

# ARTICLES

## REPRESENTATION REINFORCEMENT THROUGH ADVISORY COMMISSIONS: THE CASE OF ELECTION LAW

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*An increasingly prominent strain of legal commentary warns that the democratic good of robust political competition is endangered by legislators' penchant for enacting, and preserving, statutes that entrench incumbent officials and dominant political parties. This political entrenchment dynamic is thought to warrant external regulation of election law by a politically insulated constitutional court or regulatory commission. Drawing on recent institutional innovations in Australia, Canada, and the United Kingdom, this Article suggests a different institutional remedy for the entrenchment problem: a permanent advisory commission, authorized to draft bills for the legislature to consider under a closed-rule procedure, or for the citizenry to address by referendum. The approach suggested here provides an answer to the two main criticisms that have been lodged against external regulation in the interest of fair political competition: that such regulation is democratically illegitimate, and that the regulator itself is likely to be captured by political insiders. The standing advisory commission can be expected to do a better job of identifying and pursuing normatively appropriate reforms than would an otherwise similar external regulator. The very tenuousness of the advisory commission's de facto power to reform the law (depending as it does on public opinion) should make the body a more reliable agent of the citizenry's interests and concerns. And in the event that the body falls under the sway of political insiders, it stands to do much less damage than a captured external regulator, thanks to the voters' freedom to ignore it.*

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## INTRODUCTION

It has been received wisdom for the better part of a generation that the Supreme Court has an important role to play in countermanding the predictable efforts of incumbent legislators to “chok[e] off the channels of political change,”<sup>1</sup> insulating today’s political insiders against tomorrow’s challengers.<sup>2</sup> In the 1990s, however, the Court issued several opinions that suggested a lack of concern about the incumbent-entrenchment dynamic, and these opinions engendered a fresh and vigorous body of election law scholarship on the Court’s representation-reinforcing role.<sup>3</sup> In the 2003–04 Term, litigants and *amici* in two much-anticipated cases placed the renewed election law literature before the Court.<sup>4</sup> Twice the Court was asked to undo laws said to impinge on political competition, and twice it declined. In *Vieth v. Jubelirer*,<sup>5</sup> the Court announced that the constitutionality of extreme partisan gerrymanders is a political question not for resolu-

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<sup>1</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980).

<sup>2</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 716 (2000) (“Thanks most notably to the work of John Ely, the need for a check against this sort of abuse is broadly acknowledged in constitutional circles.”).

<sup>3</sup> See, for example, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668–687 (1998), wherein the authors take issue with the Court’s decisions in *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii’s ban on write-in ballots in Democratic primary and general election), and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (sustaining Minnesota’s ban on fusion candidacies). See also Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332 (disputing Court’s statement in *Timmons* that there is legitimate state interest in protecting two-party “duopoly” from third party competitors); cf. Melissa Cully Anderson & Nathaniel Persily, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform 2* (Univ. Penn. Law Sch. Scholarship at Penn Law, Paper No. 60, 2005), available at <http://lsr.nellco.org/upenn/wps/papers/60/> (“Perhaps more than any other political phenomenon, incumbents’ capture of political institutions through the manipulation of the rules of the electoral game has commanded the attentions of scholars of the law of democracy in recent years.”).

<sup>4</sup> See, e.g., Amicus Brief of Public Citizen et al. in Support of Appellants at iv–v, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580); Brief of the DKT Liberty Project as Amicus Curiae in Support of Appellants at v–vi, *Vieth*, 541 U.S. 267 (No. 02-1580); Brief Amicus Curiae of Pennsylvania Voters Joann Erfer and Jeffrey B. Albert in Support of Appellants at ii–v, *Vieth*, 541 U.S. 267 (No. 02-1580); Brief of Amici Curiae Texas House Democratic Caucus et al. in Support of Appellants at iv–v, *Vieth*, 541 U.S. 267 (No. 02-1580); Brief of Amici Curiae the ACLU and the Brennan Center for Justice at NYU School of Law in Support of Appellants at v–vii, 11, *Vieth*, 541 U.S. 267 (No. 02-1580). The academic literature was not quite so pervasively briefed in the other major political competition case, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), but one of the nation’s leading election law scholars, Richard L. Hasen, authored a brief in which his own scholarship is cited liberally. See Brief of Amicus Curiae Center for Governmental Studies in Support of Appellees at 14, 19, *McConnell*, 540 U.S. 93 (No. 02-1674).

<sup>5</sup> 541 U.S. 267 (2004).

tion by the courts, for want of judicially manageable standards for determining when the partisan effects of a districting scheme are so grave as to make the plan unconstitutional.<sup>6</sup> In *McConnell v. Federal Elections Commission*,<sup>7</sup> the Court upheld the Bipartisan Campaign Reform Act—the most important federal legislation on campaign finance in decades—which the challengers had characterized as an incumbent-protection boondoggle.<sup>8</sup> In so doing the Court glossed over the question of whether the bill was narrowly tailored to its stated goals of preventing corruption and the appearance of corruption.<sup>9</sup> As one commentator observed, the Court has simply “thrown in the towel.”<sup>10</sup>

*Vieth* and *McConnell* are not anomalous,<sup>11</sup> and the Justices’ apparent reluctance to elaborate—or ambivalence about elaborating<sup>12</sup>—competition-protecting doctrines makes it worth asking whether some sort of nonjudicial institution might fare better than the Supreme Court in maintaining the legal preconditions of fair political competition.

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<sup>6</sup> *Id.* at 281. The court in *Vieth* split 4-1-4. Four justices signed on to an opinion that treats partisan gerrymandering as a nonjusticiable political question; a fifth, Justice Kennedy, wrote that partisan gerrymandering is not *now* justiciable but might become so were litigants to come up with an adequately constraining doctrinal standard for separating acceptable partisan gerrymanders from “extreme” ones that go too far. For analysis of the case, and of the mysteries of Kennedy’s opinion, see Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 562–64 (2004).

<sup>7</sup> 540 U.S. 93 (2003).

<sup>8</sup> See, e.g., Reply Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 15, *McConnell*, 540 U.S. 93 (No. 02-1674) (“It would be difficult to devise a more effective statutory scheme to protect incumbents from criticism than by criminalizing the use of their names.”); Brief of Rodney A. Smith as Amicus Curiae in Support of Appellants at 2, *McConnell*, 540 U.S. 93 (No. 02-1674) (“This brief argues that the unintended consequences of federal control have been (1) a further heightening of the role big money plays in elections and (2) even greater advantages for rich candidates, and further empowerment of incumbents, who as the result of this regulation are all but unbeatable.”).

<sup>9</sup> This point is elaborated in Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence*, 153 U. PA. L. REV. 31, 47–57 (2004).

<sup>10</sup> Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L.J. 259, 264 (2004).

<sup>11</sup> See *supra* note 3 (citing literature on Supreme Court’s inattention to political competition concerns in 1990s); cf. Hasen, *supra* note 9, at 33 (arguing that *McConnell*’s “fail[ure] to meaningfully balance or closely examine new campaign finance laws for self-dealing” comports with Court’s decisions in three other recent, though less momentous, cases).

<sup>12</sup> It is certainly not the case that the Justices are incognizant of political competition concerns, but for whatever reasons, the Justices have yet to convert these concerns into doctrinal formulations that have bite. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 515–17 (2004) (suggesting that Court is “treading water” in its election law jurisprudence, dissatisfied with doctrinal status quo but unsure how to proceed).

That question is starting to attract attention from academic lawyers. Samuel Issacharoff, Richard Pildes, and Michael Klarman, among others, have endorsed the constitutional delegation of districting responsibilities to independent commissions.<sup>13</sup> Bruce Ackerman has gone a step further, venturing that democratic constitutions ought to provide for a politically insulated regulatory commission—a “democracy branch”—with rulemaking and administrative powers adequate to the task of giving effect to whatever “conception of democracy” the constitution embodies.<sup>14</sup> Pildes, in his *Harvard Law Review Foreword* following the Supreme Court’s blockbuster 2003–04 Term, laments the general absence in the United States of “intermediate institutions,” other than constitutional courts, that could effectively counter “the pathological tendency of democracies toward political self-entrenchment.”<sup>15</sup> Constitutional law, Pildes acknowledges, “is often an awkward and limited means to remedy problems of political self-entrenchment.”<sup>16</sup>

In one important respect, however, this incipient thinking about nonjudicial alternatives remains largely in the shadow of the Supreme Court archetype: The celebrated “intermediate institutions” formally remove certain questions from the legislature’s domain. Like the paradigmatic constitutional court, the paradigmatic districting commission (or “democracy branch”) is expected to operate as an external regulator of electoral processes:<sup>17</sup> external, in the sense that members of these bodies neither stand for periodic election nor hold office at

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<sup>13</sup> Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 641–48 (2002) (suggesting that Supreme Court develop “prophylactic rule” that would require state legislatures to create nonpartisan districting bodies); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 533–34 (1997) (gesturing towards similar approach); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 78–83 (2004) [hereinafter Pildes, *Foreword*] (describing successes of districting commissions in other countries).

<sup>14</sup> Ackerman, *supra* note 2, at 716–18. Examples of politically insulated regulatory commissions with broad “legislative” jurisdiction over the ground rules of political competition are discussed in John Murphy, *An Independent Electoral Commission*, in FREE AND FAIR ELECTIONS 25, 35–37 (Nico Steytler et al. eds., 1994).

<sup>15</sup> Pildes, *Foreword*, *supra* note 13, at 78.

<sup>16</sup> *Id.*; cf. *infra* notes 43–45 and accompanying text (briefly noting institutional limitations of judiciary vis-à-vis task of remedying political process failures).

<sup>17</sup> See, e.g., Ackerman, *supra* note 2, at 717–18 (explaining that politicians are “profoundly reluctant to cede control” over election-related matters to “truly independent authorities;” hence need to constitutionalize “democracy branch”); Issacharoff, *supra* note 13, at 647–48 (“A strategy of reinforcing political competition by taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitutional values.”); Pildes, *Foreword*, *supra* note 13, at 79 n.211 (approving of districting-by-commission arrangements in which politicians “can submit objections to [commission-]proposed plans, as can other citizens, but [politicians] cannot draw the districts, vote on the adoption of plans, or challenge plans in court”).

the sufferance of those who do; regulators, in the sense that these bodies have de jure authority to revise the ground rules of political competition.

This Article advances a different institutional remedy for the entrenchment problem, one meant to enhance rather than displace ordinary lawmaking and political contestation with respect to political process questions.<sup>18</sup> I argue that a permanent advisory commission, authorized to place its concerns on the legislature's agenda or a referendum ballot, and positioned to compete with legislators for the voters' trust, could substantially impede political insiders' efforts to hamstring would-be challengers.<sup>19</sup> This body would not be in the business of overriding legislative enactments (like a constitutional court), or supplanting the legislature in particular domains (like a districting commission or Ackermanian democracy branch). Its formal powers would be far more circumscribed: investigating problems, drafting remedial legislation, and submitting its bills for closed-rule<sup>20</sup> votes of the legislature or, in jurisdictions that recognize the referendum, a vote of the people. Whatever de facto power the body wields would largely follow from its persuasive authority with the electorate.<sup>21</sup> If voters stood ready to punish legislators who contravened the body's recommendations, the advisory commission would have great power; if not, it would have very little.

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<sup>18</sup> For another intriguing, yet ultimately pessimistic account of an approach to the entrenchment problem that would not involve end-running the elected branches, see Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533 (1999) [hereinafter Garrett, *Ballot Notations*] (analyzing pros and cons of ballot notations), discussed *infra* in note 282.

<sup>19</sup> Since drafting this Article I have come across two earlier essays by legal commentators, and one by a political philosopher, that mention the possible utility of advisory bodies for election law reform. See DENNIS F. THOMPSON, JUST ELECTIONS 134, 168–73 (2002) (encouraging use of periodic constitutional revision commissions to update election law, in manner that is deliberative and consistent with principle that “no democratic institution should have final authority to determine the rules or settle the disputes about its own membership”); Lisa E. Klein, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT’L L. 1, 45–46 (1999) (suggesting that outside advisory bodies might help to overcome problem of congressional inaction in face of calls for campaign-finance reform); Jeffrey Rosen, *Divided Suffrage*, 12 CONST. COMMENT. 199, 200–01 (1995) (raising possibility of independent advisory body with responsibility for districting and suffrage). This Article appears to be the first effort to characterize the potential influence of a standing advisory commission and to compare it with the regulatory alternatives.

<sup>20</sup> A closed-rule procedure is one which rules out amendments. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 72–73 (2000).

<sup>21</sup> In referring to the “de facto power” of an independent oversight body (be it an advisory commission, a constitutional court, or an Ackermanian democracy branch) I mean to denote the body's ability to effect reforms that are suboptimal from the perspective of the then-dominant coalition in the legislature. The farther the body can push the law away from the legislature's ideal point, the greater the body's de facto power.

The institution I propose would be representation-reinforcing in both its ends and its means. It would do the political-channel-clearing work that Ely famously proclaimed to be the core responsibility of the constitutional court.<sup>22</sup> And it would do that work not by circumscribing the domain of ordinary lawmaking, but by getting salutary reforms onto the legislative agenda and at the same time strengthening the ability of low-information voters to hold self-serving representatives to account.<sup>23</sup>

It might seem fanciful to think that an advisory body could function as an important constitutional rudder, steering the government (in collaboration with the citizenry) so as to maintain the integrity of the political process. Yet over the last several decades, democratic polities around the world have seen fit to establish ongoing advisory bodies with responsibility for such foundational commitments of liberal democracy as human rights,<sup>24</sup> public integrity,<sup>25</sup> and personal privacy,<sup>26</sup> as well as free and fair elections.<sup>27</sup> Many of these bodies enjoy some degree of structural independence from the elected branches of government.<sup>28</sup> A general account of this little-studied development among liberal political orders lies well beyond the scope of this Article. But the existence of these bodies both undercuts the objection that my proposal is simply implausible, and raises the further possibility that this Article's analysis of the standing advisory commission as prompter and prodder of election law reform might be fruitfully extended to other fields.

We will proceed as follows: Part I frames the central dilemma of external regulation of the political process. The dilemma, in short, is that while the entrenchment problem manifestly reflects a kind of "political market" failure, and thus seems to warrant an external corrective, the project of external regulation raises difficult questions

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<sup>22</sup> ELY, *supra* note 1, at 73–103 (developing "representation reinforcement" theory of judicial review).

<sup>23</sup> See *infra* Part III.A.

<sup>24</sup> See generally Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000) (arguing that human rights commissions can improve fairness of government administration and assist domestic implementation of international human rights obligations).

<sup>25</sup> See *infra* Part II.B.3.

<sup>26</sup> Privacy protection bodies are analyzed in DAVID H. FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES* (1989) (discussing privacy protection bodies in Europe and need for Privacy Protection Commission in United States).

<sup>27</sup> See *infra* Part II.B.

<sup>28</sup> For examples of strategies that have been used to provide national human rights institutions with structural independence from other branches of government, see Carolyn Evans, *Human Rights Commissions and Religious Conflict in the Asia-Pacific Region*, 53 INT'L & COMP. L.Q. 713, 716–18 (2004).

about legitimacy and, worse, the grim prospect of a captured regulator rewriting the rules of the game for the benefit of a favored political faction. Part II introduces the advisory alternative to external regulation, explains how it is responsive to the dilemma, and offers guidelines for the design of the proposed body. Part II also relates the recent emergence and achievements of advisory bodies with jurisdiction over political process and governmental integrity matters, drawing on examples from Canada, Australia, and the United Kingdom. Part III explains, at a theoretical level, the mechanisms by which a standing advisory commission could wield influence over election law—even if the commission cannot bypass the legislature. This Part also explores how the decision to make an external oversight body advisory rather than regulatory affects the likelihood that the body will prove to be a reliable agent of the citizenry. Part IV offers a few thoughts on the practicalities of creating an advisory commission on the model of this Article.

It is not the ambition of this Article to offer a full-dress account of some “optimal” institution or set of institutions for countering the political entrenchment dynamic. For now, it will be enough simply to clarify the basis for thinking that a suitably designed advisory body could substantially improve the politics of political process reform (helping voters to control their elected agents); to explain how the decision to make a political process oversight body advisory rather than regulatory bears on the likelihood that the body will prove to be a reliable agent of the citizenry; and to direct attention to the existence and apparent achievements of several heretofore obscure advisory bodies with jurisdiction over questions on which political insiders are conflicted or otherwise improperly partial. Insofar as this Article lends support to a programmatic agenda, it is an agenda of state-level experimentation. In time, the lessons of experience at the state level may yield both prescriptions and a constituency for a national election law advisory commission—one better positioned to address the entrenchment problem than the recently created but anemic Election Assistance Commission.<sup>29</sup> At present, however, there are design uncertainties, political blockages, and constitutional limitations that all weigh in favor of a state-centered program of experimentation.

## I

### THE DILEMMA OF EXTERNAL REGULATION

That election law presents a distinctive agency problem is by now almost axiomatic. Elected lawmakers have better information than

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<sup>29</sup> See *infra* Part IV.



their constituents regarding the consequences of alternative legal frameworks for the shape of democratic politics—and more particularly, for the security of their own seats and for the dominance of their political parties. Issacharoff and Pildes put it thus:

[P]rocedural rules [pertaining to elections] affect politicians directly, and politicians have particular expertise in the ways these rules affect their interests (compare the efforts of voters to understand the partisan consequences of various campaign-finance proposals). Many politicians and politically sophisticated journalists focus intense interest on such rules, but they remain relatively obscure to ordinary voters (consider partisan gerrymanders, or ballot-access restrictions whose effects, once in place, might be relatively invisible, especially to the extent they discourage new challenges even from arising). Like some carcinogenic agents, many of these political poisons have long latency periods, which insulate those who enact them from causal responsibility.<sup>30</sup>

In short, because voters don't grasp what their representatives are doing in relation to election law, incumbent legislators can and do shift the rules of the game in ways that insulate political insiders from ballot-box accountability. The result, in the eyes of many leading scholars, is a body of election law that systematically privileges incumbent legislators over challengers and the two-party "duopoly" over potential third-party entrants. Scholars have identified the fingerprints of incumbent self-interest on laws governing ballot access,<sup>31</sup> campaign finance,<sup>32</sup> voter eligibility,<sup>33</sup> candidate access to "air time,"<sup>34</sup> ballot design,<sup>35</sup> the drawing of electoral districts,<sup>36</sup> and the congressional franking privilege.<sup>37</sup>

What should be done about this?<sup>38</sup> The leading answer comes from the "structuralist" camp of election law scholars, led by Samuel

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<sup>30</sup> Issacharoff & Pildes, *supra* note 3, at 709.

<sup>31</sup> *Id.* at 683–87; Klarman, *supra* note 13, at 536.

<sup>32</sup> Issacharoff & Pildes, *supra* note 3, at 688–90; Klarman, *supra* note 13, at 536–37.

<sup>33</sup> Klarman, *supra* note 13, at 534–35.

<sup>34</sup> Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667 (2002) (suggesting that "air time" might also become subject of judicial regulation under competition-oriented approach to political process questions).

<sup>35</sup> *Id.* ("If one follows [competition-oriented] logic, independent commissions should also be in charge of all ballot access, ballot design, campaign finance, and voter registration laws, to name just a few.").

<sup>36</sup> Klarman, *supra* note 13, at 533–34, 537.

<sup>37</sup> Persily, *supra* note 34, at 667.

<sup>38</sup> A starting premise of this Article is that political entrenchment is, in fact, a serious problem. This is in keeping with much recent election-law scholarship, *cf.* Anderson & Persily, *supra* note 3, at 1, though both the contours and the gravity of the entrenchment problem have been disputed. See, for example, the recent Harvard Law Review colloquy

Issacharoff and Richard Pildes.<sup>39</sup> Structuralists maintain that democratic constitutions ought to provide for (or be interpreted to provide for) external, competition-minded regulation of electoral ground rules.<sup>40</sup> Regulatory responsibilities could be assumed by the constitutional court, or vested in a similarly insulated regulatory commission—a “democracy branch,” to use the Ackermanian lingo—whose regulations would preempt contrary legislative enactments.<sup>41</sup> Either way, the regulator’s role is to reform “grossly anticompetitive practices” so as to secure an “appropriately robust market in partisan competition.”<sup>42</sup>

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between Samuel Issacharoff and Nathaniel Persily, Issacharoff, *supra* note 13, at 612–30; Persily, *supra* note 34, at 654–67; Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 690–93 (2002), and Elizabeth Garrett’s commentary on the plasticity of political parties, Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 98–115, 137–42. But it is not the purpose of this Article to add to that empirical debate.

<sup>39</sup> RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM Baker v. Carr to Bush v. Gore* 139 (2003) (“The Issacharoff-Pildes model is becoming the new election law orthodoxy . . .”). Seminal “structuralist” contributions include Issacharoff & Pildes, *supra* note 3; ELY, *supra* note 1; and Klarman, *supra* note 13. Among the many noteworthy recent works in the structuralist vein are RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 234–47 (2003) (embracing competition-oriented approach to judicial review of political process); Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 754–55 (2004) (recommending that constitutional courts impose “prophylactic rule” that would put redistricting on fixed, ten-year cycle, in interest of partisan fairness); Gerken, *supra* note 12, at 531–39 (recommending election law jurisprudence that fosters emergence of institutions and processes for election law reform that are not infected by incumbent self-interest); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (applauding transition in election law scholarship “from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements”); Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 707–18 (2004) (recommending that Supreme Court balance four democratic values, including electoral competition, in reviewing campaign finance statutes); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 678–80 (2002) (arguing that political insiders use control over choice of voting technologies to perpetuate their hold on power).

<sup>40</sup> HASEN, *supra* note 39, at 138–56 (contrasting “structural” and “rights-based” approaches); Issacharoff & Pildes, *supra* note 3, at 644–52 (same). In contrast to the structuralists, rights-oriented election law scholars tend to favor external intervention into the ground rules of political competition (by, for example, constitutional courts) only where statutes or executive-branch actions trench upon the clearly articulated constitutional rights of individuals. See HASEN, *supra* note 39, at 73–156 (developing equality-rights framework for election law jurisprudence and critiquing structuralist alternative).

<sup>41</sup> Issacharoff & Pildes, *supra* note 3, at 698–99.

<sup>42</sup> *Id.* at 680, 648. Structuralists also tend to be sympathetic to the ballot initiative as a backstop against political entrenchment, see Anderson & Persily, *supra* note 3, at 1–2, although whether the ballot initiative reliably enables the end-running around political insiders is very much open to doubt, see *infra* note 344. Another possible solution, which has received less attention, is to constitutionalize much of election law coupled with a procedure—hopefully beyond the reach of political insiders—for periodically revising the con-

There has been little comparative scholarship on the advantages and disadvantages of locating oversight responsibilities in a constitutional court or regulatory commission (RC). RCs seem to offer several important strengths, however, including expertise,<sup>43</sup> leeway as to the timing and scope of reform,<sup>44</sup> and opportunities for public participation,<sup>45</sup> to name a few. Despite these advantages, no academic following has emerged for the Ackermanian model of a politically insulated RC with constitutionally conferred rulemaking powers sufficient to realize whatever "conception of democracy" the constitution

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stitution. Compare THOMPSON, *supra* note 19, at 168–73 (suggesting this approach, and treating Florida's constitution as exemplary), with Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 477 (2000) ("[W]hat was conceived of and sold to the people of Florida as a politics-free review mechanism was in fact a gift of a rich political plum to the politicians who happened to be incumbents in the designated offices [with appointment power] when the time for appointing a constitutional revision commission rolled around.").

<sup>43</sup> It is a truism that courts lack the fact-finding abilities of legislatures and administrative agencies, and that appellate courts are further constrained by their dependence on lower courts for the development of a factual record. Justices are not encouraged to become experts in matters of policy or public opinion. Their expertise is in the lawyer's language of justification: the nuances of doctrine, precedent, and legal history.

<sup>44</sup> It would be a breathtaking departure from settled understandings were the U.S. Supreme Court or one of its state counterparts to strike down, for example, an anti-competitive campaign finance statute (imagine severe restrictions on individual contributions to advocacy organizations), and then to order that statute's replacement with some wholly new approach (such as diluting the influence of private wealth with voucher-based public financing). Similarly, it would also be startling were a court to declare that the *absence* of legislation that might serve to open up the political process amounted to an unconstitutional "clogging of the channels of political change." In principle, an RC could do these things. And, in contrast to the constitutional court, an RC could initiate law reforms at a time of its choosing, setting its own agenda rather than relying on litigants to supply it with questions. It could develop new rules in the light of experience, without the drag of stare decisis norms that powerfully discourage the revisiting of past decisions. And, being a stand-alone decisionmaker rather than a commander atop a hierarchy, the commission need not concern itself with fashioning doctrines that other actors (e.g., lower court judges) of varying ideological orientations would administer with tolerable consistency.

<sup>45</sup> Both procedurally and politically, the RC model is far more accommodating of public participation. Procedurally, it is standard fare for administrative agencies to engage in notice-and-comment rulemaking, to consult with citizen and expert advisory boards, and otherwise to hear out concerned groups. See generally CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 158–211 (3d ed. 2003) (detailing forms of public participation in rulemaking). Politically, administrative agencies have to justify their decisions functionally by concretizing their delegated authority in the form of a regulatory objective, and then explaining on an administrative record (inclusive of public comments) how the chosen course of action serves that objective. Such outcome-oriented reasoning lends itself to public critique. Did the agency pick the right goal? Were its chosen means apt to that end? Was the agency responsive to public comments? By contrast, the constitutional court's retrospective, precedent-bound language of justification tends to obscure its policy judgments, especially to persons who lack intimate familiarity with the constitutional law canon. Cf. POSNER, *supra* note 39, at 73 (characterizing his preferred outcome-oriented style of judicial reasoning as a form of "demystification").

embodies. Some election law scholars embrace the RC for redistricting;<sup>46</sup> others favor an independent, politically insulated commission for implementing whatever election laws the legislature enacts;<sup>47</sup> but, Ackerman excepted, none has gone further.<sup>48</sup>

The prevailing sense of caution reflects two foundational concerns about the project of external regulation (whether by court or commission). Critics assert that external regulation in the interest of “appropriately robust” political competition would be standardless and problematic on legitimacy grounds;<sup>49</sup> some further suppose that any real-world institution given authority over the political process is sure to fall under the sway of political insiders.<sup>50</sup>

The critics’ objections are not easily dismissed. Consider first the legitimacy question. It is broadly acknowledged that political process reforms usually entail trade-offs among competing objectives, such as competitiveness, accountability, political equality, quality of representation, and public participation.<sup>51</sup> There is no unidimensional normative criterion analogous to economic efficiency against which candidate reforms can be assessed. Pildes, conceding as much, suggests that the legitimacy objection can be overcome insofar as the regulator only pursues reforms that persons with widely varying

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<sup>46</sup> See *supra* note 13.

<sup>47</sup> See, e.g., Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdowns*, 62 WASH. & LEE L. REV. (forthcoming, 2005) [hereinafter Hasen, *Beyond*], available at <http://ssrn.com/abstract=698201>.

<sup>48</sup> It bears mention, too, that Ackerman presents his “democracy branch” proposal in the context of an abstract inquiry into how constitutions ought to be structured, not as a prescription for specific constitutional reforms at the state or national level in the United States. See Ackerman, *supra* note 2, at 727–28. Moreover, Ackerman’s paper does not address the question of what “conception of democracy” one or another constitution ought to embody. See *id.* at 722–27.

