contests, but for the most part officiating is credible. Teams and leagues aim to make profits

for their owners, an objective that requires, among other things, credible officiating of games. In a sense, sports teams and leagues are analogous to the People in a democracy in needing to monitor and maintain the credibility of officiating and competition by the players on the field.

Madisonian democracy of course is founded on The People themselves as the only legitimate source of political power. But Madisonian democracy is also based on the fear that The People are unreliable—even dangerous—as a source of day-to-day legislative action. Instead, the people’s power is expressed through elected representatives. As noted above, this makes elected officials the agents, in an important sense, of the people. But agents are themselves unreliable because of self-interest, particularly if their performance is difficult to monitor or evaluate. Madison relies on elections to control this conflict of interest. But in the modern world voters are woefully bad judges of the performance of their agents. Voters generally are incapable of monitoring the performance of legislators, at least on non-salient issues. It might be better to rely on umpires to decide which legislative “plays” are welfare-enhancing and which are not, particularly if the umpires themselves could be insulated from the political processes that lead to corrupt laws and policies.

How could umpires be inserted into the current Madisonian system? Several possibilities suggest themselves.

1. Substantive Review in the Supreme Court

The United States is almost unique in lacking a constitutional court separate from its judicial court of last resort. According to Article III of the Constitution, the Supreme Court was to be simply a court of last resort for the resolution of disputes. John Marshall, chief justice of the Supreme Court from 1801-1835, decreed that his court should also be a constitutional court with the power to strike down federal legislation that was inconsistent with the Constitution. *Marbury v. Madison* 5 U.S. 137 (1803). At a stroke, this made the judiciary a coequal branch of government. Congress could have challenged this usurpation by initiating an Article V amendment process, but did not.

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

The point is that the U.S. Supreme Court approaches constitutional questions much as it approaches appellate review of cases: focusing chiefly on "matters of law" which are either procedural or involve statutory interpretation, giving much emphasis to precedent, and mostly ignoring substantive effects on welfare. Perhaps worse, it is constrained but what is known as "legal reasoning," a concept accessible only to the initiated. Facts are the province of juries and trial judges, nominally off the table as a focus of appellate review. A more catholic constitutional court would consider substantive analysis of effects and treat "facts" as within its jurisdiction. What this suggests, unfortunately, is that the U.S. Supreme Court is unlikely to be comfortable asserting a position that would be perfectly natural for the French *Conseil* —for example, that a statute was unenforceable because its substance *or effect* was inconsistent with the Preamble to the Constitution, or with its "spirit."

Whether the U.S. courts would accept economic well-being and collective action pathology as a new dimension of the nebulous concept of due process is problematic. Richard Hasen (2012), advocating such a development, admits that "Despite longstanding public and scholarly concern about rent-seeking, I am aware of no court that has ever considered whether national economic welfare could be considered a sufficiently important (even compelling) government interest that could justify [anti-]lobbying (or other) laws." An exception is the forlorn minority dissent in *Citizens United* authored by Justice Stevens:

When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to

channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation.” Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is “far more destructive” than what non-corporations are capable of.¹⁶

The relatively narrow perspective of the U.S. Court is unfortunate because the Court represents the least controversial of the possible means to establish a credible umpire function within the Madisonian system. As John Marshall demonstrated, no formal amendment is required for the Court to assert such a power, although a modern Court would doubtless move with greater diffidence than did Marshall. One way to begin would be for the president to appoint a distinguished non-lawyer to the Court.¹⁷

2. Existing Agencies Responsible for Policy Evaluation

Other solutions to the problem of creating a legitimate and credible umpire to serve as a substantive filter for legislative and administrative corruption seem to require a constitutional amendment.¹⁸ Any number of existing agencies, including the Office of Management and Budget (OMB), the CBO and the GAO have the necessary expertise to make such judgments, but lack not only the authority to veto legislation or administrative actions but also the political legitimacy to survive resulting push back. Some better method for appointing umpires would be required, such as presidential appointment with super-majority senate confirmation. Long or even life tenure has been sufficient to protect the integrity and credibility of Article III judges, the CBO director and the GAO director. Fur-

¹⁶ *Citizens United*, 558 U.S. 310 (2010) at _____. (Justice Stevens, concurring in part and dissenting in part and joined by Justices Ginsburg, Breyer, and Sotomayor), quoting Sitkoff (2002)

¹⁷ For a summary (and negative assessment) of proposals to subject regulatory decision-making to stricter judicial review, see, Elhauge (1991) and Fukuyama (2014, 467-476).

