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**“To Promote the General Welfare”
Addressing Political Corruption in America**

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Abstract Systemic (but lawful) political corruption reduces well-being and equity in America. Madisonian democracy is no longer capable of containing such corruption. Proposals currently on the table to stem corruption are unlikely to be effective without undermining foundational rights. This essay describes a new approach—regulating the *output* of corrupted legislative and administrative processes, rather than the inputs. Providing for substantive ex post review of direct and delegated legislation would be far more protective of the “general welfare” of the People than other reforms, while no more or less difficult to implement.

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Addressing Political Corruption in America

Bruce M. Owen*

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

Federalist 10 (James Madison)

1. Introduction

Systemic, institutional or “type 2” lawful political corruption is a serious problem. It misallocates resources, undermines trust in government and contributes to the growing gap between the rich and the poor. Systemic corruption occurs when political representatives routinely face options that advance their own interests at the expense of the public, and for which there is little or no personal or political risk. Many Americans are contemptuous of politicians because they appear to be for sale. Congress in particular is distrusted. Why is this and what can we do about it?

It is difficult to avoid the suspicion that there is something wrong with the structure of government. After all, the constitutional design ratified in 1788 has changed very little. The natural inclination of elected officials to serve their own interests at the expense of the public interest probably has changed little over the years. The Madisonian system was once widely admired but

now it seems to be failing us. If corruption is a more serious problem today than in the past, it must be because Madisonian democracy is less effective at containing it.

James Madison and his colleagues were well aware of the problem of corruption. They understood that elected officials faced an unavoidable conflict of interest between the public welfare and their own careers. The Framers also had a realistic view of how interest groups affect government policy. It was and remains perfectly obvious that if there is an organization that has the power to grant benefits to one group of citizens at the expense of others, members of each group will want to influence that organization's policies. It is not shocking that interest groups matter in policymaking.

Madison addressed the problem of "faction" (interest groups) in Federalist 10. He recognized that powerful factions could influence political outcomes in unhealthy ways, including repression of the interests of less powerful or less well-organized citizens. He argued that a strong central government would be better able to control such factions (as compared to individual states) because the number of competing interests would be greater at the national level. Madison also held that the separation of powers, the ability of citizens to discipline political misbehavior through frequent elections, and the limited scope of government itself would help to suppress corruption.

Unfortunately, in practice elections do not effectively discipline systemic corruption. Voters are not inclined to try to assess candidates' contributions to public well-being. The task is beyond the capability of any voter, however well informed or diligent. Moreover, elections are biased in favor of the same powerful interests that corrupt legislation.

It is good that elected officials are responsive to interest group asks. That is why the First Amendment has its Petition Clause. However, both legislation and the administration of interventions are vulnerable to corruption because important interests are unable to participate in the process; those interests are diffused, difficult to organize, or lack the resources to invest in political action. Further, neither the judiciary nor the president is in the business of blocking corrupted welfare-reducing legislation. Finally, most corrupted legislation is obscure, hidden in important unrelated bills, and devoid of interest to the media and media audiences. The canonical checks and balances simply do not work in stemming welfare-reducing and redistributive legislation that lacks salience.

A major purpose of any democratic government is to provide an arena in which interest groups can reach peaceful solutions to conflicts. The constitutional regulation of this struggle in a Madisonian democracy consists in defining and protecting certain minority rights that the government may not sacrifice to majority demands. Subject to these limits, we cannot regulate interest groups and their influence on legislation except through elections or pushback from the other two branches. Regulation that is more direct tends to invade foundational rights that serve important constitutional purposes.

Systemic political corruption is a much more costly today than in 1788 because the jurisdiction of the federal government is no longer limited. The government now regulates nearly every form of human interaction, economic and social. This provides a virtually unlimited menu of opportunities for elite interests and political representatives to design mutually beneficial interventions, the cost of which is borne mostly by the non-elite. Consequently, the welfare of the poor, the

middle class, (and perhaps even the elite as a class) is sacrificed to individual elite interests. Not only is the elite share of pie increased, but also the process shrinks the size of the pie. In the end, *everyone* may be worse off.

Tinkering with election or lobbying reform is not likely to be successful because it does little to redress the imbalance of interests that contributes to corruption. As the epigraphic quotation from Madison's Federalist 10 suggests, when reform of the *process* is not feasible, we must turn our attention to policing the *effects*.

When the frequent effect of legislation or regulation is to make the people as a whole worse off, or to make each faction of the elite better off at the expense of everyone else, the democratic process has either erred or failed. There is good reason to veto such law because better alternatives always exist. The reality is that neither the president nor the judiciary is inclined to do that and elections are ineffective. A different institution or branch therefore must provide a remedy—effective checks and balances to protect the general welfare. This essay proposes a general solution and a concrete illustration of how to do that.

2. Background

Most political philosophers (with the notable exception of Plato) have endorsed democracy as a superior method of governance. Winston Churchill (1947) rather glibly characterized democracy

as a terrible system but better than the alternatives.¹ A democracy is a society governed by the will of its people. A people's will is slippery, vague, fickle and ephemeral. It may be more realistic to say that democracy is a society governed by whatever voters will put up with. What matters to people, of course, is what has always mattered: well-being and justice or as the Framers put it, life, liberty and the capacity to pursue happiness. A democracy can claim to be "best" only to the extent that it delivers on these objectives.

"All political systems are prone to decay over time." Fukuyama (2014) 35. Constitutions can be social contracts or peace treaties among contending interests. Nevertheless, if the legitimacy of a constitution rests on the will of the People, and if the People's will is inconstant, it follows that the constitution or at least its interpretation must also change. America's Madisonian democracy is no exception. Shortly after publication of the proposed new Constitution, Thomas Jefferson expressed the view that the preservation of liberty might require a bloody revolution in each generation and thus a new constitution.² However, violent change has obvious costs and offers no assurance that the well-being of the People will improve.

¹ "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."

² 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

One reason to modify a democratic constitution is to reduce the costs of political corruption. Corrupt law, including administrative rules and procedures, reduces aggregate well-being or produces regressive redistribution or both. Political corruption encompasses far more than criminal acts of bribery or extortion.³ It includes other, *lawful*, behavior that undermines public trust in government.

patriots and tyrants. It is its natural manure.” Madison was skeptical of this and other Jeffersonian proposals to rely on “We the People” as a basis for constitutional revisions beyond those governed by Article V (Federalist 47-51; Rakove 1999 at 1954-58.)