<sup>49</sup> See, e.g., HASEN, *supra* note 39, at 143–46; Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1600–03 (1999); Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 577–80 (2003); Daniel H. Lowenstein, *Political Reform is Political*, in THE U.S. HOUSE OF REPRESENTATIVES: REFORM OR REBUILD? 194, 196–206 (Joseph F. Zimmerman & Wilma Rule eds., 2000); Persily, *supra* note 34, at 667–73.

<sup>50</sup> See, e.g., Persily, *supra* note 37, at 674 (“[I]t is almost impossible to design institutions to be authentically nonpartisan and politically disinterested.”); see also Garrett, *Ballot Notations*, *supra* note 18, at 1583–84 (suggesting that any system for putting notations on ballots “will largely serve the interests of the entrenched political parties, incumbents, and already powerful interests”).

<sup>51</sup> See, e.g., *supra* note 49; cf. Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 688 (2002) (“Persily’s strongest argument [against the structuralists] is that the competition theory risks placing too much weight on a single argument.”); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611–15 (1999) [hereinafter Pildes, *Theory*] (acknowledging that structuralists have yet to identify benchmark for “optimal” competitiveness).

normative commitments agree to be desirable.<sup>52</sup> But structuralists have yet to concretize this “shared agreement” approach to political process questions, either as a concept (agreement among whom? agreement how defined?),<sup>53</sup> as a doctrine (a method for determining whether candidate reforms pass muster),<sup>54</sup> or as a set of design principles for a “model” external regulator (principles that, if followed, would result in a body that generally pursues appropriate reforms).<sup>55</sup>

Nor have structuralists put to rest the specter of capture. They have answered the capture critique with counterexamples, showing that in many countries, independent districting commissions and election administration agencies have well-founded reputations for non-partisanship.<sup>56</sup> Yet the overall picture is mixed—and the performance

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<sup>52</sup> He states:

The best can be the enemy of the good when it comes to legal doctrine as well as other policies, and we might be able to forge shared agreements on what practices constitute extreme manifestations of unfair treatment, and also recognize a wide range of ‘reasonably fair’ practices to be acceptable, even without agreement on some maximal point of optimal fairness.

Pildes, *Theory*, *supra* note 51, at 1612.

<sup>53</sup> One simple idea would be to define the externally imposed reform as “legitimate” if the reform would win the support of more than 50% of the citizenry in a suitably conducted opinion poll or referendum. But on reflection this idea is doubtful, because it fails to account for preference intensity. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 58–59 (1991) (critiquing majoritarian approaches to judicial review as not accounting for preference intensity).

<sup>54</sup> For useful though still quite preliminary takes on the doctrinal question, see Gerken, *supra* note 12, at 531–39, suggesting that courts might take guidance from other actors, perhaps even judicially constituted panels of affected citizens, and Pildes, *Foreword*, *supra* note 13, at 137–39, proposing that courts look to the range of actors who supported the law under challenge.

<sup>55</sup> Within the legal academy, Cass Sunstein has offered the most elaborate account of and justification for a constitutional jurisprudence founded on low-level shared agreements among persons (judges) of widely different normative commitments (Sunstein labels such agreements “incompletely theorized”). See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35 (1996); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 42 (1999). Sunstein has not, however, offered an account of how courts (or other regulatory bodies) might reliably identify points of “shared agreement” among the citizenry, and decide cases accordingly. Sunstein appears to think that the virtues he ascribes to “incompletely theorized agreements” (tolerance, social stability, opportunities for learning and change, etc.) can be realized so long as the concept informs the *kinds of justifications* offered for a decision and the *reach* of the decision, and that these virtues operate largely independently of “who wins.” See, e.g., SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35–61 (identifying democratic and practical virtues of incompletely realized agreement as mode of public justification); SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 24–45 (arguing that certain “minimalist” strategies of constitutional adjudication can foster democratic engagement with question at hand).

<sup>56</sup> Regarding much of the literature on genuinely nonpartisan districting commissions, see Pildes, *Foreword*, *supra* note 13, at 78–83. A quick and helpful survey is DAVID BUTLER & BRUCE E. CAIN, *CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEO-*

of U.S. electoral institutions is particularly bleak.<sup>57</sup> Capture remains a live possibility, if not an inevitability. There is simply no proven technique for immunizing a political process oversight body against playing favorites.

In summary, the dilemma of external regulation is this: On the one hand, given information asymmetries between political insiders and the electorate at large, it would seem desirable for there to exist an independent body positioned to review and reform the full sweep of practices that advantage incumbent lawmakers and dominant political parties. This means a body that has jurisdiction over subjects as varied as ballot access, ballot design, campaign finance, voter eligibility, districting, and the administration of polling and vote-counting—and that has a considerably greater appetite for competition-enhancing reform than the U.S. Supreme Court has manifested. On the other hand, given the difficulty of specifying a normatively satisfactory method by which an external regulator could identify “appropriate” reforms, and given the risk that an external regulator would be co-opted by political insiders (to say nothing of the more idiosyncratic ways in which such a body could go astray), it would seem imprudent for good-government reformers to seek to establish a regulatory commission with sweeping powers over the ground rules of political competition.<sup>58</sup>

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RETICAL PERSPECTIVES 117–39 (1992). Nonpartisan election administration agencies are treated in Hasen, *Beyond*, *supra* note 47, at 60–63.

<sup>57</sup> A recent study of state districting commissions in the U.S. shows that most commissions either promulgate “bipartisan entrenchment” maps, (i.e., districting plans that maximize the odds of reelection for incumbents of both parties) or else play favorites as between the major parties. Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States*, 4 ST. POL. & POL’Y Q. 371, 385–91 (2004), available at <http://sppq.press.uiuc.edu/4/4/mcdonald.pdf>. A similar complaint has been voiced against the U.S. Federal Elections Commission (FEC)—critics say the commissioners behave as agents for their respective political parties—and against those Canadian districting commissions that, like the FEC and the typical U.S. state districting commissions, have designated seats for members of different political parties. See BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 128–31 (2002) (critiquing FEC); JOHN C. COURTNEY, *COMMISSIONED RIDINGS: DESIGNING CANADA’S ELECTORAL DISTRICTS* 111–12 (2001) (discussing partisanship by provincial districting commissions in Canada). Australian districting commissions once had a reputation for partisanship, though some observers indicate that reforms enacted in the mid-1980s have cured this problem. Michael Maley et al., *Alternative Ways of Redistricting with Single-Member Seats: The Case of Australia*, in *FIXING THE BOUNDARIES: DEFINING AND REDEFINING SINGLE-MEMBER ELECTORAL DISTRICTS* 119, 144 (Iain McLean & David Butler eds., 1996).

<sup>58</sup> Perhaps these difficulties partly explain, too, why the Supreme Court has been reluctant to embrace the structuralist prescription for making “political competition” the lode-star of its election law jurisprudence.

Notice also that substantial legal safeguards for the external regulator's independence from the elected branches of government likely are necessary, if the regulator is to have the wherewithal to pursue disentrenching reforms.<sup>59</sup> The prospect of such reforms will not please dominant political insiders. But robust insulation against preemptive and retaliatory attacks by the elected branches would make the external regulator all the more dangerous—all the harder to stop—were one or another partisan faction to garner control of it, or were it to veer off in some idiosyncratic direction divorced from the citizenry's interests and concerns.

## II

### THE CASE FOR THE STANDING ADVISORY COMMISSION

The dilemma of external regulation may be largely avoided, I submit, by assigning to the external body an advice-giving and agenda-setting rather than regulatory role, with the aim of helping low-information voters to hold self-interested and better informed incumbents to account. The proposed advisory commission (AC) would have the power to investigate election law problems, to develop candidate reforms, and to trigger a legislative or popular vote on its reforms, but the AC would not have legal authority to revise the law unilaterally. The AC could be thoroughly insulated against retaliation by the elected branches, and given wide-ranging advisory jurisdiction over the gamut of policy questions implicated by the entrenchment dynamic, all without engendering severe concerns about capture or legitimacy.<sup>60</sup>

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<sup>59</sup> Indeed, RCs arguably need greater de jure independence safeguards than constitutional courts, for two reasons: First, the court may be able to pursue an aggressive, pro-competition election law jurisprudence while palliating political insiders with friendly decisions on other fronts (whereas for the RC, election law is the only game in town). Second, the court may have a higher public profile in virtue of popular "rights-defending" decisions, which enables the court's supporters to rally the public against possible legislative incursions on the court's autonomy.

<sup>60</sup> It is well to acknowledge that the simple terms "AC" and "RC" conceal a wealth of subtle variation in the underlying institutional possibilities. One can imagine a spectrum of politically insulated commissions with jurisdiction over election law, each with a subtly different de jure law-reform power. At one end of the spectrum there is the purely advisory commission, with no de jure power to trigger legislative action on its proposals, for example, the U.S. Election Assistance Commission. See *infra* Part IV. At the other end is the regulatory commission with exclusive jurisdiction over election-related matters, such as regulatory districting commissions and the Ackermanian "democracy branch." In between, in order of increasing de jure power, one might place (1) the advisory commission with the power to put its proposals on the legislature's calendar for debate or committee consideration; (2) the advisory commission with the power to trigger a floor vote of the legislature on its proposals; (3) the advisory commission with popular vote-forcing (referendum) powers; (4) the regulatory commission with legislative (rulemaking) power co-

The choice to make a political process oversight body advisory rather than regulatory has predictable and important consequences, beyond the obvious difference in *de jure* power. This Article gives a preliminary account of what these differences are and why they matter with respect to both (1) the likelihood that the body will reliably pursue reforms of which a broad cross section of the citizenry would approve, and (2) the risk that an AC which falls under the sway of political insiders or pursues idiosyncratic reforms will nonetheless dupe voters into supporting the body's misbegotten agenda.

The core theoretical propositions are developed in Part III. Part III.A elaborates the hypothesis that an advisory body *could* become so influential that it causes incumbents to vote for laws they would otherwise disfavor. Part III.B addresses the consequences of capture. The essential point is that a captured AC is likely to lose *de facto* law-reform power much more quickly than a captured RC or constitutional court, thanks to the tight functional dependence of the AC's effective power on the body's notoriety and reputation with the electorate. Part III.C argues that the very tenuousness of the AC's *de facto* power to reform the law is likely to make the body a better agent of the citizenry. The AC should prove both less susceptible to capture and less inclined to pursue idiosyncratic reforms than a similarly structured regulator, thanks to the voters' freedom to ignore it.

If my analysis is correct, the AC represents an attractive institutional response to the dilemma of external regulation in the following sense. First, the AC respects the critics' legitimacy concerns by

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equal to the legislature's (i.e., the commission could displace legislative enactments, but the legislature could also override commission enactments; inconsistencies between commission-promulgated and legislature-promulgated rules would be resolved in favor of whichever is more recent); (5) the regulatory commission with legislative power that is *temporarily* superior to the legislature's (e.g., the commission's rules might take precedence over conflicting enactments of the legislature for a fixed period of years, and then sunset if not re-enacted by the legislature or approved by referendum); (6) the regulatory commission with legislative power that permanently trumps conflicting laws enacted by the legislature (much as the U.S. Supreme Court's decisions on a statute's constitutionality nowadays trump implicit determinations to the contrary by the enacting legislature).

Along this continuum a clear break occurs between levels (3) and (4): A commission at level (4) may change the law unilaterally, whereas a commission below that level may change the law only with the concurrence of the people themselves or their elected representatives. That is the core difference between an AC and an RC. And that is what gives the AC a pronounced democratic legitimacy advantage over the RC: The AC respects the ordinary process for giving legal effect to proposed laws; the RC does not. Certainly, though, the "formally weak" RCs at levels (4) and (5)—RCs whose reforms would be subject to legislative revision—are less objectionable on legitimacy grounds than are the "formally strong" RCs at level (6) and above. The level (4) and (5) RCs can also be expected to fall somewhere between the vote-triggering AC and the formally strong RCs in terms of desirable institutional qualities (resistance to capture and incentives for self-regulation) that are explored *infra* in Part III.C.



leaving intact the ordinary democratic processes for giving legal effect to proposed bills. Second, compared to an otherwise similar external regulator, the AC should prove to be the better agent of the electorate—and less dangerous if it strays. Third, because capture and legitimacy concerns are much diminished with respect to the AC, the downside risk of robustly insulating the external body and inviting it to tackle the full range of issues implicated by the political entrenchment dynamic is far less grave than in the case of the regulatory alternatives.

The balance of this Part paves the way for the theoretical analysis of AC influence and fidelity that follows in Part III. For now, my primary goal is simply to encourage the skeptical reader to keep an open mind regarding the proposition that an ongoing and meaningfully independent AC could substantially increase the costs to elected lawmakers of using political process legislation for self-serving or narrowly partisan purposes. Part II.A offers a brief, intuitive sketch of how an AC could become influential, foreshadowing the argument of Part III. Part II.B introduces real-world examples of ongoing advisory bodies with political process responsibilities. The anecdotal evidence indicates that many of these bodies have in fact escaped capture, and, further, that politicians are often reluctant to contravene the recommendations of the advisory bodies that have come to be regarded as “above politics.”<sup>61</sup> Part II.C sets forth the basic features and qualities that I consider desirable in an AC, and suggests some design strategies that might be used to realize these qualities. The prescriptions of Part II.C anchor the analysis of AC influence that follows in Part III.

#### *A. The Competition for Authority: A Preliminary Sketch of AC Influence*

A well designed AC can be expected to engage with members of the elected branches of government and their surrogates in a competition for authority, a competition in which each side seeks to establish (in the voter’s eye) that it is the more trustworthy agent of the electorate with respect to the policy proposals that the AC puts to a vote.<sup>62</sup>

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<sup>61</sup> At least where the recommendations in question implicate politicians’ conflicts of interest or improper partisan partiality.

<sup>62</sup> To be precise, we can say that the AC would engage in a competition for *recognitional authority*, as Raz uses the term. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 28–31 (1986) (“According to the recognitional conception [of authority], the utterances of legitimate authorities do not affect the balance of reasons. They are not themselves reasons for action, nor do they create any such reasons. They merely provide information about the balance of reasons that exist separately and independently of such utterances.”); cf. Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475, 496–500 (2000) (describing political scientists’ conceptions of trust). Whether one pre-

Insofar as the AC prevails in this competition, voters would punish at the polls elected lawmakers who reject the body's recommendations. To the extent that the AC loses out, victorious legislators could wave off AC proposals with impunity.

Competition for trust is the everyday stuff of electoral politics.<sup>63</sup> One rarely sees a campaign bottomed entirely on the theme, "I'm the better conveyor belt for your policy preferences."<sup>64</sup> The candidate for public office strives to convince voters that she can be trusted to figure out what policy reforms would best meet her constituents' concerns, and to act accordingly. The tacit premise, shared by voters and candidates alike, is that voters do not always have enough information to figure out how the law should be changed to better satisfy the voters' underlying interests and concerns.

This competition for trust usually plays out against a fixed institutional backdrop. The gist of each candidate's appeal runs thus: "Given all the constraints and opportunities presented by the legislature, you can count on me to do a better job than my opponent in advancing your interests and concerns." By contrast, when an AC competes with elected lawmakers, the debate would also run to questions of institutional structure and corresponding incentives. The AC would say, in effect: "On issues like election law, your representative can't be trusted to respect your underlying concerns because her institutional position (elected legislator, political party leader) gives her a conflict of interest or disqualifying partisan bias. By contrast, the processes by which we commissioners were selected, and the constraints under which we operate, ensure that we are free from such conflicts and, moreover, that we fairly represent the interests and concerns of a broad cross section of the populace. Therefore, if your representative rejects our proposal, you should vote her out of office." Nothing guarantees that voters will buy this argument.<sup>65</sup> Political

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fers to use "recognitional authority" or "trust" as the term of art, the object of this competition is straightforward. For any given law reform *x* that the actor favors, the actor would like to be able to convince voters that the proposition, "*x* is very important and should be enacted," is true in terms of whatever ends the voter cares about.

<sup>63</sup> See generally RICHARD F. FENNO JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978) (exploring how Congressional representatives build their district constituencies); Glenn R. Parker, *The Role of Constituent Trust in Congressional Elections*, 53 PUB. OPINION Q. 175 (1989) (developing model that relates constituent trust to electoral support); Suzanne L. Parker & Glenn R. Parker, *Why Do We Trust Our Congressman?*, 55 J. POL. 442 (1993) (analyzing factors that influence constituents' trust in public officials).

<sup>64</sup> Cf. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996) (noting and puzzling over general absence of candidates who try to get themselves elected to office by "precommitting" to vote in certain ways on certain issues).

<sup>65</sup> Indeed, if it is partisan "bias" rather than incumbent self-interest that the AC is challenging, strongly partisan voters may well side with their putatively biased representative.

entrepreneurs who disfavor the AC's proposals will do what they can to undermine public faith in the advisory body's good judgment. They may harp on the AC's eliteness, or aloofness, or misbehavior, or lack of electoral credentials, or suspect decisionmaking procedures, or bad judgment in the past.

But if the AC has gained favor with important blocs of voters, other entrepreneurs will try to piggyback on the AC's reputation. If incumbents vote against AC-introduced legislation, challengers will emerge to run on the "AC platform," as it were (compare Senator Kerry's effort to depict himself as the true, stalwart proponent of the 9/11 Commission's proposed reforms, and his opponent, President Bush, as equivocal<sup>66</sup>); news stories will highlight the incumbent's vote and explore its possible significance (compare the close media analysis of whether President Bush's first proposal for a Director of National Intelligence was or was not substantially equivalent to what the 9/11 Commission had urged<sup>67</sup>); and political activists and interest groups will join the fray (compare Saudi Arabia's major-media advertising of its "exoneration" by the 9/11 Commission<sup>68</sup>).

Ex ante, we cannot be certain how any given AC will fare in competition with elected lawmakers. With respect to some issues, one side or the other might concede from the beginning. What we can say, with considerable confidence, is that the idea of an AC exercising substantial de facto law-reform power is plausible—even as to the AC whose proposals go to the legislature rather than to a popular vote. There are examples from abroad that offer tentative support for this claim, and good theoretical reasons for it too.<sup>69</sup>

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Why not entrench "our side," the thinking goes, if we can get away with it? (That said, one should not be too quick to assume that partisan voters will support such partisan entrenchment. Partisan voters may have a longer time horizon than their elected representatives, or an independent sense of fairness, and they are not subject to pressure from party leaders.)

<sup>66</sup> See, e.g., Elisabeth Bumiller & Philip Shenon, *Bush Now Backs Budget Powers in New Spy Post*, N.Y. TIMES, Sept. 9, 2004, at A1; Philip Shenon, *9/11 Families Group Rebukes Bush for Impasse on Overhaul*, N.Y. TIMES, Oct. 28, 2004, at A20; Jim VandeHei, *9/11 Panel Roiling Campaign Platforms*, WASH. POST, Aug. 9, 2004, at A1.

<sup>67</sup> See, e.g., Bumiller & Shenon, *supra* note 66; Walter Pincus & Dana Milbank, *Bush Plan Draws on Advice of 9/11 Panel*, WASH. POST, Sept. 9, 2004, at A1.

<sup>68</sup> Press Release, Royal Embassy of Saudi Arabia, Royal Embassy of Saudi Arabia Launches New Advertising Campaign (Aug. 13, 2004) ("The Royal Embassy of Saudi Arabia in Washington, DC announced today the launch of a nationwide radio advertising campaign designed to publicize the recently released findings of the bipartisan and independent National Commission on Terrorist Attacks Upon the United States."), <http://saudiembassy.net/2004News/Press/2004Press.asp>. One such advertisement appears on page two of the November 15, 2004 edition of *The New Republic*.

<sup>69</sup> Examples are discussed in the next section, Part II.B, and theory in Part III.A, *infra*.

### B. Examples

My proposal for an ongoing advisory commission with vote-triggering powers has a number of important real-world precursors. These are worth reviewing both to soften the unfamiliarity of my proposal and for what they suggest about the possible influence—and vulnerabilities—of an AC on the model of this Article. The existing literature on these institutions is very thin but nonetheless suggestive.

One familiar antecedent is the temporary, ad hoc advisory commission, exemplified by the 9/11 Commission. Typically bipartisan, these bodies are convened by the legislature or the executive to study a problem and make recommendations, after which the body disbands.<sup>70</sup> Reports from ad hoc advisory commissions occasionally have become focal points for political advocacy, and have played a role in some electoral and constitutional reforms.<sup>71</sup> One state, Florida, has gone so far as to constitutionalize a process of periodic constitutional reform in which a temporary advisory commission takes center stage. Florida's Constitutional Revision Commission is convened automatically every twenty years to assess the need for constitutional amendments.<sup>72</sup> If the Commission decides to recommend amend-

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<sup>70</sup> The leading study of ad hoc presidential advisory commissions is THOMAS R. WOLANIN, *PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON* (1975). For a wide-ranging study of the ad hoc advisory commissions that Congress has created over the years, see COLTON C. CAMPBELL, *DISCHARGING CONGRESS: GOVERNMENT BY COMMISSION* (2002).

<sup>71</sup> Prominent examples include the National Advisory Commission on Civil Disorders (1967–68), see DAVID FLITNER, JR., *THE POLITICS OF PRESIDENTIAL COMMISSIONS* 139–40 (1986); WOLANIN, *supra* note 70, at 154, and of course the 9/11 Commission. In the domain of election law, the National Commission on Federal Election Reform, co-chaired by former Presidents Carter and Ford, played an important role in developing the Help America Vote Act of 2002. See *infra* note 273. Abroad, reports by ad hoc advisory commissions played a part: in New Zealand's transformation from a British-style first-past-the-post system of legislative elections to a two-vote hybrid system of proportional representation modeled on Germany, see Philip Temple, *Changing the Rules in New Zealand: The Electoral Reform Referenda of 1992 and 1993*, 66 POL. Q. 234, 234–35 (1995) (discussing role of Royal Commission on Electoral Systems); in the creation of the Electoral Commission in the United Kingdom, see Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT'L & COMP. L. 6, 77–82 (2001) (tracing U.K. electoral commission to recommendations of Committee on Standards in Public Life); and in the establishment of an independent criminal justice reform body in Queensland, Australia, see Colleen Lewis & Jenny Fleming, *The Everyday Politics of Value Conflict: External Independent Oversight Bodies in Australia*, in GOVERNMENT REFORMED: VALUES AND NEW POLITICAL INSTITUTIONS 167, 176 (Ian Holland & Jenny Fleming eds., 2003) [hereinafter Lewis & Fleming, *Value Conflict*] (noting strong public reaction to findings of Fitzgerald Inquiry that “led to all political parties pledging to implement Fitzgerald’s recommendations [which included establishing a permanent criminal justice commission], prior to the report being completed”), among other examples.

<sup>72</sup> FLA. CONST. art. XI, § 2.

ments, it can put its preferred reforms directly to a vote of the citizenry.<sup>73</sup>

The balance of this section focuses primarily on ongoing, putatively independent advisory commissions with jurisdiction over questions where the agency problem of representative government is particularly acute: election law and governmental integrity.<sup>74</sup> These institutions represent the nearest precursors for my proposal, and thus offer the best test of the hypothesis that a suitably designed AC would substantially increase the cost to elected officials of seeking to entrench themselves or their parties.<sup>75</sup> I pay special attention to recent events in the United Kingdom, where the recommendations of a fledgling election-law advisory body have become the focal point of political contestation over absentee voting and fraud.

### 1. *Advisory Districting Commissions*

Over the course of the twentieth century, almost all democracies with single-member electoral districts—other than the United States—shifted responsibility for drawing and adjusting districts to appointed commissions.<sup>76</sup> In a number of jurisdictions, however, the commission's formal power is limited to proposing district maps. Conflicted insiders in the elected branches of government retain legal authority to approve, reject, or modify the commission's proposal.

Australia led the way, establishing advisory districting commissions in 1902.<sup>77</sup> Roughly forty years later the United Kingdom set up its permanent Boundary Commissions, which were charged with periodically issuing "comprehensive proposals for the redistribution of parliamentary constituencies."<sup>78</sup> In the 1950s, reformers in Manitoba, Canada created a new provincial districting regime derived from the

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<sup>73</sup> *Id.* § 5.

<sup>74</sup> The surveyed bodies issue their recommendations to the legislature. I have not discovered any ongoing advisory commission authorized to submit its reforms to a referendum of the citizenry.

<sup>75</sup> There are good reasons to think that an ongoing AC would prove both more effective and more faithful to the citizenry's interests and concerns, and, if not faithful, less likely to lead voters astray, than an otherwise similar but transient AC. See *infra* Parts II.C.3.b and III.C.

<sup>76</sup> For a historical overview of districting in the United Kingdom, Australia, New Zealand, and elsewhere, see BUTLER & CAIN, *supra* note 56, at 117–28.

<sup>77</sup> See COURTNEY, *supra* note 57, at 38, 62–66 (describing electoral innovations in Australia dating back to nineteenth century, and explaining how Canadian advocates for nonpartisan districting relied on Australian model). Note, however, that in 1984 Australia transitioned from an advisory to a regulatory model, delegating to districting commissions the final power of decision over district boundaries. See Maley et al., *supra* note 57, at 126.

<sup>78</sup> David Butler & Iain McLean, *The Redrawing of Parliamentary Boundaries in Britain*, in *FIXING THE BOUNDARIES: DEFINING AND REDEFINING SINGLE MEMBER ELECTORAL DISTRICTS*, *supra* note 57, at 1, 5.

Australian model.<sup>79</sup> Over the next four decades the rest of the Canadian provinces followed Manitoba's lead.<sup>80</sup> Germany created a permanent advisory districting commission in the early 1970s.<sup>81</sup> And in 1980, the advisory districting model crept south from Canada: Iowa passed landmark legislation empowering the Legislative Services Agency—a research arm of the state legislature—to draft redistricting maps for the legislature's consideration following each decennial census.<sup>82</sup>

In some jurisdictions, the elected branches of government have formal legal duties to respond to the advisory body's proposal. Boundary Commissions in the United Kingdom make redistricting proposals to the Secretary of State, who has a statutory obligation to lay each Commission's report before Parliament along with a bill to give effect to the Commission's recommendations, with or without modifications.<sup>83</sup> Should the Secretary decide not to follow the Commission's plan in all particulars, she must explain her decision in a written report to Parliament.<sup>84</sup>

In Iowa, the legislature has a statutory duty to consider the districting body's proposals under a closed-rule procedure. Following the release of decennial census data, the Legislative Services Agency (LSA) proposes a district map, applying statutory guidelines regarding population distribution, respect for local government boundaries, and

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<sup>79</sup> COURTNEY, *supra* note 57, at 36–41.

<sup>80</sup> *Id.* at 44–52, 116, 238–41. Quebec became the next province to adopt a variant of the Australian model. *Id.* at 44–52. Over the course of four decades, “demonstration or copycat” effects have led to the adoption of some form of districting-by-commission in every Canadian province. *Id.* at 238–41. Districts for Canada's national elections are drawn by an independent body with final power of decision, but at the provincial level, most districting bodies operate in an advisory/proposing capacity. *Id.* at 116.

<sup>81</sup> BUTLER & CAIN, *supra* note 56, at 125.

