Joan Shorenstein Center
on the Press, Politics and Public Policy

Would You Ask Turkeys To Mandate Thanksgiving?

Paper #1:
The Dismal Politics of Legislative Transparency

and

Paper #2:
Using Citizens Assemblies to Reform the
Process of Democratic Reform

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ABSTRACTS

PAPER #1: The Dismal Politics of Legislative Transparency

The First Amendment of the U.S. Constitution prevents legislators from infringing on the freedom of the press. But, of necessity, legislators have been granted monopoly control of legislative information systems, including parliamentary procedure and roll call votes. New information technology is revolutionizing the economics of legislative information systems. But elected officials have a conflict of interest in using those new technologies to enhance democratic accountability when that might conflict with their own re-election interests. This paper looks at the online accessibility of roll call votes by legislator in 126 legislative branches: the 2 branches of Congress, the 99 branches in the 50 U.S. states, and the 25 branches (city councils) in the 25 largest U.S. cities. It concludes that legislators have a conflict of interest and act on it in making roll call votes accessible. Moreover, this particular conflict of interest is merely the tip of the iceberg of a greater incentive problem elected officials have in designing legislative information systems to make themselves more democratically accountable. Legislative information systems are a critical foundation of democratic media systems. Strengthening them should therefore be of concern to anyone interested in strengthening the mass media and democracy.

PAPER #2: Using Citizens Assemblies to Reform the Process of Democratic Reform

The Framers of the U.S. Constitution believed that to preserve and enhance democracy vertical accountability (elections) needed to be supplemented by horizontal accountability (checks and balances). They built strong interbranch horizontal accountability mechanisms into the Constitution (e.g., separating the legislative, executive, and judicial functions of government into separate government branches) but were weak on intrabranch horizontal accountability mechanisms. In particular, incumbent legislators were given control over key democratic institutions of government, including district boundaries, campaign finance, and legislative information systems. This created a conflict of interest because incumbents had an incentive to design democratic institutions to enhance their own re-election rather than democracy. This paper looks at three intrabranch horizontal accountability mechanisms: direct democracy, independent commissions, and citizens assemblies. Using case studies from British Columbia and Ontario, it focuses on citizens assemblies as a promising but institutionally immature horizontal accountability mechanism. It concludes that citizens assemblies have the potential to become the gold standard of intrabranch horizontal accountability mechanisms but that their price tag to be done well is similarly rich, thus restricting their practical usage.

PAPER #1: The Dismal Politics of Legislative Transparency

The First Amendment of the U.S. Constitution prevents legislators from infringing on the freedom of the press. But it does not prevent legislators as a group from having monopoly control of information about their own official actions, including their votes, on which the press depends to hold elected officials democratically accountable. Without voter access to such information, meaningful representative democracy is inconceivable. But such information has always been understood to be under the monopoly control of legislators—and necessarily so. No one seriously proposes turning over the control of legislative procedure and records to a private actor such as the press; the design of legislative information systems is an intrinsically governmental process.

New information technology is revolutionizing the economics of both legislative procedure and transparency. But there is no guarantee that this technology will be used to enhance democracy.

Do the interests of incumbent legislators and the public conflict when designing legislative information systems whose ostensible purpose is to optimize democratic accountability? To the extent that legislators are re-election seeking, we would expect the answer to be yes—just as they would have a conflict of interest if granted monopoly power over how the press reported official actions.

Re-election seeking legislators would be expected to seek to maintain control over information about their official actions so that only information favorable to themselves is readily available to their constituents. In a well-functioning democracy, however, both favorable and unfavorable information should be equally accessible; no systematic bias should exist making favorable information more readily available.

Another way to conceptualize legislators' conflict of interest is that the information most sought after by opposition candidates and other potential opponents is the type of information that incumbent legislators have the greatest incentive to control. Opposition candidates are primarily

interested in legislative information linked to particular legislators. They are interested in this information not because they are scumbags, but because elections are ultimately about the choices voters have to make among particular candidates.

This paper tests this conflict of interest hypothesis by focusing on just one aspect of legislative information systems: the use of the Internet to enhance the ability to search for roll call votes and related information—such as legislator statements explaining their votes—that gives meaning to those votes.

Not all online views of roll call votes pose the same degree of conflict of interest. As legislative roll call information becomes more closely linked to a particular legislator, we would expect the accessibility of the information to decline. For example, we would expect roll call votes by each member to be less accessible than roll call votes by each bill. Similarly, we would expect the history of a legislator's different roll call votes on the same bill as it passes through subcommittee, committee, floor, and post-conference committee to be less accessible than a bill's history as it passes through the same subcommittee, committee, floor, and post-conference committee sequence.

Nor do all roll call votes pose the same degree of conflict of interest. Those on controversial issues pose a greater conflict of interest than those on popular issues. Thus, roll call votes on sponsored bills—the subset of bills a legislator tends to be most proud of and wants his name identified with—should be more accessible.

Nor do all legislators share the re-election motive to the same degree. Legislative scholars generally agree that legislators also desire to pass good public policies.[1] But it would be reasonable to expect that where it is relatively hard to get elected and where the rewards in terms of power and money for doing so are relatively great, the re-election motive would be strongest and the desire to retain control over the accessibility of controversial roll call votes the greatest. Thus, roll call votes in legislatures from smaller political jurisdictions should be more accessible.

Nothing in this paper is meant to suggest that the typical legislator is passionately opposed to providing online access to legislator roll call votes. Most legislators have probably never even thought about the matter. The claim is only that it is in legislators' self-interest to maintain as much control as possible about information concerning their potentially controversial official actions. Thus, they will not go out of their way to use new technology to make this information more accessible.

Nor is there any claim being made that, just because some information is relatively inaccessible, highly motivated opposition candidates and interest groups cannot access it. Indeed, the Congressional Research Service compiles a long list of prominent interest groups that collect and publicize members' voting records in specific areas.[2] The point is simply that, when provided the option of creating a more democratically accountable legislative information system, incumbent legislators generally do not see the political gain to themselves in taking it—and it irks them that they would be taking an action that benefits their opponents more than themselves. Why needlessly arm a potential enemy?

The most important conflict of interest in legislatures does not have to do with the accessibility of roll call votes and other official actions that are already public. Indeed, the most controversial official actions are rarely easily tied to a roll call vote. They are embedded as small clauses in large, generally desirable omnibus bills or amendment packages. Often even the original sponsor of a controversial clause is unknown.

Rather, the most important conflict of interest has to do with the fundamental design of parliamentary procedures that determines what type of information about legislators is both generated and made public. The key change to generate more useful content is the introduction of First Amendment values of free speech to legislatures. Without strong minority rights to speak, the propensity of roll call votes to reveal useful information is greatly weakened. Fortunately, thanks to

new information technology, the old arguments for suppressing minority speech rights are weaker than ever.

Nevertheless, as we shall see, there are two advantages to studying the accessibility of roll call votes and the information that gives them meaning. First, although the conflict of interest is relatively slight, the empirical data to make the argument is readily accessible. Second, the normative argument for making roll call voting data more publicly accessible, especially floor votes, is widely accepted.

The Conflict of Interest Hypothesis

The literature on democratic reform is filled with observations that elected representatives have a conflict of interest in designing democratic institutions. For example, much of the literature on legislative redistricting,[3] ethics,[4] and electoral reform[5] focuses on the need to create independent public bodies to prevent elected officials from acting on this conflict of interest. Similarly, the literature on the First Amendment is suffused with observations about the dangers of granting elected officials excessive power over political speech.[6]

However, relatively little attention has been paid to elected officials' conflict of interest in designing legislative information systems, especially the use of new information technology such as the Internet to make elected officials more democratically accountable.[7]

The vast majority of the literature on the use of information technology in government focuses on issues where elected officials do not have a direct and blatant conflict of interest with citizens; for example, when they use information technology to make government run more efficiently or provide better service.[8]

Darrell West conducts an annual survey of State and Federal E-Government in the U.S., covering some 1,548 state and federal entities.[9] The great majority of these entities are not legislatures. The survey ranks some website features where elected officials might have a conflict of

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interest. But the overwhelming focus is on features—including the design of websites to comply with World Wide Web Consortium (W3C) disability guidelines, the disclosure of privacy policies, and the provision of foreign language translations—where such conflicts of interests do not apply.

In 2003, the Center for Digital Government conducted a Digital Legislatures Survey.[10] However, it did not focus on areas where legislators might have a conflict of interest. For example, no distinction was made between information only available internally (to legislators and legislative staff) and available both internally and to the general public. No methodology was publicly released, and only the winning legislatures (the top five) were mentioned in the report. Similarly, two sections of the National Conference of State Legislatures have since 2005 jointly given an "Online Democracy Award' for the best state legislative website. But the other 49 states are not ranked and there is no clear distinction between legislative information that is helpful for incumbent PR versus democratic accountability.[11]

The Center for Digital Government also conducts annual digital states and digital cities surveys.[12] Like the Darrell West survey, issues of legislative transparency appear to play a negligible role in the rankings. Like its Digital Legislatures Survey, the Digital States Survey also doesn't release its methodology and only the winning states are mentioned in the report.

The Congressional Management Foundation has issued a series of reports grading Congressional websites. The focus of the reports is on using technology to empower legislators rather than make them more accountable to the public.[13]

Paul Ferber et al. have analyzed the participatory features of state legislative websites but raise no conflict of interest issues. They include a smorgasbord of participatory indicators, such as the availability of press releases, legislator e-mail addresses, and compatibility with old Internet browsers. They conclude that many potential forms of participation have not been implemented on legislatures' websites.[14]

The Congressional Research Service regularly issues reports on new technology and legislative information systems. These reports provide useful historical background and a catalog of the technological issues Congress currently faces. But no mention is made of the possibility that Congress might have a conflict of interest with the American people in how it chooses to use information technology.[15]

Roll Call Votes and Democratic Representation

Essential to the concept of representative democracy is that voters have ready access to the information necessary to monitor their elected representatives' actions. This is reflected in the widely used phrase that "the legislature's business is the people's business."[16] It is also reflected in the fact that the U.S. Constitution (Article 1, Section 5) and most state constitutions require the keeping of a public journal, including votes on passed legislation.[17]

Perhaps a legislator's most fundamental type of action on behalf of constituents is to vote on bills, bill amendments, and bill procedures. Therefore, it enhances democratic accountability when voters have easy access to information about these votes. When such votes are linked to specific individuals, they are called roll call votes. To this author's knowledge, no incumbent legislator has ever spoken on the public record arguing that public roll call votes shouldn't be easily accessible to the public.

Roll call votes on procedural issues ("motions") are important because they help set the legislature's agenda and the hurdles legislation will have to overcome in order to pass. Although a vote on procedures is often considered less important than a vote on the contents of a bill, this is not necessarily so. A procedural vote to table a bill, for example, may be functionally equivalent to voting "nay."

Subcommittee and committee votes are as important if not more important than floor votes because committees set the agenda for the floor. Only a small fraction of bills ever get to the floor

for a vote. In bicameral legislatures, still fewer make it through conference committee for a final vote of the House and Senate. If the executive vetoes the legislation, there might also be a revote. Without easily accessible public information about the early stages of the legislative process, elected officials, especially the majority party leaders who control the agenda, can escape accountability for how they use their agenda setting powers.

Profiles of the roll call votes of individual legislators are widely used in the political process. Party leaders use them to assess their members' party loyalty and suitability for leadership positions; interest groups use them to devise their lobbying and campaign contribution strategy; media use them to assess the ideological and interest group leanings of legislators; and opposition candidates use them to assess their own comparative strengths and weaknesses. Legislators are thus very sensitive about their roll call votes because they know that they can play major roles in deciding elections and winning leadership positions within legislatures.[18]

As legislation moves from introduction to committee to final passage, legislator's roll call votes are linked to other roll call votes by the same legislator. Linked to roll call votes, in turn, are bills, bill amendments, motions, and legislator statements. Legislation at one point in time is linked to versions of the same legislation earlier and later in the legislative process. Legislation, in turn, cites external statutes and other government documents. To the extent that all these types of information are tightly linked together, the public is better able to assess the meaning of roll call votes.

Most legislative votes are not roll call votes; that is, they are not attributed to individual legislators. Instead, they are only tallied in the aggregate, either with precise counts or by voice vote, noting that a measure did or did not pass.[19] For example, a large fraction of bills passed out of Congressional committees to the floor are by voice vote. During the first week of May 2008 (May 1

to 7), Congressional committees passed 22 bills. Of those, 18 were by voice vote, three by roll call

vote, and one (the defense authorization bill for FY2009) in closed session.[20]

The difference between roll call vote information being easily accessible and not can have

great practical consequences for democratic accountability. That is, there can be a significant

difference between a document being "public" and "meaningfully public." Consider the importance

of accessible versus inaccessible public information in the marketplace. The combined knowledge

of the world is useless unless there is a convenient way to search for it. Google is now one of the

most valuable companies in the world because it recognized that truth: the huge value that can come

from making information more readily accessible. Even something as simple as shaving a fraction

of a second from search response times can be worth hundreds of millions of dollars to Google.

Consider the same principle in achieving political influence. Lobbyists and think tanks thrive

to a large extent not because they have exclusive access to information but because they know how

to provide information to legislators in a timely and accessible way. Congressional Scholar Robert

Bradley conducted a study of what features of information sources members of Congress find most

useful. Of 13 features, the accessibility of an information source was ranked highest.[21]

Consider the same principle in accessing other government documents such as "public"

court records about divorces, prostitution convictions, and traffic violations. These documents have

traditionally been available to anyone willing to make a trip to the right courthouse. But there is a

widely recognized qualitative difference in public accessibility when that information is made

available online. A potential friend, spouse, or business partner is unlikely to make a trip to every

local courthouse to search through records in hope of finding something of interest. But if that

information is made easily accessible—for example, via a simple Google search across all courthouse

and other records—the odds of finding and using that information are very different. The doctrine

of "practical obscurity" captures this idea that there can be a qualitative difference in impact when a

public government record becomes easily accessible. The doctrine is usually applied in cases concerning privacy.[22]

Legislatures in Congress, the 50 States, and the 25 Largest Cities

This study surveys the accessibility of roll call vote information on the publicly available websites of Congress, the 50 state legislatures, and the 25 largest cities in the U.S. Data for the survey were primarily derived from publicly available legislative websites. These data were complemented by interviews with information technology staff and legislators at the city, state, and national levels; literature on legislative information systems published by the Congressional Research Service and National Conference of State Legislatures; interviews with employees of proprietary legislative information services that belong to the National Online Legislative Associates (NOLA); and the author's direct experience working in Congress and local government.

The results reveal that information about roll call votes by legislator is not readily accessible on legislative websites. For example, suppose a voter (such as an opposition candidate) wants to find all of the roll call votes on bills of incumbent legislator X during legislator X's last term of office. The voter cannot do this in the most obvious and convenient way, which would be to locate the legislator by name and then click on that name for all the legislator's roll call votes. In many cases, the voter could access the roll call information by looking up individual bill histories. But if over the last term of office there are hundreds or thousands of roll call votes on bills, collecting that information for legislator X becomes quite cumbersome.

Table 1 presents the compiled information for Congress and the 50 states. Table 2 presents this information for the 25 largest U.S. cities. The survey is divided into two broad categories: roll call vote access and access to the roll call vote's meaning.

Roll Call Vote Access. Roll call vote access is divided into two subcategories: access by legislator and access by bill. By a wide margin, roll call information is much more likely to be

available indirectly. For example, of the 99 state legislative branches in the 50 states (Nebraska has a unicameral legislature unlike the bicameral legislature in the other 49 states), 92 provided comprehensive floor roll call votes by bill while only 10 provided the same information by legislator.