³ Lessig (2014) at 99-102, 230 n. 19. There is no single generally accepted definition of, or term for, systemic political corruption. Wallis 2006 uses the term “systemic corruption.” Lessig (2011) characterizes lawful corruption (with adverse welfare consequences) as “type 2” corruption. (Type 1 corruption is, by Lessig’s definition, unlawful.) The term “institutional corruption” is common in the field of political science. The Supreme Court has relied on a narrow definition (*quid pro quo* bribery) holding that corporate campaign expenditures on behalf of candidates is “not corruption or the appearance of corruption.” *Citizens United v. Federal Election Commission*, 558 U.S. 310, 557 (2010) (hereafter *Citizens United*). Wallis (2006) notes that political thinkers in the 18th century including the Framers used the same word, corruption, both for bribery and for systemic or institutional corruption. Fukuyama provides a list of basic works on (mostly type 1) corruption at 82-83, endnote 3 (555). For other recent perspectives, see Teachout (2014) and Kaiser (2009).

Political corruption is widely acknowledged as a serious problem. Corruption often impairs efficient production and allocation of goods and services, shrinking the pie. Corruption also often violates consensus principles of equity. Reduced economic efficiency shrinks (or fails to expand) aggregate well-being.⁴ Following John Rawls (1971), consensus principles of equity require, for example, making resources available to the poor rather than the rich. Corruption of this variety, rather than less common bribery or extortion, is the subject of this essay.

Dominant interests that achieve and preserve advantages through corrupting influence each have narrow objectives. A particular interest may seek a tax concession, an import duty, a regulation increasing rivals' costs, or a national defense project for which they hope to supply goods and services. Each successful elite interest may reduce aggregate well-being only slightly. Nevertheless, the process is ongoing and the aggregate effect is cumulative, and potentially very large. In addition, even though each successful interest increases its share of the pie at the expense of other interests, the political process as a whole may result in *every* interest, strong and weak alike, ending up worse off in absolute terms. The resulting distribution of well-being may be one that even the winners find unattractive. Feuer (2015).

⁴ Aggregate well-being as used here corresponds to the conceptions of general welfare and happiness, as used in the Preamble and Declaration, including well-being derived from the satisfaction of preferences for public goods, environmental amenities, and social justice. I use the term “pie” as a metaphor for aggregate well-being.

Bribery of public officials is commonplace around the world and not uncommon in America.

The cost of such corruption includes criminal theft or waste of tax revenues and other state resources. A greater cost is the reduction of private incentives to work, save and invest that stem from expectations of corrupt expropriation. However, many forms of corruption are lawful. Anything that causes a systemic, predictable divergence between the interest of the People and the interests of public officials, who are the agents of the People, is corruption, lawful though it may be.

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 (Zolt 2014), and from federal procurement decisions that are influenced via the legislature (Neu 2015).

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 did not create a structure with this danger in mind. As a result there is no institution in today's government that effectively restrains impositions on economic efficiency or distributional equity resulting from Congress' and agencies' responsiveness to well-organized interests—and their neglect of adverse effects on ill-organized interests. Within Washington, the process is taken for granted, business as usual, the way things are done.

Madison defended the new Constitution in Federalist 10 partly on the basis that a larger and more diverse republic would diffuse the power of interest groups (“factions”) that, in a single

state or region, might constitute an oppressive majority. The formation of a larger federal government might render such factions harmless by reducing them to minorities. Madison saw this mitigation of the effects of faction as far superior to attempting to regulate faction directly, for example by restricting freedoms of speech, press, assembly and so on. Federalist 10 foresees what I am calling systemic political corruption as inevitable, and claims that a strong but limited central government is preferable to individual state governments because factional competition will be more robust in the larger arena.⁵

Empirical evidence seems to indicate that the increased number and variety of competing factions, which the Federalists insisted would result from a stronger national government, have not forestalled corrupting factionalism. Berry & Wilcox (2009). Perhaps local or regional factions do face greater difficulties in the federal system than they do in dealing with sovereign states, but they have logrolling as a work-around. Moreover, a strong central government encourages the formation of national factions. In any event, the ratification of the Constitution has not prevented political corruption.

A republican or representative structure is another key feature of Madisonian democracy. This feature relies on an “agency” relationship between elected representatives and the voters (Alt & Lassen 2008, Barro 1973, Ferejohn 1986). As used here, “agency” is not limited to the relatively well-defined duties of a legal fiduciary or corporate executive. In the Madisonian system, representatives are agents of the People acting in the People’s interest; the electoral system is relied

⁵ By limited government I mean limited in its jurisdiction or scope.

upon to produce trustworthy representatives who seek to advance constitutional objectives.⁶

Agency in economics refers to the relationship between a supplier of services and users of those services. Suppliers assume an agency character when, due to information or skill asymmetry, supplier performance cannot easily be monitored by those who rely on the service. This condition may prevail even when users regularly consume the product or service if, for example, readily comparable alternatives do not exist. The production of law has this character.

Agency in this economic sense is fundamental to the division of labor that permits scarce resources to be employed more efficiently than would be the case in a world of autonomous individuals. Absent reliance on specialists, which is avoided when agents are seen as untrustworthy, humans would not have progressed much beyond hunting and gathering in small family groups.⁷

⁶ This may include protecting the People from their own sometimes welfare-reducing impulses, which is the central point of *representative* democracy. It is beyond the scope of this essay to consider the implications of the new behavioral economics on the public choice incentives of policy-makers, voters, and consumers. But see Viscusi & Gayer (2015), pointing out that public officials are subject to the same behavioral lapses as voters and consumers. Chetty (2015).

⁷ The economic growth literature from the time of Adam Smith has laid great emphasis on the roles of economies of scale, the division of labor (specialization), and the sharing of knowledge and expertise amongst a growing population. See generally Jones & Romer (2010).

Cooperation among individuals, backed by social and cultural institutions, particularly law, is in constant tension with instinctive human self-interest.

Agents owe a duty of fidelity to the well-being of those they represent who in turn must rely on trust. 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 modern public officials may have no choice. That is, support from one or more powerful interest usually is necessary to election and re-election.

All types of political corruption reflect an agency failure: a government official sacrifices the public welfare to advance a personal or political agenda. Elections are the remaining Madisonian check on corruption. Although elections are competitions, they would not guarantee the performance of elected representatives even if the contests were not corrupted by the campaign finance system. Voters are "rationally ignorant" of most aspects of their political agents' performance, especially non-salient legislation and administrative rule making.⁸ Voting participation is based in large part on impulse and emotion, motivated by desire for self-validation that is fulfilled simply by showing up.

⁸ A great deal of empirical evidence supports Downs' (1957) rational ignorance hypothesis. See, for example, De Leon & Rizzi (2014).