<sup>82</sup> Act of May 19, 1980 ch. 1021, §§ 1–7, 1980 Iowa Acts 154 §§ 1 to 7 (codified as amended at IOWA CODE tit. 2, § 42 (2005)). Within the United States, versions of the advisory districting commission model have also been adopted in Maine and Connecticut—but the Maine and Connecticut entities are of doubtful value. In both cases, the advisory body is transient (rather than ongoing), and largely comprised of delegates of the major parties' leadership (rather than more neutral figures). ME. CONST. art. IV, pt. 3, § 1-A; CT. CONST. art. III, § 6. The Connecticut body actually consists of sitting legislators. CT. CONST. art. III, § 6. The Maine commission, during the most recent round of redistricting, was unable even to reach agreement on a plan to propose. Francis X. Quinn, *Redistricting Talks Revived*, ASSOCIATED PRESS NEWSWIRES, Apr. 8, 2003 (“Maine's commission for redrawing the state's political boundaries expired last week after breaking down along party lines.”).

<sup>83</sup> Parliamentary Constituencies Act, 1986, c. 56, §§ 3(3)–3(5) (U.K.). Note that in 2000, the Boundary Commissions' function was transferred to the new Electoral Commission. See *infra* note 131 and accompanying text.

<sup>84</sup> Parliamentary Constituencies Act § 4(2).

district compactness and contiguity.<sup>85</sup> A temporary advisory body comprised of persons appointed by the majority and minority leaders of the state house and senate then holds public hearings on the LSA-developed plan, and makes a report to the legislative chambers.<sup>86</sup> No less than seven days after receiving this report, each house must vote on the proposed district map “under a procedure or rule permitting no amendments except those of a purely corrective nature.”<sup>87</sup> If either chamber rejects the bill, that chamber is required to explain to the LSA the basis for its negative vote,<sup>88</sup> and the LSA then returns to the drawing board and puts together a new map. The revised map is then submitted for another closed-rule vote of each chamber. If it is rejected, the LSA takes a third crack at the nut.<sup>89</sup> This time, the LSA-submitted bill is “subject to amendment in the same manner as other bills.”<sup>90</sup>

Districting commissions appear unique among the new political process advisory commissions in benefiting from an obligatory legislative or executive response to their proposals. They have also been singularly effective. Legislatures almost uniformly accede to the recommendations of nonpartisan districting commissions.<sup>91</sup> Why legislators accept commission proposals remains to be firmly established, but the prospect of public outcry seems to be an important part of the story. Advisory districting commissions have not simply advanced the interests of the dominant coalition in the legislature. In the United Kingdom, for example, “[e]ach postwar redistribution has, necessarily, favored the Conservative party because of the [population] drift from city to suburbs[, and] each redistribution has cost some prominent

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<sup>85</sup> IOWA CODE ANN. §§ 42.2–42.4 (2005).

<sup>86</sup> *Id.* §§ 42.5, 42.6.

<sup>87</sup> *Id.* § 42.3(1).

<sup>88</sup> *Id.* § 42.3(2).

<sup>89</sup> *Id.* § 42.3(3).

<sup>90</sup> *Id.* § 42.3(3).

<sup>91</sup> The convention of legislative acquiescence is particularly well established in the United Kingdom. See BUTLER & CAIN, *supra* note 56, at 121 (“All sides accept that after a lengthy quasi-judicial process, it would be absurd for the legislature to make amendments . . . .”); D.J. ROSSITER ET AL., *THE BOUNDARY COMMISSIONS* 339–40 (1999) (observing that “since 1958, Parliament must accept or reject [final recommendations of Boundary Commissions] *in toto* although . . . this is because of the practice adopted by Secretaries of State rather than any legislative requirement”). Regarding legislative acquiescence in Germany, see BUTLER & CAIN, *supra* note 56, at 125. Canada’s story is told at length in COURTNEY, *supra* note 57, at 116:

[A]part from the occasional name change of a proposed constituency, cabinets and legislatures have rarely used [the power to modify or reject the proposal]. That there are so few instances of clear legislative or executive interference in the process since the shift to electoral boundary commissions in the 1950s . . . demonstrates that the process is now a widely accepted autonomous one.

Members of Parliament their seats,”<sup>92</sup> yet with the exception of one brief and ultimately futile interlude of resistance, Labour governments have capitulated to the Boundary Commissions’ recommendations.<sup>93</sup> A longtime student of Canadian districting adds:

Boundary commissioners and provincial politicians alike share the view that there is now no politically safe alternative [to accepting the proposed district map] for a legislature. The media and public backlash that rejection or alteration of commission recommendations would generate helps to ensure legislative acceptance of a commission’s final proposals.<sup>94</sup>

Provincial legislatures in Canada occasionally have defeated redistricting proposals—but only indirectly. Rather than forthrightly vote down a proposed map, lawmakers have enacted eleventh-hour revisions to the structure of boundary commission enabling acts, revisions that “incidentally” moot the plan about to be issued.<sup>95</sup>

The Iowa legislature has also engaged in brinksmanship, taking advantage of its statutory authorization to “remand” proposed maps to the LSA, but the legislature has never dared to reject a final proposal from the LSA.<sup>96</sup> Observers remark that the party in control of the legislature fears the political fallout from ultimately rejecting the work of the LSA.<sup>97</sup>

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<sup>92</sup> BUTLER & CAIN, *supra* note 56, at 121.

<sup>93</sup> The instance of resistance is recounted in ROSSITER ET AL., *supra* note 91, at 102–04. The Labour Party, then in control of government, successfully prevailed upon its members in Parliament to vote down the redistricting proposal, on the pretense that local government boundaries were soon to be revised and that it would be better to wait until then to conduct the next round of redistricting. *Id.* at 102–03. But the Tories prevailed in the next election and quickly reintroduced the Boundary Commission recommendations, at which point all but a modest number of “hard core” Labour MPs gave their assent. *Id.* at 104. In other rounds of redistricting, the Labour Party has tried to derail the Boundary Commissions in the courts, and has organized “grass roots” opposition to the Commissions’ draft plans, but the party has not tried to block a submitted Boundary Commission report. *Id.* at 339–49.

<sup>94</sup> COURTNEY, *supra* note 57, at 117–18.

<sup>95</sup> *Id.* at 144–50.

<sup>96</sup> McDonald, *supra* note 57, at 384. Recall that under the Iowa statutory scheme, legislative rejection of the LSA’s third successive proposal would deprive the LSA of any further de jure role in that round of districting. See IOWA CODE ANN. § 42.3(3).

<sup>97</sup> McDonald, *supra* note 57, at 384; W. Walter Hearne, *Methods to Madness: Alternative Schemes for Single-Member Redistricting*, in ROBERT RICHIE ET AL., CTR. FOR VOTING & DEMOCRACY, MONOPOLY POLITICS 1998 (1997), <http://www.fairvote.org/reports/monopoly/redist.html>. To date, it appears that no one has systematically documented the extent to which the Iowa legislature manages to control the substance of the LSA’s districting proposals, either through the threat of vetoes, or budget cuts, or appointments to the LSA. But, anecdotally, the LSA seems meaningfully independent: It has proposed plans that disadvantage incumbents, and those plans have been adopted. See Center for Voting and Democracy, Iowa’s Redistricting Information, <http://www.fairvote.org/redistricting/reports/remanual/ia.htm> (last updated Mar. 13, 2005) (“The legislature has been



Many districting commissions that purport to be nonpartisan have acquired a reputation (among informed local observers) for fulfilling their mission with integrity.<sup>98</sup> This is not to say that districting commissions, as a whole, are without blemish. The "bipartisan" districting commissions that exist in a number of U.S. states have done the bidding of incumbents.<sup>99</sup> Abroad, partisanship has been an issue with some advisory districting bodies—but, significantly, these commissions do *not* appear to have wielded much influence.<sup>100</sup>

It is by no means obvious that the success of the advisory districting commissions would be replicated in an AC that has opened responsibilities for developing electoral reforms.<sup>101</sup> But the districting commissions are at least suggestive of the possible influence of an AC with wider ranging jurisdiction over election law.

## 2. *Anticorruption Advisory Commissions*

Influential advisory bodies with responsibility for governmental integrity have emerged in Australia and the United Kingdom. Scandals in the late 1980s prompted the state legislatures of New South Wales and Queensland, Australia, to create standing bodies charged with investigating and disclosing governmental malfeasance and rec-

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quick to accept the [LSA]'s plans even when they have placed incumbent state legislative leaders and congressional members in very competitive districts.”).

<sup>98</sup> See, e.g., BUTLER & CAIN, *supra* note 56, at 120 (“[N]o one has seriously suggested that the commissioners [in Great Britain] have deviated from [the] pure and apolitical ideal.”); *id.* at 125 (noting that in Germany, “little controversy” has attended work of districting body); COURTNEY, *supra* note 57, at 105–06, 111–12 (discussing commissioner selection arrangements in various Canadian provinces).

<sup>99</sup> See McDonald, *supra* note 57, at 391.

<sup>100</sup> Regarding pre-1984 Australia, see Maley et al., *supra* note 57, at 129–31. In Canada, some provinces have provided for political party representation on their advisory boundary commissions. COURTNEY, *supra* note 57, at 111–12. These commissions have not been successful in getting their proposals adopted; sometimes they have failed even to reach agreement on a proposal. *Id.*

<sup>101</sup> Among the possibly relevant differences are: (1) The districting commissions purport to apply detailed criteria in a neutral fashion, whereas the body I propose would make general reforms without particular statutory guidance, except perhaps a codification of the shared-agreement idea. See *infra* Part II.C.1. But if voters have other reasons to trust the AC to act reasonably, see *infra* Part III.A, the presence or absence of narrow criteria should not matter. (2) The districting commissions were mainly created by legislatures, which perhaps results in some sort of felt commitment on the part of the legislators to adopting the commission plans, whereas an AC on the model of this paper is more likely to be created by ballot initiative. See *infra* Part IV. On the other hand, politicians might feel even greater pressure from voters to follow the recommendations of a body that the voters themselves established, by ballot initiative. (3) It is standard practice to revise district boundaries every so often. Periodic redistricting is necessary, in other words, in a way that other changes to the ground rules of political competition are not. This might be thought to support the “truce” explanation of districting commissions. But this explanation seems more apt vis-à-vis *bipartisan* districting commissions, rather than *nonpartisan* commissions, and the nonpartisan commissions appear to be more influential.

ommending statutory reforms. New South Wales established the Independent Commission Against Corruption whose jurisdiction is limited to public corruption.<sup>102</sup> Queensland's Crime and Misconduct Commission has a broader mandate, covering the whole of criminal law, but the body has paid considerable attention to issues of public integrity over the years.<sup>103</sup> In 1996, Western Australia became the most recent Australian state to establish a permanent anticorruption advisory commission.<sup>104</sup> The Australian anticorruption commissions have no de jure power to trigger legislative action on their proposals, but they do have coercive powers of investigation including the right to subpoena documents and to compel public testimony.<sup>105</sup>

The New South Wales and Queensland commissions have used their investigatory powers to dramatic effect. They have pursued allegations of malfeasance against powerful officials, and forced some to resign.<sup>106</sup> They have taken to the media to criticize the government.<sup>107</sup> They have treated their reports to Parliament as legislative scorecards, tracking legislative adoption or rejection of earlier commission proposals and doling out praise or criticism as appropriate.<sup>108</sup> All this has led begrudging legislators to budge—a little. The New South Wales legislature, for example, implemented a Code of Conduct, which enabled ministers to be cited for misconduct.<sup>109</sup> The advisory commission “forced those who govern to re-examine their policies and move closer to the values espoused by the oversight body.”<sup>110</sup>

The triumphs of the Australian anticorruption commissions have come at a price, however. Queensland's commission started life with

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<sup>102</sup> The establishment of the Independent Commission Against Corruption is chronicled in Lewis & Fleming, *Value Conflict*, *supra* note 71.

<sup>103</sup> On the origin and sagas of the Crime and Misconduct Commission, formerly known as the Criminal Justice Commission, or CJC, see Jenny Fleming, *Conduct Unbecoming: Independent Commissions and Ministerial Adversaries*, in *MOTIVATING MINISTERS TO MORALITY* 129 (Jenny Fleming & Ian Holland eds., 2001) [hereinafter Fleming, *Conduct Unbecoming*], and Lewis & Fleming, *Value Conflict*, *supra* note 71, at 176–79.

<sup>104</sup> BARRY HINDESS, *CORRUPTION AND DEMOCRACY IN AUSTRALIA* 12, tbl.2 (Democratic Audit of Austl. Report No. 3, 2004), available at <http://democratic.audit.anu.edu.au>.

<sup>105</sup> Regarding the powers of the New South Wales and Queensland bodies, see Helen Reed, *The “Permanent” Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II*, *AUSTRALIAN JOURNAL OF ADMINISTRATION* 156, 156–63 (1995); regarding the newly established Corruption and Crime Commission of Western Australia, see About the Corruption and Crime Commission, <http://www.ccc.wa.gov.au/about.php> (last visited Jul. 17, 2005).

<sup>106</sup> Lewis & Fleming, *Value Conflict*, *supra* note 71, at 173–75, 177–79.

<sup>107</sup> *Id.* at 178–79 (describing “political power game . . . played out in the media” between Queensland government and Queensland corruption commission).

<sup>108</sup> *Id.* at 175.

<sup>109</sup> *Id.* at 175–76.

<sup>110</sup> *Id.* at 175.

the benefit of statutory protections for its operational autonomy, and a right of recourse to the courts.<sup>111</sup> But after the commission's investigations greatly embarrassed members of both major parties and the Supreme Court terminated a trumped-up parliamentary "inquiry" into the anticorruption body's supposed misdeeds, the legislature responded by stripping the commission of its right of recourse to the Supreme Court and by giving a special joint committee of parliament substantial control over the commission's day-to-day activities.<sup>112</sup> In New South Wales, hostile politicians curtailed the anticorruption agency's budget and jurisdiction.<sup>113</sup> Legislators dare not eliminate the popular anticorruption commissions, Australian observers say,<sup>114</sup> but public regard for the commissions has not kept legislators from undermining their independence.

The Australian anticorruption commissions have a counterpart in the United Kingdom, where Prime Minister John Major responded to scandals that rocked his government in 1994 by chartering the Committee on Standards in Public Life.<sup>115</sup> This ten-person, multi-partisan body was instructed "[t]o examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations . . . to ensure the highest standards of propriety in public life."<sup>116</sup>

Relations between the government and the Committee on Standards in Public Life have been relatively civil. The Committee has conducted nine substantial public investigations into different facets of governmental integrity.<sup>117</sup> These have led to significant legislative and administrative changes in British government,<sup>118</sup> but the extent to

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<sup>111</sup> The original structure is sketched in COLLEEN LEWIS, *COMPLAINTS AGAINST POLICE: THE POLITICS OF REFORM* 131–50 (1999).

<sup>112</sup> These incidents are recounted in Fleming, *Conduct Unbecoming*, *supra* note 103, at 130–35. For an analysis of the independence-compromising aspects of the retaliatory legislation, see Ross Homel, Part-Time Commissioner, Criminal Justice Commission, Political Control of the Queensland Criminal Justice Commission (Oct. 21, 1997), <http://web.archive.org/web/20000617221251/www.cjc.qld.gov.au/cjc/homelrep.shtml>. The legislation itself, Criminal Justice Legislation Amendment Act, 1997, is available at <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1997/97AC061.pdf> (last visited Aug. 3, 2005).

<sup>113</sup> Fleming, *Conduct Unbecoming*, *supra* note 103, at 142.

<sup>114</sup> Lewis & Fleming, *Value Conflict*, *supra* note 71, at 179.

<sup>115</sup> Lisa E. Klein, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT'L L. 1, 39 (1999).

<sup>116</sup> *Id.* (quoting 248 PARL. DEB., H.C. (6th ser.) (1994) 758).

<sup>117</sup> The studies are available online at <http://www.public-standards.gov.uk/reports/index.htm> (last visited Aug. 3, 2005).

<sup>118</sup> COMM. ON STANDARDS IN PUB. LIFE, *THE FIRST SEVEN REPORTS: A REVIEW OF PROGRESS* 3–4 (2001), available at <http://www.public-standards.gov.uk> (charting government's response to each of "308 recommendations" and "26 observations" made by Com-

which these changes ran counter to incumbents' policy preferences is not clear from the secondary literature. Some writers suggest that the Committee has been careful not to press too hard against incumbents' wishes.<sup>119</sup> The government has not been uniformly enthusiastic about the Committee's recommendations,<sup>120</sup> however, and members of the Committee have been willing to criticize governmental intransigence in the media.<sup>121</sup>

### 3. *General Purpose Election Commissions*

Australia, Canada, and the United Kingdom all have electoral administration bodies with reputations for nonpartisanship.<sup>122</sup> The Australian Election Commission and Elections Canada have public education roles and a responsibility to report to Parliament on the operation of election law following each general election,<sup>123</sup> but advice-giving and public education are ancillary to their core regula-

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mittee over course of its first seven reports); Rhoda James & Richard Kirkham, *Slow Progress in Parliament: The Eighth Report of the Committee on Standards in Public Life*, 66 MOD. L. REV. 906, 919 (2003) ("[T]he Committee has been remarkably successful in achieving, not just results, but a much-respected position in political circles."); Klein, *supra* note 115, at 40 n.132 (noting that "virtually all of the recommendations" of Committee's first report have been adopted); Committee on Standards in Public Life, Responses to Consultations, <http://www.public-standards.gov.uk/consultations/responses.htm> (last visited Sept. 11, 2004) (providing links to formal governmental responses, legislative and otherwise, to Committee's nine reports).

<sup>119</sup> Compare James & Kirkham, *supra* note 118, at 911 (suggesting that Committee has been politically cautious), with Geddis, *supra* note 71, at 78 ("[T]he British government appears to have felt constrained to follow the Committee's suggestions for [election law] reform wholesale . . .").

<sup>120</sup> See, e.g., James & Kirkham, *supra* note 118, at 910, 917 (describing mixed parliamentary reaction to Committee's eighth report); *A Very British Sleazebuster*, *ECONOMIST*, June 5, 1999, at 57 (predicting clash between Prime Minister Tony Blair and Committee on Standards in Public Life).

<sup>121</sup> See, e.g., David Hencke, *Watchdog Attacks PM's Rules on Advisers*, *GUARDIAN* (London), Sept. 12, 2003, at 11 ("The official responsible for standards in public life launched an extraordinary attack on the prime minister yesterday when he attacked new rules on ministerial special advisors."). The Committee's webpage excerpts and links to press coverage of its recent criticisms of the Government: <http://www.public-standards.gov.uk> (follow "News Releases" hyperlink) (last updated May 9, 2005).

<sup>122</sup> Since the passage of the Help America Vote Act of 2002, the United States has also had a standing body that gives advice on certain political process matters. I defer consideration of the U.S. Election Assistance Commission until Part V, however, where I use it to illustrate how *not* to design an advisory commission to counter the entrenchment problem.

<sup>123</sup> See Colin A. Hughes, *The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality*, in *REALISING DEMOCRACY: ELECTORAL LAW IN AUSTRALIA* 205, 209–10 (Graeme Orr et al. eds., 2003) (describing Australian Election Commission); Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 *ELECTION L.J.* 406, 406–07 (2004) (discussing Elections Canada, Canadian elections agency).

tory and enforcement functions,<sup>124</sup> and their efficacy as prodders of statutory reform has received little study.<sup>125</sup>

The United Kingdom's Electoral Commission, created in 2000, is a much nearer analogue to the AC proposed in this Article. The Electoral Commission has some administrative functions—registering political parties,<sup>126</sup> maintaining records of party finances and campaign donations,<sup>127</sup> and supervising the vote count following referenda<sup>128</sup>—but it is notable for the range of its research and recommending responsibilities. The Political Parties, Elections and Referendums Act of 2000 provides that the Electoral Commission “shall keep under review” and periodically report to Parliament on campaign finance, political advertising, districting, and other “such matters relating to elections.”<sup>129</sup> The Commission has discretion to publish these reports as it sees fit.<sup>130</sup> The Act also shifts the Boundary Commissions' redistricting function to new boundary committees appointed by the Electoral Commission.<sup>131</sup> Additionally, it gives the Electoral Commission a consultative role with respect to all regula-

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<sup>124</sup> E-mail from Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola (Los Angeles) Law School, to Christopher S. Elmendorf, Acting Professor of Law, University of California at Davis School of Law (Dec. 17, 2004) (on file with the *New York University Law Review*).

<sup>125</sup> It does appear, however, that Elections Canada has used its recommending power to keep its favored reform ideas in play. See, e.g., Press Release, Elections Canada, Chief Electoral Officer Tables Report on Recommendations for Changes to the *Canada Elections Act* (Nov. 27, 2001) available at <http://www.elections.ca> (announcing recommendations and linking them to earlier reports of CEO). The current chief argues that his recommendations and his related “educational” endeavors (such as publicizing campaign donations) motivated the enactment of sweeping campaign finance reforms in 2003. Kingsley, *supra* note 123, at 410.

The Australian Electoral Commission (AEC) has used its post-election reports to identify “loopholes” in the campaign finance statute it administers, and to suggest legislative correctives. See, e.g., AUSTL. ELECTORAL COMM'N, SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS INQUIRY INTO ELECTORAL FUNDING AND DISCLOSURE (Oct. 17, 2000), available at [http://www.aec.gov.au/\\_content/Why/committee/jsccm/funding\\_disclosure/sub7.htm](http://www.aec.gov.au/_content/Why/committee/jsccm/funding_disclosure/sub7.htm) (recounting reforms proposed following 1996 and 1998 elections, and legislative response). But a local observer reports that many AEC recommendations have been ignored by Parliament, and that suspicion has been raised that “the AEC has settled for a condition of peaceful coexistence” with the elected branches instead of agitating for loophole-closing reforms that incumbents of both major parties disfavor. HINDESS, *supra* note 104, at 18. This might be due to inadequate protections for the AEC's independence; alternatively, it might simply reflect an AEC leadership decision to prioritize election administration and enforcement over election-law reform.

<sup>126</sup> Political Parties, Elections and Referendums Act 2000, c. 41, §§ 22–40 (U.K.).

<sup>127</sup> *Id.* §§ 45, 65.

<sup>128</sup> *Id.* §§ 128, 129.

<sup>129</sup> *Id.* § 6(1).

<sup>130</sup> *Id.* § 6(5).

<sup>131</sup> *Id.* §§ 14–20.

tions promulgated by government departments pursuant to the Act.<sup>132</sup> Finally, the Act instructs the Commission to submit assessment reports following each election or referendum,<sup>133</sup> and assigns to the Commission responsibility for educating the public about electoral matters.<sup>134</sup>

It is far too early to deliver a verdict on the Electoral Commission's usefulness as a source and instigator of political process reforms. Two early trends bear noting, however. First, the Commission has been consistently attentive to minor parties, independent candidates, and politically disengaged segments of the British population. The Commission's foundational 2003 report, *Voting for Change*, lays out roughly one hundred law reform recommendations and an agenda for further research, all with the aim of "creat[ing] the best possible conditions for the widest possible range of political parties and candidates to engage with the electorate."<sup>135</sup> The report pays special attention to the burdens that the United Kingdom's regime of election law currently places on minor parties and independent candidates.<sup>136</sup> On the heels of *Voting for Change* came a slew of more detailed policy reports addressing such matters as candidate nomination,<sup>137</sup> "equal access" to voting,<sup>138</sup> nationwide voter registration,<sup>139</sup> the age of electoral majority,<sup>140</sup> political advertising,<sup>141</sup> and the funding of political parties,<sup>142</sup> among other topics.<sup>143</sup> These reports manifest the Commis-

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<sup>132</sup> *Id.* §§ 7, 11.

<sup>133</sup> *Id.* § 5.

<sup>134</sup> *Id.* § 13.

<sup>135</sup> THE ELECTORAL COMM'N, *VOTING FOR CHANGE: AN ELECTORAL LAW MODERNIZATION PROGRAM 13* (2003) [hereinafter *VOTING FOR CHANGE*], available at <http://www.electoralcommission.org.uk/about-us/policyreports03.cfm>.

<sup>136</sup> *Id.* at 21–22, 25 (recommending (1) ballot notations for independent candidates, (2) abolition of "deposit and subscription" system that burdens independent candidates, and (3) reforms to clarify and simplify administrative arrangements for nominating candidates).

<sup>137</sup> THE ELECTORAL COMM'N, *STANDING FOR ELECTIONS IN THE UNITED KINGDOM* (2003) [hereinafter *STANDING FOR ELECTIONS*], available at <http://www.electoralcommission.org.uk/about-us/policyreports03.cfm>.

<sup>138</sup> THE ELECTORAL COMM'N, *EQUAL ACCESS TO DEMOCRACY* (2003) [hereinafter *EQUAL ACCESS*], available at <http://www.electoralcommission.org.uk/about-us/policyreports03.cfm>.

<sup>139</sup> THE ELECTORAL COMM'N, *THE ELECTORAL REGISTRATION PROCESS* (2003) [hereinafter, *ELECTORAL REGISTRATION*], available at <http://www.electoralcommission.org.uk/about-us/policyreports03.cfm>.

<sup>140</sup> THE ELECTORAL COMM'N, *THE AGE OF ELECTORAL MAJORITY* (2004), available at <http://www.electoralcommission.org.uk/about-us/policypubs.cfm>.

<sup>141</sup> THE ELECTORAL COMM'N, *POLITICAL ADVERTISING* (2004), available at <http://www.electoralcommission.org.uk/about-us/policypubs.cfm>.

<sup>142</sup> THE ELECTORAL COMM'N, *THE FUNDING OF POLITICAL PARTIES* (2004) [hereinafter *FUNDING OF POLITICAL PARTIES*], available at <http://www.electoralcommission.org.uk/about-us/policypubs.cfm>.

sion's continuing regard for minor parties,<sup>144</sup> independent candidates,<sup>145</sup> and citizens who do not participate in the political process.<sup>146</sup>

Second, while the Electoral Commission itself has offered only muted criticism of the Government's foot-dragging on reforms the Commission deems "urgent," the Commission's recommendations have nonetheless emerged as focal points in the politics of electoral reform.<sup>147</sup> Opposition leaders have blasted the Government for not adopting Commission proposals. In the process they have raised the public profile of the Commission, backed their way into supporting the core of the Commission's agenda (in lieu of a partisan agenda), and forced the Government to validate its practices with reference to the Commission's objectives.

This has occurred in the context of a simmering dispute over the Government's efforts to introduce new balloting technologies that would lower the cost of casting a vote and—so it is said—disproportionately enhance turnout among key Labour constituencies. The Representation of the People Act of 2000 made postal voting available on demand (previously, absentee ballots were available only for cause).<sup>148</sup> Since then the Government has been an enthusiastic proponent of pilot experiments with "all postal" elections (wherein everyone votes by mail), internet voting, voting by cell phone, etc.<sup>149</sup> The

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<sup>143</sup> Other policy reports may be found on the Electoral Commission's webpage, <http://www.electoralcommission.org.uk/about-us/policypubs.cfm> (last visited Aug. 3, 2005).

<sup>144</sup> See, e.g., *FUNDING OF POLITICAL PARTIES*, *supra* note 142, at 14 (noting Electoral Commission outreach to political parties "without a presence at Westminster"). The Commission expressed concern that public funding of campaigns "not entrench the existing party system nor inhibit the development of new parties," *id.* at 87, and urged the expansion of eligibility criteria for political parties to qualify for "policy development grants." *Id.* at 98.

<sup>145</sup> See, e.g., *STANDING FOR ELECTIONS*, *supra* note 137, at 12–13 (summarizing weaknesses of current nomination scheme, said to hinder independent candidates and relatively unsophisticated political parties).