The roll call access section of the table further distinguishes between different types of roll call votes by place of votes (floor or committee) and type of vote (bill, amendment, and procedure). In general, roll call votes from the floor are more accessible than roll call votes from committee, and roll call votes on bills are more accessible than roll call votes on amendments or motions.

At the committee level, not one of the 126 legislatures (including the city councils) makes comprehensive roll call votes searchable online by legislator.

At the floor level, the situation is more mixed. Neither Congress nor any of the studied cities make roll call votes searchable online by legislator.

Only 10 of the 99 state legislature branches have any type of online access to floor roll call votes by legislator. These include Maine's Senate, New Hampshire's House and Senate, New Jersey's House and Senate, North Carolina's House and Senate,Vermont's House and Senate, and Washington's House.   In the case of Washington's House, the roll call information was only made available by bill (but not amendment or motion).

Table 1. Roll Call Votes ("RCV") in Congress and State Legislatures Available Online[23]

Legislatures	Direct RCV Access (By Legislator)												Indirect RCV Access (By Bill)												Access to RCV's Meaning							
	House						Senate						House						Senate						External Statutes				Member Debate			
	Floor			Comm			Floor			Comm			Floor			Comm			Floor			Comm			House		Senate		House		Senate	
	B	A	P	B	A	P	B	A	P	B	A	P	B	A	P	B	A	P	B	A	P	B	A	P	F	C	F	C	F	C	F	C
Congress	–	–	–	–	–	–	–	–	–	–	–	–	■	■	■	■	■	–	■	■	■	■	■	–	–	–	–	–	–	–	–	–
States																																
Alabama	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	–	–	–	■	■	■	–	–	–	–	–	–	–	–	–	–	–
Alaska	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Arizona	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Arkansas	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
California	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	■	–	–	■	–	■	■	–	–	–	–	–	–	–	–	–	–
Colorado	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	■	–	–	■	–	■	■	–	–	–	–	–	–	–	–	–	–
Connecticut	–	–	–	–	–	–	–	–	–	–	–	–	■	–	V	■	–	–	■	–	■	■	V	–	–	–	–	–	–	–	–	–
Delaware	–	–	–	–	–	–	–	–	–	–	–	–	■	V	#	–	–	–	■	■	#	–	–	–	–	–	–	–	–	–	–	–
Florida	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	■	–	–	–	–	–	–	–	–	–	–	–	–
Georgia	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	–	–	–	■	■	–	–	–	–	–	–	–	–	–	–	–	–
Hawaii	–	–	–	–	–	–	–	–	–	–	–	–	■	■	■	–	–	–	■	■	■	■	–	–	–	–	–	–	–	–	–	–
Idaho	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–
Illinois	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	■	–	■	–	–	–	–	–
Indiana	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	■	■	–	■	–	–	■	■	–	–	–	–	–	–	–	–	–
Iowa	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	–	–	–	■	–	■	–	–	–	–	–	–	–	–	–	–	–
Kansas	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Kentucky	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Louisiana	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	–	–	–	■	■	–	–	–	–	–	–	–	–	–	–	–	–
Maine	–	–	–	–	–	–	■	■	■	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Maryland	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	■	–	■	–	–	–	–	–
Massachusetts	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Michigan	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	–	–	–	■	■	–	–	–	–	■	–	■	–	–	–	–	–
Minnesota	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	■	–	–	–	–	–	–	–	–	–	–	–	–
Mississippi	–	–	–	–	–	–	–	–	–	–	–	–	■	V	–	–	–	–	■	V	–	–	–	–	–	–	–	–	–	–	–	–
Missouri	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Montana	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	#	–	–	■	■	–	#	–	–	–	–	–	–	–	–	–	–
Nebraska	–	–	–	–	–	–	–	–	–	–	–	–	N/A						■	–	–	#	–	–	–	–	–	–	–	–	–	–
Nevada	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
New Hampshire	■	■	■	–	–	–	■	■	■	–	–	–	■	■	■	–	–	–	■	■	■	–	–	–	–	–	–	–	–	–	–	–
New Jersey	■	■	■	–	–	–	■	■	■	–	–	–	■	■	■	–	–	–	■	■	■	–	–	–	–	–	–	–	–	–	–	–
New Mexico	#	–	–	–	#	–	#	–	–	–	#	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–
New York													■	N/A: website down											–	–	–	–	–	–	–	–
North Carolina	■	■	■	–	–	–	■	■	■	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
North Dakota	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	■	–	–	■	■	–	■	–	–	–	–	–	–	–	–	–	–
Ohio	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Oklahoma	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Oregon	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Pennsylvania	–	–	–	–	–	–	–	–	–	–	–	–	■	■	■	■	■	–	■	■	■	■	–	–	–	–	–	–	–	–	–	–
Rhode Island	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
South Carolina	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	–	–	–	■	–	■	–	–	–	–	–	–	–	–	–	–	–
South Dakota	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Tennessee	–	–	–	–	–	–	–	–	–	–	–	–	■	–	V	–	–	–	■	–	V	–	–	–	–	–	–	–	–	–	–	–
Texas	–	–	–	–	–	–	–	–	–	–	–	–	■	■	■	#	–	–	■	■	■	#	–	–	–	–	–	–	–	–	–	–
Utah	–	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Vermont	■	■	■	–	–	–	■	■	■	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Virginia	–	–	–	–	–	–	–	–	–	–	–	–	■	–	■	–	–	–	■	–	■	–	–	–	–	–	–	–	–	–	–	–
Washington	■	–	–	–	–	–	–	–	–	–	–	–	■	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
West Virginia	–	–	–	–	–	–	–	–	–	–	–	–	V	–	–	–	–	–	■	–	–	–	–	–	–	–	–	–	–	–	–	–
Wisconsin	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	–	–	–	■	■	–	–	–	–	–	–	–	–	–	–	–	–
Wyoming	–	–	–	–	–	–	–	–	–	–	–	–	■	■	–	■	–	–	■	■	–	■	–	–	–	–	–	–	–	–	–	–

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Table 2. Roll Call Votes in Top 25 City Councils Available Online[24]

City	Roll Call Votes by Member						Roll Call Votes by Bill					
	Council			Committee			Council			Committee		
	B	A	M	B	A	M	B	A	M	B	A	M
New York city	–	–	–	–	–	–	■	–	–	–	–	–
Los Angeles city	–	–	–	–	–	–	–	–	–	–	–	–
Chicago city	–	–	–	–	–	–	–	–	–	–	–	–
Houston city	–	–	–	–	–	–	–	–	–	–	–	–
Phoenix city	–	–	–	–	–	–	■	■	■	–	–	–
Philadelphia city	–	–	–	–	–	–	■	–	–	–	–	–
San Antonio city	–	–	–	–	–	–	■	■	–	–	–	–
San Diego city	–	–	–	–	–	–	■	■	■	■	■	■
Dallas city	–	–	–	–	–	–	■	■	–	■	■	–
San Jose city	–	–	–	–	–	–	■	■	■	–	–	–
Detroit city	–	–	–	–	–	–	–	–	–	–	–	–
Jacksonville city	–	–	–	–	–	–	■	■	■	–	–	–
Indianapolis city	–	–	–	–	–	–	■	–	–	■	–	–
San Francisco city	–	–	–	–	–	–	■	■	■	–	–	–
Columbus city	–	–	–	–	–	–	–	–	–	–	–	–
Austin city	–	–	–	–	–	–	–	–	–	–	–	–
Memphis city	–	–	–	–	–	–	–	–	–	–	–	–
Fort Worth city	–	–	–	–	–	–	–	–	–	–	–	–
Baltimore city	–	–	–	–	–	–	–	–	–	–	–	–
Charlotte city	–	–	–	–	–	–	–	–	–	–	–	–
El Paso city	–	–	–	–	–	–	–	–	–	–	–	–
Boston city	–	–	–	–	–	–	–	–	–	–	–	–
Seattle city	–	–	–	–	–	–	–	–	–	–	–	–
Washington city	–	–	–	–	–	–	–	–	–	–	–	–
Milwaukee city	–	–	–	–	–	–	■	■	■	■	■	■

Even where roll call votes by legislator are available, the quality of the presentation is weak, with the roll call votes made available in an inert document with no links—like a document scanned off a photocopy machine.

When the unit of analysis changes from the complete legislature to individual legislators, the situation is more ambiguous. For example, THOMAS, the congressional website for looking up legislative information, does not provide roll call votes by individual. However, some individual legislators, such as Senators John Cornyn of Texas, Orrin Hatch of Utah, and Chris Dodd of Connecticut, provide this type of information about themselves on their own websites. Random inspections of the websites of several legislators in each state and city legislature did not find other

examples of this discrepancy between a legislature's general website and the individual websites of its member legislators.

Congress, most state legislatures, and just under half of the studied cities, do make roll call votes available by bill. But there is a qualitative difference in accessibility between making roll call votes available by bill versus legislator. When investigating the roll call voting record of a representative, looking up roll call votes by bill is significantly more time consuming than by bill. Since legislators in Congress and the states usually vote on more than 500 bills over a single term in office (with a high of 9,000 in New York State), compiling these votes by legislator is very time consuming if the votes on bills must be manually compiled into votes by legislator.[25] Some members of the U.S. Senate, including Edward Kennedy, Robert Byrd, and Daniel Inouye, have cast more than 15,000 roll call votes on the Senate floor during their careers, so doing this type of roll call analysis over a legislative career is even more daunting.[26] Only the most motivated citizens, such as an opposition candidate, will likely undergo the effort. When this author ran for the House of Delegates in Maryland, scrutinized other candidates' literature, and attended more than twenty community forums with other candidates, he was surprised that even this most motivated class of citizens often did no more research on an incumbent's record than had been published in the local newspaper and touted by the incumbent.

An important distinction is between roll call votes made available via a downloadable structured database and via a predesigned web interface. None of the legislatures provided roll call votes and related information in a downloadable structured database. In contrast, various federal agencies such as the Environmental Protection Agency, Census Bureau, and Earthquake Hazards Program provide such downloadable information via their public websites. About a half dozen states do provide downloadable, structured information about bill status, legislators, public laws, and other legislative information—but they exclude roll call votes.[27]

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Many legislatures provide convenient access to roll call votes for legislators' sponsored legislation. But, from a political standpoint, this is qualitatively different from providing convenient *comprehensive* access to roll call votes by legislator. The reason is that legislators are usually proud of and want to take public credit for sponsored legislation, and don't believe it is controversial with their re-election constituency.

Access to Roll Call Votes' Meaning. The second major category is roll call votes linked to their meaning. A roll call votes gets its meaning by the document (bill, amendment, or motion) to which it refers and legislators' statements, if any, explaining their votes. These other documents, in turn, get their meaning by the documents they cite. By law, bills that are passed must be publicly linked to the votes on them. But this level of disclosure is not necessarily mandated for amendments, motions, and the documents, such as statutes, to which the legislation refers. Nor do member statements need to be linked to the bills to which they refer. In general, the links to roll call votes necessary to give them meaning are very poor, with the exception of links to the final versions of bills that come to a vote on the floor of a legislature. Table 1 indicates that links to member statements and external statutes are almost non-existent.

More Evidence of a Conflict of Interest

Experts on the electoral process generally agree that improving access to roll call votes is not in an incumbent's self-interest. Jim Leach, a former member of Congress and the Director of Harvard University's Institute of Politics, explains:

> From an incumbent's point of view, issues are liabilities. If a member votes with 80% of his constituents on each of 20 bills, he will have offended 100% of his constituents on one or two of the bills. Members argue for transparency on just about every issue except themselves. It's in the interests of incumbents to have opaque reporting requirements and to maintain control over how votes are disclosed.[28]

Karl Kurtz, the National Conference of State Legislatures' expert on state legislatures as an institution and its Director of the Trust for Representative Democracy, explains:

> [R]oll call voting by legislator is highly political information, subject to misinterpretation and campaign demagoguery. That's the main reason why most legislatures don't make the information easy to obtain. It's inherently anti-incumbent information, and since incumbents run the system, they don't make a practice of releasing it.[29]

Bart Peterson, the former Mayor of Indianapolis and two-term Indianapolis City Council member, explains:

> A lot of the concern revolves around the troublemaker idea. Elected officials worry about how the information can be manipulated. A vote is not a vote is not a vote. In legislatures, there is a lot of strategic voting that goes on.
>
> Let's say the opposition is playing a strategy to expose your strategy before you want it exposed. You may be forced to vote against Y now to be more successful in getting Y later. Or maybe you want X and the opposition wants you to settle for X light. So you may vote against X light even though you support X.
>
> My personal view is that I wouldn't mind giving away all my vote information— provided I could give a book length explanation explaining why I voted the way I did. But this isn't going to happen. From a politician's perspective, there is no upside."[30]

The literature on Congressional reform is full of assertions that when the re-election motive conflicts with Congressional reform, the re-election motive wins out. In his book, *Congressional Reform*, Leroy N. Rieselbach concludes: "[E]xperience shows that when Congress reaches the fork in the road and must make a choice between reform (particularly to promote responsible policy making) and personal prerogative, the outcome is seldom in doubt. Unless there are compelling reasons to follow the reform path—and there have been few since the mid-1970s—reform will be the 'road not taken.'"[31]

Table 3 provides additional evidence supporting a conflict of interest explanation. It ranks legislatures by the economic and political rewards for office, which are presumed to be correlated with the difficulty of attaining office and the strength of the re-election motive. The indicator for economic rewards, including the direct economic opportunity cost of losing office, is the degree of a

legislature's professionalization, which is a composite score directly proportional to a legislator's work load (time in session), staff size, and compensation. The indicator for political rewards is the average ratio of constituents to representatives. The ratio of constituents to representatives is derived by dividing a legislative branch's population by the number of its members. The results indicate that a legislature is less likely to provide roll call votes by legislator as the economic and political rewards of winning elective office increase.

The 10 of the 99 legislative branches that provided roll call votes by legislator ranked, on average, significantly lower on the professionalization scale than the other 89 legislative branches. The National Conference of State Legislatures divides state legislatures into five groups depending on their degree of professionalization. Using a scale of 1.0-5.0, with five representing the most professional and one the least professional, the mean professionalization score of legislative branches with and without online roll call votes by legislature was 2.5 and 2.9 respectively.

Similarly, the number of constituents per legislator was fewer in the 10 legislative branches with online roll call votes by legislator. The mean ratio of constituents to legislators for legislatures with and without roll call votes by legislator was 76,906 and 108,123 respectively.

Contrast California, with a professionalization score of 5.0 (including the highest annual legislator salary, $110,880) and the highest ratio of constituents to legislator (913,830 in the Senate), with New Hampshire, with a professionalization score of 1.0 (including the lowest annual legislator salary, $100/year) and the lowest ratio of constituents to legislators (3,290 in the House) of any of the 126 legislatures studied.[32] Vermont, with a professionalization score of 2.0 and the second lowest ratio of constituents to legislators (4,142 in the House), also did much better than California.