¹⁸ Anything at all can be done, of course, without an amendment if congress, the president and the courts do not oppose it. But an umpire empowered to overturn legislation and administrative policies would doubtless be opposed by one or more branches.

ther, one would not want to give an umpire agency unrestricted power. For example, an umpire's veto should be capable of override by a congressional super-majority. Also, one might want to restrict the umpire's jurisdiction in matters of war or foreign policy. Clearly, those distressed by what is called "gridlock" in Washington today will be even more distressed to consider yet another branch with veto power over legislation. From a Madisonian perspective, however, it is not so obvious that gridlock is a bad thing. It is the natural result of the checks and balances established to protect the people from ill-considered laws. Further, if a fourth branch of umpires existed, legislation likely to produce a veto would be at least partly deterred. It is expectations of what umpires will do that deter most rule infractions, not official action on every player impulse.

3. Umpires of the Past

There are at least two precedents for an umpire role in a republican form of government. One is the "Council of Revision" that existed briefly in New York State under its 1777 post-colonial constitution, Article III of which stated:

And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened; ... And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revision and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly (in whichever the same shall have originated) who shall enter the objection sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law. [emphasis supplied] Thorpe (1909); see also Jones (2012)

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

The “Tribunate” is described in the *Oxford Classical Dictionary* (2002) as follows:

The *tribuni plebis* (or *plebi*), ‘tribunes,’ were the officers of the plebs first created... traditionally in 494 BC The original number of the tribunes is variously given as two, four, or five; by 449 it had certainly risen to ten. The tribunes were charged with the defense of the persons and property of the plebeians. Elected by the plebeian assembly and exercising their power within the precincts of the city, the tribunes could summon the plebs to assembly and elicit resolutions (*plebiscita*). They asserted a right of enforcing the decrees of the plebs and their own rights... They possessed ... a right of veto against any act performed by a magistrate ... The full acknowledgement of their power came with the recognition of *plebiscita* as laws binding upon the whole *populus* and not just the plebs Tribunes were first admitted to listen to senatorial debates; at least from the 3rd cent. BC they had the right to convoke the senate; ... But the revolutionary potential and popular origins of the office did not disappear. In the first surviving contemporary discussion of the tribunes, from about the middle of the 2nd cent., Polybius ... states that ‘they are bound to do what the people resolve and chiefly to focus upon their wishes.’ Succeeding years saw the tribunate active in the pursuit of the people's interest and the principles of popular sovereignty and public accountability, as evidenced by the beginning of the practice of addressing the people in the forum directly, the introduction of the secret ballot in assemblies, concern with the corn supply agrarian legislation, ... and above all by the legislation and speeches, for which contemporary evidence survives, of Gracchus (123–122 BC). ... Active tribunes came increasingly to be associated with the particular interests and grievances of the urban plebs ...

In a nutshell, the socio-economic class called the “plebs” became restive under the tyranny of the aristocratic families that collectively ruled the Roman Republic and staged a credible revolt. The aristocracy and the plebs negotiated a lasting settlement that granted substantial political power to the elected representatives of the plebs. These Tribunes of the Plebs were kept on a short leash by the Plebeian Assembly—held to non-

renewable one-year terms. The Tribunes do seem to have sought generally to protect the interests of the plebeian class for several hundred years.¹⁹

Our understanding of the political operation of the early Roman Republic is limited; most surviving materials were created centuries after the fact. Still, what we do know of the Plebeian Tribune offers a useful model for a modern umpire that might reduce the social cost of political corruption, using veto power.²⁰

Of all the remedies discussed above, the establishment of an effective umpire function seems most likely to succeed in mitigating lawful corruption. The major difficulty is not the necessity to find consensus on some very important details (illustrated in the Appendix), but rather the enormous barrier of formal constitutional amendment.

