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ADVISORY COUNTERPARTS TO CONSTITUTIONAL COURTS

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ABSTRACT

In recent years, legal scholars have paid a great deal of attention to the emergence of constitutional courts and judicial review in democracies worldwide, yet an intriguing parallel development in democratic constitutionalism has gone largely unnoticed: the establishment of independent bodies which, like constitutional courts, are concerned with foundational commitments of liberal democracy, but which advance these commitments mainly through investigations and advice-giving. Lacking de jure authority to block the implementation of unconstitutional laws and policies, the new advice givers instead make their contributions ex ante, identifying problems that warrant legislative attention and helping to craft laws and regulations that respond to foundational aspirations. This Article

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surveys the emergence of these "advisory counterparts" to constitutional courts and offers an account of their comparative advantage, relative to constitutional courts, as guardians of liberality. The Article also presents an initial treatment of the advisory counterparts' characteristic limitations and dangers, and explores some associated questions of institutional design.

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INTRODUCTION

In the years since World War II, the written, justiciable constitution has become a universal hallmark of democratic government.[1] As Mark Tushnet quips, "[f]or all practical purposes,

1. *See generally* Vicki C. Jackson & Mark Tushnet, *Introduction* to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, at xi (Vicki C. Jackson & Mark Tushnet eds., 1999)

the Westminster model [of legislative supremacy] has been withdrawn from sale."[2] New and old, democracies everywhere are providing for some form of constitutional judicial review.

Less widely appreciated is that many democracies are also establishing independent institutions which, like constitutional courts, are concerned with foundational commitments of liberal democracy, but which make their contribution not by adjudicating constitutional cases but by investigating societal conditions and governmental conduct, and suggesting policy reforms. Examples include human rights commissions, electoral commissions, information commissions, privacy commissions, and anticorruption commissions. Many of these bodies are purely advisory,[3] although some also have specialized regulatory, administrative, or prosecutorial duties.[4] Quite commonly they possess coercive powers of investigation, such as the subpoena.[5] And a few have been given a formal role in the legislative process—for example, authority to trigger action on their proposals by the elected branches of government, or even to put questions directly to a referendum vote of the citizenry.[6]

Notwithstanding such variations, all of these bodies may be said to function, in part, as advisory counterparts to constitutional courts. *Advisory*, in that they lack de jure authority to enjoin duly enacted legislation or regulations. *Counterparts*, in that they possess the sort of democracy-reinforcing, rights-safeguarding, and minority-protecting missions that legal scholars are wont to ascribe to constitutional courts. To be sure, the symmetry here is inexact. Not all of the bodies I characterize as advisory counterparts derive their powers and mission from constitutional texts, nor are they obliged to anchor their recommendations to the language of a written

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[hereinafter DEFINING THE FIELD] (describing the study of comparative constitutional law in the context of the surge of constitutionalism); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) (contrasting American constitutionalism with the experiences of newer democracies).

2. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814 (2003); *see also* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) (describing emerging forms of judicial review in the Westminster democracies).

3. This is typical of human rights commissions. *See infra* Part I.A.

4. This is true of many election commissions and a few privacy commissions. *See infra* Parts I.B, I.E.

5. *See infra* Part I.

6. *See infra* Part II.B.2.b.

constitution.[7] The comparison to constitutional courts is nonetheless apt in functional terms, however, insofar as one accepts that an important reason for judicial review is to help secure the basic commitments of liberal democracy.

Constitutional theorists have paid a great deal of attention to the global spread of constitutional courts, but they have largely overlooked the emergence of the advisory counterparts.[8] This Article aims to lift the counterparts' profile. The new advice-givers, I suggest, have the potential to make significant contributions to the project of sustaining and perhaps improving liberal democracy over time—and to do so in a manner that does not engender the countermajoritarian