Table 3. Re-Election Incentive Indicators[33]

Legislature	Population Of Political District	Number of Representatives		Population to Representative Ratio		Professionalization Score	
		H	S	H	S	H	S
Without Roll Call Votes by Legislator							
Alabama	4,627,851	105	35	44,075	132,224	3	3
Alaska	683,478	40	20	17,087	34,174	3	3
Arizona	6,338,755	60	30	105,646	211,292	3	3
Arkansas	2,834,797	100	35	28,348	80,994	3	3
California	36,553,215	80	40	456,915	913,830	5	5
Colorado	4,861,515	65	35	74,793	138,900	3	3
Connecticut	3,502,309	151	36	23,194	97,286	3	3
Delaware	864,764	41	21	21,092	41,179	3	3
Florida	18,251,243	120	40	152,094	456,281	4	4
Georgia	9,544,750	180	56	53,026	170,442	2	2
Hawaii	1,283,388	51	25	25,164	51,336	3	3
Idaho	1,499,402	70	35	21,420	42,840	2	2
Illinois	12,852,548	118	59	108,920	217,840	4	4
Indiana	6,345,289	100	50	63,453	126,906	2	2
Iowa	2,988,046	100	50	29,880	59,761	3	3
Kansas	2,775,997	125	40	22,208	69,400	2	2
Kentucky	4,241,474	100	38	42,415	111,618	3	3
Louisiana	4,293,204	105	39	40,888	110,082	3	3
Maine	1,317,207	151	NA	8,723	NA	2	NA
Maryland	5,618,344	141	47	39,846	119,539	3	3
Massachusetts	6,449,755	160	40	40,311	161,244	4	4
Michigan	10,071,822	110	38	91,562	265,048	5	5
Minnesota	5,197,621	134	67	38,788	77,576	3	3
Mississippi	2,918,785	122	52	23,924	56,130	2	2
Missouri	5,878,415	163	34	36,064	172,895	3	3
Montana	957,861	100	50	9,579	19,157	1	1
Nebraska	1,774,571	N/A	49	N/A	36,216	3	NA
Nevada	2,565,382	42	21	61,081	122,161	2	2
New Mexico	1,969,915	70	42	28,142	46,903	2	2
New York	19,297,729	150	62	128,652	311,254	5	5
North Dakota	639,715	94	47	6,805	13,611	1	1
Ohio	11,466,917	99	33	115,827	347,482	4	4
Oklahoma	3,617,316	101	48	35,815	75,361	3	3
Oregon	3,747,455	60	30	62,458	124,915	3	3
Pennsylvania	12,432,792	203	50	61,245	248,656	5	5
Rhode Island	1,057,832	75	38	14,104	27,838	2	2
South Carolina	4,407,709	124	46	35,546	95,820	3	3
South Dakota	796,214	70	35	11,374	22,749	1	1
Tennessee	6,156,719	99	33	62,189	186,567	3	3
Texas	23,904,380	150	31	159,363	771,109	3	3
Utah	2,645,330	75	29	35,271	91,218	1	1
Virginia	7,712,091	100	40	77,121	192,802	3	3
Washington	6,468,424		49		132,009	NA	3
West Virginia	1,812,035	100	34	18,120	53,295	2	2
Wisconsin	5,601,640	99	33	56,582	169,747	4	4
Wyoming	522,830	60	30	8,714	17,428	1	1
With Roll Call Votes by Legislator							
Maine	1,317,207	NA	35	NA	37,634	NA	2
New Hampshire	1,315,828	400	24	3,290	54,826	1	1
New Jersey	8,685,920	80	40	108,574	217,148	4	4
North Carolina	9,061,032	120	50	75,509	181,221	3	3
Vermont	621,254	150	30	4,142	20,708	2	2
Washington	6,468,424	98	NA	66,004	NA	3	NA

Legislatures Without Roll Call Votes by Legislator

Mean Population to Representative Ratio: 108,123   Mean Professionalization Score: 2.9

Legislatures With Roll Call Votes by Legislator

Mean Population to Representative Ratio: 76,906   Mean Professionalization Score: 2.5

Competing Explanations

Elected legislators' conflict of interest is not the only possible explanation for why they have not made roll call votes by legislator more accessible. Five competing explanations, some of which overlap, are: 1) the novelty of the idea, 2) the inertia of the legislative process, 3) the high cost of implementing more accessible roll call votes, 4) the lack of demand for improved access, and 5) the likelihood that opponents will misuse the information by taking it out of context. From a democratic theory perspective, this last explanation is the most compelling of the five. Nevertheless, as I will argue, it is not compelling enough to justify making roll call votes by legislator inaccessible.

I do not want to suggest that incumbent elected officials have publicly made these arguments against greater access to roll call votes. To the contrary, it is exceedingly hard to find legislators who have made any arguments on the public record against greater transparency for roll call votes. Nor am I aware of any public vote on this subject that has ever failed to pass. The one vote I am aware of, in New Jersey, passed the Senate 39-0 and the Assembly 79-0.[34] To my knowledge, none of the twelve legislative branches that launched websites with roll call votes by legislator appears to have done so with any public opposition in the legislature. These arguments, then, come from the academic literature on deliberative democracy, private conversations with legislators, and the general arsenal of arguments that legislators publicly use when they want to avoid politically popular transparency reforms.

Novelty. The idea of making roll call votes available online by legislator is hardly new. Three companies—Congressional Quarterly, National Journal, and Gallery Watch (owned by the publisher of *Roll Call*)—provide online roll call votes by legislator as part of expensive packages of legislative information. In addition, OpenCongress.org, GovTrack.us, and WashingtonPost.org have recently started providing such information without charge. At least twenty-two state

legislatures have companies that provide such information for a fee, usually of thousands of dollars per year per subscription.

Parties, interest groups, and opposition candidates routinely compile roll call votes by legislator, and they seek to use the most convenient online tools to do so.[35] One member of the National Online Legislative Association (NOLA), who requested anonymity, reported that legislative party leaders occasionally use such services to provide free opposition research to candidates from their own party during election season and that incumbent legislators use such services to do their own opposition research. Other users include former legislators turned lobbyists and government agencies who want to track agency-related legislation. In the U.S. Senate, the Republican and Democratic policy committees collect this information for the exclusive benefit of their own members.[36]

On November 11, 2004, the newly elected Speaker of the U.S. House, Newt Gingrich, promised that, as part of the Republican Party's Contract With America, "we will change the rules of the House to require that information will be available to every citizen in the country at the same moment that it is available to the highest paid Washington lobbyist."[37] Only days before this statement, the Republicans had overturned longtime Democratic majorities in the House and Senate. After the Republicans took office the following January, Gingrich introduced THOMAS, the online Congressional information system for the public. While THOMAS provided roll call votes by bill, it conspicuously lacked roll call votes by legislator.

Ralph Nader has campaigned for improved online access to congressional votes since the mid-1990s. In 1994, he set up the Congressional Accountability Project, directed by Gary Ruskin. On August 22, 1995, the Congressional Accountability Project sent a letter to the Speaker of the House signed by dozens of senior executives at non-profit institutions such as Common Cause, the Natural Resources Defense Council, the Project on Government Oversight, Yale University Library,

and Harvard University Library. The letter requested that voting records of members of Congress be made more accessible online.[38] On July 29, 1998, Gary Ruskin testified to this effect before the U.S. Senate Committee on Rules and Administration. In an op-ed in the *Los Angeles Times* in 1999, Nader and Ruskin observed: "Congress has yet to place on the Internet a searchable database of congressional votes, indexed by… member name."[39] In an article in *Wired* magazine on this issue, Ruskin was quoted as saying "You can get a senator's favorite recipe on his Web site, but you can't search how he voted.[40]" In 2004, Nader put together the Congressional Voting Record Project, a coalition of 14 conservative and liberal groups, including conservative groups such as Americans for Tax Reform and Judicial Watch, and liberal groups such as the NAACP and National Resources Defense Council. Nothing came of it.[41]

On November 18, 1996, Kenneth Weinstein, Director of Government Reform at the Heritage Foundation, a think tank closely allied with Speaker Gingrich and arguably the most influential conservative think tank in the U.S. at that point in time, published an issue paper titled "Needed: A Congressional Freedom of Information Act." Among its many recommendations to improve Congressional transparency was a recommendation to enhance THOMAS to provide roll call votes by members of the House and Senate.

In 2006, Democrats won control of the House like Republicans had done 12 years before. Newly elected House Speaker Nancy Pelosi promised to create "the most honest and open Congress in American History."[42] On February 8, 2007, the Sunlight Foundation, following in the tradition of Nader's now defunct Congressional Accountability Project, launched the Open House Project. The Project was backed by a bipartisan coalition of more than two dozen non-profit groups, including the Center for Democracy and Technology, OMB Watch, and the Heritage Foundation. Speaker Pelosi endorsed the Project: "The Internet is an incredible vehicle for transparency…. I'm

encouraged by this working group and look forward to recommendations on how the House can be as open and accessible to citizens as possible."[43]

On May 8, 2007, the Open House Project released its report, which, among a long list of reforms, called on Congress to post online all legislative information, including roll call votes, in a downloadable, structured database format.[44] The politically shrewd report did not explicitly call for Congress to make roll call votes accessible by legislator, but it was implicit in its recommendations. Speaker Pelosi applauded the effort and released a letter endorsing it.[45] The report received wide publicity in *The Hill*, *Roll Call*, and *Washington Examiner*, which cover Congress and are closely read by Congressional staff.[46] Now more than a year has passed and THOMAS still doesn't provide roll call votes by legislator, although a beta version of THOMAS has been created to search for bills by sponsor.

In short, making roll call votes available by legislator is an obvious, highly publicized idea, not an esoteric new information age idea.

Inertia. Legislatures are slow moving institutions. For example, it is not unusual for them to take many years to copy efficiency enhancing innovations already adopted in the private sector. Delay between the introduction of the Internet and a legislature's use of it to maximize democratic accountability would not be unexpected.

However, legislatures are accomplished users of the Internet, with in-house staff skilled in routine database and web development, including the use of structured computer databases to store roll call votes. Every legislature studied in this survey provided Internet access to bill information and legislator home pages. To the extent that providing roll call votes by legislator is an obvious and trivial task, the inertia argument is weak.

Templates for creating sophisticated access to roll call votes are readily available in the private sector, given that dozens of proprietary services, such as Arizona's LOLA, Massachusetts'

Instatrac, and New Jersey's GovNetNJ.com, already provide such information and actively market their services to government agencies and legislators.

Moreover, the necessary data to provide such access are already collected and often stored in a flexible, structured relational database. For example, International Roll Call, which provides roll call systems to 44 of the 99 state legislative branches, uses Oracle as the database engine for its LawMaker System. Oracle is arguably the most sophisticated database program available in the world today. Making the Oracle database of roll call votes available by legislator would be a trivial programming task.

Given that party leaders keep close track of the roll call votes of their members, it is likely that many legislatures have already developed such software using taxpayer money. From this perspective, online public access to roll call information can be viewed as a stripped down version of in-house systems.

If so, roll call votes wouldn't be the only case where democratically useful information is stripped from legislative information systems when the information is posted online. For example, bill drafting systems may include historical information about revisions and links to external documents that are used internally but stripped out when the bills are made public.

Providing online access to roll call votes by legislator seemed such an obvious and trivial feature that the information technology (IT) staffs in Vermont and North Carolina, two of the six states that provide online access to roll call votes by legislator, took advantage of the new technology to post roll call votes online without consulting the legislature's leadership. Says Gerry Cohen, the Director of Bill Drafting for North Carolina's General Assembly, "Our IT folks were unaware that not providing votes by member was ever even a topic for discussion, and they never got any pushback."[47] Vermont's Duncan Gross adds, "In Vermont it was similar to the North Carolina

situation: when we added the roll call detail functionality to our internal database, we just naturally went ahead and put it on the Web site. No discussion, we just did it."[48]

Cost. Closely related to the inertia argument is the cost argument. In a general report on legislative technology in the fifty states, the National Conference of State Legislatures uses this type of argument to explain the apparent technological backwardness of legislatures (while also ignoring the possibility that legislators might have a conflict of interest in deploying new information technologies):

> State legislatures have been seen by some as less than innovative in the use of technology, especially in comparison with the private sector and even the executive branch of government. It would not be surprising if the generalization is true, though, in light of t he constant and close scrutiny given to legislative expenditures in the media, legislatures often are reluctant to pay for computer equipment or consulting equipment for their own benefit, especially when most are seeking ways to reduce government spending overall."[49]

However, as applied to the online accessibility of roll call votes by legislator, cost arguments do not withstand scrutiny. The marginal cost of making roll call votes accessible online by legislator is now essentially zero.

How large is the one-time fixed cost of providing such information? I have spoken to a variety of programmers about the one-time cost of writing an online search query for roll call information stored in any major commercial database program. None think it is a difficult or especially time consuming programming task.[50] Nor could I find a legislator who thought cost was a significant barrier to providing this type of information.

GovTrack.us provides congressional roll call votes by member of Congress—along with many other sophisticated features. It has been programmed and maintained by a single graduate student working without compensation and on a part-time basis. Moreover, GovTrack.us has had to gather the legislative information the hard way: by scraping and parsing legislative web pages

rather than having direct access to the structured database of information that Congress uses to generate its web pages.

It is also possible that providing a decent search interface to legislative information could result in a net cost savings to governments, since in many states a dozen or more state agencies may each spend thousands of dollars per year to subscribe to commercial legislative information services that primarily make existing public legislative information more accessible.

Common sense would also suggest that if small states such as Vermont, New Hampshire, and Maine can afford to provide this information, then large states such as California, New York, and Massachusetts should be able to do so, too. California, for example, has a hundred times the population of Vermont, and whereas Vermont is known for its tourism and dairy industries, California is the high-tech capital of the world.

Demand. There is an economic demand for convenient access to legislative information, as evidenced by the annual subscription fees intermediaries are willing to pay to commercial services for improved access to this information. However, such access to legislative information should not be justified in terms of economic laws of supply and demand. It should be justified because without an affordable way to monitor elected officials, democracy is impossible.

In terms of the democratic need for roll call votes by legislator, it is true that the general public would make very little direct use of it. This is the type of information most useful to intermediaries such as political parties, press, interest groups, and opposition candidates. But this could be said of access to all public meeting information. Nevertheless, we have Open Meeting and Public Records laws because citizens in a democracy generally accept that it is vital for intermediaries to have convenient access to such information—since only through such access can the public hold its elected officials accountable.

One striking piece of evidence for popular interest in roll call vote information by legislator comes from THOMAS, the Congressional legislative information system. On the home page of THOMAS is a link named "Roll Call Votes." When the link is clicked, a page comes up offering a chronological list of floor roll call votes by bill. At the top of this page is a link to a page called "Compiling a Member Voting Record." It starts: "Users of the THOMAS system often ask where they can get voting records for their members of Congress. By "voting record," they may mean all the votes cast by a specific member of Congress over a length of time, or only votes by a member of Congress on a specific issue or set of issues, such as affirmative action or environmental protection."[51]

One might think that if there was such a well-recognized demand for roll call votes by legislators that THOMAS's programmers would have provided it like the legislative programmer in New Hampshire. Instead, THOMAS provides advice on how to manually compile this information: "You can begin to compile your own records for individual members of Congress by searching the THOMAS system — either through the Bill Summary and Status files, or the Bill Text files."[52]

This advice section then closes with a disclaimer, explaining that the roll call information THOMAS didn't compile could be misleading in the hands of the public: "Although you may compile a voting record for your Representative and Senators, roll call and recorded votes on the House and Senate floors, despite their high visibility, are imperfect and imprecise measurements of a member's views. A fuller assessment can be made by considering the member's statements during debate, in speeches on the House or Senate floor, books, newspaper or periodical articles they may have written, press releases and briefings, committee deliberations, and the time a member spends in gathering information on and gaining expertise on issues."[53]

The catch is that THOMAS makes this other legislative information, notably legislators' floor and committee statements explaining their roll call votes, as inaccessible as it makes roll call

votes by legislator. Since Congress collects all this information in electronic form and makes it publicly available in other contexts—e.g., through committee websites and through the chronologically organized *Congressional Record*—it would be a relatively simple programming task to link this information to roll call votes to help solve the problem THOMAS itself has identified. Yet one gets the sense that THOMAS doesn't provide such linkages for the same reason it doesn't provide convenient links between legislators and their roll call votes: legislators don't believe it is in their self-interest to make this information readily accessible.