No one thinks that either method of amendment under Article V is easy or riskless. Indeed, the prospect of a convention is positively scary, given the precedent. As noted above, the constitution is usually changed tacitly by the Supreme Court or by an arrangement between the other two branches. Something like that likely will have to precede full realization of an umpire institution willing and able to call strikes on lawful political corruption. For example, perhaps a president could delegate “advisory” veto authority to a new organization within the executive branch, made up of umpires. This in itself would do little if anything to reduce corrupt legislation, but it might in time evolve into a more effective force, without the need for a formal amendment

¹⁹ The earliest surviving account of the Tribune, by Polybius (c. 160 BC), painted too rosy a picture of the tribunes’ effectiveness. Also, it would be a mistake to regard the plebs as “the people” in a modern sense. Women, slaves, and those who lacked land ownership were excluded, and participation in the Plebeian Assembly was determined by tribal membership. Some scholars contend that the Plebeian Assembly was itself in thrall to and even included members of the Roman aristocracy.

²⁰ For a modern take on the potential role of a Tribune in a democratic system see McCormick, (2011).

Appendix: Illustrative Details

For the sake of concreteness, I set out below some candidate features of a new or fourth Branch of the federal government designed to reduce the impact of legislative and administrative error and corruption on the well-being of the people. In political terms, the proposal is intended to counter the influence of elite interests in the legislature and the administrative process with a democratic institution representing the principal victims of elite power, the middle class. Given the difficulty faced by the elite in containing the potentially destabilizing and pie-shrinking excess greed of its members, it seems likely that the proposal also is in the collective interest of the elite. As with any Madisonian system, the effect of a new branch would be felt chiefly on changes in the incentives of the remaining branches.

Amendment XXVIII

The United States Council of Review

1. Function. Severability. Counterfactual. Control of docket. There shall be a United States Council of Review, independent of the three branches created by Articles I – III of this Constitution. The function of the United States Council of Review (Council) is to consider at the request of any citizen or its own initiative any Law (including for this purpose executive orders, and all federal administrative rules or regulations having the force of law) for consistency with the fundamental objectives of government, as set out in the Preamble to the Constitution. The Council may not review any Bill until it has passed both houses of Congress and been signed into law by the president, nor issue advisory opinions. The Council may review as a unit related Laws, and it may review and veto portions of a Law (“line items”). The Council may, for purposes of its review, consider what alternative(s) would prevail if the subject matter of the review were vetoed. The Council may decline to undertake any review requested of it.
2. Predictability. Upon ratification of this Amendment, all new Laws shall go into effect as heretofore, unless the Council imposes a stay of not more than one year on all or a

portion of the Law, pending its review. A stay pending a decision to review may not exceed 45 days. Any new Law or amendment thereof shall be subject to review by the Council for three years after enactment, and not thereafter until the 13th year after its enactment and at 10-year intervals thereafter. Any Law in effect upon ratification of this Amendment shall remain in force, but subject to review by the Council for 10 years and thereafter for one year at 5-year anniversaries of the Law's enactment. Laws or portions thereof, vetoed by the Council, if the veto is overridden, may not be subject to further review by the Council for 10 years (and then for one year) and at 10-year intervals thereafter.

3. Criteria for veto. The Council may veto any Law or provision thereof likely substantially to reduce the aggregate well-being of the people or substantially to redistribute income or wealth so as to reduce the well-being of the poorest citizens.