<sup>146</sup> See, e.g., *EQUAL ACCESS*, *supra* note 138, at 4 (recommending that Braille and large-print paper ballots be made available, and that non-English speakers be aided with foreign language instructions and pictorial guides); *STANDING FOR ELECTIONS*, *supra* note 137, at 8 ("A number of responses to our consultation exercise highlighted the extent to which particular interests, including electoral administrators and the established political parties, carry a potential risk of operating to the detriment of the widest possible participation in democracy.").

<sup>147</sup> The question of why the Commission itself has been muted in its criticism is worth exploring. It may reflect an astute judgment by the Commission about how best to remain (in the public's eye) above the partisan fray. But it could also reflect inadequate structural protection for the Commission's independence, or Government influence manifested through the appointments process.

<sup>148</sup> Representation of the People Act 2000, c. 2, § 12, sched. IV (Gr. Brit.).

<sup>149</sup> See, e.g., OFFICE OF THE DEPUTY PRIME MINISTER, *THE GOVERNMENT'S RESPONSE TO THE ELECTORAL COMMISSION'S REPORT: DELIVERING DEMOCRACY? THE FUTURE OF POSTAL VOTING*, 2004, Cm. 6436, at 4, 11, 14 [hereinafter, *RESPONSE TO DELIVERING*

Conservative Party and the Liberal Democrat Party have sought to check some of these reforms, invoking the specter of fraud.<sup>150</sup> The Electoral Commission has wanted to pair cost-lowering reforms with improved monitoring for fraud and new security safeguards.<sup>151</sup> The Commission's top security priority is to replace the existing, household-based system of voter registration with an individualized system in which each voter would be separately enrolled.<sup>152</sup>

The Labour Government first challenged the Electoral Commission in early 2004, introducing legislation that provided for a trial run of "all postal" balloting (requiring everyone to vote by mail) in four upcoming referenda on the establishment of regional legislative assemblies.<sup>153</sup> The Commission had thought it preferable to experiment with all-postal voting in only two of the regional assembly referenda, and the Commission had argued that the experiments should be accompanied by new safeguards against fraud (few of which the bill incorporated).<sup>154</sup> A coalition of Conservatives and Liberal Democrats in the usually quiescent House of Lords rose up to block the bill, arguing that the Government was wrong to reject the advice of the

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DEMOCRACY], available at <http://www.opsi.gov.uk/official-publications/command-papers/index.htm>; SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS, THE GOVERNMENT'S RESPONSE TO THE ELECTORAL COMMISSION'S REPORT: VOTING FOR CHANGE—AN ELECTORAL LAW MODERNISATION PROGRAM, 2004, Cm. 6426, at 7 [hereinafter, RESPONSE TO VOTING FOR CHANGE], available at <http://www.opsi.gov.uk/official-publications/command-papers/index.htm>.

<sup>150</sup> See *infra* notes 155–56 and accompanying text (regarding opposition to all-postal pilots).

<sup>151</sup> See, e.g., THE ELECTORAL COMM'N, DELIVERING DEMOCRACY? THE FUTURE OF POSTAL VOTING 7–8 (2004) [hereinafter, DELIVERING DEMOCRACY], available at <http://www.electoralcommission.org.uk/about-us/04pilotscheme.cfm>; Press Release, The Electoral Comm'n, The Electoral Commission Reports on Absent Voting, Mar. 25, 2003, available at <http://www.electoralcommission.org.uk/media-centre/newsreleasecorporate.cfm/>.

<sup>152</sup> DELIVERING DEMOCRACY, *supra* note 151, at 7 (describing individual electoral registration as "the key building block on which safe and secure remote elections can be delivered"); ELECTORAL REGISTRATION, *supra* note 139, at 11–15. For additional background on postal voting in the United Kingdom, including a timeline of many of the events I discuss below, see Isobel White, *Postal Voting and Electoral Fraud* (House of Commons Library Standard Note SN/PC/ 03667, 2005), available at <http://www.parliament.uk/commons/lib/research/notes/snpc-03667.pdf>.

<sup>153</sup> Brendan Carlin & Chris Benfield, *Dismay over "Post Only" Election in Yorkshire*, YORKSHIRE POST, Jan. 22, 2004, at 1 (reporting government plan for all-postal pilot in Yorkshire was "mired in controversy[,] after it emerged that the independent Electoral Commission had specifically not recommended an all-postal pilot in Yorkshire"); Rob Merrick, *Vote-Rigging Fear*, DAILY POST (Liverpool), Jan. 24, 2004, at 7 (reporting opposition to new pilots bill by nongovernmental Electoral Reform Society, on ground that bill failed to include security measures recommended by Electoral Commission).

<sup>154</sup> See *supra* note 153.



Commission.<sup>155</sup> The upper house eventually countered with a bill that would allow postal voting experiments to go forward in additional regions—*provided* that the expansion was first approved by the Commission.<sup>156</sup> The Government rejected the proposal, and eventually the peers backed down, though not without much harsh language about the Government “bully[ing] and overriding” the Commission.<sup>157</sup> Evidently the Government figured it could get away with transgressing the Commission on legislation that, after all, merely provided for a one-time experiment with a voting technology that the Commission had already approved in principle.

The all-postal elections took place on June 10, 2004. There were logistical snafus in distributing ballots and “widespread allegations of fraud, vote-stealing, and intimidation,” giving Conservatives and Liberal Democrats plenty of opportunities to remind the citizenry once again that the Government had rebuffed the Electoral Commission.<sup>158</sup> In August, the Commission reported on the June 10 election.<sup>159</sup> While

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<sup>155</sup> Gabriel Rozenberg, *Electoral Reform Put Back by Lords*, TIMES (London), Feb. 24, 2004, at 11. Regarding the usual quiescence of the House of Lords, see generally Denis Carter, *The Powers and Conventions of the House of Lords*, 74 POL. Q. 319 (2003).

<sup>156</sup> Brendan Carlin, *Peers Offer Compromise New Twist in Postal Voting Argument*, YORKSHIRE POST, Mar. 19, 2004, at 4 (“Privately, Tories and Liberal Democrats made clear they remained opposed in principle [to the all-postal trials] but were prepared to challenge the Government to abide by the views of the independent Electoral Commission.”); cf. James Slack, *Playing Ping-Pong with Post Votes*, U.K. NEWSQUEST REGIONAL PRESS—THIS IS YORK, Apr. 2, 2004, at 10, available at <http://archive.thisisyork.co.uk/2004/4/2/249697.html> (noting that House of Lords had in effect made itself “the election watchdog’s representative at Westminster”).

<sup>157</sup> Brendan Carlin, *Yorkshire to Vote by Post After Lords Back Down*, YORKSHIRE POST, Apr. 2, 2004, at 2; Gabriel Rozenberg, *Lords Yield on Trials for All-Postal Voting*, TIMES (London), Apr. 2, 2004, at 2.

<sup>158</sup> Dominic Kennedy & Jill Sherman, *Postal Ballot Marred by Fraud*, TIMES (London), June 9, 2004, at 1 (reporting allegations of fraud, and that “all three main parties [were] breaching the Electoral Commission’s draft [code of conduct] guidance”); see, e.g., David Bamber, *Postal Ballot in Chaos as One Man Gets 36 Votes*, SUNDAY TELEGRAPH (London), June 6, 2004, at 15 (firsthand account of reporter who “was able to obtain fraudulently dozens of ballot papers without detection”); Jill Sherman & David Charter, *Postal Votes Chaos Puts Poll at Risk*, TIMES (London), May 29, 2004, at 1 (reporting on delays in distribution of paper ballots, and quoting Bernard Jenkin, Shadow Minister for the Regions, “This is an entirely self-inflicted crisis of [Local Government Minister] John Prescott’s own making. If he had accepted the advice of the Electoral Commission then there would have been no crisis.”); Jill Sherman et al., *Postal Ballot Dirty Tricks Exposed*, TIMES (London), June 10, 2004, at 1 (“[T]he Liberal Democrats and the Conservatives . . . stepped up their attacks on the Government, pointing out that ministers had ignored the Electoral Commission’s advice to limit the pilot to two regions.”). For a relatively temperate version of the illicit partisanship charge, see Jon Rentoul, *Compulsory Postal Voting Is a Shameful Exercise in Electoral Manipulation*, INDEPENDENT (London), June 3, 2004, at 31.

<sup>159</sup> DELIVERING DEMOCRACY, *supra* note 151, at 6. For news coverage of the report’s release, see, for example, Dominic Kennedy & David Charter, *‘Bribery and Fraud Rife’ in*

emphasizing that the jury was still out on whether “increased use of postal voting . . . led to an increase of fraud,” the Commission warned that “high profile allegations of fraud reported in the media” had begun to sap public support for all-postal voting.<sup>160</sup> The report went on to criticize the government for “encourag[ing] or actively impos[ing] the piloting of all-postal voting at too fast a pace,” with too little attention to the Commission’s “wider electoral law reform agenda” including such safeguards as individual (rather than household) voter registration.<sup>161</sup> Looking to the future, the report made three pointed statements. First, notwithstanding the Commission’s earlier recommendations to the contrary, “all-postal voting should not be pursued for use at United Kingdom statutory elections.”<sup>162</sup> Second, the Commission “would not be able to lend its support to any further piloting of . . . any new voting channel,” until “a firm public commitment to the introduction of individual registration has been made.”<sup>163</sup> Third, “it is now a matter of urgency” that the “archaic” legislation underpinning on-demand postal voting be updated to restore public confidence in the electoral system.<sup>164</sup>

Opposition leaders and the press jumped on the report, characterizing it as a “vote of no confidence in the Government’s handling of all-postal voting” and a “damning report.”<sup>165</sup> Newspapers editorialized that the Government had “little choice” but to “immediately heed the Commission’s advice” if it was to “restore credibility [to the] electoral system.”<sup>166</sup> The Government signaled in response that it was

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*Postal Vote*, TIMES (London), Aug. 26, 2004, at 1; Simon McGee, *Watchdog Says: Ditch All-Postal Elections*, YORKSHIRE POST, Aug. 27, 2004, at 1.

<sup>160</sup> DELIVERING DEMOCRACY, *supra* note 151, at 6.

<sup>161</sup> *Id.* at 73.

<sup>162</sup> *Id.* at 70–72.

<sup>163</sup> *Id.* at 73.

<sup>164</sup> *Id.* at 75–80.

<sup>165</sup> Jill Sherman & Dominic Kennedy, *Election Watchdog Demands End to All-Postal Ballots*, TIMES (London), Aug. 27, 2004, at 1.

<sup>166</sup> Editorial, *Democracy at Stake: Election Proposals Must Be Adopted*, YORKSHIRE POST, Aug. 27, 2004, at 14; *see also* Editorial, *Watchdog Says No to More All-Postal Ballots*, SCUNTHORPE EVENING TELEGRAPH, Aug. 27, 2004, at 5 (“[T]oday’s announcement will make it almost impossible [for the Government] to reintroduce [plans for all-postal referendum].”); Andrew Grice, *Watchdog Warns Against All-Postal Voting*, INDEPENDENT (London), Aug. 27, 2004, at 21 (“The Government’s plans to extend all-postal voting are in disarray after the Electoral Commission said it should no longer be used in British elections . . . . The verdict is a severe setback for ministers . . . .”); David Turner, *Pressed Prescott*, FIN. TIMES (London), Aug. 27, 2004, at 16 (“[T]he commission has plunged a dagger deep into [Deputy Prime Minister] Prescott’s back . . . .”); *cf.* Editorial, *Post Post-Mortem*, TIMES (London), Aug. 27, 2004, at 27 (“[The Electoral Commission’s] observations ought to make Tony Blair blush beetroot beneath his Tuscan tan.”); Editorial, *Public Must Have Voting Confidence*, U.K. NEWSQUEST REGIONAL PRESS—THIS IS LANCASHIRE, Aug. 27, 2004, <http://archive.thisislancashire.co.uk/2004/8/27/471780.html> (“[I]t is encour-

open to the Commission's recommendations and not committed to further all-postal pilots.<sup>167</sup> However, the Government held off on publishing a formal response to the Commission's report until December.

On December 9, 2004, the Government released two white papers, one a response to the Electoral Commission's report on the all-postal pilots,<sup>168</sup> the other a belated response to *Voting for Change*, the Electoral Commission's foundational statement and legislative recommendations.<sup>169</sup> Confounding earlier prognostications, the Government rejected the Commission's call for an end to all-postal pilots and equivocated on the Commission's top priority of voter registration reform.<sup>170</sup> Yet the Government also committed itself "in principle" to adopting some seventy percent of the reforms urged in *Voting for Change*.<sup>171</sup> Presumably the Government's hope was that its *Voting for Change* response would retard criticism that it was running roughshod over the Electoral Commission's ballot-security recommendations.<sup>172</sup> This strategy was only partly successful. While the Electoral Commission chairman "said he was pleased that the Gov-

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aging to hear the Commission say that both law and policy on these methods of voting must be tightened up before they are used instead of traditional polling.").

<sup>167</sup> Ian Craig, *Death Knell for All-Postal Ballots*, MANCHESTER EVENING NEWS, Aug. 27, 2004, at 4 ("The government today virtually abandoned the idea of all-postal voting for elections."); Peter Hetherington, *Plans for All-Postal Voting Likely to Be Dropped*, GUARDIAN (London), Aug. 28, 2004, at 3 ("In an embarrassing retreat, the local and regional government minister, Nick Raynsford, has acknowledged that a forthcoming devolution referendum in the north-east could be the last all-postal poll."); Jamie Lyons, *North to Hold Last Post Vote*, JOURNAL (Newcastle), Aug. 28, 2004, at 20 ("The Government looks set to abandon all-postal voting after a devastating report by the elections watchdog.").

<sup>168</sup> RESPONSE TO DELIVERING DEMOCRACY, *supra* note 149.

<sup>169</sup> RESPONSE TO VOTING FOR CHANGE, *supra* note 149.

<sup>170</sup> RESPONSE TO DELIVERING DEMOCRACY, *supra* note 149, at 13 ("The Government is surprised at the rigidity of this recommendation [against any further all-postal ballots] and is not persuaded, on the basis of the evidence so far available, to accept it."). The report continued:

The Government is sympathetic to the principles of individual registration and appreciates the benefits that it might bring, but is concerned about maintaining a simple and clear system, and comprehensive registers. We are therefore considering the options to support remote voting with an approach that preserves the completeness and integrity of electoral registers.

*Id.* at 15.

<sup>171</sup> Jill Sherman, *Ministers Back Legal Safeguards*, TIMES (London), Dec. 10, 2004, at 13.

<sup>172</sup> *Cf.* Nick Raynsford, *Why We Back Postal Votes*, GUARDIAN (London), Dec. 14, 2004, at 21 ("The government is not defying the Electoral Commission on all-postal elections."). Nick Raynsford, MP, was then the Deputy Prime Minister in charge of the government's electoral reform program.

ernment had accepted many recommendations,”<sup>173</sup> the opening line in many newspapers was that the Government had again “defied” the Commission.<sup>174</sup>

Postal voting fraud reappeared in the headlines in the spring of 2005. It was Prime Minister Blair’s misfortune that on the day before the opening of the four-week general election campaign, six Labour Party representatives on the City Council of Birmingham were convicted of vote fraud.<sup>175</sup> The convictions were accompanied by a two-hundred-page opinion that praised the work of the Electoral Commission and offered a scathing indictment of postal voting security.<sup>176</sup> As Tony Blair’s reelection campaign got underway, the British newspa-

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<sup>173</sup> Sherman, *supra* note 171. See also Press Release, Electoral Comm’n, The Electoral Commission Welcomes First Step Towards Overhaul of Electoral Law (Dec. 9, 2004), available at <http://www.electoralcommission.org.uk/media-centre/newsreleasecorporate.cfm/>.

<sup>174</sup> E.g., Sarah Hall, *Watchdog Defied on All-Postal Elections*, *GUARDIAN* (London), Dec. 10, 2004, at 14 (“The government insisted yesterday that all-postal elections should continue, overriding strong objections from the watchdog responsible for overseeing polls.”); Cathy Newman, *Ministers Reject Calls to Halt Postal Ballots*, *FIN. TIMES* (London), Dec. 10, 2004, at 6 (“Ministers have rebuffed calls by the elections watchdog to halt all-postal voting.”); Jill Sherman, *Fraud Fears as Post Replaces the Ballot Box*, *TIMES* (London), Dec. 10, 2004, at 1 (“The Government defied its own independent advisers [sic] yesterday by declaring that all-postal ballots could go ahead . . .”); Andrew Sparrow, *Government Defies Advice to Abandon Postal Voting*, *DAILY TELEGRAPH* (London), Dec. 10, 2004, at 12 (“Ministers vowed yesterday to press ahead with plans to introduce all-postal voting for certain elections despite opposition from the Electoral Commission.”).

<sup>175</sup> Paul Eastham, *Can We Trust the Result?*, *DAILY MAIL* (London), Apr. 6, 2005, at 1; Dominic Kennedy & Jill Sherman, *Up to 3000 People Had Ballot Papers Stolen*, *TIMES* (London), Apr. 5, 2005, at 9.

<sup>176</sup> The last three paragraphs of the opinion are worth quoting in full:

¶ 715. In the course of preparing my judgment, my attention was drawn to what I am told is an official Government statement about postal voting which I hope I quote correctly:

There are no proposals to change the rules governing election procedures for the next election, including those for postal voting. The systems already in place to deal with the allegations of electoral fraud are clearly working.

¶ 716. Anybody who has sat through the case I have just tried and listened to evidence of electoral fraud that would disgrace a banana republic would find this statement surprising. To assert that “The systems already in place to deal with the allegations of electoral fraud are clearly working” indicates a state not simply of complacency but of denial.

¶ 717. The systems to deal with fraud are not working well. They are not working badly. The fact is that there are *no* systems to deal realistically with fraud and there never have been. Until there are, fraud will continue unabated.

In re Local Gov’t Election for Bordesley Green Ward of Birmingham City Council Held on 10th June 2004, & In re Local Gov’t Election for Aston Ward of Birmingham City Council Held on 10th June 2004 (2005) (Election Court), <http://www.hmcourts-service.gov.uk/cms/2384.htm>, modified, *Afzal v. Election Court & Ors*, [2005] EWCA civ 647 (quashing part of Commissioners decision in relation to one party).

pers were filled with choice morsels from the Birmingham opinion.<sup>177</sup> Four days later, a former Labour member of Blackburn Council was jailed for stealing postal votes in 2002; the presiding judge “said that he had no precedent for deciding [the Councilor’s] punishment because election fraud on such a scale had been unknown in Britain for 100 years.”<sup>178</sup> Commentators and opposition politicians lambasted the Government for dilly-dallying on the Electoral Commission’s “urgent” antifraud recommendations.<sup>179</sup> Conservative leader Michael Howard harrumphed, “If we had had our way, the recommendations [of the Electoral Commission] would have been accepted and implemented and we would not have a voting system fit for a banana republic, which is what the High Court judge said is the present position.”<sup>180</sup> Poll numbers showed widespread distrust of postal voting.<sup>181</sup> Blair, having emphasized that the Electoral Commission had approved of on-demand postal voting in principle,<sup>182</sup> described the

<sup>177</sup> To illustrate: A Westlaw search on the UKNEWS database for “*banana republic*” & (*postal* /2 *vot!*), over the two-week period following the election court’s ruling, returns 176 documents.

<sup>178</sup> White, *supra* note 152, at 13.

<sup>179</sup> See, e.g., Jason Beattie & Ross Lydall, *Surge in London Postal Votes Sparks Fraud Fears*, EVENING STANDARD (London), Apr. 15, 2005, at C6 (“[Conservative leader Michael Howard] said Tony Blair should be ‘thoroughly ashamed’ of his decision to ignore calls by the elections watchdog to tighten the postal vote system.”); Editorial, *Postal Ballot on Trial*, YORKSHIRE POST, Apr. 5, 2005, at 10 (“The Ministers have [no excuse]; they proceeded with last year’s pilot schemes in defiance of advice by the Electoral Commission . . . .”); *Election 2005: Postal Votes Warning*, PETERBOROUGH EVENING TELEGRAPH, Apr. 9, 2005, at 10 (quoting Conservative candidate: “What is regrettable is that the electoral commission has warned the Labour Government of its concerns, but they did nothing about it.”); Ben Fenton & Brendan Carlin, *Government Accused of Ignoring Warnings of Postal Voter Fraud*, DAILY TELEGRAPH (London), Apr. 11, 2005, at 9 (quoting spokesman for Electoral Reform Society: “They [the Government] could have acted, they should have acted, either in 2003 when the commission reported its concerns, or in 2004 when the Cabinet met. Now it’s too late.”); Bob Glanville, *Britain—Jowell Dismisses Postal Vote Fears*, MORNING STAR (U.K.), Apr. 16, 2005, at 6 (“John Rees [chairman of the left-wing Respect coalition] questioned why the government had refused to take heed of the Electoral Commission’s recommendations over the glaring holes in the postal voting scheme . . . .”); Tim Shipman, *Why Blair’s Lies Cannot Justify Fraud*, SUNDAY EXPRESS (U.K.), Apr. 10, 2005, at 22 (“Mr. Blair claimed that he has accepted the recommendations of the Electoral Commission . . . . This too is nonsense. Nothing has been done to implement their extra safeguards.”); Jimmy Young, *Postal Fraud Threatens a Fair Election*, SUNDAY EXPRESS (U.K.), Apr. 10, 2005, at 41 (“[Eighteen] months ago the Electoral Commission was sufficiently concerned . . . to warn the Government of the risk of fraud in postal voting, but the Prime Minister chose to ignore the warning.”).

<sup>180</sup> Beattie & Lydall, *supra* note 179, at C6.

<sup>181</sup> Robert Winnett & David Leppard, *Ministers Ditched Vital Measures to Stop Fraud Voting*, SUNDAY TIMES (London), Apr. 10, 2005, at 1 (reporting that 64% of respondents agreed that postal voting should be stopped pending security improvements).

<sup>182</sup> Andrew Sparrow, *Blair Says Postal Voting Is Still Safe System*, DAILY TELEGRAPH (London), Apr. 7, 2005, at 8.

burgeoning criticism of postal voting insecurity as “hugely exaggerated.”<sup>183</sup> Howard answered that the “principles of voting ‘were in a very serious state of affairs’” and “committed his party to a raft of recommendations made by the Electoral Commission”—including individual voter registration.<sup>184</sup> Labour Party sources told *The Times* that “reforms will be given a priority and a Bill [requiring individual voter registration] will be announced at the start of the next session if the party wins.”<sup>185</sup> Opposition figures ridiculed this as “too little far too late and an admission that postal votes could be defrauded at this election.”<sup>186</sup>

While the general election returned Blair to office, his government had been stung. The Constitutional Affairs Minister, who had “vigorously defended the government’s inaction” on ballot security, was defeated at the polls, and another Cabinet member prominent for his opposition to Commission-proposed reforms stepped down.<sup>187</sup> A week after the election, the new Constitutional Affairs Minister outlined eleven ballot-security reforms, including “a form of individual registration for postal ballots.”<sup>188</sup> The Government’s opening statement to Parliament spoke of “rushing through [these] urgent reforms in time for next year’s local elections.”<sup>189</sup> Conservative leaders challenged the Government to introduce legislation that would adopt the Commission-proposed registration system in all of its particulars.<sup>190</sup> The Government followed up, however, with a white paper that carefully hedges on voter registration; it suggests a compromise solution, while leaving the Government with space to move all the way to the Commission’s position should the politics of postal voting so require.<sup>191</sup> The Electoral Commission welcomed the Government’s

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<sup>183</sup> Simon McGee, *Ballot Fraud Is Not Big Problem, Says PM*, YORKSHIRE POST, Apr. 22, 2005, at 1.

<sup>184</sup> McGee, *supra* note 183.

<sup>185</sup> Jill Sherman & Dominic Kennedy, *Labour to Halt Postal Vote Fraud but Only After Election*, TIMES (London), Apr. 11, 2005, at 1.

<sup>186</sup> *Id.* (quoting Ed Davey, Liberal Democrat spokesman for local government).

<sup>187</sup> Editorial, *A Welcome Rethink: The Government Wisely Pledged to Legislate to Reform Postal Voting*, TIMES (London), May 14, 2005, at 23.

<sup>188</sup> *Id.*

<sup>189</sup> Dominic Kennedy, *Climbdown on Postal Vote Fraud as Reforms are Rushed Through*, TIMES (London), May 14, 2005, at 6.

<sup>190</sup> Jill Sherman, *Crackdown on Postal Voting Fraud Gets Priority*, TIMES (London), May 18, 2005, at 30; Jill Sherman, *Tighten Electoral Law, Says Report*, TIMES (London), May 21, 2005, at 16.

<sup>191</sup> DEP’T FOR CONSTITUTIONAL AFFAIRS, ELECTORAL ADMINISTRATION—A POLICY PAPER FOR DISCUSSION (2005), available at <http://www.dca.gov.uk/consult/elections/electoraladmin.htm>. Regarding voter registration, the paper has this to say:

Our preferred solution, particularly for the short term (ie: for the 2006 annual canvass) has, therefore been to collect the additional individual identifiers rec-

support for many of its recommendations,<sup>192</sup> but yielded no ground on the need for a wholly individualized system of registration.<sup>193</sup>

It remains to be seen whether the Government will concede to all of the Commission's priority proposals. A few weeks after the Commission released its response to the Government's white paper, terrorists attacked London, and electoral reform was relegated to the legislative backburner.<sup>194</sup> As of this writing, it appears that electoral reform legislation will have to wait until the fall or winter of 2005.<sup>195</sup>

For present purposes, the important lesson is that Commission recommendations appear to be functioning as an Archimedean point for opposition leaders, enabling them to criticize the Government's stance on political process questions in a manner insulated from the charge of illicit partisan self-interest. Partisan contestation has elevated the public profile of the Commission, and seems to be backing the major parties into support for the Commission's central recommendations.<sup>196</sup> As perhaps the nearest real-world analogue to the AC on the model of this Article, the United Kingdom's Electoral Commission will be worth watching in the years ahead.

#### 4. Conclusion

The standing advisory commission with jurisdiction over questions with respect to which elected officials are thought conflicted or improperly partisan constitutes a new and little studied development. Commentary regarding commission influence is largely impression-

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ommended by the Commission (signature and date of birth), but to do so on an adapted household form at the time of the annual canvass (although there will continue to be individual rolling registration forms). We recognize, however, that there is a strong body of opinion that individual registration with individual forms remains the best option from a security point of view. We are therefore keen to seek a consensus on this issue before finalizing any legislation.

*Id.* ¶ 21.

<sup>192</sup> ELECTORAL COMM'N, ELECTORAL ADMINISTRATION—A POLICY PAPER FOR DISCUSSION: THE ELECTORAL COMMISSION'S RESPONSE ¶¶ 3, 9, 21 (2005), available at <http://www.electoralcommission.gov.uk/media-centre/statements.cfm>; cf. ELECTORAL COMM'N, SECURING THE VOTE—KEY RECOMMENDATIONS AND GOVERNMENT RESPONSE (2005), available at <http://www.electoralcommission.gov.uk/media-centre/statements.cfm> (listing Government's response to each of 45 Commission-proposed ballot security measures).

<sup>193</sup> *Id.* ¶¶ 29–38.

<sup>194</sup> Dominic Kennedy, *Postal Votes 'Undermine Faith in Our Democracy,'* TIMES (London), Aug. 6, 2005, at 16 ("Whitehall blamed [the delay in introducing the promised electoral administration bill on] the new priority of fighting terrorism.").