Misuse. Legislators worry that roll call votes and other legislative information could be used out-of-context by their opponents. This could not only hurt incumbents unfairly but also damage the institutional capacity of legislatures. Legislators would anticipate this misuse and thus be forced to spend their time trying to justify votes, which would divert their attention from more important matters of public concern.

This is a legitimate worry. There is abundant evidence that opponents frequently use information out-of-context to score political points. But it is also, at its root, profoundly anti-democratic. If the public cannot be trusted to know how their elected representatives voted on their behalf, then a fundamental premise of representative democracy—that citizens are competent to judge the actions of their rulers—is undercut.

An analogy to this type of problem is the problem of free speech. The traditional remedy for deceitful political speech is not to give political elites the right to ban the speech but to encourage diverse voices so the public can ascertain the truth for itself. In Supreme Court Justice Oliver Wendell Holmes' famous words: "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[54]

The preferable cure, then, to the problem of opponents using votes out-of-context is not to try to hide the votes but to make information about their context more accessible. If legislators find

they need to make a non-intuitive vote—such as a vote against an amendment they support because they view it as a poison pill that would kill the larger bill they want to pass—then they should have an opportunity to explain their vote in the public record and opponents who use that vote without providing the context should be taken to task by the press. In the Internet world, where links from a vote to its context in the public record are easy to provide, it should be the accepted norm that any reference to a legislator's vote will be linked via the legislative website to the legislator's explanation of that vote.

Should the additional time allocated to explaining votes be viewed as a waste or a benefit? On the one hand, time spent justifying legislation means that legislators have less time to do other desirable things, such as craft needed legislation. On the other hand, passing and justifying legislation is their job. As deliberative democratic theorists argue, when legislators provide public reasons for their actions rather than merely bargain among interested parties in secret, the democratic process is strengthened.[55] Congressional scholars Thomas Mann and Norman Ornstein argue that "More genuine debate needs to occur at every level of the legislative process."[56] Among legislators' many distractions from pursuing their representative function, including the huge amount of time spent raising campaign contributions, explaining their votes is likely to be relatively minor.

Bolstering the deliberative democratic argument is that information technology has greatly reduced the cost of providing public reasons for actions. In the past, when effective legislative speech was necessarily restricted to face-to-face group environments such as committee meetings and floor debates, colleagues had to listen to explanations intended for the public record and this unduly slowed down the legislative process. But with modern information technology, such statements don't have to consume the time of colleagues. They can be inserted into the public record electronically and then linked to the relevant roll call vote.

Still, the problem of opponents misusing legislative information is real. To the extent that the press is weak or irresponsible, the problem is aggravated. It is ultimately the press's job to alert the public when an opposition candidate, interest group, or other intermediary is misusing an incumbent candidate's public record. Thus, fostering a strong press—a topic beyond the scope of this paper—needs to go hand-in-hand with improving legislative information systems.

Perhaps the best argument for improving the accessibility of roll call votes is fairness for opposition candidates. It is true that opponents can use roll call votes out-of-context and with harmful consequences—but so can incumbents. When incumbents take credit for votes, they can put the best possible spin on them in a way that is highly misleading to the public. Incumbents are also likely to spin the meaning of their votes depending on the audience to which they are speaking. Conclude Congressional scholars Gary Mucciaroni and Paul J. Quirk about how incumbents spin the meaning of their votes: "Anyone listening to debate in Congress will be treated to a stream of half-truths, exaggeration, selective use of facts, and, in a few instances, outright falsehoods."[57]

Why should incumbents be given privileged rights to spin their votes? The appropriate question, then, is not whether opposition candidates will misuse legislative information—they will. It is whether the opportunity to misuse information is reasonably balanced between incumbents and challengers.

Legislative Procedure for the Information Age

If the problem of democratically unaccountable legislative information systems were restricted to needlessly costly access to roll call votes, the problem would be relatively minor. However, the inaccessibility of roll call votes is only a symptom of a much larger failure of legislative information systems to take advantage of the opportunities created by new information technology. Some of these problems are merely matters of improving access to already public information. The

problem discussed in this paper—the difficulty of accessing roll call votes and related information by legislator—is one such example.

Another example is access to general public meeting information. The great majority of public meetings are recorded with a set of written minutes that do little more than identify who spoke and how legislators voted. With today's technology, there is no good reason not to create a high-fidelity record (such as a video record), integrate that record with the meeting agenda and documents cited in the agenda (e.g., a budget), and make the record permanently accessible on a public website. Today, this is very rarely done, despite the fact that the technology to do so is readily available.[58]

More fundamentally, the legislative process needs to be rethought in light of the new possibilities for democratic deliberation and accountability created by new information technology. To think about this issue, let's distinguish between two types of legislative procedure. The first type is what we have been discussing in this paper. It is the formal procedures controlled by the majority party, where the ability to speak and vote largely depends on the consent of the legislative leadership and only one action can be taken at a time.[59]

The second type of legislature allows legislators to speak and vote on the public record, at any time, without seeking the leadership's permission and recognition. Speaking and voting in the first type of legislature is costly because only one person can hold the floor at a time. The first "may-I-speak" legislature may be called the *Primary Legislature*; the second "free speech" legislature may be called the *Shadow Legislature*. The former emphasizes majority rights, the latter minority rights, with minority defined as any group of legislators that with respect to a particular issue in the Primary Legislature has second class speech and voting rights in comparison to the majority.

In its discussion of procedure in the U.S. House of Representatives, the Congressional Research Service starts its analysis with the critical assumption that high cost minority speech drives

the current structure of legislative procedure: "Underlying the complicated legislative procedures of the House of Representatives is the general principle that the majority should be able to prevail without undue delay by the minority."[60] In smaller legislatures such as the U.S. Senate, minorities can be granted more power because their ability to delay and obstruct is lessened. But the underlying constraint of costly minority speech is assumed to remain valid.

Creating a Shadow Legislature is facilitated by new asynchronous information technologies, which undercut the assumption of costly minority speech. In a conventional synchronous public body, only one legislator can speak at a time. This makes speech costly because everybody else has to listen and the important work of the democratically elected majority can be brought to a halt by an obstructionist minority. Alternatively, the majority has to consent to allow a particular piece of information to be entered into the public record.

With today's information technology, it is easy to give all legislators enhanced speech rights—because nobody else has to listen to a speaker and the cost of storage and distribution is negligible. This means that, for the first time, First Amendment values of free speech can regulate legislative speech, arguably the most important type of political speech in a representative democracy. Majorities will presumably continue to find it in their self-interest to restrict minority speech,[61] but their legitimate excuse for doing so is becoming weaker.

The Shadow Legislature does everything the Primary Legislature does, but without the majority controlled speech and voting restrictions. In a Shadow Legislature, a member can speak, introduce amendments, and vote on legislation without seeking the permission of the legislative leadership. All this communication is inserted into the formal, public legislative information system where it would belong if it didn't need to seek the approval of the majority leadership of the Primary Legislature. For example, let's say the leadership has decided it won't allow any amendments to bill X. However, legislator A wants to introduce an amendment to X. In the Primary Legislature,

legislator A couldn't get his amendment voted on. But in the Shadow Legislature, he could. Although the amendment would have no chance of passing, important information about the bill's politics and policy would likely have been revealed. The Shadow Legislature would also force the majority into an implicit vote on legislation that it would prefer not to have to come to a vote. For example, let's say the majority in the U.S. House of Representatives wouldn't allow amendment Y to come up for a vote, but in the Shadow Legislature the amendment got 217 of 435 votes; that is, just one vote shy of the majority. The minority could then credibly claim that the other 218 members had, for practical purposes, cast a "pocket no vote" just like a president can pocket veto a bill by not signing it when Congress is in recess.

The basic mechanics of a Shadow Legislature are simple. As in a Primary Legislature, members can take three basic types of official actions: enter a statement, propose legislation (with accompanying rules), and vote. Statements would be akin to blog entries but their links would be much richer than that found in the typical blog. They would be tagged by key attributes of official legislative acts such as date, type of legislation (bill or amendment), place (floor, committee, conference committee, caucus), and type of event (hearing, markup). The entries would then be automatically linked to all these elements in the legislative information system. Thus, it would be easily accessible for different types of purposes. For example, a journalist or other intermediary could easily find all the Shadow Legislature documents associated with a Primary Legislature bill they were researching. And an opposition candidate could point to an amendment introduced in the Shadow Legislature that his opponent, a candidate in the majority, opposed with a pocket no vote—and with bad long-term consequences for his constituents. Once a Shadow Legislature entry was time stamped and entered into the legislative information database, it would be authoritative in the same way as official public acts within the Primary Legislature.

Current legislative procedure has some Shadow Legislature like features. For example, all members of a committee may ask the Committee Chair to enter their written statements into the public record. But the Committee Chair controls the public record and typically does not make such statements readily accessible. In a Shadow Legislature, the minority would be much less dependent on the goodwill of the majority to both enter information on the public record and make that information readily accessible.

Perhaps the closest precedent for the Shadow Legislature is the system of "Dear Colleague" letters used in legislatures. These letters are part of the official legislative information system and "primarily used to encourage others to cosponsor or oppose a bill."[62] According to the U.S. House Committee on Administration, legislative staff often receives more than 70 Dear Colleague letters per day.[63] The catch is that these letters are neither published nor linked to the public legislative information system.

Those most dependent on the Shadow Legislature would primarily be those in the minority because in the Primary Legislature those in the minority are not given the same speech and voting rights as those in the majority. Minority rights are essential to democratic accountability because it is minorities that force majorities to give public reasons and take responsibility for their actions. As Constitutional scholar Adrian Vermeule describes this democratic logic: "[S]ub-majority rules are best understood in procedural terms, as devices that empower minorities to force public accountability and transparency on the majority…. Accountability forcing is accomplished by empowering minorities, through sub-majority rules, to force the majority to make a highly visible, ultimate substantive decision on a given question, rather than disposing of the issue in some less prominent fashion, including simple inaction."[64]

Creating a Shadow Legislature to enhance minority rights and force democratic accountability on the part of the majority is not enough. The Primary Legislature also should be

reformed, if only to make the Shadow Legislature effective. As with the Shadow Legislature, enhancing minority rights in the Primary Legislature is also important. But this effort is far more difficult for the reasons already explained: it creates opportunities for the minority to restrict the will of the democratically elected majority and to reduce the efficiency of legislative institutions to do the public work that needs to get done.

Nevertheless, new information technology significantly changes the cost-benefit calculus of making two important changes in the Primary Legislature that would strengthen minority rights while enhancing democratic deliberation and accountability.

The first change has been sought since at least the late 1960s during the Congressional debate over what would become the Legislative Reorganization Act of 1970.[65] It calls for making all legislation, except under extraordinary circumstances, publicly available for at least 72 hours before it is voted on. When legislative leaders have already set their minds on a particular course of action, they like to provide as little notice as possible on potentially controversial issues because such notice, from their perspective, simply provides information and time for the opposition to mobilize. Today, organizations such as ReadTheBill.org, The Reform Institute, and the Open House Project continue to advocate for such advance notice of legislation.

Without the opportunity to have a proactive discussion of legislation, the democratic value of free speech in a Shadow Legislature would be significantly reduced. One reason is that the incentive to engage in vigorous democratic deliberation is greatest before legislation is passed because such deliberation offers the prospect of having an immediate, tangible impact on the development and passage of public policies. This free marketplace of information, in turn, tends to improve the quality of decision making. A second reason is that such proactive deliberation enhances democratic accountability. At the next election, voters will want to know if their elected representative exercised good judgment in passing legislation. To make this evaluation, voters need

to know what information was readily available to their elected representatives when they made their key decisions. Such retrospective democratic accountability, arguably the most important type of legislative accountability,[66] is lost when bills are released and voted upon at the last minute.

The second change has been debated since at least the Constitutional Convention more than two hundred years ago. This is the voting threshold at which minorities can require the majority to take a roll call vote. The Framers of the Constitution set this requirement at one-fifth of the members of the legislature. The dominant concern then was that roll call votes were much more time consuming than voice and division votes and thus could be used to slow down the work of the majority and the efficiency of Congress as an institution.[67]

With today's electronic and portable roll call voting technology, this objection is eliminated: roll call votes take no longer than voice voices, and, since they don't generate uncertainty and the need to redo votes, should even be viewed as time savers. Thus, the hurdle for minorities to call for roll call votes should be reduced at every level of legislative decision making from subcommittees to the floor. Indeed, eliminating all types of votes but roll call votes should be carefully considered. This last step may be too extreme. Many votes are on truly trivial issues, such as "Without Objection, this meeting is adjourned." In other cases, the time necessary to justify a trivial vote may dwarf the time necessary to actually vote. Nevertheless, the balance should be shifted in the direction of more roll call votes because too many important and potentially controversial issues are decided without roll call votes when incumbents have a common interest in avoiding accountability for their actions.

Given the problem that both minority and majority legislators will have common interests adverse to the public, it is vital that the Primary and Shadow Legislatures be supplemented by a third type of legislative information system, a niche media structured on the foundations of the publicly-available databases created by both the primary and shadow legislatures. Many attempts are

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currently being made to create such "Legislative Media," including at the U.S. national level

OpenCongress.org, GovTrack.us, and Maplight.org; at the U.S. state level RichmondSunlight.com

(Virginia), KnowledgeAsPower.org (Washington), and OpenMass.org (Massachusetts); and overseas

TheyWorkForUs.com (the United Kingdom), OpenAustralia.org (Australia), and

HowdTheyVote.ca (Canada).

Legislative Media are arguably a paradigmatic example of the new social, user generated

media. They are a distinctive, innovative mash up of government information, citizen participation,

and professional journalism.

Legislative Media are attempting to take on three primary functions: aggregating the

information in the Primary and Secondary Legislatures; inviting citizen feedback on the particulars

of those two legislatures; and synthesizing all that information in a way that allows the public to

monitor legislatures and legislators with less effort than ever before. The key stumbling blocks to

the development of a powerful Legislative Media are parliamentary procedures and disclosure

policies that serve to hide rather than reveal potentially controversial information.

Legislative Media presume that the current chronological and news driven structure of the

mass media is inadequate to the information and deliberative needs of a modern, complex

democracy. They are not a substitute for Mass Media, but an intermediary type of media between

the raw information of legislatures and the highly compressed information that emerge from popular

media. Unlike interest groups, which collect much the same information as Legislative Media,

Legislative Media aggregate all information in an objective format without regard to a lobbying

agenda.

Legislative Media take on important functions that governmental legislative information

systems cannot reasonably take on because of First Amendment considerations. For example,

moderating discussion forums providing citizen feedback would appear to be an essential function

of a modern legislative information system. But elected officials are hesitant to take on such a role, in part because they recognize that the public won't trust them to moderate such discussions impartially.

To encourage the development of vigorous Legislative Media, technology staff in legislatures should focus not on the development of their own public website interfaces but on the development of structured databases of legislative information made freely available on their public websites.[68] Regardless of the conflict of interest problem, it is unreasonable to expect that governments have the imagination and marketing sensitivity to dream up all useful views of legislative information, including links to non-government data, that voters would find useful. For example, suppose that legislatures made roll call votes by legislator easily accessible on their public websites. This would still constitute an absurdly primitive interface to do roll call vote analysis compared to what is currently available on private legislative information systems, which, for example, offer roll call statistics on the percentage of times a legislator voted with each other member of the committee he is on, the committee leadership, the party leadership, various powerful special interest groups; and any user's own preferences.

The hierarchical relationship between the different components of the legislative information system is depicted in Figure 1.

Why Legislative Information Matters

Legislative information is not a mass medium and never will be. With rare exceptions, only a tiny percentage of the general population will ever look at it. By conventional benchmarks of mass media impact, such as the size of the direct viewing audience, its impact is trivial.

However, legislative information provides the raw information on which democratic accountability is based. Its impact on the democratic process is therefore anything but trivial.