Electioneering and voting are not exercises in public policy analysis. Voting certainly is not based, and these days could not possibly be based, on well-informed voter assessment of the contribution of incumbents either to local or national well-being. Relative advertising expenditures and simple name recognition strongly influence election outcomes, along with the attitudes predominant in each voter's immediate social network. A handful of high salience policy issues dominate the media and influence debate. Changes in attitudes among political elites precede corresponding changes in the electorate. The process that produces elected officials is in many respects identical to the process that produces legislation—that is, a struggle among interest groups—and both are subject to political corruption by elite interests. The major virtue of elections is the absence of superior alternatives, just as Churchill suggested.

The separation of powers and checks and balances are not effective safeguards against corruption because neither the president nor the judiciary is prepared to veto welfare-reducing legislation.⁹ Lack of line-item veto power and a need to maintain workable relationships with legislators limits what the president can do. The Court typically avoids substantive review of welfare consequences of legislation and regulation, legal realism notwithstanding.

Current practice relies on a corrupted institution (elections) and ineffective intramural branch rivalry to discipline a corrupted legislative system. This is rather like relying on the criminal law of arson as the sole remedy for house fires. Smoke alarms and fire fighters are useful supple-

⁹ Alt & Lassen (2008), 33-37.

ments to arson laws. A central theme of this essay is that mechanisms to reduce the costs of political corruption should focus on examination of the welfare impact of legislation itself rather than on the political or electoral processes or motives that led to enactment. In addition to interdicting welfare- or equity-reducing laws directly, interdiction of welfare-reducing law will tend to reduce the incentive for interests and legislators to engage in political corruption.

There has been a century-long expansion of central government jurisdiction in the United States. Changing political and policy preferences on the demand side and changing technologies, economic conditions, and political incentives on the supply side may help to explain the expansion. In any event, I take the expansion as given in order to explore 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 Madisonian structural remedies as alternatives to, or at least as ways to postpone, a potentially radical Jeffersonian reboot.

Corruption is seldom addressed today from a Madisonian perspective. By “Madisonian” I mean the idea of using organizational structure to discipline political action—for example, dividing constitutional responsibilities among rivalrous institutions to achieve a “separation of powers” (Montesquieu 1750) or recognizing that sometimes controlling effects is better than regulating causative processes (Madison in Federalist 10). Intramural rivalry among the branches reflects

the trope common to the economic competition that disciplines markets, political competition among rival candidates and sporting events.¹⁰

Parts 2-6 of this essay chiefly summarize existing literature and understanding. Part 3 describes the problem of *lawful* systemic or institutional political corruption in detail, explaining its role in reducing public well-being and distributive justice. My focus is on legislation that is non-salient and hence inaccessible to public scrutiny via the media or otherwise. Part 4 reviews the relevant objectives of government as described by the Framers of the Constitution. This step is antecedent to measuring the performance of Madisonian governance and a predicate to designing remedies for poor performance. Part 5 reviews a variety of commonly discussed remedies for systemic corruption. I conclude that most are ineffective or impracticable.

¹⁰ Competition and cooperation each play key roles in our culture. In many contexts, competition contributes to the general welfare, most often by selecting and promoting the fittest individuals or organizations for a particular role. However, competition can also reduce welfare by diverting resources to zero-sum struggles. In other contexts, cooperation is more effective in promoting welfare, often through economies of scale and specialization. Anti-social cooperation can reduce the gains available from competition, as in cartels, cabals and oligarchies. In contrast to the generally pro-social effects of competition in economic markets, however, competition in other “markets” lacks any a priori expectation of superiority.

Part 6 explores the concept of quality control in organizations and specifically the role of “umpires” in sports and politics. I conclude that the addition of a quality-control umpire to the Madisonian branches would improve the performance of government by reducing the impact of lawful corruption directly and through changed incentives. I also explore historical precedents and practical impediments. Part 7 provides some illustrative details of an umpire function, formulated as an Amendment.

3. 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.¹¹ The vast majority of legislation involves low-salience issues or low-salience riders to high-salience bills. Low-salience legislation is most likely to reflect corrupt influence and to have adverse welfare or equity effects. Eric Lipton & Kevin Sack (2013) describe an illustrative instance of apparent low-salience corruption in the *New York Times*. Here is the lead:

¹¹ “[P]olitical decay is evident in the capture of large parts of the U.S. government by well-organized interest groups. The old nineteenth-century problem ... [of political patronage] ... has been replaced today by a system of legalized gift exchange, in which politicians respond to organized interest groups that are collectively unrepresentative of the public as a whole.” Fukuyama (2014) at 35-36.

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

Similarly, Igan & Mishra (2014) trace much of the blame for the 2008 financial collapse on political corruption in Washington. Lessig (2011), Kaiser (2014) and many others offer numerous examples of such lawful corruption and their political and personal motivations.

Corruption has always been a camp follower of political power. Its modern form is imbalanced pluralism. Schattschneider (1960) called modern governance "pluralist" because legislative outcomes reflect the interplay of various interest groups. Pluralism involves political effort by such well-represented interests as regulated industries and professions (today, virtually all industries and professions) and passionate factions (the gun lobby, AARP, environmentalists). However, pluralism in practice omits unorganized and ill-represented interests such as citizens in their roles as consumers, non-union workers, small investors, patients and so on. This lack of balance is corrupting because among the outcomes is a reduction in public welfare, at the expense of everyone, but especially absent interests. "If you are not at the table, you're on the menu." Schlozman, et al. (2012) at vi.

Politics is useful because it addresses conflicts among contending interests without resort to costly and risky violence. Now that the scope of government extends to every aspect of our daily

lives, corruption has become a more serious threat to prosperity and political stability. The pluralist competition is imbalanced and so are its outcomes. This undermines in the most fundamental way not merely the legitimacy¹² but also the performance of representative democracy.

Significant expansion of central government jurisdictions and interventions in America began in the Progressive Era (roughly 1880-1920) partly in response to demands by organized interests and official desire to create and protect continuing streams of political support.¹³ National elites found it convenient to substitute federal for state-by-state political influence. Expansions also arose from popular—often populist—demands for protection against “unfair” behavior by others or from various perceived risks to well-being. It was in this era that the modern party system

¹² “Democratic legitimation occurs when persons believe that the government is potentially responsive to their views. ... Democratic legitimation therefore depends upon what people actually believe.” Post (2014) 49.

¹³ The “public choice” literature in economics and political science explores the supply and demand for legislative action and related subjects. See, for example, Buchanan (1986), Buchanan and Tullock (1962), Downs (1957), Mueller (1976), Olson (1965), and Stigler (1971). Like all economic models, public choice (and the subfield of “constitutional economics”) makes simplifying assumptions. The public choice literature generally assumes that voters and officials are “rational actors,” and often emphasizes economic efficiency while sometimes neglecting income distribution. Critics decry normative conclusions that rely on such assumptions. See, e.g., Ackerman (1999) for a particularly impassioned attack.

emerged in an ultimately futile attempt to increase electoral accountability. The Great Depression later cemented Americans' sense of reliance on big government.