<sup>195</sup> Posting of Nigel Hurl, *Electoral Administration Bill Delayed, to Help & Advice for U.K. Professionals Involved in Running Elections*, Association of Electoral Administrators, <http://www.aea-elections.co.uk/latest-news.htm> (July 26, 2005).

<sup>196</sup> Fortuitous circumstances have obviously mattered too—for example: the fact, the timing, and the rhetoric of the vote-fraud convictions of the Birmingham Councilors.

istic. There is virtually no comparative literature that seeks to understand, structurally or contextually, why these bodies succeed or fail. The very thin available evidence does suggest, however, that an ongoing advisory commission can develop meaningful de facto law-reform power. Politicians are often wary about publicly rejecting the recommendations of advisory bodies with developed reputations for being “above politics”—and many of the advisory bodies do seem to have risen above partisanship. But as the Australian and Canadian case studies suggest, public opinion does not seem to have reliably deterred legislative assaults on the commissions’ autonomy.<sup>197</sup> Substantial de jure safeguards for a commission’s independence are probably necessary if the body is to have the spine to challenge the government persistently.

### C. *Towards a Model AC*

To anchor the analysis of AC influence that follows in Part III, it will be helpful to sketch the features I consider desirable in an AC. This Article does not purport to say just how an AC ought to be designed. In lieu of an architectural blueprint, I offer here a more general set of design guidelines, drawn with an eye to enhancing the AC’s influence, its resistance to capture, and its normative appeal to persons of varying ideological predilections. I also briefly suggest a number of concrete design strategies and techniques through which the guidelines could be operationalized. I introduce these techniques not by way of endorsement of any particular AC design, but as a challenge to those who would dismiss the whole idea of experimenting with ACs on the ground that any such body is sure to be corralled or suppressed by political insiders.<sup>198</sup>

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<sup>197</sup> It may be the case that many voters who can successfully assimilate and punish an incumbent’s rejection of a commission proposal find it comparatively difficult to understand and respond to structural reforms to the advisory commission itself—particularly if those reforms have the effect of quieting the commission.

<sup>198</sup> While the international examples above suggest that capture is far from inevitable, American political culture may be so pervasively partisan as to make it comparatively difficult to create nonpartisan institutions here. *Cf. BUTLER & CAIN, supra* note 56, at 128–39 (speculating about anomalous persistence in U.S. of partisan redistricting); Hasen, *Beyond, supra* note 47, at 65 (“[E]very country is different, and . . . what might be required for non-partisanship to work in the United States may be unnecessary in countries like Australia and Canada with their stellar records of election administration.”). In Canada, Speakers of the House of Commons are said to have “taken seriously their responsibility for constructing politically independent commissions” in selecting boundary commissioners. COURTNEY, *supra* note 57, at 95. By contrast, in the United States, legislative leaders who have the power to make appointments to election-regulating bodies typically select party hacks. *See supra* note 57. In the U.S. setting, it may be necessary to attenuate elected-branch control over the appointments process.



My design guidelines proceed from the uncontroversial premise that the following qualities are desirable in any body set up to counter the political entrenchment problem, whether by giving advice or imposing reforms: First, a normatively attractive *goal orientation*—the body should be structured in such a way that the goals its decisionmakers pursue, when aggregated according to the governing decision rule, coincide with whatever norm has been settled upon as the basis for the body's activities. Another important quality is *independence*—the body's ability to withstand pressure from the elected branches of government.<sup>199</sup> Beyond goal orientation and independence there are considerations of *capacity*—the resources the body has for researching and developing regulatory schemes, for taking the measure of public opinion and discerning the public's underlying interests and concerns, for investigating how the law is actually working, and for communicating the rationale for its reforms to the public.<sup>200</sup>

I will also take it as given that some *citizen-based* specification of Pildes's shared-agreement norm affords an acceptable basis for an advisory body to identify candidate reforms.<sup>201</sup> More specifically, I will proceed on the assumption that the AC should only pursue reforms that a majority or supermajority of the citizenry, if well informed, would regard as an improvement over the status quo. This Article will refer to such reforms as *consensus improvements*. That, say, sixty percent of the citizenry, if well informed, would support a proposed reform, may not constitute a normatively sufficient justification for an unelected body to impose that reform by decree. But as a threshold screening condition for an advisory body that merely recommends reforms, this hardly seems objectionable. Indeed, there is a straightforward sense in which the AC's pursuit of such reforms is representation-reinforcing. It is the AC's job to put on the lawmaking agenda reform packages that a well-informed citizenry would favor,

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<sup>199</sup> The distinction between goal orientation and independence is subtle but important. The former is an aggregate property of the objectives that each member of the body decides to pursue; the latter goes to the question of whether the body is likely to be forceful or quiescent in the event that its goal orientation puts it at odds with the powers that be.

<sup>200</sup> While I think it uncontroversial to assert that all three of these qualities are desirable in any body set up to deal with the entrenchment problem, it is not the case that they are *independently* desirable. Independence and capacity are instrumental qualities whose value depends on the body's goal orientation. If the goal orientation is, on balance, appropriate, then independence and capacity are desirable. Absent the proper goal orientation, however, the other two qualities serve only to make the institution a more effective actor in the pursuit of illegitimate ends.

<sup>201</sup> See *supra* notes 49–53 and accompanying text for a description of “shared agreement” as a basis for external regulation.

but which, in the usual course of things, go unaddressed because of asymmetric information and political insider self-interest.

The design guidelines follow. It should be emphasized that these guidelines are meant to inform institutional innovation at the state level. Some of my recommendations would present constitutional difficulties (on current understandings) if adopted at the national level.<sup>202</sup>

### 1. *Regarding the Normative Goal Orientation*

Of foremost importance, I recommend (1) that the AC be governed by a group of persons who, taken together, comprise an ideologically representative cross section of the citizenry as a whole, and who are not beholden to political insiders; and (2) that the AC be constrained to follow a supermajority decision rule. These guidelines, if satisfied, should yield a body whose collective orientation is roughly congruent with the consensus-improvement ideal—even if each commissioner pursues her respective policy goals, rather than fixing her sights on consensus improvements.<sup>203</sup>

<sup>202</sup> See *infra* notes 339–40 and accompanying text.

<sup>203</sup> Given the insights of legal realism, it is prudent to begin with the working hypothesis that politically insulated decisionmakers who have power over election law will be motivated to a nontrivial degree by their own policy preferences and values. Cf. HASEN, *supra* note 39, at 14–46 (arguing from archival records that justices' personal conceptions of political equality determined their votes in Supreme Court's foundational election law cases).

One possible objection to the ideological diversity/supermajority approach is that it might prove disabling. Election law reforms sometimes have predictable partisan effects, and one might think that, for example, “left-leaning” members of an AC would refuse to accede to reforms that incidentally advantage Republicans, even if the left-leaning commissioners judge those reforms “fair” in the abstract. Answers to this dilemma can be found, ironically, in Congress itself. When discrete reforms have identifiable partisan consequences, they can be bundled: hence the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 5 and 42 U.S.C.), which facilitates political participation by previous nonvoters (benefiting Democrats, on the conventional wisdom), while taking steps against voter fraud (benefiting Republicans, on the conventional wisdom). Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584, 585 (2004). Congress has also shown that the anticipated, near-term partisan consequences of reforms can be avoided by delaying the effective date of legislation: hence the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.), which by design took effect *following* the next congressional election after the bill's enactment; this period of delay gave Democrats, the expected near-term fundraising losers, a window to strategize and adjust to the new rules. Evan Stephenson, Note, *Game Theory and the Passage of McCain-Feingold: Why the Democrats Willingly and Rationally Disadvantaged Themselves*, 19 J. L. & POL. 425 (2003). Also, one ought not to discount the possibility that reasonable people (who are not political insiders) will accede to reforms that they judge to be fair, but which happen to somewhat disfavor “their” side. The notion that people value fairness in politics, as in many other domains, is supported by an abundance of experimental and survey data. See generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE,

The central design challenges presented by this approach are two-fold. The first challenge is to develop a selection mechanism that generates commissioners who are representatively diverse in their perspectives but not unrepresentatively loyal in their affections for one or another political party or elected official. Whatever solicitude an AC commissioner has for a party or politician should emerge from the congruence between the commissioner's ideology and what the party or politician stands for, not from the commissioner's personal sense of fealty or ambition. The second and related challenge is to design prophylactic conflict-of-interest rules, and tenure and salary guarantees, to discourage commissioners from doing favors for interested parties or acting on the basis of the commissioners' own aspirations for higher office. Such rules might, for example, bar ex-commissioners from accepting further public appointments, from running for office, from registering as a lobbyist, or from serving as a political party official, at least for a period of years. These tools are familiar,<sup>204</sup> and with a little experimentation it should be possible to discover what suffices. The question of how best to select commissioners, however, demands a more imaginative solution.

In a two-party system, it may be possible to ensure a fair degree of ideological diversity—and also to guard against capture by partisan factions—by setting aside equal numbers of seats for members of each major party,<sup>205</sup> and choosing a decision rule that allows major-party affiliated commissioners to form separate blocking coalitions.<sup>206</sup> There is an obvious risk, however, that such party-affiliated commissioners would end up serving as agents for their respective political

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STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK (2002); John R. Hibbing & John R. Alford, *Accepting Authoritative Decisions: Humans as Wary Cooperators*, 48 AM. J. POL. SCI. 62 (2004).

<sup>204</sup> See, e.g., ARIZ. CONST. art. IV, pt. 2, § 1, cl. 13 (barring districting commissioners from holding public office or registering as lobbyists for three years following service on commission).

<sup>205</sup> The reason an equal division of seats between the major parties is roughly "representative" is that, in the long run, by Duverger's Law, plurality rule voting tends to "create and maintain two-party systems," see Maurice Duverger, *Duverger's Law: Forty Years Later*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 69, 69 (Bernard Grofman & Arend Lijphart eds., 1986), and both parties face incentives to compete for the median voter, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY, 115–17 (1957).

<sup>206</sup> To illustrate, a twenty-person commission might have eight seats reserved for members of the largest party in the jurisdiction, eight seats for the next largest party, and four seats for members of third parties or independents; the voting rule would permit the AC to take official actions only with the assent of at least thirteen commissioners. Alternatively, the voting rule might allow decisions to be made by a less numerous majority (e.g., eleven of the twenty commissioners) provided that the majority includes, say, at least two commissioners affiliated with the largest party, two affiliated with the next largest party, and two independents or third-party affiliates.

parties, such that the AC as a whole simply advances the common interests of the two-party “duopoly.”<sup>207</sup> To reduce the likelihood of this, the process of selecting commissioners should be structured so that political insiders cannot hand-pick their favorites.

One possibility is to vest the power to select AC commissioners in an independent nominating commission, or even in the constitutional court. Some observers think that Arizona’s early experience with using its commission on appellate court appointments to nominate members of the state’s new districting commission has reduced legislators’ influence.<sup>208</sup> In the United Kingdom, the Royal Commission on the Reform of the House of Lords (also known as the Wakeham Commission) has issued guidelines for a multi-partisan appointments commission responsible for choosing upper-house members who belong to, but are not agents of, the political parties.<sup>209</sup> Party members would be selected so as to maintain an upper house in which the relative abundance of party members corresponds to the parties’ respective vote shares in the preceding general elections.<sup>210</sup> But the parties themselves would not have the power to choose “their” members, lest the Lords’ readiness to check Parliament and the government of the day be compromised.<sup>211</sup>

Skeptics will point out that elected officials who have control over the selection of appointments commissioners will be tempted to abuse this prerogative.<sup>212</sup> That may be so. But an appointments commission could also be composed by lot. For example, the commission might be drawn at random from the pool of former elected officials and high-level political appointees. All persons who held office above a certain level in previous Republican administrations, or who served in the legislature as a Republican, or who were appointed (or elected) to the bench by or as a Republican, would be thrown into one pool; a corresponding Democratic pool would also be created. The appointments commission would consist of an equal number of persons from

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<sup>207</sup> Such has been the fate of the Federal Election Commission and many “bipartisan” state districting commissions. *See supra* note 57.

<sup>208</sup> *See* McDonald, *supra* note 57, at 383–84 (classifying Arizona’s districting commission as “neutral, or nonpartisan”). *But see* ARI WEISBARD & JEANNIE WILKINSON, CTR. FOR GOV’T STUDIES & DEMOS, *DRAWING LINES: A PUBLIC INTEREST GUIDE TO REAL REDISTRICTING REFORM* 10–12 (2005), available at <http://www.cgs.org/publications> (criticizing performance of Arizona’s districting commission).

<sup>209</sup> ROYAL COMM’N ON THE REFORM OF THE HOUSE OF LORDS, *A HOUSE FOR THE FUTURE* 130–44 (2000) [hereinafter WAKEHAM COMM’N], available at <http://www.archive.official-documents.co.uk/document/cm45/4534/4534.htm>.

<sup>210</sup> *Id.* at 102, 137.

<sup>211</sup> *Id.* at 102, 106–07.

<sup>212</sup> *Cf.* Persily, *supra* note 34, at 674 (“[A]ppointed officials will be beholden to those appointing them or at least selected because their intentions are well known.”).

each partisan pool, chosen at random and appointed to staggered terms.<sup>213</sup> Such a party-balanced structure should keep the appointments commission from playing favorites as between the parties of the left and the parties of the right. At the same time, this method of composition seems unlikely to result in an appointments commission badly overloaded with fierce party loyalists. Odds are that persons randomly selected from the pool of high-level public officials would not prove as unwaveringly party-loyal as persons hand-picked for the job by current party leaders. It also seems likely that former public officials, as a group, are less party-beholden than persons currently serving in government.<sup>214</sup>

Another route to limiting political insiders' influence over the appointments process is to give the constitutional court a leading role, either alone or in conjunction with an appointments commission. Constitutional democracies quite commonly make their constitutional courts responsible for appointing persons whose charge may put them at odds with elected officials.<sup>215</sup> The foremost attraction of this solution is that the justices' self-conceptions and, plausibly, the respect paid to their institution, are somewhat dependent on a reputation for

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<sup>213</sup> One can also imagine variations on this model in which the appointments commission would also include one or more non-party-affiliated or third-party-affiliated members. To keep these members from tipping the ideological (left-right) balance of the appointments commission, their appointment might be conditioned on approval by a supermajority of the legislature.

<sup>214</sup> Cf. Philip Shenon & Sheryl Gay Stolberg, *10 Ex-G.O.P. Lawmakers Attack Changes in Ethics Rules*, N.Y. TIMES, Apr. 15, 2005, at A14 (reporting letter from former Republican members of Congress, alleging that recent rule changes were unjustifiable ploy to protect sitting speaker Tom DeLay (R-Tex.)).

<sup>215</sup> Precedent for judicial appointment may be found in the electoral administration and oversight bodies of some transitional democracies. See Todd A. Eisenstadt, *Off the Streets and into the Courtrooms: Resolving Postelectoral Conflict in Mexico*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 83, 89 (Andreas Schedler et al. eds., 1999) (discussing special electoral court, whose members are nominated by Supreme Court); Robert A. Pastor, *A Brief History of Electoral Commissions*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES, *supra* at 75, 78 (discussing Supreme Electoral Tribunal in Costa Rica, whose members are chosen by justices of Costa Rica's constitutional court); Vijay Padmanabhan, Note, *Democracy's Baby Blocks: South Africa's Electoral Commissions*, 77 N.Y.U. L. REV. 1157, 1778 n.129 (2002) (mentioning role of President of Constitutional Court in nominating members of South Africa's Electoral Commission). Nearer to home, a few state districting commissions, like Montana's and New Jersey's, have judicially appointed members. See McDonald, *supra* note 57, at 383. In Montana, the state supreme court is called upon to name a "tiebreaker" commissioner if the commission cannot select one. *Id.* Some judges have been accused of letting their partisan preferences influence their tiebreaker selection; other courts have a reputation for naming nonpartisan political scientists to the tiebreaker post. *Id.* Another and perhaps more notorious precedent for judicial appointment is the Ethics in Government Act, which provided for "independent counsel" to be appointed by a panel of three judges selected by the Chief Justice of the U.S. Supreme Court. See *Morrison v. Olson*, 487 U.S. 654, 659-61 & 661 n.3 (1988).

rising above partisan politics. Prestige and security of tenure may also make the justices relatively immune to whatever enticements incumbent legislators might offer as implicit *quid pro quos*. To be sure, justices do have partisan preferences, and because of this it might be wise to locate the appointment power not in the court as a whole, but in a randomly selected pair consisting of two justices affiliated, respectively, with each of the two largest political parties. Rather than constituting a permanent commission, this pair could be chosen afresh whenever openings on the AC arise. (Justices selected in this way could also be employed to ratify or reject appointments proposed by a nominating commission.)

Whether the power of selection resides in elected officials, in an appointments commission, or in a constitutional court, the likelihood of improper outcomes can be further reduced with qualification requirements that winnow insider loyalists from the pool of eligible candidates. For example, the United Kingdom bars from Electoral Commission service persons who within the preceding ten years have held office in a political party, been employed by a political party, or made donations to a political party in excess of a modest threshold.<sup>216</sup>

Also worthwhile are mechanisms that tend to reveal bias or manipulation by the appointing authority. The Wakeham Report proposes that the House of Lords Appointments Commission be required to report annually to Parliament on its search and selection procedures, its diversity and representation goals, its rationales for recent appointments, and the like.<sup>217</sup> Another option is to have the appointing authority assemble a large pool of nominees, and then to make the final selection by lot.<sup>218</sup> To illustrate, the appointing authority could be required to name, say, twenty-five candidate commissioners per opening—with the twenty-five to consist of ten members of the largest political party in the jurisdiction, ten members of the next largest party, and five independents or members of third parties—who taken together “fairly represent the diversity and ideological balance of the citizenry.” A computer would then select one commissioner at random from the pool of nominees. Compared to

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<sup>216</sup> Political Parties, Elections, and Referendums Act, 2000, c. 41, § 3(4) (U.K.).

<sup>217</sup> WAKEHAM COMM’N, *supra* note 209, at 135–36.

<sup>218</sup> Selection by lot (from among a panel of nominees) was first proposed for redistricting commissions by California State Senator Arlen Gregorio in the 1970s, and, with this writer’s encouragement, has since been embraced by Common Cause. See Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for “Fair and Effective Representation,”* 14 HARV. J. ON LEGIS. 827, 868 n.160 (1977); Common Cause, Summary of ACAX1 3, to Be Amended As Agreed, <http://www.commoncause.org/site/pp.asp?c=DKLNL1MQIwG&b=368187> (last visited Aug. 6, 2005) (summarizing proposed redistricting amendment to California Constitution).

the usual pick-your-favorite appointments method, this randomization technique should make it more logistically and politically difficult for the appointers to name a loyalist, a partisan hack, or an aberrational ideologue to the AC. To achieve such an outcome with any reliability the appointing authority would have to stack the pool with a statistically implausible lineup (relative to the norm of representative ideological diversity) consisting of dozens of loyalists, hacks, or ideologues. The appointers' bad faith would be transparent, there for the press to ridicule. Moreover, appointers are unlikely to vet each member of a pool of twenty-five nominees with the same attention to detail that they would lavish on their ultimate selection under a pick-your-favorite system. These higher screening costs should further limit the appointers' ability to manipulate the AC's goal orientation.

## 2. *Independence and Capacity*

Compared to the challenge of designing an AC for the consensus-improvement goal orientation, the design problems of independence and capacity are much more plebeian, though not unimportant: Inadequate protection against preemptive and retaliatory strikes by the elected branches has been a recurring problem for real-world political process oversight bodies.<sup>219</sup>

The AC's governing legal framework should buttress the body's jurisdiction, budget, and operational autonomy against hostile legislators. Techniques that may be worth exploring include multi-year or entitlement-style budgeting,<sup>220</sup> fixing the AC's budget at a given percentage of total government revenues,<sup>221</sup> or tying the AC's budget to that of some "indispensable" government agency—for instance, the courts. Laws that establish the AC's structure, jurisdiction, and powers, and that provide for the body's funding, should be entrenched against revision by a simple majority of the legislature.<sup>222</sup>

Regarding capacity, the AC's efforts to identify and communicate appropriate reforms should be supported by equipping the body with an adequate budget and the research and outreach capabilities of an

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<sup>219</sup> See *supra* Part II.B; see also Moshe Maor, *Feeling the Heat? Anticorruption Mechanisms in Comparative Perspective*, 17 GOVERNANCE 1 (2004) (showing through case studies that highly positioned officials subject to corruption investigations typically orchestrate brutal and often effective campaigns of character assassination to discredit investigators).

<sup>220</sup> Cf. ACKERMAN & AYRES, *supra* note 57, at 134–36 (proposing entitlements approach to FEC budgeting, which would somewhat insulate body against hostile amendments to appropriations bills).

<sup>221</sup> Cf. Ackerman, *supra* note 2, at 694 (proposing this technique as way of insulating bodies set up to investigate and prosecute public corruption).

<sup>222</sup> This could be done by constitutional amendment or, in some states, by ballot initiative. See *infra* text accompanying notes 341–44.

ordinary administrative agency. The AC's capacity might also be enhanced by giving it subpoena power and by authorizing it to sponsor advertising campaigns, although these design choices do present risks.

An AC possessed of the subpoena power might develop a better understanding of the actual workings of the political process; then again, a publicity-hungry AC might abuse the subpoena power, investigating high-profile incumbents or their associates for the purpose of grabbing headlines and in the process seriously distracting those officials from the quotidian business of governing.<sup>223</sup> Such powers would also make the AC a considerably more attractive target for would-be capturers. There is little warrant for the AC to peer into the dealings of politicians currently in office, however, as the AC is meant to function as a law reformer, not a law enforcer. Commissioners can learn what they need to about the backrooms of politics by querying *former* officials and their supporters. The AC's subpoena power, if any, should be limited accordingly.

Whether and how the AC should be restricted from campaigning on behalf of its proposals also presents hard questions.<sup>224</sup> The basic tradeoff here is clear; how best to strike a balance is not. The more ways in which the AC can campaign on behalf of its proposals, and the more resources it has for campaigning, the more likely the AC is to propose reforms it considers optimal. To the extent that the AC is restrained from campaigning, AC-initiated reforms are likely to represent compromises between what the AC considers best, and what the AC believes will attract the support of well-resourced political entrepreneurs who could broadcast the AC's message.<sup>225</sup> Insofar as the AC is meant to give voice to the latent concerns of the unorganized mass of voters, one could argue that the AC should have within

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<sup>223</sup> The "legislative privilege" conferred by the Speech and Debate Clause of the U.S. Constitution and corresponding provisions in most state constitutions might limit the AC's ability to call legislators to account in any event. *See generally* ESKRIDGE ET AL., *supra* note 20, at 159–67. However, many state supreme courts have adopted lax interpretations of the legislative privilege in the interest of governmental transparency, *see* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221 (2003), and insofar as ACs are created by state constitutional amendment, *see infra* Part IV, the legislative privilege could be expressly narrowed vis-à-vis the AC.

<sup>224</sup> Should the AC have authority to spend money on advertising the merits of its proposed reforms? On advertising an upcoming vote on its reforms? On advertising that "names names"—incumbents who voted for and incumbents who voted against AC-proposed reforms? On advertising in the weeks or months leading up to a legislative election?

<sup>225</sup> Recall in this regard the role of opposition political parties in trumpeting the reforms proposed by the U.K. Electoral Commission. *See supra* notes 153–86 and accompanying text.



its ambit all the tools and techniques of privately established issue-advocacy groups. But empowering the AC to sponsor and finance political advertising would make the AC a considerably more attractive target for would-be capturers—and much more dangerous if captured—particularly if the AC has a constitutionally protected budget. And even if not captured, a media-savvy AC with ample resources might draw too much attention to political process questions, at the expense of public discourse on more pressing matters.

### 3. *Other Recommendations*

#### a. *The Vote-Forcing Power*

While the AC should have authority to trigger closed-rule legislative votes or popular referenda on its proposals, it should not be authorized to do so frequently. The AC might be limited, for example, to one such bill per election cycle.<sup>226</sup> Endowing the AC with vote-triggering powers should bolster the AC's accountability as well as its influence.<sup>227</sup> Sharply limiting the frequency with which the AC may exercise this power will keep the advisory body from unduly impinging on legislative agenda-setting, and from burdening voters with long lists of ballot propositions.

#### b. *Continuity*

The AC should be set up as a permanent institution (not as a transient body that disbands upon issuing its recommendations), whose members serve long, staggered terms, and whose structure is entrenched against easy revision. Ongoing institutions with some degree of structural obduracy are comparatively easy for voters to evaluate.<sup>228</sup> This matters for AC influence and accountability.<sup>229</sup> Long terms should also foster in each commissioner a salutary interest in the future reputation of the AC.<sup>230</sup>

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<sup>226</sup> There may be value in an iterated procedure modeled on the Iowa districting statute, see *supra* notes 85–90 and accompanying text, that enables the AC to demand one or two follow-up votes if the legislature rejects the initial version of its bill. Iterated procedures might also facilitate technical corrections and/or be conducive to compromise—as well as position the AC to keep the media spotlight on legislators' intransigence.

<sup>227</sup> See *infra* Parts III.A & B.

<sup>228</sup> Cf. James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in *ELEMENTS OF REASON* 153, 182 (Arthur Lupia et al. eds., 2000) (observing that low-information voters are less likely to err insofar as they take their voting "cues" from "the broader and longer-standing features of politics [such as] political parties, social groups, ideologies, and established leaders," rather than "narrower or shorter-term features [such as] singular events, aspiring leaders, changing social or economic conditions, and . . . specific policies").

<sup>229</sup> See *infra* Part III.

<sup>230</sup> See *infra* Part III.C.

Another advantage of the permanent AC is its ability to monitor implementation of its reforms, suggest correctives, criticize governmental foot-dragging, and so forth.<sup>231</sup> This capacity is important in virtue of the enormous energy that powerful interests invariably will put into discovering and exploiting loopholes in whatever reforms are initially established. Importantly, too, the permanent AC could make its presence felt during those occasional event-driven crises or near-crises of public confidence in the elected branches or the electoral system, moments at which dramatic political process reforms are most likely to occur.<sup>232</sup>

Making the AC permanent also improves the odds that its members will settle into a practice of putting aside their immediate partisan preferences in hashing out reforms. That a reform under consideration today may incidentally benefit Republican candidates need not be cause for a long-serving AC commissioner who prefers the Democratic Party to reject it—not if she trusts that her Republican-leaning colleagues will be equally game to set aside their partisan preferences and take a longer view of “the merits” of whatever issue happens to surface tomorrow. An equilibrium of this sort would seem

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<sup>231</sup> Recall the ongoing and quite sharp criticism of government by the New South Wales and Queensland anticorruption commissions, *see* Lewis & Fleming, *Value Conflict*, *supra* note 71, and the more muted but nonetheless incessant drumbeat of Electoral Commission criticism regarding ballot security and voter registration in the United Kingdom, *see supra* notes 126–92 and accompanying text.