Figure 1. Hierarchical Order of Legislative Information Systems
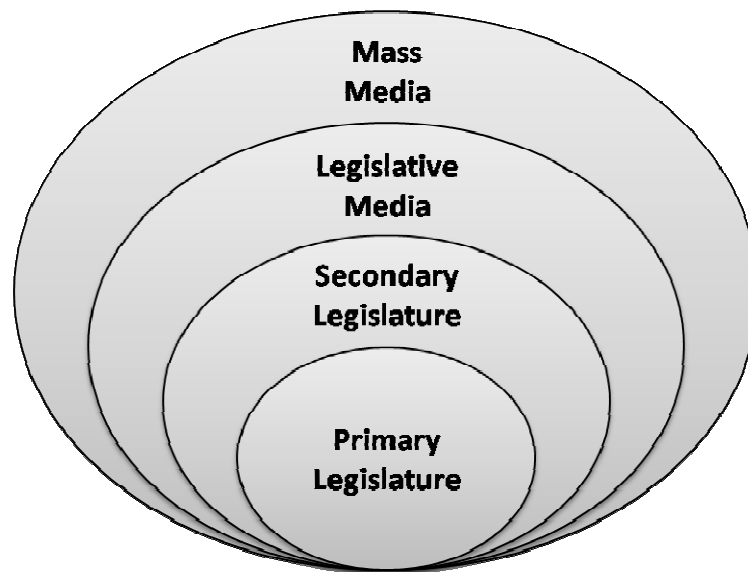
What is the mechanism of this influence? It is a multi-step information flow, where the raw information generated by legislators' actions is synthesized and condensed by information agents such as the press, interest groups, and political candidates and then transmitted to the general public.

This multi-step information flow greatly increases the efficiency of democratic accountability. Just as delegating decision making to elected representatives greatly increases the efficiency of democracy, delegating the monitoring of those representatives to information agents greatly increases the efficiency with which such monitoring can be done.

In a modern, complex democracy, it is unrealistic to expect that the general public will directly monitor their elected representatives. If every citizen needed to pay attention to what their representatives did, modern civilization would collapse under the burden.

The critical importance of having a good legislative information system, then, is that it empowers information agents to do a better job informing the public. Since information agents are

often extremely sensitive to the costs of accessing legislative information, even a slight change in these costs can have a big impact on the extent to which they monitor elected officials on behalf of the public.

The impact of reduced information costs from improved legislative information systems can be divided into three major categories: how informed journalists are, how biased journalists are, and who becomes a "journalist."

High legislative information costs lead to less monitoring of elected officials, which results in less informed reporting and analysis of their behavior. To date, the impact of new information technology on the resources available to do journalism has been mixed. On the one hand, as advertising dollars have migrated toward Internet search engines like Google and dedicated classified advertising services such as Craigslist, the amount of advertising dollars available to support the news media appears to have been reduced.[69] On the other hand, the cost of gathering and distributing news has also been reduced. More affordable access to newsworthy legislative information could be a major factor in reducing the cost of monitoring elected officials. For example, the cost of viewing public hearings, identifying useful sources, and discovering points of controversy could all plummet from improved legislative information systems.

High legislative information costs also create conflicts of interest for journalists. Today's journalists must ask legislators for much of their information. This gives legislators the power to trade information for favorable coverage. A local school reporter, for example, who is expected to generate three school system stories a week, cannot afford to alienate the school superintendent and handful of school board members. If she did, her sources of information would dry up and she might be out of a job. The result is that journalists are co-opted by those in power. At the national level of government, where there are many more potential sources and much more competition among journalists, this type of corruption tends to be less important.

Lastly, high legislative information costs change the type of person who can become a journalist. Consider what happened when the Supreme Court began to release same-day transcripts of its proceedings. The number and nature of journalists covering the Supreme Court radically changed. Suddenly law school professors and practicing lawyers all over the country could compete with the professional journalists, and they could enrich their reporting with analysis that was often missing in the work of the professional journalists. A secondary consequence was that, to compete, the professional journalists could no longer get away with summarizing the Court's decision. Now they were expected to provide some analysis themselves—and, in doing so, they could improve their own work by reading the work of all those "amateur" law professor journalists.[70]

Access to improved legislative information, then, could have a great impact on the feasibility of high quality citizen journalism because citizen journalists are the most sensitive to the costs of gathering information. Today, a primary advantage of conventional, professional journalism is "boots on the ground."[71] Citizen journalists cannot afford to be physically present in legislatures and win the trust of sources. But if citizen journalists could get good information about legislatures without having to be physically present—like the law school professors who aspired to cover the Supreme Court and finally could when same-day transcripts were made available—the barriers to entry for citizen journalists who want to cover legislatures would greatly decrease.

Perhaps improved online access to legislative information could even make the media galleries in legislatures obsolete or at least much less important. If so, then the bloggers and citizen journalists who have been seeking "online media gallery" credentials should shift their focus to push for improved legislative information systems to eliminate the advantage that insiders with physical access to legislatures currently have.

Conclusion

The evidence supports the hypothesis that elected officials have a conflict of interest in using new information technology to provide convenient public access to roll call votes and related information directly linked to specific legislators. Moreover, this conflict of interest may be only the tip of the iceberg of a much larger and more important conflict of interest that legislators have in using new information technology to make themselves more democratically accountable.

If legislative information systems not only exhibit large democratic deficits but also serve as vital sources of affordable information about elected officials for both professional and citizen journalists, then improving such systems should have a significant salutary effect on the overall media system. Unfortunately, democratic reform communities interested in open government (such as members of the Washington, DC-based Open Government Coalition) and media policy (such as members of the Washington, DC-based Media and Democracy Coalition) tend not to recognize their close, shared interests. To the extent that legislative and mass media are inextricably linked in an efficient and effective democratic information system, this parochialism of interest can lead to major blind spots.

Democratic reformers will tend to gloss over the conflict of interest problems because it is generally not a good lobbying strategy to tell legislators it is not in their self-interest to support a particular reform. One strategy to overcome the conflict of interest problem is to build a grassroots constituency in favor of a particular democratic reform. Another strategy is to address the conflict of interest problem directly using such mechanisms as the referendum, independent commission, or citizens assembly. The merits of this second strategy are discussed in the second and final paper in this series: Using Citizens Assemblies to Reform the Process of Democratic Reform.

PAPER #2: Using Citizens Assemblies to Reform the Process of Democratic Reform

Twice during his life George Washington had the opportunity to seize dictatorial powers at the expense of America's fledgling democracy. The first time was after the British defeat, when he chose to resign from public life rather than use his control of the army to seize power. The second time was when he resigned at the end of his second term as President.

Historian Garry Wills reports that after Washington's first resignation, "The fame of the deed sped around the world."[72] King George III of England reportedly said when he heard the news: "If he does that, he will be the greatest man in the world."[73] Napoleon Bonaparte, who seized his crown shortly after Washington resigned from the presidency, observed: "They wanted me to be another Washington."[74]

Napoleon is a striking contrast to Washington. Both rose to fame as military commanders. And both championed the causes of liberty and political equality. But unlike Washington, when Napoleon had the opportunity to grab power at the expense of democracy, he could not resist the temptation to do so.

The Framers of America's Constitution recognized it was unwise to design a democracy based on the assumption that political leaders would make the goal of enhancing democracy their top priority. They also recognized competitive elections would not be adequate to prevent incumbent office holders from seizing power. A "checks and balances" system would also be necessary. One of the Framers, James Madison, famously explained the reasoning behind the design of this system:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men,

the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[75]

In a democracy with checks and balances, vertical accountability (where the government is accountable to voters) is complemented by horizontal accountability (where parts of government are accountable to each other and check each other's strivings for anti-democratic powers).[76] The separation of powers between the executive, legislative, and judicial branches is one of the ways the Framers institutionalized horizontal accountability.

The current system of horizontal accountability is incomplete because it is strong on preventing *interbranch* but not *intrabranch* abuses of power. It prevents gross abuses of power (between branches), but allows small abuses (within branches) to flourish. Specifically, where incumbent legislators have a collective interest in being re-elected, they can effectively skewer the system of democratic accountability to favor their own re-election. They cannot become tyrants, but they can nevertheless erect barriers to desirable democratic competition.[77]

The Framers were not oblivious to this danger. Recognition of it is tacit in the First Amendment, which made it illegal for elected representatives to monopolize certain mechanisms of intrabranch democratic accountability that were easy to delegate to the private sector, such as freedom of speech and of the press, and the right of the people to assemble and petition their government.

However, some mechanisms of intrabranch horizontal accountability could not reasonably be delegated to the private sector and were thus left in the hands of incumbent representatives. These include legislators' **d**istrict boundaries, **e**lection campaign finance, **v**ote-to-seat formulas (electoral systems), **i**ntegrity/ethics (e.g., personal finance and lobbying disclosure), and **l**egislative

information systems. A convenient acronym for these five mechanisms is DEVIL. These were the devilish details America's Framers didn't work out in their democratic design.

The tendency of incumbent legislators to rig intrabranch democratic accountability mechanisms in their own favor has been widely observed. This has been studied in gross terms as the "incumbents' advantage" or the lack of "competitiveness" in elections.[78] Or it has been studied in more fine terms as the various parts of DEVIL, including redistricting,[79] campaign finance,[80] ethics,[81] electoral reform,[82] and legislative information systems.[83]

A Short History of Intrabranch Horizontal Accountability Mechanisms

The Framers of the Constitution were profoundly mistrustful of the most obvious mechanism of horizontal accountability to address intrabranch conflicts of interest: direct democracy. They believed that direct democracy was impractical for a county the size of the United States. They were wary of direct democracy even for small countries, associating it with what they perceived to be the failed Ancient Athenian direct democracy.[84] Therefore, they made no provisions for direct democracy in the U.S. Constitution. In retrospect, this was a striking omission. Most new democratic countries that would be created in the next two centuries would include some type of direct democracy safety valve in their constitutions. Most American states created after the middle of the 19th century would do the same.[85]

By the end of the 19th century, mistrust of representative democracy was widespread and contributed to the formation of the Progressive Movement, which called for creating institutions of direct democracy, including the initiative, referendum, and recall. Governor Woodrow Wilson, who would be elected president of the United States in 1912, captured the sentiment of the times: "Bills that the machine and its backers do not desire are smothered in committee; measures which they do desire are brought out and hurried through their passage…. It happens again and again that great groups of such bills are rushed through in the hurried hours that mark the close of the legislative

sessions, when everyone is withheld from vigilance by fatigue and when it is possible to do secret things." Based on such observations of corruption in the legislative branch, Wilson concluded that the purpose of direct democracy would be "to restore, not to destroy, representative government."[86]

This association of representative government with corruption led many states, especially the new Western states, to include provisions for the initiative, referendum, and recall in their state constitutions. Between 1898 and 1918, 23 states adopted some form of direct democracy, usually both the initiative and referendum. In the next 90 years, another five states would join them, with Mississippi the last to join in 1992.[87]

But direct democracy has been no panacea. A large literature describes its flaws.[88] A major objection to initiatives is that they tend to be captured by special interests—the very entities that they were supposed to circumvent. It is expensive to formulate a proposal, gather enough signatures to get it on the ballot, and then wage an effective campaign to sell it to the public. Thus, special interest groups tend to dominate the process.

Another major objection to direct democracy is the primary rationale for representative democracy: citizens lead busy lives and do not have the time and resources to become experts on the types of issues often covered by initiatives and referendums. Yes, representatives may often be corrupt. But this must be balanced against the ignorance of the average citizen. To the extent that democracy is a choice between lesser evils, representative government may have the advantage.

In part to address the limitations of direct democracy as an intrabranch horizontal accountability mechanism, there has been a push in recent decades to use independent commissions. For example, a dozen U.S. states now have independent commissions to create legislation for redistricting political districts.[89] None of these independent redistricting commissions existed prior to World War II. Partly because the Constitution mandates its occurrence every decade, redistricting is the most common, high profile form of state level democratic reform in the United States. The

Constitution mandates that a census be taken every decade and Congressional seats reapportioned based on the results. Reapportionment, in turn, often requires redistricting. With the Supreme Court's *Baker v. Carr* decision in 1962, reapportionment also became a decennial feature of local government.

Members of independent commissions lack the democratic representation of interests associated with direct democracy. They partially compensate for that deficiency, however, by having much greater expertise in their subject matter than the average American. For example, the initiative is ill-suited to deal with a complex task such as redistricting. Dozens of different variables must be weighed, and great skill is required to draw the district maps. At the same time, using elected representatives to choose their own voters through redistricting is widely recognized to be fraught with democratic peril: in a democracy, voters are supposed to choose elected representatives, not the other way around.

However, it isn't enough that independent commissions include experts. Rule by experts is inherently undemocratic. As the great democratic theorist Robert Dahl observed: "Throughout the world policy elites are famous for the ease with which they advance their own narrow bureaucratic, institutional, or group interests in the name of the public good."[90] Thus, there is invariably an attempt to ensure that an independent commission's members collectively represent the public interest.

To the extent that independent commissions are advisory only, there is less pressure on them to be representative of the public. In this regard, there is significant variation among independent commissions, ranging from Hawaii and Montana, where the commissions' redistricting plans become law without legislative approval, to Maine and Vermont, where the commissions' recommendations are purely advisory. In Washington, the commission's recommendation becomes law unless voted against by two-thirds of the members in both the House and Senate.[91]

There are three basic types of representation for independent commissions: partisan, non-partisan, and bi-partisan, with the great majority being bi-partisan, often with a tie-breaker member jointly selected by the members of the two parties on the commission. In a bi-partisan commission, the commission members are selected to represent the two major political parties equally. Usually the majority and minority party leaders in the House and Senate pick the members. In a partisan commission, the members may all belong to one party and are representative of the public in the sense that duly elected majority party officials appoint them. In a non-partisan commission, members are chosen for their objective pursuit of the public interest.

Regardless of their type of representation, independent commissions are no panacea. Bipartisan commissions tend to be good at drawing districts that do not favor one party over another. This is no small achievement compared to the situation where the majority party has a monopoly on redistricting. But bi-partisan commissions also have a strong pro-incumbent bias, creating safe seats for incumbents of both parties. This contributes to the current situation of uncompetitive elections.[92]

Non-partisan commissions are much less widely used, in part because they are widely felt to be a figment of an idealist's imagination. Nelson Polsby characterizes non-partisan redistricting plans as based on "the hope that men are angels."[93] Jeffrey Kubin echoes this sentiment, arguing that to appoint a non-partisan redistricting commission "would require us to locate Plato's philosopher-King."[94]

Most recently, citizens assemblies have been proposed as a solution to the problem of intrabranch conflicts of interest.[95] In theory, a citizens assembly is the best of all possible mechanisms of intrabranch horizontal accountability because it combines the interest representation of direct democracy with the expertise of the independent commission.[96]

A citizens assembly is defined as a democratically representative governmental body whose members are randomly selected (rather than by election) and statistically representative of the population (thus requiring a large sample size), whose jurisdiction only covers issues (the DEVIL issues) where elected officials have a direct conflict of interest, and which has the power to bring its democratic reform proposals to an authoritative vote.

Definitions of citizens assemblies are usually more inclusive than the one proposed here.[97] Just as the initiative and referendum have not been limited to issues of democratic reform, the natural scope of citizens assemblies has been presumed to include any issue where the conventional representative process, often as a result of special interest politics, appears to have failed. Designing health care and climate change policies, for example, have been conceived of as good uses for a citizens assembly like process.[98]

I disagree with using "citizens assembly" in this broader context because the intrabranch conflict-of-interest problem is the underlying reason for the failure of representative institutions. If those institutions were fixed, the need for an alternative democratic mechanism would be eliminated. If citizens assemblies were an inexpensive way to make public policy decisions, then their application could be expanded more broadly. But given their very great expense—and intrinsic inefficiency compared to representative institutions whose members are chosen in part for their expertise—they should be limited to policy issues where they are indispensable.