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

Nevertheless, interventions intended to remedy even undisputed imperfections (air pollution, to take one example) are subject to corrupt design and implementation. Popular interventions often evolve to serve elite interests by distorting markets and behavior, usually at the expense of ill-organized interests. The greater the number and reach of regulatory interventions, the greater the range of continuing opportunities for political corruption, in which one or more elite interest is serviced at the expense of other, less effective interests. Eventually these effects accumulate to slow or stop the improvement in well-being that results from economic growth and technological change.

When progress slows or stops, public discontent is inevitable. Americans have expectations of increasing prosperity. Such expectations may be out of reach in any case, but today widespread discussion of substantial and growing inequality¹⁴ reinforces discontent.

¹⁴ The connections among actual or perceived inequality, expectations, and political upheaval are complex. For a recent review and discussion, see Gimpelson & Treisman (2015).

“The dramatic rise in U.S. wage inequality since the 1970s has been well documented.” Song et al. (2015) According to Stiglitz (2015), “real U.S. wages have stagnated for decades.... Adjusted for inflation, average hourly earnings of production and non-supervisory employees have *decreased* some 30 percent since 1990. More dramatic ... the aggregate share of labor *excluding the top 1% compensation* ... has slid from just under 80% to around 60%.” [Emphasis added] While there are many explanations of growing inequality, corruption of political institutions is prominent among them.

There can hardly be a tavern in American where one can provoke an argument by claiming that all politicians are crooks.¹⁵ 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 at all extremes. This process tends to produce additional interventions, each of which presents a continuing stream of opportunities for officials to

¹⁵ See generally, for example, Fukuyama at 35, 455-548; Hasan (2012). Opinion polls have long shown that both politicians as a class and most political institutions, especially Congress, are widely disrespected. Post (2014), 65 and n.103; Hibbing (1995 and 2005); Newport (2013); Pew (2013); Gallup (2013). Quantification of corruption and its costs is challenging for obvious reasons, but see Fisman (2001) and Duggan & Levitt (2002).

reward elites within programs characterized and even intended as remedial. The process is a negative-sum game that, unchecked, may eventually have an unhappy Jeffersonian ending.¹⁶

The Framers of the American Constitution were familiar with corruption, which permeated the 18th century British parliament and the monarchy. Partly in response, the Framers designed a small federal government with limited powers, which necessarily 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 necessarily the inclination of a typical elected official to seek private objectives at the expense of aggregate well-being. Instead, that inclination is now presented with a much wider set of opportunities, often embedded in politically legitimate responses to public needs or demands. Specifically, on-going regulation of any economic or social activity by an administrative bureaucracy creates a focus of interest-group leverage. Leverage is exercised directly on the political appointees that head the agency and on career bureaucrats and is traceable in most cases to members of congressional committees.

Before discussing remedies for these problems we need to agree on the purposes of government and to understand James Madison's constitutional design and its objectives. In considering remedies for systemic corruption our focus must be on the *performance* of constitutional structures

¹⁶ Violent revolution in America may be a long shot, but not for lack of impassioned despair at political corruption from both ends of the political spectrum. Compare Murray (2015) with Hedges (2015).

in achieving the Framers' (and the Peoples') key objectives, which remain largely uncontroversial.

4. 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 other Enlightenment philosophers, 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.¹⁷ We have indications of their intent, in the prevailing Enlightenment climate of opinion, but most clearly famously in the Declaration of Independence, 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. Preamble ¹⁸[Drafted 1787, ratified 1788; emphasis supplied]

¹⁷ Maier (2010) describes in some detail the process and the politics of ratification.

¹⁸ The Supreme Court has held that "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the

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 guide to the Founders’ intent.

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

Key ideas in the Declaration of Independence and the Preamble still appear in the speeches of modern politicians, but they have become ritualistic. It is clear enough how Madison’s Constitution served the ends of life and liberty by creating specific personal rights against the government. More important for present purposes, the Preamble says, in different words, the same thing as the quoted paragraph from the Declaration, that the *general welfare* of the People—their

source of any substantive power conferred on the Government of the United States or on any of its Departments.” *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). Madison in Federalist 41, responding querulously to criticism of the Preamble, makes the same point.

capacity to achieve 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, and fora for the peaceful resolution of conflicts. 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 extent or threat of tyranny. Moreover, given the inherent self-interest of public officials—even if only for their own careers—government that is more extensive implies a greater burden of corruption.

The Federalists' Constitution relies on limited government and on elections to control corruption. The Framers were well aware of the potential shortcomings of voters and elections, but saw no superior alternative. Indeed, it was Federalist doctrine that the People themselves were the only legitimate source of political power. The Constitution produced by the Philadelphia Convention of 1787 relied on ratification by the People for its own legitimacy. Rakove (1999).

This objective helps explain Madison's creation of a central government structure that permits or even encourages "gridlock."¹⁹ In the absence of near unanimity among the interests supporting

¹⁹ Madisonian gridlock results from intramural rivalry among the branches. Modern gridlock is, admittedly, in large part a product of partisan extremism. Another variety of gridlock results from the Senate's tradition permitting a single senator to hold up a bill or confirmation without

the branches, each with veto power over the others, the federal government would be prevented from acting quickly or easily.²⁰ 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 19th century changes that eventually made *unlimited* central government inevitable, among them national markets, mass production, the limited liability corporation, and revolutions in communication and transportation. Most important, by the 20th century, government had become, for many citizens, the natural panacea for all social and economic discontents.

Madison designed federal government structure was to minimize the potential cost, in corruption and tyranny, of supplying what were in 1787 considered the essential services of government. He also designed the Constitution 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

explanation. The House has traditions and rules with similar effect. Single-member holds can facilitate lawful corruption.

²⁰ The Article III courts did not become a full-fledged Madisonian branch until the Supreme Court made clear that it claimed the right of judicial review of legislation in *Marbury v. Madison* 5 U.S. 137 (1803).

adjusting to the new age of mass production and mass media. By the time of the New Deal such demands had been greatly magnified.

Simultaneously, the federal government became freer to respond to demands for political solutions to economic discontents. Big business had pioneered the development of scientific management and large organizational hierarchies. A professional and reformed civil service, freed of patronage appointments by early in the 20th century, faster and cheaper communication and transportation, and national media enabled Congress to offer solutions to the problems of organized interests who could produce votes, directly or indirectly. Simply put, central government services could now expand to meet the demand. As the Supreme Court has noted, the federal government today, a century after the Progressive Movement, “wields vast power and touches almost every aspect of daily life.”²¹

Broadly speaking, the expansion of government that began in the Progressive Era has been associated not with provision of more effective or extensive liberties but with the creation and administration of new entitlements.²² Both liberties and entitlements require administration, as do

²¹ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. 477, 499 (2010).