<sup>232</sup> For example, during the four-week general election campaign that followed immediately on the heels of the election court’s harsh indictment of postal voting security, the U.K. Electoral Commission negotiated advisory guidelines regarding political party participation in the gathering and distribution of postal ballots and participated in high-profile meetings with the Association of Chief Police Officers regarding vote-fraud enforcement. *See* Tom Baldwin & Jill Sherman, *Tories Accused of Helping to Block Postal Voting Reforms*, *TIMES* (London), Apr. 16, 2005, at 33 (discussing negotiations over guidelines); Jill Sherman, *Now Crisis Meeting Is Called Over Dangers of Postal Votes*, *TIMES* (London), Apr. 19, 2005, at 25 (regarding vote-fraud enforcement meeting). Commission chairman Sam Younger also took advantage of the attention being paid to ballot security to repeat his call for the adoption of the Commission’s central recommendations. *See, e.g.,* Jill Sherman & Dominic Kennedy, *Missing Votes and Fraud Spark Call for Safeguards*, *TIMES* (London), May 7, 2005, at 58 (reporting EC chairman’s expression of disappointment that “ministers had repeatedly ignored the commission’s recommendations to make changes before the general election,” and quoting his statement, “What is absolutely clear is that postal voting has knocked the public’s confidence in the system.”); White, *supra* note 152, at 14 (reproducing statement to this effect issued by Electoral Commission during general election campaign).

Regarding the event-driven nature of public demand for political process reforms, *see* generally Luke J. Keele, *Social Capital, Government Performance, and the Dynamics of Trust in Government*, (2004), <http://users.ox.ac.uk/~7Epol0034/MacroTrust.pdf> (finding that trust in government is substantially and persistently affected by scandal “shocks,” and observing that political system tends to generate process reforms when trust in government is low).

more likely to develop among people who work together for many years than among people who convene for a single round of reform.

### c. Jurisdiction

The jurisdiction of an election-law AC could be defined in several different ways. One could try to identify and enumerate *ex ante* the political process issues that incumbent legislators and dominant parties (for self-entrenchment reasons) are particularly keen to control, and limit the AC's jurisdiction to these issues. Or, one could authorize the AC to address any political process matter conditional on a showing that its proposal is responsive to some blockage. Simplest of all, one could give the AC jurisdiction over all questions about the rules governing political competition, representation, or legislation.

This last approach is, I think, preferable. The first tack demands too much by way of foresight; it risks the creation of an AC unable to address the problems of tomorrow. The second approach may invite unnecessary conflict with the elected branches. It would also entail highly fact-bound judicial review by courts whose ideological and partisan balance is not at all assured, and whose independence from the legislative and executive branches may well be less secure than the AC's.<sup>233</sup> The jurisdictional boundary-policing entailed by the third approach is likely to be more categorical, and as such less readily manipulated to defeat particular AC proposals.<sup>234</sup>

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<sup>233</sup> Judicial review of administrative agency decisionmaking is notoriously open-ended; it invites *sub silentio* reliance on the judges' partisan or ideological preferences. See generally Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1269–76 (1999) and sources cited therein.

<sup>234</sup> To illustrate: Imagine that the AC wishes to introduce a particular set of campaign finance reforms. Legislative leaders who oppose the reform (and wish not to vote on it) accuse the AC of overreaching. They bring suit, seeking a declaratory judgment that the legislature is under no obligation to vote on the AC proposal because the content of the proposal exceeds the AC's jurisdiction. Of course, the court might dismiss this suit on the ground that it raises a political question, but for the sake of argument, let us assume the court reaches the merits. (Readers who think it implausible that courts would intervene at the "proposing" stage are invited to imagine instead a scenario in which the AC subpoenas testimony or documents, and the person to whom the subpoena is issued seeks a court order quashing it on the ground that the subject being investigated is beyond the AC's jurisdiction.) Under the third approach to jurisdiction, the court would have to decide only (1) whether the AC's description of the subject matter of its proposal ("campaign finance") falls into the category of, for example, "rules governing political competition, representation, and legislation"; and (2) whether the AC's description of the subject matter of its proposal is correct (i.e., whether the proposal really would govern campaign finance—as opposed to, say, transportation policy). The first inquiry could be resolved, in many cases, by conventional usage: What do lawyers and law professors who work on the "law of politics" concern themselves with? What subjects are covered in, for example, casebooks on election law? By contrast, under the second approach, the court would be reviewing

#### 4. *Summary*

The remainder of this Article will use the expression “model AC” to refer to advisory commissions whose design comports with the following guidelines:

First, the AC ought to be composed of persons who, taken together, fairly represent the ideological diversity of the citizenry; who have no special loyalties to particular political parties or politicians; and who serve long, staggered terms. Ideological diversity may be achieved by slotting positions on the commission for persons who belong to different political parties. Authority to select AC commissioners should be vested in an appointments commission or constitutional court; randomization strategies could be employed to reveal bias, if any, in the selection of commissioners.

Second, the AC ought to be constrained to follow a supermajority decision rule, one which enables commissioners affiliated with each of the major political parties to form separate blocking coalitions.

Third, the AC as a whole, and the commissioners as individuals, ought to be well insulated from the elected branches of government. At the collective level, this means entrenching the body’s structure, jurisdiction, powers, and operational autonomy against revision by an ordinary legislative majority, and providing for a secure source of funding. At the individual level, this means salary protections and prophylactic conflict-of-interest rules that, *inter alia*, limit the commissioners’ future employment options with political insiders.

Fourth, the AC ought to be authorized to put one package of reforms to a closed-rule vote of the legislature (or a popular referendum) per electoral cycle.

These guidelines are just starting points. They will suffice to ground the analysis of AC influence that follows in Part III, and, I hope, to parry the objection that any putatively independent political process oversight body is certain to be corralled by some insider faction. But there are many further details to work out, pertaining not only to such knotty matters as AC campaigning and the proper scope (if any) of the AC’s subpoena power, but also to the benefits and costs of subjecting the AC to “sunshine” laws and requiring adherence to notice-and-comment procedures or other forms of citizen review.

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the AC’s highly case- and fact-specific determination—which may be both normatively and empirically contentious—regarding (1) the existence of some “political blockage” that arises, in part, because of the extant regime of campaign finance; and (2) the anticipated effects of the proposed regime of campaign finance on that blockage.

### III

#### INFLUENCE AND FIDELITY: THE AC AS REPRESENTATION REINFORCER

This Part builds towards an understanding of what is functionally distinctive about assigning the political process oversight role to an AC rather than to a similarly structured external regulator.<sup>235</sup> I begin, in Part III.A, by clarifying the theoretical basis for the AC's potential influence, identifying three channels of influence over voters through which an AC could successfully pressure incumbent legislators into adopting AC-proposed reforms.

Part III.B addresses the dynamics of AC influence, with particular attention to the risk that a "bad" (captured) AC will continue to drive voter decisionmaking. Here the analysis is largely comparative, emphasizing the differences between ACs and external regulators. As compared to an external regulator, the AC's de facto law-reform power, mediated by the electorate, is almost surely more sensitive both to information suggestive of capture and to information about the body's previous decisions. This sensitivity follows, I suggest, from the notoriety of the process by which the AC shapes the law, and from the differential impact of a loss in public trust on the respective bodies' de facto law-reform power. We can say with some confidence that the electorate would detect the capture of an AC (that has meaningful de facto power) more quickly than the electorate would detect the capture of a constitutional court or RC. And it is virtually a sure thing that following such a detection, the AC would lose power more rapidly than a similarly insulated constitutional court or RC.

In Part III.C, the focus shifts from the comparative *consequences* of capture to the comparative *likelihood* of capture and, more generally, to the differing propensities of ACs and external regulators to depart from courses of reform that the citizenry favors. Because it is more dependent on public opinion, the AC is likely to prove the more reliable agent of the citizenry's interests and concerns.

#### A. Potential Influence

##### 1. Three Paths to Electoral Relevance

This section highlights three plausible pathways of AC influence. The common theme is one of information costs. In each case, the

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<sup>235</sup> By "similarly structured," I refer to such things as the method of appointing decisionmakers, the body's decision (voting) rule, and the applicable conflict of interest rules. In short, "similarly structured" encompasses all structural variables *other* than whether the body is advisory or regulatory (and if the latter, whether it regulates by rulemaking or adjudication).

presence of the AC helps the low-information voter to better conform her actual decisions to the hypothetical decisions she would have made were information costs no obstacle. But each pathway presupposes a somewhat different characterization of the voter's information problem. In acknowledging the plausible relevance of all of these scenarios, I remain agnostic regarding the prevalence of issue-based voting in general, and of mistaken issue-voting more particularly—questions that are currently the subject of sharp debate among political scientists.<sup>236</sup>

The analysis in this section presumes a model AC that does, in fact, manifest the consensus-improvement goal orientation; that possesses substantial research capacity; and that is effectively insulated from the elected branches of government. In the next section, I relax these assumptions and consider the dynamics of influence in the event that the AC “goes bad.”

#### a. Scenario #1: “Show Your Cards”

When voters have a consistent issue preference that runs contrary to the preferences of their representatives, lawmakers resort to obfus-

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<sup>236</sup> Compare JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS IN HOW GOVERNMENT SHOULD WORK* 19–34, 150–56 (2002) (summarizing research tending to discount prevalence of issue-motivated voting), with, e.g., Jon K. Dalager, *Voters, Issues, and Elections: Are the Candidates' Messages Getting Through?*, 58 J. POL. 486 (1996) (demonstrating that senators' actual roll-call records do have explanatory power vis-à-vis voter perceptions of senators' ideology). Voter mistakes and issue-based voting have also been the subject of recent debate. Compare BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 40–61 (2004) (reviewing “Deliberative Poll” experiments showing that when representative cross section of citizens is given “balanced” information about policy choices and chance to deliberate and query experts, citizens' policy preferences change in systematic ways) and MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (summarizing survey research indicating that most Americans know very little about political issues and institutions, and demonstrating that less well informed individuals express systematically different political preferences than otherwise similar persons who are better informed), and Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1320–24 (critiquing theories of low-information rationality) with ROBERT S. ERIKSON ET AL., *THE MACRO POLITY* (2002) (explaining results of long-running empirical project aimed at documenting electorate's aggregate “knowledge” and rationality, notwithstanding individual voters' mistakes), and ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998) (developing and testing theory that low-information voters are able to vote as if they were much better informed, by relying on various simple cues), and David P. Redlawsk, *You Must Remember This: A Test of the On-Line Model of Voting*, 63 J. POL. 29 (2001) (reviewing and extending research that tests theory that when evaluating candidates and institutions, voters successfully process considerably more information than they are able to recollect when questioned by survey takers).

cation.<sup>237</sup> Lawmakers may delegate an unpopular decision to some obscure regulatory body set up to do their bidding,<sup>238</sup> bury an objectionable measure in an otherwise highly popular bill, or enact dubious legislation during a trough in the cycle of public attention.<sup>239</sup> Consider Congress's effort to foist responsibility for congressional pay raises onto the executive branch. In 1967, Congress passed legislation establishing the *Presidential* Commission on Executive, Legislative, and Judicial Salaries, whose salary recommendations were to take effect automatically if included in a budget submitted by the President.<sup>240</sup> Pay-raise shenanigans also illustrate the "bury it in a popular bill" technique: In 1989 Congress added a thirty percent pay hike for lawmakers to a bill, introduced by the first President Bush, that tightened legislative ethics rules.<sup>241</sup>

Lawmakers often struggle bitterly over seemingly obscure procedural rules in an effort to defeat indirectly legislation that they are loath to be seen as opposing.<sup>242</sup> Well-positioned lawmakers can kill popular legislation in committee, where votes are less likely to receive public scrutiny than votes cast on the floor.<sup>243</sup> If a disfavored bill does reach the floor, strategic legislators who occupy safe seats may weigh it down with unpopular amendments, and thereby give cover to others who would like to vote against it.<sup>244</sup>

An AC could stymie strategic obfuscation by packaging popular, disentrenching reforms into a bill of its own creation, and, timing its move to the electoral cycle, submitting that bill for a floor vote of the legislature. The closed-rule nature of the vote would preclude poi-

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<sup>237</sup> See generally R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POLICY 371 (1986); José María Maravall, *Accountability and Manipulation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 154 (Adam Przeworski et al. eds., 1999).

<sup>238</sup> MORRIS P. FIORINA, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

<sup>239</sup> Weaver, *supra* note 237, at 386.

<sup>240</sup> David W. Brady & Sean M. Theriault, *A Reassessment of Who's to Blame: A Positive Case for the Public Evaluation of Congress*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 175, 178–80 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (emphasis added) (providing thumbnail sketch of history of congressional strategies to raise lawmakers' pay); see also Roger H. Davidson, *The Politics of Executive, Legislative, and Judicial Compensation*, in THE REWARDS OF PUBLIC SERVICE: COMPENSATING TOP FEDERAL OFFICIALS 53 (Robert W. Hartman & Arnold W. Weber eds., 1980) (summarizing research indicating public hostility to pay raises for elected officials).

<sup>241</sup> Stuart C. Gilman, *Presidential Ethics and the Ethics of the Presidency*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 73 (1996).

<sup>242</sup> Weaver, *supra* note 237, at 388.

<sup>243</sup> See ESKRIDGE ET AL., *supra* note 20, at 69–76 (regarding power of committees); Weaver, *supra* note 237, at 384 (describing "blame avoidance" strategies of agenda control, including parliamentary maneuvers designed to avoid politically embarrassing floor votes).

<sup>244</sup> Cf. ESKRIDGE ET AL., *supra* note 20, at 72–73 (explaining congressional practice regarding floor amendments).

sonous amendments and strategic delay, forcing lawmakers to show their hands.

b. Scenario #2: The Integrity Cue

A substantial and growing body of research suggests that many voters do not have meaningful preferences with respect to specific policies, or if they do, do not generally vote on the basis of those preferences. Voters are not policy wonks. They have better things to do with their time than worry about election law reform. What they want out of their elected legislators is mainly good faith. They want lawmakers who are willing to forgo opportunities for personal enrichment or advancement, and to act instead on the basis of what the legislators take to be the public interest.

This picture emerges from focus group and national survey research conducted by the political scientists John Hibbing and Elizabeth Theiss-Morse,<sup>245</sup> and the psychologist Tom Tyler.<sup>246</sup> Hibbing and Theiss-Morse depict a citizenry that deeply mistrusts the motives of elected lawmakers, and that views the legislative process as unrelentingly dominated by parochial interest groups.<sup>247</sup> Indeed, Hibbing and Theiss-Morse's polling reveals that forty-eight percent of respondents nationwide would prefer to see "independent experts" or "businessmen" take over Congress's lawmaking responsibilities.<sup>248</sup> The public's desire for disinterested government helps to explain the fact that the Supreme Court has a consistently higher public approval rating than does Congress.<sup>249</sup>

Scandals captivate, and are not easily forgotten. The political scientist Luke Keele has found, for example, that scandals such as Watergate, ABSCAM, the Keating Five, and the resignation of House Speaker Jim Wright, had adverse effects on public trust in government that persisted for about eight years following each incident.<sup>250</sup>

Public concern for legislators' good faith is not simply an abstract desire that shows up in surveys and focus groups. Susan Welch and

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<sup>245</sup> See generally HIBBING & THEISS-MORSE, *supra* note 236.

<sup>246</sup> Tom R. Tyler, *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *LAW & SOC'Y REV.* 809 (1994).

<sup>247</sup> HIBBING & THEISS-MORSE, *supra* note 236, at 87-106, 121-24, 150-56 (recounting survey and focus-group research regarding attitudes and beliefs about governmental processes, people's attitudes toward politicians, and preferences for disinterested representation).

<sup>248</sup> *Id.* at 137-43.

<sup>249</sup> *Id.* at 99. For further information about public support for the Supreme Court, as compared to the other branches of the federal government, see generally Rosalee A. Clawson et al., *The Legitimacy-Conferring Authority of the U.S. Supreme Court*, 29 *AM. POL. RES.* 566, 568-69 (2001).

<sup>250</sup> Keele, *supra* note 232, at 20.



John Hibbing found that, for the 1982–90 period, a sitting congressperson who was accused of corruption lost about nine percent of her vote share in the next election.<sup>251</sup> Twenty-five percent of these corruption-charged incumbents were defeated, “an astonishingly high defeat rate when compared to the 2.8% of noncharged incumbents who lost during this same time period.”<sup>252</sup> Similar, if somewhat smaller, corruption-accusation effects have been shown for the 1968–78 period.<sup>253</sup>

These findings bear on AC influence because of what an incumbent’s vote on an AC-initiated political process reform—the stated purpose of which is to counteract a conflict-of-interest problem—could signal about the incumbent’s good faith, or lack thereof.

It is not easy for integrity-minded voters to discern bad faith. Direct evidence of lawmakers’ self-seeking rarely comes to light. Lacking direct evidence, voters may try to draw inferences from their representatives’ previous votes, if any, on “incumbent-benefit bills.” A classic example is the pay-raise bill.<sup>254</sup> Higher pay for legislators may well be good public policy, but it indisputably benefits sitting lawmakers and, because of this, voters seem to treat a legislator’s support for higher pay as evidence of bad faith.<sup>255</sup> But with respect to many other putative conflict-of-interest issues, the insider benefit, if any, is hard for voters to discern.

Take campaign finance reform, for example. Proponents of contribution limits argue that such restrictions reduce the corrupting flow of money into politics and open up the political process.<sup>256</sup> Opponents argue that contribution limits further entrench incumbents.<sup>257</sup> Should voters read a lawmaker’s vote against contribution limits as a vote for, or against, personal benefits? Incumbent-initiated campaign finance reforms are presumptively suspect, coming as they do from

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<sup>251</sup> Susan Welch & John R. Hibbing, *The Effects of Charges of Corruption on Voting Behavior in Congressional Elections, 1982–1990*, 59 J. POL. 226, 234 (1997) (reporting average vote-share loss of 9.27%—average taken over cases in which charges were quickly rebutted, and cases in which charges persisted but were never proven, as well as cases in which charges were shown to be true).

<sup>252</sup> *Id.* at 233.

<sup>253</sup> *Id.* at 232–34.

<sup>254</sup> Bills to lengthen or eliminate term limits represent another example.

<sup>255</sup> Brady & Theriault, *supra* note 240, at 178.

<sup>256</sup> See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 130–38 (1997) (describing theories of corruption related to campaign contributions).

<sup>257</sup> See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1072–75 (1996).

those who benefit from the status quo.<sup>258</sup> But that insight does not help the low-information voter to decide whether legislator A's opposition to the contribution-limits bill that legislator B introduced and defends should be taken as evidence of A's self-interest, B's mendacity, or an honest difference of opinion over policy.<sup>259</sup>

Critically, this ambiguity would not be present were the bill in question drafted by the AC. Members of the AC do not share the legislators' interest in hobbling challengers, and the model AC bill reflects a substantial consensus of opinion from across the ideological spectrum. Because of this, the voter with no prior opinion whatsoever on the merits of the proposed reform, or on the priority of campaign finance as an issue, is nonetheless positioned to infer an answer to the question of overarching importance: Does my representative legislate on a good faith understanding of the public interest or for her own benefit?<sup>260</sup>

c. Scenario #3: Correcting Mistakes and Confusion About Policy

Consider now the informational role of the AC with respect to a voter who, as in the first scenario, has specific policy preferences, but this time imagine that his policy preferences are mistaken, inapt as means to his ends.<sup>261</sup> For concreteness, let's use a campaign-finance hypothetical once again. Assume that the policy status quo caps individual and corporate contributions to candidates, restricts the use of "soft money" by political parties, and curtails independent advertising that promotes or attacks a candidate during the two-month window prior to election day. There is no public funding. Our representative voter (V) supports tighter contribution limits and new expenditure caps; he also opposes any public funding. These policy preferences

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<sup>258</sup> Cf. Kathleen M. McGraw et al., *The Pandering Politicians of Suspicious Minds*, 64 J. POL. 362 (2002) (reporting experimental results on voter distrust of politicians' claims).

<sup>259</sup> Consistent with my account, public opinion polls show that a majority of voters will voice support for almost any proposed restriction on campaign contributions and expenditures, yet remain deeply skeptical of the efficacy of reform. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 142-45 (2004). One might surmise that the average voter's attitude toward reform legislation runs something like this: "I'll give your plan a try (whatever it is), because the system is so bad that we've got to try something, but I basically distrust your motives and am not very hopeful that your plan will work."

<sup>260</sup> This inference would not be possible, of course, were a "pooling equilibrium" to obtain, such that all legislators and candidates pledge their support for the AC's recommendations. But in that case, there can be little doubt that the AC is relevant!

<sup>261</sup> The analysis that follows can be applied as well to the voter who knows his issue priority but has yet to form an idea about how best to achieve it.

comport with his vague impression that “big interests have too much influence,” and his conviction that “taxpayer money shouldn’t be wasted on politicians.”<sup>262</sup>

Voter V is represented by Legislator B. B is bold and selfless—though this is not altogether clear to V. Legislator B also believes that the current system of campaign finance regulation isn’t working well, but that the kinds of reforms that her constituent V favors would unduly privilege incumbents. Along with Bruce Ackerman and Ian Ayres, she favors instead an expensive, voucher-based system of public financing, coupled with a requirement that all private contributions be channeled through “blind trusts” (so that the recipient remains unaware of the donor’s identity).<sup>263</sup> Being bold and selfless, she introduces legislation to this effect. Come the next election, Legislator B finds herself facing a brutal challenge from Candidate O, who overloads the airways with advertisements that use the public funding bill to portray B as a selfish, deceptive loony: “B wants to lavish your hard-earned dollars on herself and her staff! B wants to hide her special-interest supporters from people like you and me!” These ads tap all of Voter V’s suspicions. He votes for O. B goes down in defeat.

Would B have fared better if the reform legislation had been proposed by a model AC? It is plausible to think so, not only because the commission’s role could help to neutralize O’s charge that the reform legislation was motivated by B’s self interest, but also because the commission’s views may well prompt V to reconsider his own underlying policy preferences.

We can see this by working through the rational choice framework of policy persuasion developed by Arthur Lupia and Matthew McCubbins.<sup>264</sup> Like many contemporary public-opinion scholars, Lupia and McCubbins argue that the typical voter relies on “informa-

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<sup>262</sup> These assumptions are actually quite realistic. Regarding support for contribution limits, see HIBBING & THEISS-MORSE, *supra* note 236, at 75–77; Persily & Lammie, *supra* note 259, at 138–44. Opposition to public financing of political campaigns is documented in William G. Mayer, *Public Attitudes on Campaign Finance*, in A USER’S GUIDE TO CAMPAIGN FINANCE REFORM 47, 59–61 (Gerald C. Lubenow ed., 2001).

<sup>263</sup> See ACKERMAN & AYRES, *supra* note 57, at 4–6.

<sup>264</sup> LUPIA & MCCUBBINS, *supra* note 236. Like Lupia and McCubbins themselves, *see id.* at 206–10, the legal scholars who have applied their framework to problems of election law have sought to explain how the law can make accessible to voters informative “cues” that are implied by the deeds and words of private actors. *See, e.g.*, Garrett, *Ballot Notations*, *supra* note 18; Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141 (2003). The suggestion of this Section, however, is that the deeds and words of a governmental body can themselves function as an important cue; indeed, that a governmental body can be designed for this very end.

tion shortcuts”—simple cues or heuristics—to form conjectures about whom or what to support in the absence of a nuanced understanding of policy and politics.<sup>265</sup> In their model, a voter draws inferences from the speaker’s endorsement of, or opposition to, a policy change, provided that: (1) the voter believes the speaker to have relevant information that the voter lacks; and (2) the voter believes the speaker either shares the voter’s interests or is subject to external forces that discourage or defeat deception (i.e., the speaker is credible).<sup>266</sup>

Think of the AC’s initiation of reform legislation as an implicit statement that the proposed legislation would represent an improvement over the status quo for V. Should V believe the commission, and revise his views accordingly? From V’s perspective, there is every reason to think that the “speaker” (the advisory commission) has “relevant information that the voter lacks.” It is the commission’s business to develop expertise regarding both the workings of the democratic process and what the public wants from that process. There are, moreover, a number of factors that help to make the AC’s “statement” credible. Unless V conceives of himself as an ideological outlier, he should appreciate that the commission in a sense “shares his interests” and concerns.<sup>267</sup> This follows from the AC’s ideological diversity and supermajority decisionmaking, and the stringent conflict-of-interest rules that wall off the commissioners from interested parties. Second, the AC’s implicit statement is not “cheap talk.” The time and resources that the AC has put into developing its reform legislation might have been deployed to tackle other problems over which the AC has jurisdiction.<sup>268</sup> Also, voters’ freedom to disregard the AC’s counsel is likely to operate, over time, as an “external force

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<sup>265</sup> LUPIA & MCCUBBINS, *supra* note 236, at 4–6.

<sup>266</sup> Lupia and McCubbins identify three such external forces: (1) verification (a likelihood that the observer will independently establish the truth of the matter prior to the moment of decision), (2) penalties for lying (the speaker who dissembles suffers an economic cost), and (3) observable costly effort (when the communication in question is not “cheap talk” but involves the expenditure of resources, then by observing the speaker’s expenditure the voter may draw inferences about how much the speaker values the policy change for which she is arguing). *Id.* at 53–64.

<sup>267</sup> More precisely, what V should appreciate is that under full-information conditions, he would likely prefer the AC’s proposal over the status quo alternative.

<sup>268</sup> Of course, as a publicly funded entity, the AC’s commitment of financial resources to a particular reform project is not so telling as an analogous commitment of resources by a private actor such as an industry trade association or “public interest” lobbying group. The opportunity cost of the AC’s commitment of resources is simply its inability to pursue other reforms (and perhaps loss of leisure time for AC commissioners), whereas the opportunity cost of a private commitment of resources is private consumption (money in the pockets of the trade association members, as it were). Still, the AC’s pouring of its resources into one particular reform would speak (credibly) to the AC’s prioritization of that reform, relative to the other issues it might have pursued.

that discourages or defeats deception.” Under plausible assumptions, a suitably designed AC will be reluctant to advance policies not likely to appeal, in retrospect, to a broad cross section of the citizenry.<sup>269</sup> Voters who appreciate this have even stronger reasons to credit the AC’s policy judgments.<sup>270</sup>

This Section’s claim that the AC’s “endorsement” would help voters to avoid making policy mistakes comes with two qualifications. First, the AC’s signal would convey little information about what is optimal policy—as opposed to what represents an improvement over the status quo—relative to the interests and concerns of any given voter. Reasonably sophisticated voters will appreciate that with respect to whatever specific issues they care most intensely about, the relevant AC policy proposal is not likely to fit their preferences as well as a proposal that issues from a narrow-interest group committed to the voter’s pet concern. But the AC’s signal may still be relevant for this voter, as it marks a baseline policy response that people of many differing perspectives agree to be worthwhile. The signal contains information regarding what, at a minimum, ought to be politically viable—a relevant data point for the voter who accepts the inevitability and appropriateness of political compromise, yet wishes to sanction politicians who disingenuously invoke the “need for compromise” to explain away their failure to heed the voter’s special concerns.

Second, an election-law AC may not be able to affect the relative importance that voters attach to election-law questions.<sup>271</sup> True, the AC might highlight some heretofore obscure issue by pouring its resources into public hearings, discussion panels, and other outreach efforts with respect to that issue. But these agitations would signal only that the AC considers the question at hand to be the subject most deserving of attention among election-law issues (i.e., the issues over which the body has jurisdiction). This would not cast into doubt the voter’s belief that, say, no election-law issue is of any great moment,<sup>272</sup>

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<sup>269</sup> See *infra* Part III.C.