To date, only two citizens assemblies have ever been implemented that have met these strict criteria: one met in the province of British Columbia, Canada during 2004; the other met in the province of Ontario, Canada, in 2006-7. A third citizens assembly-like body met in the Netherlands in 2006. It included all the attributes of a citizens assembly but lacked the power to force an authoritative vote on its final recommendation; its final recommendation was only advisory to parliament. Table 1 summarizes key attributes of the three citizens assemblies.

Table 1. Comparison of British Columbia, Netherlands, and Ontario Citizens Assemblies[99]

	British Columbia	Netherlands	Ontario
Meetings Start	January 2004	March 2006	September 2006
Meetings Finish	November 2004	November 2006	April 2007
Date of Final Report	December 10, 2004	December 14, 2006	May 15, 2007
Referendum Date	May 15, 2005 May 12, 2009[100]	N.A.	October 10, 2007
# of Members	161[101]	140	104[102]
Alternate Members Selected[103]	0	4	0
Total Dropouts	1	6	1
# of Political Districts	79	12	103
Members/District	2	from 3 to 30	1
Members Selected From Districts	158	140	103
Members Selected at Large	2[104]	0	0
Members Supporting Final Recommendation	95% (145/152)	114/127	84% (86 of 102 votes)
Voters Supporting Referendum	57.7%	N.A.	36.9%
Votes Required to Pass Referendum	60%	N.A.	60%
Budget for Member Deliberations[105]	$5.5 million	€5.1 million	$5.5 million
Budget for Marketing the Referendum	$.5 million	N.A.	$6.8 million
Total Government Budget	$6.0 million	€5.1 million	$12.3 million
Jurisdiction	Select Electoral System	Select Electoral System	Select Electoral System
Formal Power	Place referendum on ballot	Issue report to parliament	Place referendum on ballot
Status Quo System	Non-Proportional	Party-Centered Proportional	Non-Proportional
Recommended System	Single Transferable Vote Proportional	More Candidate-Centered Proportional	Mixed Member Proportional
Stratification Criteria for Random Sample	Gender, Age, District, Aboriginal	Gender, Age, District	Gender, Age, District, Aboriginal
Population	4.4 million	16.3 million	12.9 million
Initial Sample Size	23,034	50,000	123,489
Positive Responses	1,715	4,000	7,033
% Initial Yield	0.07	0.08	0.06
2nd Round Sample Size (invited to attend information session)	1,441	N.A.	1,253
Number of Information Sessions	27	N.A.	29
Positive Responses After Informational Session	914	1,700	N.A.[106]
Final Round Sample Size	160	140	103

The model for both the Ontario and Netherlands citizens assemblies was the British Columbia citizens assembly, which has spawned a substantial academic literature, including an authoritative edited volume published by Cambridge University Press in 2008.[107]

In 2004, the government of British Columbia created an Assembly of 160 near-randomly selected citizens and gave it the job of recommending the best possible electoral system for British Columbia. If the Assembly recommended a system different from the current one, its recommendation would be placed on the ballot at the next provincial election as a referendum item.

Members were chosen via a stratified random sample. To ensure that the resulting Assembly looked like the population of British Columbia, the random selection was stratified over three selection rounds by riding (political district), gender, and age. Invitations to become members of the Assembly were initially sent to a stratified random sample of 23,034 individuals. Of those, 1,715 expressed an interest in learning more information about becoming a member of the Assembly. Of those, 1,441 were selected via a second round stratified random sample to attend a local informational session describing the Assembly's work and the significant commitment being a member would entail. After the informational sessions, 914 agreed to participate. Of these, 158 (a male and female from each of British Columbia's 79 ridings) were selected via a third round stratified random sample. After this final selection, when it was discovered that no native British Columbians were in the final 158, two were randomly selected, thus bringing the total to 160, plus an additional vote for the Chair of the Assembly.

All selected members of the citizens assembly would be paid $150/day for their participation, plus travel expenses. The total budget for the citizens assembly was $5.5 million (in Canadian dollars).

The Assembly deliberated for close to a year, mostly on weekends, before making its recommendation. The deliberations occurred from January through November 2004, with the

referendum in May 2005. The referendum received 57.1% of the popular vote but needed 60% to pass. After failing to pass by such a close margin, the government, still led by Gordon Campbell, ruled that the Assembly's recommendation would be placed on the ballot again, at the next provincial election in May 2009.

Driving the push for citizens-assembly-based electoral reform was the sense that the current electoral system was deeply flawed but politicians shouldn't be trusted to change it. In 1996, the Liberal Party had lost an election due to what its head, Gordon Campbell, believed was an unfair electoral system. Campbell subsequently promised that if he were elected, which he was in 2000, he would institute a citizens assembly to propose a new electoral system for British Columbia.

Campbell appointed a former leader of the Liberal Party, Gordon Gibson, to propose a detailed implementation plan for the citizens assembly.[108] With only minor changes, the recommendations he came up with in 2002 were approved by the legislature in 2003 and institutionalized as the British Columbia Citizens' Assembly on Electoral Reform the following year.

The Ontario Citizens' Assembly on Electoral Reform met from September 2006 to April 2007 and submitted a recommendation for electoral change that was placed on the ballot in October 2007 and received 37% of the vote, far short of the 60% needed for passage. Although the Ontario Citizens' Assembly was inspired by the British Columbia Citizens' Assembly and closely hewed to the model it established, it differed procedurally in important respects, including assembly size, duration, in-house expertise, and elite domination.

Assembly Size. The Assembly in British Columbia was more than 50% larger (160 members) than the Assembly in Ontario (103 members). Following the British Columbia example, Ontario decided to choose at least one member from each riding. But Ontario has 103 ridings as opposed to 78 in British Columbia. British Columbia randomly selected two members from each riding. But given the choice between an Assembly of 103 or 206 individuals, Ontario's leaders for

reasons of manageability and cost decided to go with one member per riding, resulting in a total of 103 members.[109] One result of this decision may have been a less representative assembly, including less diversity of opinion among the members.

Duration. The Assembly in British Columbia met for eleven months. This included a summer of no face-to-face meetings but extensive members-only deliberation online. Ontario cut out the summer months, meeting for eight months, about a 30% shorter duration than in British Columbia. Without the summer break, there was also minimal use of the members-only website. In British Columbia, the summer months appear to have been critical in shifting Assembly members away from an MMP to STV electoral reform recommendation. During the final months of the Ontario citizens assembly, there was no change from the members' initial preference for MMP.

In-House Expertise. The Research Chair in British Columbia was a political scientist who was one of the world's leading experts on electoral systems. In Ontario, the Research Chair was a political scientist with far less expertise in this particular area of political science. As a result, it was harder for Ontario Assembly members to ask electoral questions and get quick, authoritative answers.

Elite Domination: The Chair of the British Columbia Assembly stood to the periphery of the group, whereas the Chair of the Ontario Citizens Assembly stood in front of the group, classroom style. Perhaps as a result, the Ontario Assembly members appear to have been less rambunctious and behaved more like students than a legislative assembly. On the other hand, the Research Chair of the British Columbia Citizens' Assembly was known to have published work favoring STV. Regardless of his objectivity as Research Chair, this may have subtlety influenced the Assembly members who would have had ample time to learn about his writings.

The significance of these and other procedural differences is unclear. But they could have been a major factor in the different outcomes of the two assemblies, including the different policy

recommendations (STV vs. MMP), the different press coverage of the citizens assembly members (as impartial experts vs. advocates),[110] and the different outcomes of the ballot referendum (57% vs. 37% popular support). Eliminating procedural differences that undermine confidence in the reliability and validity of the citizens assembly process should be a top priority of reformers interested in improving the citizens assembly process.

Legislation to create a citizens assembly to develop democratic reforms has also been introduced in New Zealand (Supplemental Order 170, introduced on December 5, 2007), Hawaii (see SB1845, introduced on January 24, 2007, and reintroduced on January 22, 2008 as SB2619), California (A.C.A. 28, introduced on January 25, 2006), and the United Kingdom (Bill 88, introduced on November 15, 2005). These bills have all either been defeated (New Zealand and United Kingdom) or failed to even be placed on the agenda for a vote (Hawaii and California).

Reform Recommendations

The basic citizens assembly established by British Columbia is an innovative solution to the problem of elected officials having an inherent conflict of interest in designing democratic institutions with a direct bearing on their re-election prospects. It cleverly addresses the problems of citizen ignorance that plagues direct democracy and of lack of democratic representation and true independence that plague independent commissions.

However, citizens-assembly-based democratic reform is not without its own significant limitations. The biggest may be that in its current form a citizens assembly—to do well—is hugely expensive, both in terms of government expenditures and the burden it places on particular citizens. A citizens assembly may be the Rolls Royce of reforms to reform the process of democratic reform. But it bears a correspondingly high price tag.

Compared to independent commissions, for example, members of citizens assemblies start with less expertise with respect to a particular issue. Therefore, they must spend far more time than

expert-based commissions accumulating a body of knowledge that will result in an informed recommendation. This deliberation takes both extra time and money. Both the British Columbia and Ontario citizens assemblies took about two years from the time the member selection process began until the public voted on the recommendation via a referendum.

Similarly, independent commissions are comparatively small, rarely including more than a dozen members. Citizens assemblies, in contrast, must be large in order to be statistically representative of the public. Using more people over more time causes costs to greatly increase.

In Ontario, the cost per member for eight months of deliberation was more than $50,000.[111] Adding in the cost of promoting the Assembly's recommendations to the public, the total cost per member was over $100,000. Compared to this, the cost of the typical independent redistricting commission is negligible.

Compared to an initiative or referendum, a citizens assembly is also more expensive. Citizens deciding how to vote on a ballot item need spend minimal time doing so. Indeed, the average citizen probably spends less than 10 minutes researching a typical ballot item. In contrast, citizens assembly members are expected to take the time to develop a high level of expertise on the issue they will seek to bring to an authoritative vote. In British Columbia and Ontario, as we have seen, this required months of effort.

The government also bears a minimal cost for adding an additional item to a ballot that will be voted upon during an already established election. In contrast, a citizens assembly probably costs tens of millions of dollars to do really well—and that cost is largely independent of the size of the political district. Moreover, if the final output of a citizens assembly is a referendum item, then these costs must all be added to the costs of conducting a citizens assembly.

In addition to high costs, citizens assemblies in their current form have significant democratic deficits. They retain significant dependencies on elected legislatures to create their

agendas and appoint their leaders. This leads to concerns that highly motivated political elites could relatively easily manipulate them.

Their high cost of participation also creates sampling and self-selection bias. Paying for large numbers of people to participate is very expensive, so there is a strong temptation to skimp on numbers—and statistical representation—to keep costs down. Similarly, asking people to give up work, family, and other commitments to serve on a citizens assembly is a lot to ask, so less than 10% of those randomly selected to serve on a citizens assembly agree to do so, even if paid $150/day plus expenses. The combined factors of relatively small sample size and self-selection bias means that a citizens assembly may significantly depart from the democratic ideal of being a microcosm of the general public.

Fortunately, there is much room left to improve both the efficiency and democratic characteristics of citizens assemblies. The citizens assembly is still very much a democratic reform in its infancy. Taking the British Columbia Citizens' Assembly as the benchmark, here are my six suggestions for improvement.

1) **Make citizens assemblies into standing bodies to reduce the cost of deciding relatively minor democratic reforms.**

The current citizens-assembly model lacks economies of scope. It is therefore extremely inefficient for dealing with issues where elected officials have relatively simple conflicts of interest. Assume, for the sake of argument, that the fixed cost of a well designed citizens assembly is $10 million. That includes the costs of selecting members, giving those selected basic training, and hiring support staff. Now compare the cost-benefit ratio of making the following two decisions: designing a new electoral system versus designing a new legislative information system requiring that roll call votes be made accessible online by legislator. The first decision involves an intrabranch

conflict-of-interest issue of huge importance. For a country the size of the United States, even spending hundreds of millions of dollars to fine tune the electoral system might seem like a bargain.

The second decision, however, is relatively trivial. It's hard to imagine that citizens would need to spend very long debating whether or not they should have easy online access to a legislator's roll call votes. Such access seems inherent to the concept of representative democracy. Finding a legislator even willing to publicly defend the current inaccessible system would probably be very hard. One might thus guess that in a relatively short period—perhaps a matter of hours—a citizens assembly would affirm the need to make roll call votes by legislator easily accessible online. The problem is also relatively trivial to fix. Assuming a legislature already has the roll call information in a sophisticated, modern relational database such as the Oracle software program used by International Roll Call, which provides roll call systems to 44 state legislatures, an entry level software programmer with less than a day's work could probably provide the functionality to do online searches of roll call votes by legislator.

Would creating a $10-million-dollar public body to deal with a $1,000 problem make sense? If the value of such roll call access was sufficiently great, maybe it would. But what if there were dozens of such problems? Would it make sense to call a citizens assembly to address each one of them? The inefficiency of doing so would obviously be great.

The solution to this type of problem is relatively simple. To deal with the wide range of intrabranch conflicts of interest, a citizens assembly should be a standing rather than an ad hoc body. Then, if a relatively trivial issue comes up, no fixed costs of setting up a citizens assembly need be incurred. It's the same reason why legislatures have standing committees to deal with an ongoing class of issues rather than setting up an ad hoc committee to deal with every problem that comes along. Legislation currently before the Hawaii legislature (SB2619) calls for such a standing citizens assembly.

2) Enlarge citizen assemblies to reduce sampling bias.

Small citizens assemblies are likely to suffer from sampling bias, with the result that key interests are likely not to be represented in such a public body. This can be partially alleviated by taking a stratified sample based on objective, easily-determined characteristics such as prospective members' political district, gender, and age. But citizens also differ in hundreds of other ways, such as sexual orientation, ethnicity, religion, and political ideology, which a stratified sample cannot reasonably rectify because of the lack of objective, verifiable stratification criteria.

To make citizens assemblies more representative of the larger population, their size should be increased, especially for large countries and states. Surveys are often based on interviews with about 500 respondents, which would be a good target size.

Such a large citizens assembly would need to be divided into sections to achieve intimacy and high-quality deliberation. Geographically-based sections could also reduce transportation costs. I suggest nine such sections of 60 people each, resulting in a citizens assembly with 540 members— about the size of Congress.

3) Create an executive committee to allow the citizens assembly process to become truly independent of elected officials' agenda control.

In the current citizens assembly model, key parts of the citizens assembly's agenda and information environment are chosen by elected representatives. This reduces the citizens assembly's independence and thus capacity to solve elected officials' conflict of interest problem.

The solution is for citizens assemblies to create their own executive committee. This executive committee, like a public school board in relation to a public school system, would be responsible for setting the citizens assembly's agenda and hiring its executive staff.

I suggest the following electoral process for members of the executive committee. Each citizens assembly would have a term of one year, at the end of which members of each section would hold an election to appoint one delegate and one alternate to an executive committee for a three-year term. This would result in an executive committee of 27 individuals, with three representing each section. Each year the three executive committee members from a particular section would be subject to recall from that year's section. If one were recalled, then the alternate delegate from the original class would be chosen as a substitute.

To eliminate potential conflicts of interest, no executive committee or citizens assembly member would be allowed to vote on an issue that affected his own compensation; all such changes would only apply to succeeding citizens assemblies and executive committees.

4) Change the incentives for participating to reduce self-selection bias.