²² Admittedly, a traditional liberty can be viewed as an entitlement and an entitlement can often be viewed as a liberty. For example, freedom from expropriation of property, a traditional liberty with roots in Magna Carta, entitles citizens to state enforcement of a right. Health care in old age

taxation and procurement. Administration of each of these functions unavoidably implies policies, rules, regulations and adjudications that directly or indirectly marshal and reallocate resources within the private economy. Administration, whether assigned to independent or executive branch agencies, entails the exercise of discretion. Both agency officials and members of congressional budget and oversight committees must choose among options that create and destroy income and wealth.

Participants in the economy and other interests today therefore have enormous incentives and opportunities to influence government policy. Well-funded interest groups wield much of their leverage by influencing which of these options are selected. Their objectives, broadly, are to advance their own agendas without regard to the impact on other interests or on the economy as a whole. The public choice term for this is “rent-seeking.” Tullock (1967), Krueger (1974).

Rent-seeking by elite interests is nearly by definition regressively redistributive and reduces aggregate welfare. The name itself derives from the monopoly rents (profits) gained by royal favorites who were granted such concessions as the right to collect customs duties at a British port of entry. Elites succeed today by providing elected officials with financial and other support, by foregoing such aid to rival candidates, by hiring appointed officials after they leave office, and by providing all officials with substantive resources crucial to the legislative or rule-making process. In consequence, of course, organized interests threatened by rivals are obliged to defend

(Medicare) is an entitlement that confers liberty from a particular category of suffering and dependency on others.

themselves in like fashion, if they can. The goals of elite interests often are 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.²³ 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 intervention.

The Framers' likely perceived the consequences of corruption in a small and limited government as a tolerable cost of doing business. To put it the other way around, limited government meant limited opportunities for corruption. Further, many potentially effective anti-corruption measures conflict with constitutional freedoms. *Citizens United* makes a good example: to reduce corruption in elections we must invade freedom of speech. Nevertheless, 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 and more so as the freedom to petition Congress has become the focus of a large professional class.

²³ According to Professor Reich (2015), “In the 1970s only 3 percent of retiring members of Congress went on to become Washington lobbyists. Now half of all retiring senators and 42 percent of retiring representatives become lobbyists.” See Blanes i Vidal (2012) on the “revolving door.”

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

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

5. 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 unsatisfactory in various respects.

5.1 Broaden the Reach of Criminal Law

It is tempting to suggest that that authors of welfare-reducing legislation, and perhaps even those who vote for such laws, should face criminal penalties. But the criminal law would be of little help in controlling currently lawful corruption. Post (2014) at 57. The behavior of legislators is often difficult to categorize. At one extreme, it may be unlawful—frank bribery or extortion, for example. Stein (2012). At another extreme, it may be unambiguously virtuous—beneficial to constituents and neutral or adverse to the legislator’s personal interest. In general, legislative be-

havior reflects mixed motives and complex interactions with other legislators as well as imperfect information about the effects of the law itself. For this reason, constraints on legislative behavior intended to deter corruption can easily generate false positive or negative errors and adverse welfare consequences. Classifying currently lawful influences and their consequences as crimes is inadvisable also because of the difficulty of proving intent.

5.2 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 receive respect. Membership of legislators on relevant appropriation and oversight committees creates channels of influence to executive and agency officials. Access accompanies the “revolving door” of congressional staff alumni appointed to regulatory commissions and executive agency positions.

This exchange—money for access—is very much like a bribe. Of course, 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) political support. However, 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.

Campaign contributions and independent expenditures, while important, are far less significant than the relationships between lobbyists and officials. Lobbyists, often alumni of congress and congressional staffs, are effective because they earn, or have earned, the gratitude and trust of officials. Officials in need of data or arguments in support of their positions often turn to lobbyists for support, even on matters unrelated to a lobbyist's immediate interests. Allard (2008). Private sector expenditures on lobbying are many times greater than campaign contributions.²⁴ The relationships between helpful lobbyists and officials generate feelings of gratitude that make officials reluctant to decline support for the lobbyist's clients.²⁵

²⁴ The Center for Responsive Politics, a.k.a. www.OpenSecrets.org, compiles data on contributions and lobbying expenditures based on reports mandated by federal laws and Congressional rules. While there is general agreement that lobbying expenditures greatly exceed expenditures on campaign donations, (see Draca 2014 for recent illustrations), the data themselves are of poor quality and almost certainly understate both sorts of expenditure, especially lobbying. Clemmons (2013).

²⁵ Even small favors can generate powerful feelings of gratitude. Malmendier & Schmidt (2012).

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

The Supreme Court faced one facet of the problem in *Citizens United*, 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.²⁶

The Court's exceedingly narrow definition of corruption as common bribery informed its decision. The Court evaded answering the real question posed by corporate expenditure in the context of systemic faction-based political corruption (Post 2014 at 55). Most constitutional scholars object to the definition, or at least to the Court's originalist argument for the definition.

²⁶ See n. [3] supra

Nevertheless, it is difficult to fault the Court for its choice to promote free expression at the necessary expense of corruption—corruption that in any case would not be much reduced by regulation of political spending.

Notoriously, candidates and contributors have evaded or avoided a succession of regulations of direct campaign contributions. There is usually a lawful way around any regulatory constraint, although generally at some cost. Given that the very politicians targeted by the regulations establish these regulations, any other result would be surprising.

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

5.3 Tighten regulation of lobbying

Although statutes require Washington lobbyists to register, identify clients and report contributions, there is little chance that such regulation has or will reduce corrupted legislation. After all, the First Amendment encourages lobbying. If lobbying were effectively ended, isolated elected officials would have less information about legitimate (welfare-enhancing) legislation and legislative debate would be less well-informed. Moreover, restrictions on access by current lobbyists do not address the underlying problem, which is that important unorganized interests lack the means to hire professional lobbyists. In other words, lobbying is not the problem; the problem is

imbalanced lobbying. It is unclear, however, how to define or achieve “balanced” lobbying. Regulation cannot make lobbying more balanced. Once again, as with campaign finance, it appears futile to rely on reforms aimed at decreasing the effectiveness or imbalances of lobbying as a means to improve legislative outcomes.

5.4 Congressional reform

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

Finally, both houses of Congress have rules restricting non-germane amendments to bills on the floor and restrictions on so-called “ear-marked” bills proposed by individual legislators. Nevertheless, 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 or line items inserted in committee or in conference.