4. Jurisdiction. The Council may not stay or veto a Law solely on the basis of any provision of the Constitution except the Preamble, nor treaties except for those provisions concerning international trade and commerce. The Council may not stay or veto Laws concerning the armed services or national security, including declarations of war, except those provisions dealing with procurement. The Council may not stay or veto appointments to federal executive or judicial offices made by the President with the advice and consent of the Senate. The Council shall have primary jurisdiction over its proper subject matter.

5. Legislation. The Council may not propose or enact legislation, override a presidential veto, or nullify a congressional override of a presidential veto.

6. Override. A veto by the Council may be overridden by a two-thirds majority of each house of Congress or by the president together with a two-thirds majority of either house.

7. Members. Terms. There shall be eleven (11) Members of the Council, each serving a non-renewable term of fifteen (15) years, except that the terms of initial Members shall be staggered.

8. Selection. The president, the vice president, the chief justice, the speaker of the house, the majority leader of the Senate, and the minority leaders of the Senate and House each shall nominate ten (10) candidates within 30 days of a vacancy on the Council, for a total of 70 nominations. The vacancy on the Council shall then be filled by lot from among the nominees. The Council determines for each nominee selected randomly whether the qualifications are met. Members of Congress and their first-degree relatives may not be nominated except if five years has elapsed since their leaving of-
fice.

9. Qualifications. Nominees for the Council must be U.S. citizens 35 years of age or older, who have completed at least 14 years of schooling, and whose family income and assets in the five years preceding nomination are in the middle third of U.S. family incomes and assets for the same period. Congress may by law establish additional qualifications for nominees.

10. Budget. The Congress shall appropriate and authorize funds for the operation of the Council, including retention of experts and analysts. The appropriation shall not be less than the budget of the Congress, including its staff and agencies, in the same year. The Council shall return unexpended funds to the Treasury.

11. Council chair. Staff director. The Council shall have a rotating Chair (by seniority) with a 5-year non-renewable term; the Chair shall appoint, with the consent of the Council, a Staff Director with a renewable 5-year term. Professional employees of the Council shall serve "at will" and without tenure, but the Council may offer reasonable compensation to terminated employees, except those terminated for cause.

12. Compensation of Members. Lifetime ban on other income. Members shall be compensated at three times the salary of a member of Congress. No Member may receive any other form of income. Financial and other substantial assets, other than securities of the United States, owned by a Member at the time of appointment are placed in a blind trust for the benefit of his or her heirs. A Member who retires or resigns, or whose term otherwise ends, may not earn or accept income in any form, including gifts and bequests, for life, but is paid a pension equal to the Member's compensation in his or her

final year of service, adjusted thereafter at the same percentage rate as the nominal per capita GDP of the United States. The same pension is due to a Member's surviving spouse.

13. Compulsory process. The Council shall have the power of compulsory process, including, with appropriate safeguards to avoid public disclosure, access to classified government or confidential private materials.

14. Opinions. The Council shall publish written opinions to explain its reasons for any decision, including decisions not to veto a Law that has been reviewed. All deliberations and proceedings of the Council are recorded and immediately thereafter made available to the public. The Council may assign investigations and preliminary decisions to panels of its Members, but all actions, and decisions not to act, after a review shall be made en banc.

15. Procedure. Conflicts of interest. The Council shall establish and publish rules regarding conflicts of interest and ethical conduct for Members and its staff, and rules of investigative procedure.

16. Immunity from civil and criminal liability. No Member shall be liable in civil or criminal proceedings for actions taken in the course of Council business, except for bribery or extortion.

17. Immunity from congressional appearance. Congress may not compel Members or employees of the Council to appear before it.

18. Expulsion of Members. The Council may expel a Member for cause by a two-thirds vote of its remaining members.

19. Notices. Submissions. Oral presentations. The Council shall publish notice of reviews in process and any person may submit written comments according to procedures established by the Council. All oral and written submissions shall be made public except for those containing classified information. The Council may invite oral and written submissions by any person, including government employees and elected officials, before panels of no fewer than three Members. The Council may not make or offer grants of

immunity from prosecution, but testimony compelled before the Council may not be used as evidence in any civil or criminal proceeding.

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