As Table 1 indicates, in British Columbia, Ontario, and the Netherlands, less than 10% of those randomly selected to become members agreed that, if they were chosen in the final selection round, they would become members of the citizens assembly. The reason for this low acceptance rate is the high opportunity cost of participating on a citizens assembly. For example, it is unreasonable to expect that most of the very old (e.g., those over 80) or very young (e.g., those in college) or in work roles with others dependent on them (e.g., mothers with young children and family breadwinners in mid-career) would be willing to devote the large amount of time necessary to serve on a citizens assembly.[112] To the extent that those who do not choose to serve on a citizens assembly are representative of the general populace, this is not a problem. But just as a telephone survey with a 10% response rate is not considered statistically valid, neither is a 10% acceptance rate to join a citizens assembly. In both cases, a wide variety of interests would likely be underrepresented.

The solution to the self-selection problem is not mandatory service. Even if service on a citizens assembly, like jury service, were made mandatory, the social costs of doing so would likely be excessively high. It's one thing to ask somebody to serve on a jury or grand jury in his or her hometown for a few days, weeks, or months. It is entirely a different matter to ask people to leave their families and work to attend a citizens assembly in a far-off place for an extended period of time. Even if a large part of the work were done through telecommunications, the opportunity cost to individuals would be too high. Moreover, forcing people to serve on a citizens assembly may not be a good idea, given that they need to be reasonably well motivated to do a good job.

Thus, I suggest the following approach to recruit citizens assembly members. It targets a broad cross section of Americans with the greatest incentive to serve on a citizens assembly while strengthening carrots and sticks to motivate prospective citizens assembly members still further.

In the year an American starts receiving social security benefits or reaches the age they would receive benefits, if eligible, that person would be put, for one year, in a pool of individuals eligible to serve on a citizens assembly. I chose this age because it is not too old and not too young; it is an age when family and work commitments are typically at a minimum, yet one is still mentally and physically vigorous. Prospective citizens assembly members appear highly sensitive to such age-related incentives, as evidenced by the fact that in British Columbia and Ontario prospective citizens assembly members in the 56-70 age bracket were most likely to respond affirmatively to a request to serve.[113]

Carrots and sticks should also be strengthened. Those unwilling to serve on the citizens assembly would lose social security benefits for the one-year duration of the citizens assembly or the portion missed without a valid excuse. Those serving would receive either their social security benefits or their average compensation for the prior three years, whichever was larger.

The question then arises, which is more democratically harmful, the self-selection bias of choosing citizens assembly members from all age groups, or the age bias that results when only those of a certain age are chosen? I believe that the age bias is the lesser and more manageable problem. Most issues of democratic reform, unlike, say, social security and Medicare retirement benefits, do not involve a direct conflict of interest based on age. When an issue of democratic reform, such as choosing a voting age, does present a conflict of interest, it is relatively easy to identify because the conflict is precise and transparent. In contrast, self selection bias can play out in countless hard to see dimensions such as ethnicity, income, religion, sexual orientation, family commitments, work commitments, ideology, and party identification. Thus, it is easier to manage age bias than self-selection bias because everybody will be on guard for it and will have relatively little difficulty credibly pointing it out. If the citizens assembly would want the public to vote in support of its recommendations, it would have to be wary about acting in such an obvious self-interested way.

Moreover, age bias is tempered in a way that self-selection biases are not. Older people typically have children and grandchildren and have a strong biological self-interest to care about their interests as well as their own.

Note that even a significant amount of self-selection and age bias would not be a definitive objection to citizens assemblies because all democratic bodies suffer from such representational biases. For example, juries are too small to be a representative cross section of the public, and legislatures tend to attract a highly skewed sample of the public by income, occupation, gender, and age. Moreover, unlike the decisions of juries and legislatures, the decisions of citizens assemblies are not final; they only have the power to request an authoritative vote such as a vote by referendum.

In addition to interest-based age bias, there is epistemic bias. Young and old people tend to know different things. Young people, for example, may be more technologically adept, whereas

older people might have a greater understanding of human motivation and institutions. In general, eliminating epistemic age bias has not been a factor in the design of representative democratic institutions. If anything, there has been a strong epistemic bias in favor of older people. The U.S. Constitution, for example, requires that the president of the U.S. be at least 35 years of age—older than the average lifespan in the late 18th century when the Constitution was adopted. In legislative bodies, the proportion of young people is far lower than the proportion of middle aged people. Currently, not a single 18-year-old serves in Congress or any of the state legislatures in the United States.

5) **Change the Rules on Non-Profit 501(c)3 Foundations to allow them to conduct campaigns for or against the recommendations of citizens assemblies.**

Politicians and special interest groups do not have an interest in educating the public about the merits of a citizens assembly's recommendations. In British Columbia and Ontario, for example, the political parties remained virtually silent on the referendum item proposed by the citizens assembly, and no major interest group financed an information campaign either for or against the referendum. In the case of elected representatives, a citizens assembly only has jurisdiction on issues where they have a conflict of interest, so they would have no reason to promote the recommendations of a citizens assembly. Moreover, anything they said would be inherently suspect, so they have an incentive to say nothing. Similarly, special interest groups rarely have an interest in democratic reform issues because they are interested in issues where they can reap concentrated benefits for themselves.[114] Since democratic reform tends to benefit everyone, not just their own narrow interests, special interest groups cannot be expected to engage in the type of high-profile initiative and referendum campaigns they do on other issues.

To address this problem, I suggest allowing charitable foundations to fund information campaigns on ballot referendums proposed by citizens assemblies. Charitable foundations already fund much of the democratic reform work in the United States, but it is illegal for them to fund information campaigns promoting any type of particular legislation, including referendums. A special exemption should be carved out for the legislative recommendations of citizens assemblies because those recommendations relate to collective benefits, not the type of exclusive benefits that the law restricting lobbying by charitable organizations was intended to prevent.

6) **Create a citizens assembly as a standing committee of the legislature when the state or national constitution doesn't allow for direct democracy.**

The U.S. Constitution doesn't allow any form of direct democracy, although about half U.S. states have provisions for the initiative, referendum, or recall. This makes implementing a citizens assembly along the British Columbia model exceedingly difficult to do because it would require passing an amendment to the Constitution.

The solution is to create a citizens assembly as a standing committee to both houses of Congress with jurisdiction over the democratic reform DEVIL issues and the power to command at least one roll call vote a year on the floors of the House and Senate on a bill of its own design. This could be achieved with a simple resolution of the House and Senate. The greatest difficulty with most democratic reform issues is getting them out of committee. Once they are out of committee, they tend to pass by large margins because it is too embarrassing for a member to oppose them under the glare of public scrutiny. Thus, the ability to propose a referendum item might give a citizens assembly greater powers, but the ability to command a vote on the House and Senate floors would also be a great power, especially if a citizens assembly came to have great democratic legitimacy and members of Congress grew fearful of taking away the citizens assembly's power of

requiring an up or down vote on its recommendations. The President would retain his veto and the courts their ability to engage in judicial review.

Conclusion

Experience has born out the Framers' belief in the importance of horizontal accountability to preserve and enhance democracy. However, the Framers didn't make adequate provision for the collective interest incumbents have in raising entry barriers for potential competitors. Indicative of this problem is the primitive state of legislative information systems in America. It is likely that conventional vertical mechanisms of accountability will eventually solve this problem. After all, most legislatures have at least some idealists genuinely committed to the principle of democratic accountability; voters do occasionally mobilize on issues of democratic reform; and powerful leaders committed to democracy even at their own short-term expense—like George Washington—do occasionally show up on the historical stage. But experience with the other DEVIL issues suggests that this will at best be a long-delayed and hard-fought process. Direct democracy and independent commissions are other potential solutions to this problem. But direct democracy is ill-suited for dealing with complex problems demanding expertise, and independent commissions lack democratic representation. This creates an opportunity for the citizens assembly, with suitable refinements on the current model established in British Columbia, to become the most effective solution yet to the conflict of interest problem that occurs when elected officials are expected to pass and enforce laws to enhance their own democratic accountability.

The conflict of interest problem in designing democratic institutions tends to be downplayed by democratic reformers. After all, if you want to get lawmakers to support a particular piece of legislation, it is generally not a winning lobbying strategy to argue that it is against their interest to do so. Like complaining about the constraints caused by the law of gravity, a fixed feature of the universe, democratic reformers also have nothing to gain by drawing attention to a problem without

a solution. But if an effective way can be found to take elected representatives out of the democratic reform process, then the conflict of interest problem can be brought front and center to the debate on democratic reform. Citizens-assembly-based democratic reform, by tackling the conflict of interest problem head on, thus offers the prospect of transforming the debate over democratic reform. It shifts the focus from vertical accountability (elections) to horizontal accountability (intrabranch checks and balances), and from the politically feasible to the democratically desirable. In this context, it is a meta-democratic reform: a reform that reforms the process of democratic reform so that other democratic reforms become politically feasible and, as a consequence, the democratic imagination unleashed.

ACKNOWLEDGEMENTS

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ENDNOTES

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[1] Most legislative scholars agree that legislators have personal motives, such as policy influence and prestige, other than re-election (see Richard F. Fenno, *Congressmen in Committees*, [1st ed., The Study of Congress Series (Boston,: Little, 1973). However, they also agree that the assumption of a re-election motive is reasonable and can be useful for generating hypotheses. It is in that spirit that this assumption is being made.

[2] Kathy Doddridge, "Organizations That Rate Members of Congress on Their Voting Records," (Washington, DC: Congressional Research Service, August 3, 1997).

[3] E.g., see Samuel Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116, no. 2 (2002), Jeffrey C. Kubin, "The Case for Redistricting Commissions," *Texas Law Review* 75, no. 4 (1997). Daniel H. Lowenstein and Jonathan Steinberg, "The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?," *U.C.L.A. Law Review* 33, no. 1 (1985), Jeffrey Toobin, "The Great Election Grab," *New Yorker* 79, no. 38 (2003).

[4] E.g., see Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, DC: Brookings Institutions, 1995).

[5] E.g., see ———, "Who Should Govern Who Governs?," in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse (Cambridge, UK: Cambridge University Press, 2008), John Ferejohn, "The Citizens' Assembly Model," in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse (Cambridge, UK: Cambridge University Press, 2008).

[6] E.g., see Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People, [1st ed. (New York,: Harper, 1960), Anthony Lewis, Freedom for the Thought That We Hate: A Biography of the First Amendment, Basic Ideas (New York: Basic Books, 2007).

[7] For J.H. Snider's earlier work on this subject, see J.H. Snider, "E-Government Vs. E-Democracy," *Government Technology*, 1 August 2001. ———, "Is It Time for an E-Congress?," *Vital Speeches of the Day* 68, no. 5 (2001), ———, "The Failure of E-Democracy" (paper presented at the Annual Meeting of the American Political Science Association, Washington, DC, September 1-4, 2005), ———, "Should the Public Meeting Enter the Information Age?," *National Civic Review* 92, no. 3 (Fall 2003).———, "Democracy on-Line," in *The Information Revolution*, ed. Donald Altschiller (New York: H.W. Wilson, 1995).

[8] E.g., see the trade publications *Government Technology* (local and state government) and *Federal Computer Week*; the reports of the Center for Digital Government and IBM's Center for the Business of Government; and academic journals such as *Government Information Technology* and the *International Journal of Electronic Government Research*.

[9] Darrell West, "State and Federal E-Government in the U.S., 2007," (Providence, RI: Taubman Center for Public Policy, Brown University, August 2007).

[10] Center for Digital Government, "2003 Digital Legislatures Survey: Best of Breed Report," (Folsom, CA: Center for Digital Government, 2003).

[11] The two sections are the Legislative Information and Communications Staff Section (LINCS) and National Association of Legislative Information Technology (NALIT). See http://ncsl.org/programs/press/webawardhome.htm.

[12] See www.centerdigitalgov.com.

[13] Congressional Management Foundation, "2007 Gold Mouse Report: Lessons from the Best Web Sites on Capitol Hill," (Washington, DC: Congressional Management Foundation, 2007).

[14] Paul Ferber, Franz Foltz, and Rudy Pugliese, "The Politics of State Legislature Web Sites: Making E-Government More Participatory " *Bulletin of Science, Technology & Society* 23, no. 3 (June 2003). See also ———, "Cyberdemocracy V. Egovernment: The Degree of Interactivity on State Legislative Websites," in *Paper prepared for delivery at the 2004 Annual Meeting of the American Political Science Association* (Chicago, IL: September 1-5, 2004).

[15] e.g., see Walter J. Oleszek, "Congress and the Internet: Highlights," (Washington, DC: Congressional Research Service, August 29, 2007), Jeffrey W. Seifert and R. Eric Peterson, "House of Representatives Information Technology Management Issues: An Overview of the Effects on Institutional Operations, the Legislative Process, and Future Planning," (Washington, DC: Congressional Research Service, April 2, 2003).

[16] National Conference of State Legislatures, "Open Meetings and Notice Requirements," in *Inside the Legislative Process* (Denver, CO: National Conference of State Legislatures, 2002 Edition).

[17] The relevant section of the Constitution reads: "Each Househttp://thomas.loc.gov/home/votes/member.html shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their

Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."

[18] R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990).

[19] Walter J. Oleszek, "House Voting Procedures: Forms and Requirements," (Washington, DC: Congressional Research Service, December 21, 2006).

[20] The data were compiled from Markup Reports at NationalJournal.com.

[21] Robert B. Bradley, "Motivations in Legislative Information Use," *Legislative Studies Quarterly* 5, no. 3 (1980): 400.

[22] E.g., David Canton, "Online records pose risks," *London Free Press* (Ontario), June 14, 2007, D1; Arthur Charity, "Public Information; All the information fit to post?" *New Jersey Lawyer*, April 9, 2007, Vol. 16, No. 15, 1; Pam Louwagie, "How public should court data be?; A Minnesota Supreme Court committee is debating what kinds of public records should be posted online,"*Star Tribune* (Minneapolis, MN), February 4, 2004, 1B.; Robert Patrick, "Panel will debate Web access to documents," *Sarasota Herald-Tribune* (Florida), March 14, 2004; Katherine Webster, "Task force recommends some access to court records online," *The Associated Press State & Local Wire*, February 21, 2006.

[23] **Dates:** Data collected from February through May 2008. **Source:** Search of state legislature web sites, compiled by Aram Hur. **Explanation:** B: Bill Votes, A: Amendment Votes, P:Procedural Motion Votes, F: Floor Votes C: Committee Votes; ▮: Item of interest is available online and fully meets standard, ▪: Item of interest is available online, but only partially meets standard, _ : Item of interest is not available online, #: Only roll call final tallies listed, no by-member breakdown, V: Voice votes.

[24] Same Dates, Source, and Explanation as in Table 1.

[25] E.g., Over the ten year period from 1995-2004, the U.S. House of Representatives had 2,613 recorded votes on the Floor. See John S. Pontius, "Congressional Roll Call and Other Record Votes: First Congress through 108th Congress, 1789 through 2004," (Washington, DC: Congressional Research Service, March 3, 2005), Table 1.

[26] Available at www.senate.gov/pagelayout/reference. Data derived from Senate Democratic Policy Committee, Vote Information Office.

[27] Examples of such states include Virginia, Connecticut, Illinois, Minnesota, and Texas. Some legislatures, most notably the U.S. House of Representatives, now display legislative information in their public websites in a structured database format such as XML. But this requires a software programmer to write a program to parse the data to pull out the relevant fields. Then the web pages must be periodically scanned for changes. Most noteworthy, although THOMAS is applying XML tags to many legislative data components, roll call votes tagged by legislator are not one of those components. Given the widespread use of XML in the private sector to display structured database information on the web, the tendency of legislative websites not to fully deploy this technology is a striking omission.

[28] Interview with Jim Leach, Director of Institute of Politics, Kennedy School of Government, March 18, 2008.

[29] Karl Kurtz, "Making Legislators' Votes Available Online," *The Thicket* (April 16, 2008), http://ncsl.typepad.com/the_thicket/2008/04/making-legislat.html#comments.