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. The most recent law on a

given matter always trumps preceding laws. Moreover, 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 supporting that member) 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.

5.5 The Westminster System

One of the remarkable features of Madisonian democracy is its competing independent but interdependent branches. Most democracies use a parliamentary system. In the Westminster system, the prime minister is both head of government and the leader of the majority party or coalition in the legislature. The prime minister's party controls the legislative agenda and executes the resulting law, directing a permanent professional civil service. Gridlock normally is absent from such a system, or has been since the monarch and the House of Lords have been taken out of the picture.

When it comes to the role of well-organized interests and lobbyists, the situation in Britain and other parliamentary democracies is no different from the United States. Draca (2014). Corrupt influences, corrupt practices, and important ill-organized interests exist everywhere. Party leaders still need to negotiate with members of parliament, and both candidates and parties crave financial and career support from interest groups.

The chief relevant difference between Washington and Westminster is that in Britain there is no ambiguity about assigning responsibility for policy and performance to the current majority party, which may give voters a clearer basis for their decisions in the next parliamentary election. While a parliamentary system might alleviate the frustrations associated with Washington “grid-lock,” 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, in general, would retain incentives and numerous opportunities to cater to elite interests without regard to the public welfare. Finally, pursuit of a parliamentary structure in the United States would almost certainly require a massive constitutional amendment or a constitutional convention under Article V, perhaps a dangerous undertaking.²⁷

5.6 The presidential veto and the unitary executive

Why does the president not 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 enables Congress to package corrupt legislation in bills that the president cannot veto without endangering his own

²⁷ 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. Although beyond the scope of this essay, constitutional reform in the U.S. is thought to be hampered by the grave difficulty of amending the Constitution; but see Ginsberg (2014). As noted above, tacit amendment by the Supreme Court is far more common than the formal routes.

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, that might forestall the passage of such legislation but only at the price of depriving themselves of a key negotiating tool. In addition, 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. Justice Elena Kagan, then a Harvard law professor, discusses the idea in a 2001 law review article.

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. This was due in part to activism by the Senate Judiciary Committee, then chaired by Senator Ted Kennedy. In almost

every case, the result of deregulation was to improve consumer welfare through lower prices or better service.²⁸

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 distinguish 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. Elite interests may face greater resistance within the executive branch than in the legislature.

However, 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.

²⁸ 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.

5.7 Direct democracy²⁹

The golden age of Athenian democracy relied on direct government by the people. All citizens could vote on matters of policy. Functionaries, including military leaders, were either directly elected or selected at random from the 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, described by Thucydides, to invade Sicily in 415 B.C. (see also Ryan 2012 25-28.)

Direct democracy has avid advocates even today. Modern technology offers potential solutions to the problem of voter numerosity. Political scientists, e.g., Fishkin (2011), have offered methods (and some evidence from experiments with a “deliberative” decision process) designed to

²⁹ 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).

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. Bias in favor of those interests is the likely result.

McCormick (2011), channeling some of Machiavelli's lesser-known work, has suggested reliance on a system of selecting legislative representatives at random from among eligible citizens, excluding those from the elite class. That may preserve the advantages of having full-time representatives while eliminating corrupting incentives related to election and re-election campaigns. However, random selection would not eliminate corrupting influences arising from imbalanced interest group lobbying. Juries may be sequestered, but not legislators. A citizen selected at random for a brief term in Congress, with no chance of serving a second term, would be particularly dependent on interest-group sources of information and professional advocacy.

5.8 Limited government

A traditional conservative or libertarian perspective is that political corruption is an inevitable consequence of big government—with an obvious remedy. However, that does not solve the problem of corruption. This remedy ignores the likelihood that the People simply prefer many or most of the entitlement and regulatory programs that inhabit the expanded sphere of federal jurisdiction. Reducing the scope of the federal jurisdiction would likely require devolution of these programs to the individual states. State governments face many of the same problems with political corruption as the federal jurisdiction. Effective remedies on a state-by-state level could include those considered here.

6. Quality control—in business, sports and politics

The preceding selection of possible remedies for political corruption focuses on the selection and regulation of elected representatives and factions. None of these remedies have been (or would appear to be) effective or, in some cases, practicable. It is useful to step back at this point and ask how non-government organizations mitigate principal-agent corruption (or equivalently, increase principal-agent incentive compatibility). Leaving aside formal civil and criminal legal remedies, such measures include relational contracts with suppliers and employee compensation designs mostly inappropriate to political representation.

A more general approach in commercial contexts is quality control. Quality control (of products and services) includes the incentive-related measures just mentioned but is grounded on direct measurement and evaluation of outcomes. Firms inspect and test finished products and services for adherence to design specifications and survey customer satisfaction. A feedback loop adjusts organizational practices and incentive structures.

Law in its various forms is a major “output” of the administrative state. (Increasingly, delivery of government services is outsourced or delegated to the states.) The output of law is of poor quality, in part because of corruption, but also due to poor or no quality control. Compared to ordinary practice in the private sector there is only vestigial or nominal attention to the relationship between output and the well-being of clients. Corrupted elections are a poor substitute for best-practice quality control. Law at the national level is a monopoly of the state; competitive

discipline is absent. The rivalry that stems from the separation of powers is seldom about substantive policy; it is chiefly about branch jurisdiction. The rivalry may protect against tyranny but it does little to forestall corruption.

As discussed above, quality filters such as presidential vetoes and judicial review attend only to a small subset of legislation and generally do not address the public well-being objective of the Preamble. The filtering role of the media is confined to issues of high salience that do not correspond systematically to issues that most deeply impugn welfare. The media seek to produce audiences, chiefly by appeal to emotion, especially fear. The media, by reporting on criminal corruption and high-visibility boondoggles (such as the Alaskan “bridge to nowhere” *New York Times* 2005), incite contempt for politicians but not attention to the welfare and distributional consequences of lawful corruption.

In a Madisonian government the most natural way to interdict corrupted law (and thereby to deter its instigation) in one branch is to assign another branch the responsibility and power to monitor and constrain the *effects* of processes that have been corrupted.³⁰ (See Madison’s argument in Federalist 10, which includes the quotation used here as an epigraph.) To accomplish this we need an “independent” umpire, with the power to assess and veto legislation and agency policy

³⁰ See Federalist 10 (Madison). An umpire role is useful not only in mitigating lawful corruption but also in detecting errors and non-corrupt promotion of local constituent interests at the expense of the general welfare.

that fails substantively to advance the aims of government set out in the Preamble to the Constitution. Such a function could supply Madisonian intramural discipline focusing on the welfare reductions produced by elite rent seeking.