<sup>270</sup> Note that while the argument of this Section has assumed that the AC’s informational cue is directly relevant to voter decisionmaking, it could also be the case that the AC affects voters indirectly by furnishing a cue to intermediaries—such as newspapers, blogs, and television personalities—upon whose endorsements voters rely. Regarding the effects of newspaper coverage and endorsements on voter decisionmaking, see, for example, Kim Fridkin Kahn & Patrick J. Kenney, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens’ Views of Candidates*, 96 AM. POL. SCI. REV. 381 (2002); Byron St. Dizier, *The Effect of Newspaper Endorsements and Party Identification on Voting Choice*, 62 JOURNALISM Q. 589 (1985).

<sup>271</sup> This limitation is, of course, much more of a problem for the AC whose recommendations go to the legislature rather than to referendum.

<sup>272</sup> An advisory body that had jurisdiction over multiple policy domains—perhaps the House of Lords is an example—might be able to elevate the importance of a heretofore

unless the voter actually tries to understand the nature of the problem the AC has highlighted.

## 2. *An Objection?*

The second and third scenarios (but not the first) both depend on the idea that the AC would convey to the voter relevant information about the public-interest merits of legislation, information to which the voter would not otherwise have access. Given a bill with fixed content, the voter is assumed to evaluate her representative's support for, or opposition to, the bill differently, depending on whether the bill was drafted by the AC or instigated and hashed out through the ordinary legislative process.

One might object to such claims of AC influence on the ground that the information the AC nominally reveals is already available from other sources, making the AC redundant with civil society. Endorsements from newspaper editorial boards or good-government reform organizations may signal whether a proposed election-law reform has solid public-interest justifications. Bipartisan advocacy organizations can provide useful information about whether one or another answer to some technically complex policy questions would make sense from both liberal and conservative points of view.<sup>273</sup>

Counting against the redundancy hypothesis, however, are publicity advantages that inhere in the AC; the economics of political advocacy; and, potentially, features of the AC's design (made possible by the body's status as a creature of public law) that bolster its authority.<sup>274</sup>

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obscure issue by visibly prioritizing it over the full range of other pressing public concerns that the body could have addressed. Analysis of the merits and disadvantages of such all-purpose advisory bodies is beyond the scope of this Article, however.

<sup>273</sup> Consider the role of the Concord Coalition in publicizing the virtues of deficit-cutting, or the role of the privately established National Commission on Federal Election Reform in lending credence to ideas that were later adopted in the Help America Vote Act of 2002. See Martha Phillips, State of the Concord Coalition, Address at the National Leadership Conference of the Concord Coalition Citizens Council (Feb. 22, 1997), *available at* [http://www.concordcoalition.org/issues/socsec/old-doc/news/state\\_concord97.html](http://www.concordcoalition.org/issues/socsec/old-doc/news/state_concord97.html) (recounting media coverage of Concord Coalition activities); Memorandum from Philip Zelikow & Ryan Coonerty to the Members of the National Commission on Federal Election Reform (Nov. 8, 2001), *available at* [http://millercenter.virginia.edu/programs/natl\\_commissions/ner/ney-hoyer\\_commission\\_analysis.pdf](http://millercenter.virginia.edu/programs/natl_commissions/ner/ney-hoyer_commission_analysis.pdf).

<sup>274</sup> It is perhaps worth noting, too, that in the United Kingdom, leading "good government" groups have been big proponents of the Electoral Commission and have sought to publicize its recommendations, which is not what one would expect if the Commission were "redundant" with civil society. See, e.g., Rob Merrick, *Vote-Rigging Fear*, *DAILY POST* (Liverpool), Jan. 24, 2004, at 7 (reporting opposition to all-postal-voting pilots bill by nongovernmental Electoral Reform Society, on ground that bill failed to include security measures recommended by Electoral Commission); Ken Ritchie, Letter to the Editor,

Begin with publicity. That information is “available,” in the sense that some endorsement-making organization exists and is trying to publicize its view, does not mean that large numbers of voters know of that organization and correctly interpret the meaning of its endorsement. Most voters have little political knowledge.<sup>275</sup> The AC should have a leg up on potentially similar cue sources because of background public awareness of the entity. It will be thrust into the news by the politics of its enactment. There may be further public skirmishes over appointments to the AC. And the AC’s rare power to demand a closed-rule vote of the legislature on its proposal will make that vote—and by extension the genesis of the proposal—a newsworthy object of attention.

Whatever public awareness the AC initially achieves—in virtue of the politics of its creation, the prominence of its members, the effects of its outreach and educational endeavors, and the debate surrounding AC-triggered votes—will make the AC that much more attractive to political entrepreneurs who see potential value in the AC’s cue. The issue-advocacy group that wants a broader audience for its proposals, the industry trade association with a reasonable policy idea that it seeks to dissociate from the association’s tarnished public image, the greenhorn politician looking to trade on someone else’s reputation—all of these actors, and others, are more likely to emphasize the point of consonance between their agenda and the AC’s recommendation to the extent that the AC is already within the public’s field of view and has a significance that is readily communicated. (Compare the roles played by the House of Lords and the Liberal Democrat and Conservative Party leadership in publicizing Electoral Commission recommendations in the United Kingdom.) A positive feedback loop seems plausible: The greater the number of political entrepreneurs who seek to broadcast the AC’s virtues in an effort to burnish their own agendas, the more voters will become aware of the AC, and the more (favorable) background public awareness there is, the more other entrepreneurs will invest in publicizing AC proposals that they support.

Consider next the economics of political advocacy. It is well known that small groups of intensely interested persons have political organizing advantages, particularly if they have other reasons to pool

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*Need for Debate on Postal Voting*, TIMES (U.K.), Dec. 15, 2004, at 16 (“One of the Government’s most commendable moves has been the creation of an independent Electoral Commission, taking the task of reviewing and revising electoral practices away from the politicians whose jobs may depend on them.”). Ritchie is the Chief Executive of the Electoral Reform Society.

<sup>275</sup> See *supra* note 236.

their resources and form collectivities.<sup>276</sup> What results is a political landscape populated by trade associations, on one side, and narrow-focus “public interest” groups on the other (abortion rights or fetal rights, church-in-state or church-out-of-state, funding for cancer or funding for heart disease, etc.).<sup>277</sup> Transideological or bipartisan groups concerned with the integrity of the political process surely account for only a miniscule fraction of advocacy expenditures. And putatively nonpartisan advocacy groups that purport to be concerned with responsive government regularly come under attack for (supposedly) having a hidden left-liberal agenda.<sup>278</sup> In short, the model AC would fit into a relatively empty niche in the cue market.

And the AC could prove to be a uniquely trustworthy and competent occupant of that niche, due to structures and powers that are not within the reach of privately created organizations. For example, some democratic polities have tried to assure the nonpartisan integrity of election commissions and anticorruption bodies by giving justices of the constitutional court a significant role in making appointments to the body.<sup>279</sup> A privately created advisory body would not have the power to compel judges or other trusted current or former government officials to serve an *ex officio* appointment role.<sup>280</sup> Consider also the sanctions that back conflict-of-interest rules. The privately

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<sup>276</sup> See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

<sup>277</sup> See generally ANTHONY J. NOWNES, *PRESSURE & POWER: ORGANIZED INTERESTS IN AMERICAN POLITICS* 52–63 (2001) (recapping and explaining unequal organized interest representation); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 66–87 (1986) (describing “skewed” representation of interests among groups that lobby federal government).

<sup>278</sup> See, e.g., JOHN SAMPLES, *GOVERNMENT FINANCING OF CAMPAIGNS: PUBLIC CHOICE AND PUBLIC VALUES* 12 (Cato Inst. Pol’y Analysis No. 448, 2002) (“[G]overnment financing [of campaigns] in the states has favored candidates of the left . . . . For that reason, government financing . . . serves private goals through public means. Far from being a reform, government financing offers more ‘politics as usual’ . . . .”); Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 850 (1998) (“That Common Cause should assert that our rights to political participation and speech should be limited because Common Cause thinks legislators are passing bad laws . . . is a serious threat to our rights.”); George F. Will, *Campaign Cops and Car Ads*, WASH. POST, Aug. 22, 2004, at B7 (“[T]he ‘corruption’ rationale [for campaign finance restrictions] merely disguises the reformers’ real agenda, which is to extend government supervision of speech whenever they think extension serves their partisan advantage.”); Martin Morse Wooster, *Too Good To Be True*, OPINION JOURNAL, Apr. 1, 2005, <http://www.opinionjournal.com/taste/?id=110006499> (arguing that McCain-Feingold bill was “orchestrated by Pew [Charitable Trusts] and other like-minded foundations,” which are committed to “castor-oil liberalism” yet which “pretend[ ] to nonpartisanship”).

<sup>279</sup> See *supra* note 215.

<sup>280</sup> Cf. *supra* notes 212–13 and accompanying text (suggesting appointments commission composed of former high-level public officials, chosen by lot).



crafted conflict-of-interest rules that apply to members of a private advisory body may be nominally stringent, but the law generally does not countenance punitive sanctions for the breaking of private agreements.

The AC's public status also means that it could possess coercive investigatory powers, like the power to subpoena documents and testimony. This would give the AC an informational advantage over private good-government organizations, particularly as to questions that implicate the "secret" workings of government.<sup>281</sup> The orchestration of public hearings at which high-profile witnesses testify under oath can also raise public awareness about the advisory body itself, as demonstrated by the 9/11 Commission and some of its antecedents.<sup>282</sup>

Finally, we should not lose sight of the fact that the redundancy hypothesis, even if borne out, only matters to the second and third channels of influence. The AC whose policy-informational function proved entirely duplicative of civil society could still leave a mark on election law through its power to force legislative consideration of reforms that lawmakers would prefer to avoid. And what little is known about the extant standing advisory commissions with jurisdiction over election-law and other conflict-of-interest issues suggests that those regarded as substantially nonpartisan do, in fact, leave a mark.<sup>283</sup>

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<sup>281</sup> This matters to the third pathway of influence, which presupposes that the AC has policy-relevant information that the voter lacks. See *supra* notes 264–69 and accompanying text. Note, however, that the AC's use of this power to uncover the hidden workings of government may be circumscribed by legislative privileges. See *supra* note 223.

<sup>282</sup> Cf. Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419 (2005) (recounting investigatory "performances" of 9/11 Commission and other ad hoc commissions established to inquire into circumstances surrounding riots, wartime attacks, and assassination of presidents). Another way in which the AC's influence might be enhanced would be to give it the power to draft ballot notations indicating whether incumbent officeholders voted for or against AC-submitted bills. Elizabeth Garrett has suggested that ballot notations might help voters to associate candidates with ideologically distinctive interest groups, and in virtue of this, to vote more competently. Garrett, *Ballot Notations*, *supra* note 18, at 1539. She ultimately concludes, however, that there is no practical way of keeping ballot notations from being deceptively manipulated by political insiders. *Id.* at 1582–84. If the notation merely stated the number of times the incumbent had voted for and against AC-submitted bills, rather than trying to *describe* those bills, the problem of deceptive verbiage could be avoided. On the other hand, it may not be wise to elevate the salience of the AC cue in the voting booth; doing so might result in people who know relatively little about the body choosing to follow (or reject) its lead in an impulsive fashion. Cf. Cain, *supra* note 49, at 1593–94 (favoring "free for all" of competing heuristics over ballot-privileging of one particular heuristic). In the absence of a special ballot notation for the AC, the people who end up voting on the basis of the AC cue are more likely to be knowledgeable about why the body is (or is not) trustworthy. See *infra* Part III.B.1 (discussing importance of "thick" public opinion for AC power).

<sup>283</sup> See *supra* Part II.B.

### *B. The Dynamics of De Facto Power*

The last Section presented a picture of AC influence that is premised on the body's structure. Yet it seems likely that at any given point in time the AC's de facto power<sup>284</sup> will reflect not just the AC's structure but its actual doings, the attacks that have been leveled against it, the defenses it has mounted, etc., to say nothing of the esteem in which the voters hold their incumbent representatives. AC influence will fluctuate over time as competitions for authority play out between the AC and elected lawmakers.

There is one overriding question to ask about these dynamics: Could an AC that acquires substantial de facto power be captured by political insiders and still retain its effective power? More generally, to what extent is the public's trust in the AC likely to be informed by an awareness of the AC's previous policy choices? These questions are difficult to answer in any absolute sense. The principal claim of this Section is therefore comparative: We can be confident that a captured AC would lose effective power over the shape of the law much more quickly than a similarly misdirected constitutional court or RC. The same is true of an AC that makes policy choices of which voters—who may or may not be aware of those choices—would disapprove.

This Section will also suggest, albeit more tentatively, that the introduction of an AC on the model of this Article could help voters to make salutary, institution-specific attributions of responsibility for the overall quality of electoral politics. If so, the AC's de facto law-reform power will vary with its track record of creating good results, not simply with its insulation from political insiders and its record of adopting policies that voters (failing to appreciate the consequences) like.

#### *1. The Comparative Claim*

Stated plainly, my comparative claim is that the AC's de facto law-reform power will prove comparatively sensitive (relative to that of an external regulator) to (1) information in the public domain that is suggestive of capture, and (2) the popularity of the AC's previous policy choices.

This claim follows from two logically prior suppositions. The first is that the AC's de facto law-reform power depends more than that of

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<sup>284</sup> Recall that in speaking of the "de facto power" of independent bodies such as ACs, RCs, and constitutional courts, I am referring to the body's ability to effect reforms that are suboptimal from the perspective of the then-dominant coalition in the legislature. The farther the body can push the law away from the legislature's ideal point, the greater the body's de facto power.

a constitutional court or RC on voters' perceptions regarding the body's competence and fidelity in relation to whatever ends the voters care about. Second, and more intriguingly, public opinion about the AC should prove sensitive to the body's actual record (with respect to its choice of reforms and favoritism for political factions)—more sensitive, in all likelihood, than public opinion about external regulators.

a. De Facto Power and Public Opinion

The AC that wants to enact a reform that most legislators disfavor must establish a base of public support for its plan, because every single act of "lawmaking" by the AC requires the concurrence of the electorate or the legislature. Support for certain AC-proposed reforms may be wholly independent of public opinion regarding the AC itself, as in scenario #1 ("show your cards"), above. But for the AC to garner much discretionary power over the shape of the law, the AC must win the voters' trust, such that the very fact that the body is behind a particular reform bill *changes* how the electorate responds to a lawmaker's vote for or against that bill (as in scenarios #2 and #3, above).

By contrast, the external regulator's ability to give a reform of its choosing the force of law is, by definition, not closely tied to popular support for that reform. The regulator is, by hypothesis, a duly constituted lawmaking or adjudicatory authority whose ability to replace the status quo with its chosen alternative follows not from public approval of that reform but rather from the larger society's regard for the rule of law itself. Of course, public opinion does bear on the external regulator's policymaking discretion over time. Credible threats of an assault on the body's autonomy, budget, or composition could deter the regulator from pursuing reforms that political insiders dislike, and the credibility of such an assault obviously depends, in part, on whether the external regulator has an enthusiastic base of public support.<sup>285</sup> But only in part: In a society with regard for the rule of law, de jure protections for an external regulator's independence could also undermine the threat.

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<sup>285</sup> Barry Friedman has emphasized, for example, that anticipated public reaction affected the shape of Franklin Roosevelt's infamous plan to "pack" the U.S. Supreme Court—and that public outrage stalled the plan after it was announced. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1037–59 (2000). Cf. Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379 (2004) (developing formal model with asymmetric information in which voters' belief that judiciary is relatively reliable agent of voters' preferences sustains judicial independence).

### b. The Informational Base of Public Opinion

That the AC's effective law-reform power depends more on public opinion than that of a constitutional court or RC goes a long way toward connecting the AC's power to its actual track record of policy choices (insofar as voters have preferences over those choices),<sup>286</sup> and to evidence of capture. True, public opinion may sometimes fail to respond to such things, at least for a while. But public opinion is likely to be better informed with respect to an AC than with respect to an RC or constitutional court, for the following reasons: The AC, unlike the RC or constitutional court, cannot exercise law-reform power out of public view. This is true on several levels. The AC shapes the law through votes of the legislature,<sup>287</sup> not obscure administrative proceedings or arcane and jargon-filled legal opinions. Furthermore, the AC's potential influence over the outcome of legislative or popular votes depends on the body's notoriety. For the voter to reevaluate (positively) her assessment of some policy based on the AC's involvement, she must have reason to believe that the AC is trustworthy vis-à-vis her ends. The AC that wants large influence thus would do well to open itself up to public inspection and scrutiny. By contrast, an external regulator may conclude that it fares best when it hides in the shadows<sup>288</sup>—at least so long as it occasionally palliates the dominant legislative coalition.

This has important implications for the relative sensitivity of public opinion, both to evidence of capture and to the body's previous decisions. Constitutional courts and RCs may wield substantial power in the face of "thin" public opinion, that is, where the public's sense of the body is vaguely positive or negative but not strongly held or well-informed, and where the public knows nothing at all of the body's decisions.<sup>289</sup> The AC, by contrast, needs "thick" public opinion—people who have strong reasons to follow the body's lead—if it is to cause the passage of laws that would not otherwise win favor with lawmakers. But insofar as voters or their intermediaries know enough about the body to have strong reasons to follow its lead, the likelihood of an out-of-view capture grows progressively more remote. Of

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<sup>286</sup> Cf. *supra* Part III.A.1.b (presenting voter decisionmaking model that is not policy-focused).

<sup>287</sup> Or, if the referendum is used, an even more notorious vote of the people.

<sup>288</sup> Cf. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2631–35 (2003) (describing strategies employed by U.S. Supreme Court to keep public in dark regarding Court's process of making decisions).

<sup>289</sup> Cf. VALERIE J. HOEKSTRA, PUBLIC REACTIONS TO SUPREME COURT DECISIONS 115–28 (2003) (reviewing empirical scholarship on "diffuse support" for U.S. Supreme Court among people who know very little about Court's decisions); Friedman, *supra* note 288, at 2617–23 (same).

course, those strong reasons could be a function of the body's past doings, not its current situation. But the more powerful the AC is, the more it will be in the news, and the more criticism it will draw from those who disagree with its agenda.

In addition, ACs lack the legitimizing mythology that sometimes enables constitutional courts to hide their policy judgments behind the veil of precedent, doctrine, and black-robed symbolism.<sup>290</sup> An AC charged with identifying and pursuing consensus-improvement reforms would have to found its claim to authority more directly on its propensity for choosing policies likely to work well.

## 2. *Power and Consequences*

Can public opinion regarding the AC be expected to respond to the *actual effects* of legislation that the AC pushes through? One might think not. If "long latency periods" keep elected legislators from being held to account for election-law shenanigans,<sup>291</sup> the same factors presumably would insulate the AC.

Yet voters who lack the information necessary to trace particular, objectionable facets of the political process to specific laws may nonetheless succeed in attributing to different institutions "shares" of responsibility for the current state of the political process. That voters are, in the aggregate, capable of making analogous institutional attributions of responsibility has been shown in other contexts. For example, international comparisons of what is known as "economic voting"—voting for or against the sitting administration on the basis of recent economic performance—establish that electorates are quite sensitive to the manner in which the structure of government allocates responsibility for economic policy.<sup>292</sup> Similarly, American survey respondents have been shown to divvy up responsibility for their state government's fiscal condition in a manner responsive both to subtle variations in the distribution of budgetary powers among the branches

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<sup>290</sup> Cf. James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998) (arguing that public support for constitutional courts is founded in part on familiarity with "legitimizing symbols"); Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1123–24 (1997) (reviewing related literatures).

<sup>291</sup> See *supra* note 30 and accompanying quotation.

<sup>292</sup> See generally Christopher J. Anderson, *Economic Voting and Political Context: A Comparative Perspective*, 19 ELECTORAL STUD. 151 (2000). Anderson demonstrates that intertemporal and cross-country patterns of economic voting can be explained by the "institutional clarity of responsibility" (whether the structure of government tends to muddle or clarify who controls economic policy), "target size" (the legislative and cabinet strength of the governing party), and the "clarity of available alternatives" (the number of available alternative governments—with more alternatives resulting in less clarity).

of state government, and to unified versus divided party control of government.<sup>293</sup>

Consider two polar scenarios: in one the AC has for many years been extremely authoritative (with the result that virtually all of the AC's political process proposals have been enacted); in the other the AC has been an electoral irrelevance (with the result that none of its proposals have been adopted). Imagine that during this same period of time, voters have grown more and more disgusted with politics. It's plausible that, in the first scenario, voters would pin the blame on the AC and quit punishing lawmakers who oppose AC-initiated reforms.<sup>294</sup> Conversely, in the second scenario, responsibility for the status quo clearly resides with the elected branches. Good-government organizations and upstart candidates could launch campaigns promoting the AC and its proposals as a cure for the corrupt politics of the day, and voters may well respond positively to this.

Notice too that the AC's power to force a closed-rule vote on its proposals would facilitate voter attribution of responsibility for the state of democratic politics. The closed-rule procedure makes it transparent that the law as adopted was the law as submitted by the AC, rather than some bastardized version worked up by a legislative committee.<sup>295</sup> Studies that show economic voting to be more prevalent when the constitutional structure "clarifies who is in charge of policymaking"<sup>296</sup> suggest that this would be useful for the electorate.

In short, the existence of an AC could help to transform a situation in which voters are fairly helpless in deciding whom to blame for the state of democratic politics<sup>297</sup> into one in which the sense of disap-

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<sup>293</sup> See generally Thomas J. Rudolph, *Institutional Context and the Assignment of Political Responsibility*, 65 J. POL. 190 (2003) (analyzing survey respondents' attribution of responsibility for outcomes of fiscal policy between governor and state legislature, and Democrats and Republicans).

<sup>294</sup> If so, this answers one possible objection to the AC model, namely, that it would encourage non-consequentially oriented voting based on perceptions of lawmaker "integrity," to possible ill effect. I am not at all convinced, however, that voting on this basis is a bad thing, at least if one accepts that low-information voting is inevitable.

<sup>295</sup> Of course, the legislature might muddy the waters later on by passing measures which modify laws that had been enacted through the AC-submission procedure. But the transaction costs of amending an existing law tend to be higher than the transaction costs of amending a bill that is presently under consideration. So if the AC has the right to induce closed-rule consideration of its proposals, fewer of its proposals are likely to end up being modified by the legislature. Also, the AC could respond to later-in-time "muddying" modifications of laws it developed by submitting a new bill (for closed-rule vote) that undoes the modification.

<sup>296</sup> Anderson, *supra* note 292, at 168.

<sup>297</sup> Sometimes voters register their "disgust" with the political process by voting against the candidates of the party currently in power, or for third-party candidates. See, e.g., Marc J. Hetherington, *The Effect of Political Trust on the Presidential Vote, 1968-96*, 93

pointment (or satisfaction) can be intelligently translated into institution-specific feedback.<sup>298</sup>

### 3. *The Dynamics of Power: Conclusions*

This Section has sought to ground the thesis that the AC would lose effective power over the shape of the law more quickly than an external regulator should the body fall under the control of a partisan faction, or do the bidding of incumbents, or otherwise pursue a course of reform that the citizenry disfavors. This seems plausible in virtue of the comparatively public process by which AC proposals acquire the force of law; the dependence of the AC's de facto law-reform power on "strong" public opinion; and (when contrasted with constitutional courts) the AC's lack of a non-consequential legitimizing mythology.

#### *C. Public Opinion and Performance: On Fidelity to the Public's Interests and Concerns*

The thesis of the last section has an important corollary. Precisely because the AC "gone awry" stands to lose power more quickly than a similarly misdirected external regulator, the AC should prove somewhat less prone to capture. Moreover, the AC's dependence on public opinion should further discourage the body from pursuing reforms that the commissioners relish but which seem unlikely to find favor with the public. In short, the advisory nature of the AC *as such* can be expected to make the body more reliably faithful to the overlapping interests and concerns of broad cross sections of the citizenry.

The AC's plausibly greater resistance to capture reflects both "demand side" and "supply side" forces. On the demand side—from the would-be capturer's perspective—the returns from seizing control of an AC are less than the returns from garnering control over an external regulator.<sup>299</sup> Because of this, elected-branch insiders and political party officials are not likely to invest quite so much in cap-

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AM. POL. SCI. REV. 311, 311 (1999). This response amounts to an institutional attribution of responsibility; the institution in question is a political party. But this sort of response is not very useful for changing the structure of political institutions, for the new incumbents, once in office, will face the same sort of conflicts as their predecessors. Cf. HIBBING & THEISS-MORSE, *supra* note 236, at 36–60 (developing idea of "process space"—dimension of voter decisionmaking concerned with political process as such—and theorizing why two-party competition fails to generate convergence on median voter's position in process space, as it has long been thought to do in policy space).

<sup>298</sup> This might prove to be valuably stabilizing during periods when voters are thoroughly dissatisfied with the legislature, of a mind to "kick them all out," and susceptible to demagoguery.

<sup>299</sup> The magnitude of this effect of course depends on how quickly the captured AC's de facto power is likely to dissipate.

turing an AC as they would in trying to gain control of an external regulator.

On the supply side, AC commissioners who wish to exercise power tomorrow by virtue of their body's continued persuasive authority with the electorate have cause to self-regulate collectively against potential conflicts of interest, the appearance of which might be exploited by opponents of the AC's agenda. To be sure, the strength of this incentive to self-police, and the efficacy of self-policing, will depend on the AC's design. Thus, for example, the extent to which commissioners' concern for the AC's future authority operates as a check on conflicts of interest may depend on: the process for choosing commissioners (does it select for people who value the exercise of influence over the shape of the law?); the initial or default conflict-of-interest regime (does it discourage most commissioners from pursuing personal or political goals that are inconsistent with the long-term authority of the AC?); and the length and staggering of the commissioners' terms of service (under the prevailing voting rule, can those commissioners with the most at stake in the body's future authority stymie their compatriots who are nearing the ends of their terms of service and care less about the long-term ramifications of the AC's actions?). Additionally, the effectiveness of self-policing may depend in part on whether the body has formal delegated authority to supplement default conflict-of-interest rules with further legally enforceable restrictions of its own creation.

However pristine the AC's conflict-of-interest rules, they will not stop opponents of AC-proposed reforms from trying to portray the (unelected) AC commissioners as inattentive to the concerns of ordinary people. The prospect of such criticisms will put pressure on the AC to implement procedures that improve the correspondence between its law-reform agenda and the interests and concerns of the citizenry. The AC might test its preferred reforms against public opinion before openly proposing them.<sup>300</sup> It might establish citizen oversight and advisory panels. It might develop reform ideas in dialogue with policy juries, relying perhaps on James Fishkin's "delibera-

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<sup>300</sup> In the United Kingdom, the new Electoral Commission has been an enthusiastic proponent of voting reform pilot projects, and intends to base future reform recommendations on "opinion research in a selection of the pilot areas . . . with qualitative research to explore [voter and nonvoter] views in depth." *VOTING FOR CHANGE*, *supra* note 135, at 34. Similarly, the Committee on Standards in Public Life is conducting a long-term study of "public opinions about standards of conduct in public life." *ANNUAL REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, SURVEY OF PUBLIC ATTITUDES TOWARD CONDUCT IN PUBLIC LIFE 13* (2004), available at <http://www.public-standards.gov.uk>.



tive polling" techniques.<sup>301</sup> It might build mechanisms for third-party monitoring and evaluation into the bills it puts to a vote.