[30] Interview with Bart Peterson, Institute of Politics Fellow, Kennedy School of Government, April 4, 2008.

[31] Leroy N. Rieselbach, *Congressional Reform: The Changing Modern Congress* (Washington, D.C.: CQ Press, 1994), 79. See also E. Scott Adler, *Why Congressional Reforms Fail: Reelection and the House Committee System*, American Politics and Political Economy (Chicago: University of Chicago Press, 2002), 220.

[32] For the compensation information, see Eric Keiderman, "Legislators' Pay Falling Behind," *Stateline* February 13, 2007.

[33] **Dates:** As of April 2008. **Source:** Population data from most recent U.S. Census Bureau Data, Professionalization data from National Conference of State Legislatures, compiled by J.H. Snider and Aram Hur. **Explanation:** H: House, S: Senate, NA: Not applicable because of either a unicameral legislature (Nebraska) or a bicameral legislature with different roll call accessibility.

[34] New Jersey Assembly vote on A3252 on March 15, 2007, and Senate vote on S1662 on May 18, 2006. The final Senate vote, which came after an amendment to the Senate version of the bill, passed 37-0 on June 18, 2007. In early May 2008 I interviewed an information technology staffer in the New Jersey legislature. Speaking off-the-record, he said the staff never thought the bill had a chance of passage because legislators in the past hadn't gone for this type of openness.

[35] Note that just because private websites recognize the importance of online roll call access by legislator doesn't necessarily mean that the quality of their data is high. These websites tend to be only as good as the raw information provided on the government websites. For example, if committee roll call votes are not available on the government websites, they are also unlikely to be available on the private websites.

[36] See Eric Peterson, "Senate Policy Committees," (Washington, DC: Congressional Research Service, April 25, 2007), 8. http://rpc.senate.gov.

[37] Cited in David Corn, "Filegate.Gov; the Biggest Congressional Scandal in the Digital Age: Politicians Aren't Putting Public Docs on the Net, and No One Seems to Care," *Wired*, November 2000.

[38] Letter to Speaker Newt Gingrich, August 22, 1995.

[39] Ralph Nader and Gary Ruskin, "Congress Pulls the Shades on the Net: If Members Are So Proud of What They Do, They Ought to Post Their Voting Records Clearly on the Net," *Los Angeles Times*, November 30, 1999.

[40] Corn, "Filegate.Gov."

[41] "Nader's Latest Crusade," *National Journal*, January 10, 2004, 113.

[42] "Democratic House Leader Nancy Pelosi Describes What She Sees as Job One on Capitol Hill," *CNBC News Transcripts*, November 8, 2006.

[43] Open House Project Press Release, February 8, 2007.

[44] Sunlight Foundation, "Congressional Information & the Internet," (Washington, DC: Sunlight Foundation, May 8, 2007), 12, 23.

[45] Kevin Bogardus, "Coalition Pushes for Web 2.0 on Capitol Hill," *The Hill*, May 8, 2007.

[46] E.g., Elizabeth Brotherton, "Sunlight to Unveil 'Open House' Proposal," *Roll Call*, May 8, 2007; John Wonderlich, "More Access to Committees," *Washington Examiner*, May 21, 2007; Joshua Tauberer, "Improve Databases," *The Hill*, June 12, 2007.

[47] Kurtz, "Making Legislators' Votes Available Online."

[48] Ibid.

[49] Pam Greenberg, "Guide to Legislative Information Technology," (Denver, CO: National Conference of State Legislatures, December 1995), 4.

[50] Said Greg Elin, Chief Data Architect at the Sunlight Foundation, in an email to J.H. Snider dated May 30, 2008: "If the public web site of bills exist, and legislator's roll call votes are tracked in any structured way, it's technically easy to put online pages of each legislator's roll call vote on each bill…. In the age of free Facebook pages and free Gigabytes of storage, the legislature can afford to publish on a page how each representative voted."

[51] Library of Congress, "Compiling a Member Voting Record," (June 8, 2008), http://thomas.loc.gov/home/votes/member.html.

[52] Ibid.

[53] Ibid.

[54] Cited in Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment*, 185.

[55] E.g., see Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, N.J.: Princeton University Press, 2004).

[56] Thomas Mann and Norman Ornstein, "Restoring Order: Practical Solutions to Congressional Dysfunction," (Washington, DC: The Reform Institute, November 16, 2006), 2.

[57] Gary Mucciaroni and Paul J. Quirk, *Deliberative Choices: Debating Public Policy in Congress*, American Politics and Political Economy (Chicago: University of Chicago Press, 2006), 200.

[58] For a company that provides an integrated solution, see www.granicus.com. Even Microsoft's $45 program, OneNote, marketed for students taking class notes, seamlessly integrates text and streaming video.

[59] Minorities do have significant rights, including the Constitutionally guaranteed right to demand a roll call vote with the support of only one-fifth of the members. But the rights of the majority are clearly much greater than the rights of the minority. E.g., see Mann and Ornstein….

[60] Elizabeth Rybicki and Stanley Bach, "Floor Procedure in the House of Representatives: A Brief Overview," (Washington, DC: Congressional Research Service, August 26, 2003), 1.

[61] Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford; New York: Oxford University Press, 2006), Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (New York, NY: Cambridge University Press, 1997).

[62] R. Eric Peterson, "'Dear Colleague' Letters: A Brief Overview," (Washington, DC: Congressional Research Service, January 4, 2005), 1.

[63] U.S. House Administration Committee, "Press Release: House of Representatives Moves to Enhanced E-Dear Colleague System," http://cha.house.gov/view_press_release.aspx?r=20080624104634.

[64] Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007), 90-91. Vermeule also cites a minority member of Congress making this argument in more colorful prose: "I believe the minority party as the right to smoke out the majority and make them face issues, make them vote on great public questions." Ibid., 94.

[65] Special Subcommittee on Legislative Reorganization, Committee on Rules, U.S. House of Representatives, *Hearings on Legislative Reorganization Act of 1970 (P.L. 91-510; 84 Stat. 1140)*, Congress-Session: 91-1 (1969), Oct. 23, 30, Nov. 6, 13, 20, Dec. 3-5 1969. E.g., see statement of Representative Lawrence Coughlin, November 20, 1969, 161.

[66] Arnold, *The Logic of Congressional Action*.

[67] Vermeule, *Mechanisms of Democracy*, 100. 109.

[68] This argument is powerfully developed in a general government context in David et al. Robinson, "Government Data and the Invisible Hand," *Yale Journal of Law and Technology* 11 (Fall 2008, forthcoming).

[69] Cathy Taylor, "The Future of Advertising," (Washington, DC: Project for Excellence in Journalism, March 2008).

[70] Dahlia Lithwick, "Courting Change: Rethinking the Supreme Court Press Corps for a New Era," *Slate*, April 11, 2008. For an example of the new Supreme Court journalism, see Scotusblog.com, a compendium of posts by different authors and including reader comments.

[71] E.g., see Dan Gillmor, *We the Media: Grassroots Journalism by the People, for the People*, Pbk. ed. (Sebastopol, CA: O'Reilly, 2006).

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[72] cited in Garry Wills, *Cincinnatus : George Washington and the Enlightenment*, 1st ed. (Garden City, N.Y.: Doubleday, 1984), 13.

[73] Ibid.

[74] cited in Richard Brookhiser, *Founding Father: Rediscovering George Washington* (New York: Free Press, 1996), 103.

[75] Alexander Hamilton, James Madison, and John Jay, "Federalist #51," in *The Federalist Papers* (New York: Pocket Books, 2004).

[76] e.g., see Larry Jay Diamond, Leonardo Morlino, and American Political Science Association. Meeting, *Assessing the Quality of Democracy*, Journal of Democracy Book (Baltimore: Johns Hopkins University Press, 2005), 71.

[77] Note that legislators do not have this type of conflict of interest when imposing intrabranch accountability mechanisms in ways that don't harm or may even enhance their incumbency advantage. Consider Congressional efforts to create checks and balances within the executive branch through the creation of such entities as the Office of Management and Budget, the Attorney General's Office, and Offices of Inspectors General. Or within the legislative branch, consider the periodic election of leaders, the Congressional Budget Office, and the General Accountability Office. These entities strengthen Congress as an institution but not at the expense of incumbents' collective pursuit of re-election.

[78] Michael McDonald and John Curtis Samples, *The Marketplace of Democracy: Electoral Competition and American Politics* (Washington, D.C.: Cato Institute: Brookings Institution Press, 2006).

[79] Samuel Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116, no. 2 (2002), Jeffrey C. Kubin, "The Case for Redistricting Commissions," *Texas Law Review* 75, no. 4 (1997), Jeffrey Toobin, "The Great Election Grab," *New Yorker* 79, no. 38 (2003), Daniel H. Lowenstein and Jonathan Steinberg, "The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?," *U.C.L.A. Law Review* 33, no. 1 (1985).

[80] C. Lawrence Evans, "Politics of Congressional Reform," in *The Legislative Branch: Institutions of American Democracy Series*, ed. Paul J. Quirk and Sarah A. Binder (Oxford; New York: Oxford University Press, 2005), 516-17. Leroy N. Rieselbach, *Congressional Reform: The Changing Modern Congress* (Washington, D.C.: CQ Press, 1994), 108.

[81] Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, DC: Brookings Institutions, 1995).

[82] See Dennis F. Thompson, "Who Should Govern Who Governs?," in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse (Cambridge, UK; New York: Cambridge University Press, 2008), John Ferejohn, "The Citizens' Assembly Model," in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse (Cambridge, UK; New York: Cambridge University Press, 2008).

[83] J.H. Snider, "The Dismal Politics of Legislative Transparency," in *Would You Ask Turkeys to Mandate Thanksgiving?* (Cambridge, MA: Shorenstein Center on the Press, Politics, and Public Policy, 2008), Adam Przeworski, Susan Carol Stokes, and Bernard Manin, *Democracy, Accountability, and Representation*, Cambridge Studies in the Theory of Democracy (Cambridge, U.K. ; New York: Cambridge University Press, 1999)., 24.

[84] Thomas E. Cronin, *Direct Democracy: The Politics of Initiative Referendum and Recall* (San Jose, CA: toExcel, 1999), 13.

[85] Ibid., 51, 162.

[86] Ibid., 1-2.

[87] E.g., Ibid., 51.

[88] David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money*, 1st ed. (New York: Harcourt, 2000), Cronin, *Direct Democracy: The Politics of Initiative Referendum and Recall*, Richard Ellis, *Democratic Delusions: The Initiative Process in America*, Studies in Government and Public Policy (Lawrence: University Press of Kansas, 2002).

[89] For an up-to-date list, see the redistricting section of the National Conference of State Legislatures website, www.ncsl.org.

[90] Cited in Robert Alan Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989).

[91] Kubin, "The Case for Redistricting Commissions," 843.

[92] Ibid.; Issacharoff, "Gerrymandering and Political Cartels."

[93] Cited in Kubin, "The Case for Redistricting Commissions," 848.

[94] Jeffrey C. Kubin, "The Case for Redistricting Commissions," *Texas Law Review* 75, no. 4 (1997). 849. For a more expansive attack on the possibility of non-political redistricting commissions, see Lowenstein and Steinberg, "The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?"

[95] E.g., see J.H. Snider, "Solving a Classic Dilemma of Democratic Politics: Who Will Guard the Guardians?," *National Civic Review* 94, no. 3 (2005). ———, "Crackpot or Genius? Canada Steps onto the World Stage as a Democratic Innovator," *Journal of Public Deliberation* 4, no. 1 (2008). Mark Warren and Hilary Pearse, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, Theories of Institutional Design (Cambridge, UK: Cambridge University Press, 2008).

[96] Warren and Pearse, *Designing Deliberative Democracy.*

[97] E.g., John Ferejohn, "The Citizens' Assembly Model," in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse (Cambridge, UK: Cambridge University Press, 2008), 210-12. Dennis F. Thompson, "Who Should Govern Who Governs?" in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse (Cambridge, UK: Cambridge University Press, 2008), 66.

[98] E.g., see Mary Pat McKinnon, "Citizens' Assemblies and Climate Change," and Julia Abelson, "Citizens' Assemblies and Healthcare," presentations at the University of British Columbia's Centre for the Study of Democratic Institutions conference on *When Citizens Decide: the Challenges of Large Scale Public Engagement*, Vancouver, British Columbia, May 1, 2008.

[99] Compiled by J.H. Snider from news articles and the various reports published by the citizens assemblies. See www.citizensassembly.gov.on.ca and www.citizensassembly.bc.ca.

[100] A second, identical referendum: the first referendum failing by such a close margin that the government placed the same referendum on the ballot for the next election.

[101] Includes two native Americans (called "First Nation" people in Canada) and chair of the citizens assembly.

[102] Includes the chair of the citizens assembly.

[103] Two were selected for each selected delegate as part of the final selection process. But none of the delegates in British Columbia and Ontario dropped out in a timely way, so no alternates were selected.

[104] Only the aboriginal members were selected at large.

[105] In units of country of origin, not U.S. dollars.

[106] The absence of this information in the 262 page official report summarizing the Ontario Citizens' Assembly on Electoral Reform deserves note. The only discussion of this dropout rate is the observation: "Throughout the meetings, only a handful of people declined to enter their names." See Ontario Citizens' Assembly on Electoral Reform, "Democracy at Work: The Ontario Citizens' Assembly on Electoral Reform," (Toronto, Ontario: Ontario Citizens' Assembly on Electoral Reform, 2007), 45.

[107] Warren and Pearse, *Designing Deliberative Democracy.*

[108] Gordon Gibson, "Report on the Constitution of the Citizens' Assembly on Electoral Reform, Submitted to the Honorary P. Geoffrey Plant, Attorney General of British Columbia," (Vancouver, British Columbia: 2002).

[109] Interview with George Thomson, Chair of the Ontario Citizens' Assembly on Electoral Reform, April 14, 2008.

[110] The press in British Columbia treated the Assembly members as impartial spokespeople. The press in Ontario treated them as advocates for a particular cause. See Amy Lang, "Media Coverage in the BC and Ontario Referendums," paper presented at the University of British Columbia's Centre for the Study of Democratic Institutions conference on *When Citizens Decide: the Challenges of Large Scale Public Engagement*, Vancouver, British Columbia, May 2, 2008. This may have led Ontario citizens to be less trusting of the citizens assembly process than British Columbia citizens.

[111] Calculated by dividing the cost of the Assembly, $5.5 million, by the 103 members. The members themselves earned far less. Most of the money went to overhead.

[112] In British Columbia, controlling for relative age distribution in the population, those in the 56-70 age cohort were 3.6 times more likely than those in the 71+ cohort to serve on the Assembly, and 2.6 times more likely than those in the 18-24 age cohort. See British Columbia Citizens' Assembly on Electoral Reform, "Making Every Vote Count: The British Columbia Citizens' Assembly on Electoral Reform Technical Report" (Vancouver, British Columbia: British Columbia Citizens' Assembly on Electoral Reform, 2004), Table 16, p. 40.

[113] The British Columbia Citizens' Assembly divided adult citizens into five age cohorts. Those in the 56-70 age cohort were 35% more likely to respond positively to the initial letter of inquiry to serve on the Assembly. In each succeeding sample in the selection process, this age bias continued, with the final selection of Assembly members 65% more likely to be in this age bracket than their percentage in the general population. See "Making Every Vote Count," Tables 3, 13,

14, 16, pp. 33, 35, 40. Future citizens assemblies should collect more precise age cohort data plus work status and number of dependents in household data in order to more precisely test this hypothesis concerning the motivation of potential citizens assembly members.

[114] E.g., see Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard Economic Studies (Cambridge, MA: Harvard University Press, 1971).