The American people are familiar with the roles of umpires, referees and kindred officials in sports contests. In addition, while umpires strive to score pitches and runs accurately, their task is to look at plays, not the recruitment of players. The focus generally is on output or performance, not inputs or form. Partisans do often question the rulings of umpires and refs, and sports officials sometimes accept bribes or bet on the outcome of contests, but for the most part sports 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. This is not accomplished by asking baseball fans to elect umpires.

Madisonian democracy recognizes the People themselves as the only legitimate source of political power. However, Madisonian democracy also recognizes that the People are unreliable—even dangerous—as a source of day-to-day legislative action. Instead, the People entrust their power to elected representatives. As noted above, this makes elected officials the agents, in an important sense, of the People.

All agents are unreliable to some degree because of self-interest, particularly if their performance is difficult to monitor or evaluate. Madison relied on competitive elections to control this conflict of interest. We can assume that Madison understood that elections would be biased if the

partisan influences on voter choices are biased, but saw no better option. In the modern world, voters are woefully bad judges of the performance of their political agents. Voters generally are incapable of monitoring the performance of legislators, at least on non-salient issues.

Unlike private businesses, legislators are not vulnerable to product liability lawsuits. It would be an improvement to rely on disinterested professional 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.

As with the canonical branches of government, no one should expect perfection from a new “officiating” branch. Welfare-oriented umpires will not perfect or “optimize” the output of law, but at least welfare and equity issues will have a place, and an institutional advocate, in the debate.

No less important, insulated umpires will reduce the elite bias that infects current law making.

As for legitimacy, what matters in the end is whether people trust the government to act in their interests. Despite being thoroughly undemocratic, the judiciary is seen as far more trustworthy as congress, and an umpiring branch may usefully rely on similar organization features.

This essay does not explore the technical means by which to assess the welfare and distributional effects of law. Benefit-cost-risk-distribution analysis seeks to include assessments of the significant values citizens place on environmental amenities (such as clean air and water), public services, and policy preferences, including distributional equity. Ultimately, of course the question is whether a given law or policy increases happiness, compared to the status quo or some counterfactual, and of what categories of the population. The literature is enormous. For brief recent

discussions of relevant concepts and citations, see Halliwell et al. (2014), Williams & Broughel (2015), Fichtner & McLaughlin (2015), and Davidson (2015).

Suffice it to say for present purposes that the practice of benefit-cost-risk-distribution analysis applied to legislative impact is no less objective, reliable or accurate than the constitutional and statutory analysis carried out by the Supreme Court.

How could we include umpires in the current Madisonian system? Several possibilities suggest themselves.

6.1 Substantive review in the Supreme Court

The United States lacks a constitutional court separate from its judicial court of last resort. According to Article III of the Constitution, the Supreme Court was to be a court of last resort for the resolution of disputes. John Marshall, chief justice of the Supreme Court from 1801-1835, believed that his court should also be a constitutional court with the power to strike down federal legislation that was inconsistent with the Constitution. In *Marbury v. Madison* 5 U.S. 137 (1803), the Court awarded itself the right to a line-item veto. At a stroke, this made the judiciary a co-equal branch of government. Congress might have challenged this usurpation by initiating an Article V amendment process, but did not.³¹

³¹ There is debate whether the power of judicial review of legislation was inherent in the British common law imported to America. If it was, there was no “usurpation” by the Marshall court.

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

Because it is made up of lawyers, the U.S. Supreme Court approaches constitutional questions much as it approaches appellate review of cases: focusing chiefly on "matters of law" which are either procedural or involve statutory interpretation, giving much emphasis to precedent, and mostly ignoring substantive effects on welfare. Perhaps worse, for present purposes, it is constrained by "legal reasoning," a mode of justification in which several factors are alleged to motivate some prior action or doctrine, with respect to which the writer now assigns different subjective weights.

A 2015 Supreme Court decision dealing with Environmental Protection Agency (EPA) regulation of mercury emissions from coal-burning power plants illustrates the problem. *Michigan v. EPA*, no. 14-46 (decided June 29, 2015). The question was whether EPA should consider costs in deciding to impose regulation. It was undisputed that the costs of compliance would exceed \$10 billion per year, while the benefits would be well under \$100 million per year. An assessment of the effect on aggregate well-being, on these facts alone, would lead one to reject the proposed regulation. However, the Court could reach this sensible result only through a tortuous

analysis of the Clean Air Act, the Administrative Procedures Act, canons of statutory interpretation, and other legal materials. In the end, the Court’s legal analysis rests in large part on the observation it would be unreasonable for the EPA (or the Congress) to ignore cost. This, despite numerous instances in which Congress has mandated explicitly that costs be ignored in environmental matters, notably in connection with endangered species.³²

A more catholic constitutional court would consider substantive analysis of effects and treat “facts” as within its competence. What this suggests, unfortunately, is that the U.S. Supreme Court is unlikely to be comfortable asserting a position that would be perfectly natural for the French *Conseil*—for example, that a statute was unenforceable because its substance *or effect* was inconsistent with the Preamble to the Constitution, or with its “spirit.” Still, the modern Court has “found” all sorts of new rights and entitlements in the Constitution just as the Marshall Court “found” a momentous new right for itself.

Whether the U.S. courts would accept economic well-being and collective action pathology as a new dimension of the nebulous concept of due process may be the key to tacit acceptance of an umpire role. Richard Hasan (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

³² “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172-74 (1978), interpreting 16 U.S.C. §§ 1531–1544 (2000).

(even compelling) government interest that could justify [anti-]lobbying (or other) laws.” An exception is the forlorn minority dissent in *Citizens United*:

When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, “provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation.” Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is “far more destructive” than what non-corporations are capable of.³³

The relatively narrow traditional 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 existing 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

³³ *Citizens United*, 558 U.S. 310, 357, (Justice Stevens, concurring in part and dissenting in part and joined by Justices Ginsburg, Breyer, and Sotomayor), quoting Sitkoff (2002) at 1113.

with greater diffidence than did Marshall. One way to begin might be for a president to appoint a distinguished non-lawyer to the Court.³⁴

6.2 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.³⁵ 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. Those distressed by “gridlock” in Washington today clearly will be even more distressed to consider yet another branch with veto power over legislation.³⁶ From a Madisonian perspective, however, it is

³⁴ 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.

³⁵ Anything at all can be done, of course, without an amendment if none of the branches opposes it. But an umpire empowered to overturn legislation and administrative policies would doubtless be opposed by one or more branches.

³⁶ See n. [40], *supra*.

not so obvious that gridlock is a bad thing. It is a natural result of the checks and balances established to protect the People from ill-considered laws. Further, if a fourth branch of umpires existed, legislation likely to produce a veto would be at least partly deterred. Paraphrasing Holmes, expectations of what umpires will do deter most rule infractions, not official action on every latent player impulse.