A proponent of external regulation could respond, however, that the AC's attentiveness to public opinion is a mixed blessing. Imagine that a hypothetically well-informed cross section of the citizenry would favor a certain reform which actual, ill-informed opinion runs strongly against. An RC might opt for the reform, gambling that the citizenry will acclimate and appreciate the change in retrospect, and that legal protections for the RC's independence will enable it to ride out any intervening wave of public anger. The AC, by contrast, seems unlikely to press the case, unless opinion research suggests that the pull of the AC's endorsement would be enough to shift the tides of public opinion. Generalizing, one might say that while the AC appears less given to "false positives" than the RC (proposing reforms that do not comport with the consensus-improvement standard), the RC—if it manifests the normative goal orientation—is likely to prove less given to "false negatives" (refraining from normatively appropriate but politically challenging reforms).<sup>302</sup>

The force of this objection to the AC model is questionable. On one hand, false positives are probably a larger concern than false negatives, at least in a well-established democracy. We may fairly doubt whether a democratic polity should (or would) countenance a regulatory body—led by commissioners who answer neither to the electorate nor to the legislature—that unilaterally implements unpopular reforms on the premise that the chosen reforms are what the people would have wanted, if only they were not so ignorant. On the other hand, the AC is not utterly without recourse where the divergence between actual and well-informed opinion is too solid to be overcome by sheer force of the AC's endorsement. Rather than exposing itself to attack for urging a controversial policy, the AC could sponsor and publicize educational exercises, such as deliberative polls, which accentuate how average citizens view the relevant policy choice once they become better informed.

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<sup>301</sup> The "deliberative poll" technique, pioneered by James Fishkin and his colleagues, enables researchers to explore how the opinions of randomly selected groups of citizens change when those citizens are brought together for the purpose of studying and deliberating a question of policy. For examples and citations to the literature, see ACKERMAN & FISHKIN, *supra* note 236, at 44–59.

<sup>302</sup> The extent of the "gap" between the AC and the RC as to false negatives is likely to depend on key design variables, such as the AC's insulation against retaliation by the elected branches, and the AC's resources for "campaigning" directly on behalf of the reforms it proposes. Cf. *supra* notes 224–25 and accompanying text (raising questions about AC campaigning).

This is illustrated by the U.K. Electoral Commission's recent work on public financing of political campaigns. During 2003 and 2004 the Commission carried out an impressive program of research and outreach on this subject, distributing issue and background papers, sponsoring debates, holding public hearings, undertaking study tours abroad, meeting with grass-roots activists, and commissioning quantitative and qualitative studies of public opinion.<sup>303</sup> This culminated in the Commission's December 2004 publication of *The Funding of Political Parties*, a report in which public opinion takes center stage.

As the report explains, the results of the Commission-sponsored opinion surveys were troubling—"somewhat confused and contradictory."<sup>304</sup> "[M]ost people did not feel informed about how political parties are funded,"<sup>305</sup> yet there was "instinctive hostility towards the idea of political parties being funded by taxpayers' money."<sup>306</sup> Survey respondents overwhelmingly supported an individual right to make donations and balked at taxpayer subsidization; at the same time, almost equally large majorities objected to inequality in political party spending on elections and expressed concern about the "risk that wealthy individuals, businesses, and trade unions can buy influence over the parties."<sup>307</sup>

Follow-up focus group studies confirmed "very low levels of understanding among the public about how political parties are currently funded,"<sup>308</sup> and pervasive suspicion about quid pro quos for donations in excess of what "an average person could afford."<sup>309</sup> Most importantly for present purposes, the researchers also discovered that *after deliberation*, focus-group participants were "broadly in favor of increased or total public funding of political parties"—if that funding would reduce politicians' dependence on large donors, and help to equalize the resources of the political parties.<sup>310</sup> Many deliberants remained skeptical, however, that "implementation" of a public funding regime would be carried out in a manner that well serves those goals.<sup>311</sup>

In view of its equivocal findings, the Electoral Commission opted not to recommend a massive expansion of public funding for political

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<sup>303</sup> FUNDING OF POLITICAL PARTIES, *supra* note 142, at 9–10.

<sup>304</sup> *Id.* at 14.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 16.

<sup>307</sup> *Id.* at 15.

<sup>308</sup> *Id.* at 18.

<sup>309</sup> *Id.* at 19.

<sup>310</sup> *Id.* at 19–20.

<sup>311</sup> *Id.* at 20.

parties. But the Electoral Commission's research, outreach, and reporting has nonetheless advanced the public debate about public financing. The Commission has publicized the nature of the citizenry's ambivalence, highlighting the disparity between extant and reflective, better-informed opinion. Second, the Commission has identified and endorsed some relatively small-scale public funding mechanisms that tap into the public's enthusiasm for "average person" donations<sup>312</sup> and the public's support for measures that would "help cover the costs [for political parties] of playing a role in Parliament."<sup>313</sup>

Finally, the Commission has framed the debate over public funding of political parties in a way that makes such funding more palatable. The Commission's report presents (unpopular) public funding and (popular) donation limits as two sides of the same coin; neither one should be undertaken without the other, the Commission instructs.<sup>314</sup> Bolstering the case for "both" over "neither," *The Funding of Political Parties* intimates that the public's "unease about the size of some donations" and possible quid pro quos is warranted.<sup>315</sup> And the report subtly positions the (trustworthy, nonpartisan) Electoral Commission as ready and willing to develop a public-funding/donation-cap program, in the event that unspecified "changed circumstances" were to warrant such a program.<sup>316</sup>

It is too soon to say whether the Electoral Commission's educational and issue-framing endeavors will bear fruit.<sup>317</sup> Nevertheless, the Commission's efforts nicely illustrate how a "newborn" AC—one that has yet to develop a track-record and associated constituency—may gently advance a law reform agenda that appears congruent with well-informed public opinion, yet well ahead of public opinion as-is.

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<sup>312</sup> *Id.* at 15–19.

<sup>313</sup> *Id.* at 19. Specifically, the Commission recommends tax breaks for donations of up to £200, equivalent public subsidies for low-income donors, and expansion of a "policy development grants" program so as to enable all parties with at least two members in the legislature to develop more concrete "manifestos." *Id.* at 4–5, 97–101.

<sup>314</sup> *Id.* at 4–5, 86–87.

<sup>315</sup> *Id.* at 4.

<sup>316</sup> *Id.* at 87.

<sup>317</sup> *The Funding of Political Parties* was released by the Electoral Commission on December 16, 2004. Then and in the months since, the political process question most prominent in public discourse has been postal voting and ballot security. See *supra* notes 168–86 and accompanying text. That said, the Electoral Commission's report on party finances did not go unnoticed. See, e.g., Patrick Wintour, *Tax Relief Urged for Small Donors: Report Backs Spending Switch to Local Campaigns*, GUARDIAN (London), Dec. 16, 2004, at 12; Ben Hall, *Watchdog Recommends Tax Relief for Political Donations up to £200*, FIN. TIMES (London), Dec. 16, 2004, at 4; *MP Welcomes New Report on Party Funding*, CORNISH GUARDIAN (U.K.), Dec. 23, 2004, at 6.

### *D. Influence and Fidelity: Conclusion*

We have now covered the main functional attractions of the proposed institution. I have argued, first, that a model AC is likely to be relevant, meaning that elected lawmakers who vote against the body's proposed bills would face a nontrivial probability of adverse reactions among their constituents. This claim draws from recent scholarship on voter decisionmaking and desires; it is bolstered by suggestive accounts of the influence of standing advisory commissions abroad.

Second, I have offered reasons to believe that the AC's de facto lawmaking power is likely to be considerably more sensitive to evidence of capture and, more generally, to the body's track record of pressing for reforms that voters regard well in hindsight, than is the lawmaking power of an external regulator. This hypothesis is grounded in the AC's dependence on popular or legislative support for each act of "lawmaking"; in the relatively open process by which the AC's proposals are converted into law; and in the fact that for the AC to be powerful, it needs to give citizens strong reasons to follow its lead.

Third, I have suggested the AC's dependence on public opinion would make it more reliably responsive to the interests and concerns of a broad cross section of the citizenry. Because of this dependence, the AC should prove at least somewhat less likely to fall under the sway of political insiders (compared to a similarly structured external regulator), and also less inclined to pursue courses of reform unlikely to win plaudits from the citizenry.

## IV

### TWO PATHS FORWARD: STATE-LEVEL REFORMS, OR A BETTER ELECTION ASSISTANCE COMMISSION?

What remains to be considered is how a model AC might actually come into being in the near future. This Part briefly canvasses two routes. The first, and less plausible, is through reforms to the Election Assistance Commission (EAC). The second is through state-level ballot initiatives.

The EAC was created by the Help America Vote Act of 2002 (HAVA),<sup>318</sup> in response to the voting technology problems brought to light by the 2000 presidential election.<sup>319</sup> Its mission is to study "election administration issues"<sup>320</sup> and make associated law-reform recom-

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<sup>318</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 201, 116 Stat. 1666, 1673 (codified in scattered sections of 42 U.S.C.).

<sup>319</sup> Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 425-28 (2004) (tracing development and passage of Act).

<sup>320</sup> 42 U.S.C. § 15381 (Supp. II 2003).

mendations to Congress.<sup>321</sup> As presently constituted, however, the EAC will do little for electoral competitiveness. Partly this is a consequence of the body's limited jurisdiction<sup>322</sup> and de jure powers;<sup>323</sup> more fundamentally, however, the EAC's goal orientation is deeply suspect.

The EAC is designed for partisan balance<sup>324</sup> and can take action only with the agreement of seventy-five percent of the commissioners.<sup>325</sup> This much is attractive. But the EAC has only four commissioners, who serve staggered four-year terms.<sup>326</sup> The body's small size necessarily amplifies the significance of any given commissioner's idiosyncrasies or misbehavior. A four-person body cannot meaningfully embody a decent cross section of perspectives. Further, the brevity of the commissioners' terms may undermine the normative goal orientation: Commissioners who serve for just a few years are more likely to squander their body's accumulated authority than commissioners who stand to benefit tomorrow from forbearance today.<sup>327</sup> (Compare the U.K. Electoral Commission, whose members serve for up to ten years<sup>328</sup> and may be removed only for cause and with the agreement of the House of Commons.<sup>329</sup>)

HAVA does not in any way restrict the future employment options of persons who serve as EAC commissioners. This leaves political insiders free to reward compliant commissioners with other plum positions.<sup>330</sup> Nor does HAVA authorize the commissioners to promulgate their own, stronger conflict-of-interest regulations, as I have suggested.<sup>331</sup>

The EAC's goal orientation is most seriously jeopardized, however, by HAVA's reliance on the discredited method of selecting FEC commissioners.<sup>332</sup> The FEC consists of six commissioners, no more

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<sup>321</sup> *Id.* § 15381(c).

<sup>322</sup> The EAC's jurisdiction over "election administration issues" is not co-extensive with the problem of political self-entrenchment. Congress assuredly has not invited the EAC to address policy questions regarding, for example, the structure of representation, campaign finance, political advertising, or ballot access. *See* 42 U.S.C. § 15381(b).

<sup>323</sup> HAVA fails to mandate any sort of congressional or presidential response to the Commission's law-reform recommendations, let alone compel a closed-rule vote of the legislature. Nor does HAVA authorize the EAC to subpoena documents or testimony.

<sup>324</sup> 42 U.S.C. § 15323.

<sup>325</sup> *Id.* § 15328.

<sup>326</sup> *Id.* § 15323.

<sup>327</sup> *See supra* Part III.C.

<sup>328</sup> Political Parties, Elections, and Referendums Act, 2000, c. 41, § 3(3) (U.K.).

<sup>329</sup> *Id.* sched. I, §§ 4–6.

<sup>330</sup> 42 U.S.C. § 15323(b)(1).

<sup>331</sup> *See supra* Part III.C.

<sup>332</sup> Regarding the FEC's support for political insiders, *see* ACKERMAN & AYRES, *supra* note 57.

than three of whom may belong to the same political party, appointed by the President with the advice and consent of the Senate.<sup>333</sup> Thanks to a well-settled convention with roots in an earlier, unconstitutional FEC selection procedure, the FEC really consists of three Democrats and three Republicans selected by party leaders in Congress and then “made official” by the White House.<sup>334</sup> HAVA formalizes this convention and extends it to the EAC<sup>335</sup>—and without meaningfully limiting the pool of eligible candidates so as to constrain the majority and minority leaders from picking their favorite hacks.<sup>336</sup> (Members of the U.K. Electoral Commission, on the other hand, must be drawn from the pool of persons who have not held office in a political party, been employed by a political party, or made donations to a political party in excess of a modest threshold, within the ten years preceding the date of appointment.<sup>337</sup>)

In summary, the structure of the Election Assistance Commission makes it probable that this body’s goal orientation, like that of the FEC, will prove quite congenial to sitting lawmakers and the major political parties. Reforms opposed by either party’s congressional leadership are not likely to issue from the EAC. And if the EAC were to turn on political insiders, it could face budgetary or other retaliation—nothing in HAVA protects it. The U.K. Electoral Commission once again offers an instructive contrast. While the Electoral Commission’s budget and jurisdiction are not entrenched against subsequent revision by an ordinary legislative majority, the Political Parties,

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<sup>333</sup> 2 U.S.C. § 437c(a)(1) (2000).

<sup>334</sup> PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 15–18 (2002), <http://www.democracy21.org>.

<sup>335</sup> Formally, the President has the power to appoint EAC Commissioners, subject to the advice and consent of the Senate, but HAVA specifies that the majority and minority leaders of the House and Senate each shall submit to the President a “recommended” candidate whenever a commissioner slot belonging to the relevant leader’s party opens up. See 42 U.S.C. § 15323(a)(2) (Supp. II 2003).

<sup>336</sup> Beyond the partisan balance requirement, the only specified qualification is that appointees “have experience with or expertise in election administration or the study of elections,” 42 U.S.C. § 15323(a)(3), and the only condition on service is that appointees give up “any other business, vocation, or employment while serving as a member of the Commission . . . .” § 15323(d)(1). The qualifications section of the FEC legislation is similar:

Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members . . . shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment.

2 U.S.C. § 437c(a)(3) (2000).

<sup>337</sup> Political Parties, Elections, and Referendums Act, 2000, c. 41, § 3(4) (U.K.).

Elections, and Referendums Act does set up a process whereby the Commission proposes its own budget directly to Parliament, rather than going through a government ministry as the typical public agency does.<sup>338</sup>

For competition-minded reformers, then, one route forward is to try to salvage the EAC by pushing legislative reforms that would remedy the institutional weaknesses identified above. But any restructuring of the EAC likely to incline and enable the Commission to challenge the perquisites of incumbency would face stiff resistance in Congress. Moreover, even if upstarts in Congress were to favor such reforms, the Supreme Court might stand in the way. The Court's separation-of-powers and Appointments Clause jurisprudence could limit experimentation with non-insider methods of selecting commissioners,<sup>339</sup> for example, and on present constitutional understandings one Congress cannot entrench laws against revision by an ordinary majority in the next.<sup>340</sup>

The more promising route forward is to push for the creation of ACs at the state level. Twenty-four states allow lawmaking by ballot initiative.<sup>341</sup> Some of these states permit voter-initiated constitutional amendments, or otherwise limit the legislature's authority to revise laws that were enacted by ballot initiative.<sup>342</sup> Even absent a constitutional prohibition, legislators are reluctant to second-guess laws that bear the citizenry's stamp of approval.<sup>343</sup> The ballot-initiative process

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<sup>338</sup> See Oonagh Gay, *The Political Parties, Elections, and Referendums Bill—Electoral Aspects* 19 (House of Commons Library Research Paper No. 00/1, 2000), available at <http://www.parliament.uk/commons/lib/research/rp2000/rp00-001.pdf>.

<sup>339</sup> The Appointments Clause of the U.S. Constitution provides that "Officers of the United States" "shall [be] nominate[d]" by the President and appointed with the "Advice and Consent" of the Senate; and that Congress may vest the appointment of "such inferior Officers . . . in the President alone, in Courts of Law, or in Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. The Office of Legal Counsel has argued that members of Presidential advisory commissions are not "officers of the United States" because they "possess no enforcement authority or power to bind the Government." Memorandum from Walter Dellinger, U.S. Dep't of Justice Office of Legal Counsel, to the General Counsels (May 7, 1996), reprinted in 63 LAW & CONTEMP. PROBS. app. at 514, 534 (2000). But it is not clear that this reasoning would extend to a body that has de jure power to trigger a Congressional vote, whether or not a claim to enforce that power would be justiciable. Regarding the murky line between "inferior" and other officers, and the unresolved question of whether "Departments" includes divisions of the executive branch not headed by a member of the President's cabinet, see *id.* at 539–44.

<sup>340</sup> See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1665 (2002) (explaining and critiquing this principle).

<sup>341</sup> For a survey, see PHILIP DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 27–45 (1998).

<sup>342</sup> *Id.* at 71–81.

<sup>343</sup> *Id.* at 80.

thus offers a possible means for citizens' groups to establish new institutions entrenched against easy revision by the elected branches.<sup>344</sup>

A state-centered strategy also conduces to experimentation with a variety of AC designs. This is so, not simply because of the number of different states in which ACs might be established, but also because of the typically flexible doctrines that state constitutional courts apply to separation-of-powers and related structure-of-government questions.<sup>345</sup> Moreover, the ballot initiative enables the creation of state-

<sup>344</sup> One might ask whether the availability of the ballot initiative—as a means of end-running around political insiders—obviates the need, or reduces the value, of an AC on the model of this Article. It is beyond the scope of this Article to plumb the downsides of the ballot initiative as a lawmaking mechanism. Suffice it to say, for now, that while the ballot initiative has sometimes been used to effect political process reforms disfavored by insiders, political insiders have also proven extremely adept at using the ballot initiative for their own purposes and at neutering initiatives they do not like. Compare John Phippen et al., *Election Reform and Direct Democracy: Campaign Finance Regulation in the American States*, 30 AM. POL. RES. 559 (2002) (finding that ballot initiative facilitates political process reforms), and Caroline J. Tolbert, *Changing Rules for State Legislature: Direct Democracy and Governance Policies*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 171 (Shaun Bowler et al. eds., 1998) (same), with ELIZABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* (2001) (arguing that elected branches substantially affect implementation and enforcement of initiatives), and Anderson & Persily, *supra* note 3 (finding that states with ballot initiatives are more likely to adopt independent districting commissions and term-limit laws, but that with respect to many other political process questions, differences between initiative and non-initiative states are small), and Elizabeth Garrett, *California's Hybrid Democracy*, GEO. WASH. L. REV. (forthcoming, 2005), available at <http://ssrn.com/abstract=646763> (highlighting California Governor Schwarzenegger's use of initiative as governing tool, and political parties' success in defeating open-primary initiative by introducing competing (and perhaps confusing) counter-initiative). More generally, structural features of the ballot initiative often generate laws that are hard to justify on plausible conceptions of "the public interest." See generally Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990) (arguing that "direct democracy bypasses . . . safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest"); Thad Kousser & Mathew McCubbins, *Social Choice, Crypto-Initiatives, and Policy Making by Direct Democracy*, 78 SO. CAL. L. REV. 949 (2005) (discussing recent emergence of "crypto-initiatives," used by party insiders to increase turnout of select groups, and analyzing various other informational, agenda-control, and tradeoff-obscuring problems with ballot initiative process). In summary, it is far from clear that the initiative is *reliably* useful as a means for effecting consensus-improvement reforms opposed by political insiders.

<sup>345</sup> For an overview of state courts' generally flexible approach to separation-of-powers questions, see generally Ellen A. Peters, *Getting Away from the Federal Paradigm: The Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997). State regulatory boards and commissions with members appointed in all manner of fashions (even by non-governmental actors) are commonplace, and frequently sustained against state constitutional challenge. See HANS A. LINDE ET AL., *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 501–02 (2d ed. 1981); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 585–86 (2000); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975). Many state constitutions provide for "plural" executive branches, comprised of separately elected officials (e.g., the governor, the attorney general), and this, along with other features unique to the states like the ballot



level institutions whose structure and jurisdiction are entrenched against unilateral revision by the legislature, yet susceptible to changes initiated by other political entrepreneurs. Such “asymmetric entrenchment” could facilitate experimentation with different methods of selecting and insulating AC commissioners.

Finally, a state-centered strategy could take advantage of the sudden political salience that undue partisanship in election administration has recently achieved in several jurisdictions. Problems of partisanship in redistricting have been highlighted in Texas, where an off-year partisan gerrymander of that state’s congressional districts was dramatically successful;<sup>346</sup> in Pennsylvania, where an egregious partisan gerrymander was left standing by the U.S. Supreme Court’s decision in *Vieth*;<sup>347</sup> in Colorado, where the state supreme court ultimately rejected an off-year partisan gerrymander on the ground that the state constitution permits redistricting only once per ten years;<sup>348</sup> and in California and Ohio, where ballot initiatives to establish nonpartisan districting commissions are underway.<sup>349</sup> In addition, problems of partisanship in voter-roll, balloting, recount, and polling-place administration were illuminated by election-year spotlights on Florida,<sup>350</sup> Iowa,<sup>351</sup> Missouri,<sup>352</sup> New Mexico,<sup>353</sup> Ohio,<sup>354</sup> and Washington.<sup>355</sup> There is an incipient sense that the political process would benefit

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initiative, the frequent lack of an appointments clause, and the line-item veto, militates in favor of a flexible and deferential judicial approach to separation-of-powers questions under state constitutional law. See Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 U.C.L.A. L. REV. 1079, 1108–47. Twenty-three of fifty states lack general appointments clauses vesting appointment power in the governor. *Id.* at 1149–50.

<sup>346</sup> Cox, *supra* note 39, at 751–53.

<sup>347</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004); Amy Worden, *Pa. Redistricting Case May Set Path for U.S. on Role of Politics*, PHILA. INQUIRER, Dec. 20, 2003, at A1.

<sup>348</sup> *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied*, 124 S. Ct. 2228 (2004); Cox, *supra* note 39, at 753.

<sup>349</sup> News stories and other information about the California redistricting initiative plan are collected at the website of the Institute of Governmental Studies, U.C. Berkeley, <http://www.igs.berkeley.edu/library/htRedistricting.html> (last visited July 11, 2005). Regarding Ohio, see Dean E. Murphy, *Ohio Critics of G.O.P. Start Battle to Change Election Process*, N.Y. TIMES, Aug. 10, 2005, at A12. Movements to reform districting have also sprung up in Florida, Georgia, Maryland, Massachusetts, and Rhode Island. Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 7, 2004, at A1.

<sup>350</sup> Hasen, *Beyond*, *supra* note 47 (manuscript at 55–59) (discussing *Bush v. Gore* recount debacle, and subsequent controversies over administration of felon disenfranchisement, provisional ballots, and ballot access).

<sup>351</sup> *Id.* at 53, 61 (noting criticism of Democratic Secretary of State for, inter alia, accepting by-mail voter registrations from persons who failed to check “U.S. citizen” box).

<sup>352</sup> *Id.* at 60 (noting criticism of Republican Secretary of State for making various election administration decisions that appeared to advantage President Bush).

<sup>353</sup> *Id.* at 61 (noting criticism of Democratic Secretary of State for enabling “fraudulent” voting by likely Democrats).

from some form of nonpartisan oversight.<sup>356</sup> The AC model I have presented is broadly congruent with that sentiment, and may have special appeal for voters in the handful of states at the center of these recent controversies.

### CONCLUSION

Election law presents a distinctive agency problem. Low-information voters are ill-equipped to check incumbent lawmakers' efforts to establish "rules of the game" that disadvantage would-be challengers and upstart political parties. But the customary prescription for this problem—external regulation of the ground rules of political competition, by a politically insulated constitutional court or commission—presents another agency problem, and raises normative concerns to boot. Moreover, the very institutional qualities that seem necessary if the oversight body is to remedy the entrenchment problem—broad jurisdiction to revise any number of ground rules of political competition, and security against legislative retaliation—would make the body all the more dangerous were it to pursue a partisan agenda or otherwise to depart from the overlapping interests and concerns of the citizenry.

This Article offers the standing advisory commission with vote-triggering powers as one plausible answer to the dilemma of external regulation, one which seeks to channel rather than displace ordinary democratic politics in the interest of political process reform. The AC could enhance political competition by putting disentrenching reforms on the lawmaking agenda—and by raising the ballot-box tariff for incumbents who vote against those reforms. That the electorate would respond favorably to an AC on the model of this Article is suggested both by recent political science research on voter decision-making and objectives, and by scant but suggestive case studies of extant political process and anticorruption advisory bodies in several countries.

In addition to documenting the potential relevance of the AC, I have sought to explain how the AC's status as an advisory rather than regulatory body affects both the likelihood that it will prove to be a reliable agent of the citizenry, and the consequences if it does not.

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<sup>354</sup> *Id.* at 59–60 (discussing various controversial rulings by Republican Secretary of State and Bush campaigner Kenneth Blackwell).

<sup>355</sup> Ironically, Washington's Republican Secretary of State has faced intra-party criticism for not aggressively deploying his office for partisan advantage. See David Postman, *Republican Reed Faces Wrath of GOP Over Recount Decisions*, SEATTLE TIMES, Jan. 3, 2005, at A1.

<sup>356</sup> See, e.g., Richard L. Hasen, *Crisis of Trust over Voting Difficulties Must Be Addressed*, ROLL CALL, Jan. 10, 2005 at 9.

While the AC has the potential to be relevant, its relevance is no more secure than its standing in public opinion, and the corresponding possibility of *irrelevance* should make the advisory body a less attractive target for would-be capturers. The prospect of irrelevance should also help to focus the commissioners on the citizenry's concerns. In these ways, making a political process oversight body advisory rather than regulatory attenuates the agency problem between citizen-principals and their "external" agent.

The ambition of this Article has been limited. I have not prescribed an optimal design for the AC, nor have I tried to give an account of some optimal mix of institutions for keeping the structures of representation and political competition in good order. There may well be important and complementary roles for constitutional judicial review, ballot initiatives, periodic constitutional revision, and rulemaking by regulatory commissions of various sorts. If ACs on the model of this paper are established, however, and if the lessons of experience bear out my arguments, then the pressure for other, higher-stakes interventions in the political process should be considerably reduced.

It is my hope that by adding the standing advisory commission with vote-triggering powers to the institutional menu, I will prompt today's good-government activists to look beyond the particulars that now concern them, and to contemplate institutional mechanisms that would facilitate ongoing reform in the years ahead. No less, I hope to broaden the research horizon for academics concerned with political entrenchment. This Article has only begun the AC inquiry, and there is much yet to quarry.<sup>357</sup>

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<sup>357</sup> The following lines of research would be particularly valuable. First, we need a better empirical understanding of the accomplishments and failures of extant standing advisory commissions with jurisdiction over conflict-of-interest questions. Second, in view of the increasing interest in nonpartisan election administration agencies (such as the Australian Elections Commission and Elections Canada), it is worth asking whether the AC role is well played by bodies that also have administrative and regulatory responsibilities, or whether it is better to assign the advice-giving function to a separate body. Third, there are important questions to explore about the possible interplay between ACs and constitutional courts: To what extent might constitutional courts foster the creation of ACs? How ought constitutional courts to respond to AC recommendations? As a purely descriptive matter, what AC effects on constitutional jurisprudence seem likely? (Notice that AC recommendations that the legislature disregards might nonetheless prove highly consequential if they color the decisionmaking of a constitutional court.) Fourth, there is room for foundational work on normative standards for guiding (or evaluating) political process ACs, and on procedures for involving the public in AC decisionmaking. Finally, it is worth asking whether ACs are warranted in domains outside of election law (such as human rights, privacy, or governmental integrity), and if so, whether it is better to have several subject-specific commissions, or to integrate these various domains into a single advisory entity.