6.3 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”³⁷ 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 revisal 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

³⁷ I am indebted to Jack Rackove for pointing me to this episode.

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 ... 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 B.C.). The *Oxford Classical Dictionary* (2002 ed. online) describes the Roman “Tribunate” as follows:

The *tribuni plebis* (or *plebi*), ‘tribunes,’ were the officers of the plebs first created ... traditionally in 494 B.C. ... The tribunes were charged with the defense of the persons and property of the plebeians. ... Elected by the plebeian assembly and exercising their power within ... the city, the tribunes could summon the plebs to assembly and elicit resolutions (*plebiscita*). They asserted a right of enforcing the decrees of the plebs and their own rights... They possessed ... a right of veto against any act performed by a magistrate ... The full acknowledgement of their power came with the recognition of *plebiscita* as laws binding upon the whole *populus* and not just the plebs ... Tribunes were first admitted to listen to senatorial debates; at least from the 3rd cent. BC they had the right to convoke

the senate; ... 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 B.C.). ... Active tribunes came increasingly to be associated with the particular interests and grievances of the urban plebs ...

Briefly, 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 boycott. The aristocracy and the plebs negotiated a lasting settlement that granted substantial political power to the elected representatives of the plebs. The Plebeian Assembly held these Tribunes of the Plebs 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.³⁸

³⁸ The earliest surviving account of the Tribunate, by Polybius (c. 160 B.C.), likely paints too rosy a picture of the tribunes’ effectiveness. In addition, it would be a mistake to regard the plebs as “the People” in a modern sense. Women, slaves, and (perhaps) those who lacked land owner-

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 the veto power. The relevance of the Tribunes to mitigation of modern systemic corruption is two-fold: the Tribunes protected the people (or at least the plebs) from executive and legislative actions adverse to plebian interests, and they did so *ex post*—after the legislation or action was enacted or ordered.

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 Part 6), but rather the barrier of formal constitutional amendment, assuming that hurdle proved unavoidable.

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 1787 precedent. As noted above, the Constitution is usually amended tacitly by the Supreme Court in the course of interpretation. Something like that likely will have to precede full realization of an umpire institution willing and able

ship were excluded, and participation in the Plebeian Assembly was determined by tribal membership. McCormick (2011), pp. 178-188, explores the advantages of reviving the Tribunes of the Plebs as a modern solution to the problem of political corruption; Posner (2010) provides a political economy perspective on the Roman constitution, including the tribunes.

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 evolve into a more effective force, without the need for a formal amendment.

Even a common understanding of “human nature” as given to us by a complicated mixture of nature and civil nurture should leave no one surprised at manifestations of antisocial tendencies in principal/agent relations, including political representation. That is why we have so many mechanisms to contain it: supervision, morality, religion, civil, criminal and reputational penalties, conscience, audit trails and so on. Political corruption in America is far from costly to its authors—it is a near requirement of holding a congressional seat, and it is boring to voters and media audiences. We need something more effective than dreams of direct democracy and easily evaded controls on interest group activity. If we are to retain the bones of Madisonian democracy and still avoid the growing economic and equitable costs of corruption a Madisonian solution is required. That calls for a Branch whose only business it is to veto Washington’s massive output of corrupt law.

7. Illustrative details

For the sake of concreteness, and in emulation of McCormack (2011), 170-188, 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 legisla-

ture and the administrative process with a democratic institution representing the principal victims of elite power, the middle class. Given the difficulty faced by elites collectively in containing their potentially destabilizing and pie-shrinking excess greed, it seems likely that the proposal also is in the collective interest of the elite. Feuer (2015). As with any Madisonian system, the effect of such a new branch would be felt chiefly through changes in the incentives of the remaining branches.

AMENDMENT XXVIII

THE UNITED STATES COUNCIL OF REVIEW

7.1 Function. Severability. Counterfactual. Control of docket.

There shall be a United States Council of Review (Council), independent of the branches created by Articles I – III of this Constitution. The duty of the Council shall be 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 and regulations having the force of law, including those of Independent Agencies) for consistency with the fundamental objectives of government, as set out in the Preamble. 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.

7.2 Predictability.

Upon ratification of this Amendment, all newly enacted Laws shall go into effect, 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 whether 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 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 then 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. The Council shall consider the principles of *stare decisis* in its decisions.

7.3 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 redistribute income or wealth so as to reduce the well-being of the poorest citizens.

7.4 Jurisdiction.

The Council may not veto a Law based solely on 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.

7.5 Legislation.

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

7.6 Override.

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

7.7 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.

7.8 Selection of Members.

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 45 days of a vacancy on the Council, for a total of 70 nominations. Each vacancy on the Council shall then be filled by lot from among the nominees, and the candidate thus selected must be confirmed by a two-thirds majority of the Senate. The Council shall determine, for any candidate selected, whether the qualifications are met. Members of Congress, their first-

degree relatives and senior staff may not be nominated until five years have elapsed since leaving office.³⁹

7.9 Qualifications of Members.

Nominees for the Council must be U.S. citizens at least 45 years of age, having 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.

7.10 Budget.

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

7.11 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. Notwithstanding any provision of law to the contrary, the Council may offer staff compensation commensurate with that in the private sector. Neither the Staff Director nor any professional Council

³⁹ Clearly, a one-time procedure will be required for the inaugural panel. See 7.20 *infra*.

employee may earn income from representing or advising clients with business before the Council before five years after leaving employment.

7.12 Compensation of Members. Lifetime ban on other income.

Members shall be compensated at three times the compensation of a member of Congress. Financial and other substantial personal assets, other than obligations of the United States, owned by a Member at the time of appointment, shall be placed in a blind trust. No Member or former Member may receive any other form of income, including gifts and bequests, for life, but shall be 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.

7.13 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.

7.14 Opinions.

The Council shall publish written opinions to explain its reasons for any decision, including decisions not to veto Laws that it has reviewed, so that its methods and procedures may be understood and relied upon. All deliberations and proceedings of the Council shall be recorded and immediately thereafter made available to the public.

7.15 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. The Council may assign investigations and preliminary decisions to panels of its Members, but all decisions to act or not to act, after a review, shall be made en banc.

7.16 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, extortion, or acceptance of unlawful gratuity.

7.17 Immunity from congressional appearance.

Congress may not compel Members or employees of the Council to appear before it in relation to the business of the Council.

7.18. Expulsion of Members.

The Council may expel a Member for cause by a two-thirds vote of its remaining members. The Congress may impeach and expel a Member according to the procedures established for Article III judges.

7.19 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 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.

7.20 Implementation.

The Congress shall have the power to enforce this Amendment by appropriate legislation.

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