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7. The new advice-givers have been entrenched in a number of emerging-democracy constitutions. *See* HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA 28–58 (2001) (tracing the establishment in the 1990s of constitutionally entrenched human rights commissions in a number of African nations); INT'L COUNCIL ON HUMAN RIGHTS POL'Y, PERFORMANCE AND LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS 59–62 (2000), *available at* http://www.ichrp.org/paper_files/102_p_01.pdf (discussing the constitutional entrenchment of human rights commissions in new democracies); RAFAEL LÓPEZ-PINTOR, ELECTORAL MANAGEMENT BODIES AS INSTITUTIONS OF GOVERNANCE 20 (2000) (noting that most independent electoral agencies are constitutionally entrenched); Birgit Lindsnaes & Lone Linholdt, *National Human Rights Institutions: Standard-setting and Achievements*, *in* NATIONAL HUMAN RIGHTS INSTITUTIONS: ARTICLES & WORKING PAPERS, INPUT TO THE DISCUSSIONS ON THE ESTABLISHMENT AND DEVELOPMENT OF THE FUNCTIONS OF NATIONAL HUMAN RIGHTS INSTITUTIONS 1, 14–15 (Birgit Lindsnaes et al. eds., 1st rev. ed. 2001) (noting that "[n]ational [human rights] institutions established by constitution . . . are mainly found in countries which have recently undergone constitutional reforms and which have been marked by grave human rights violations in the past").

Roughly analogous bodies have been established by statute in many of the older democracies. *See* INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra*, at 64–67 (discussing the establishment by statute of human rights commissions in "stable democracies"). Near-to-home examples include the U.S. Commission on Civil Rights, 42 U.S.C. § 1975 (2000); the Election Assistance Commission, *id.* § 15381; and the Privacy and Civil Liberties Oversight Board, Pub. L. No. 108-458, § 1061, 118 Stat. 3638, 3684 (2004) (codified at 5 U.S.C. § 601).

8. Indicative is the lack of attention to the advice-giving role of independent but nonjudicial bodies in recent works on constitutional design by Cass Sunstein, CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001), and Bruce Ackerman, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634 (2000), as well as the absence of these bodies from the foundational casebook, VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999), and compendium of readings on comparative constitutional law, DEFINING THE FIELD, *supra* note 1. Ackerman does contemplate a role for independent but nonjudicial bodies such as electoral commissions and anticorruption commissions, but he seems to envision these bodies operating in administrative and enforcement capacities, rather than as sources of law reform. *See* Ackerman, *supra*, at 694–96 (proposing an "'[i]ntegrity [b]ranch'" to investigate corruption); *id.* at 718–21 (proposing a "'democracy branch'" to administer and regulate elections); *id.* at 723–26 (proposing a "'[d]istributive [j]ustice [b]ranch'" to administer a constitutionally entrenched program of income redistribution).

worries associated with constitutional judicial review. This Article gives one account of that potential and takes up some of the distinctive challenges and concerns that these institutions present. Along the way I raise many more questions than I answer. The object of my inquiry is a vast and varied array of institutions, but the ambitions of this Article are actually rather modest: to explain why the advisory counterparts should be of interest to constitutional scholars, and to advance some tentative hypotheses that will help to orient further inquiry and institutional experimentation.

The attractions of the advisory counterpart model for institutionalizing a constitutional commitment to liberal democracy are twofold. First, the counterparts are or could be, in important respects, better positioned than constitutional courts to pursue structural remedies for (or prophylactics against) illiberality. This follows from the counterparts' license to craft legislative solutions to the problems they ascertain; from the counterparts' superior resources for identifying and understanding threats to liberality; and from the logical possibility that an independent advisory body could be more thoroughly insulated from the elected branches of government without incurring the countermajoritarian risks associated with constitutional judicial review. To be sure, the counterparts, as advisory bodies, are always at risk of being ignored, and an advice-giver that speaks to deaf ears cannot hope to accomplish much. There is some evidence, however, that elected officials fear the ballot-box consequences of ignoring counterpart recommendations on certain kinds of issues (election law and corruption control) at least at certain times (for example, following scandals).

The second attraction of the counterpart model is dialogic. Although counterparts lack the constitutional court's ability to bring about public confrontations with constitutional principle by striking down high-profile laws, some counterparts have other tools with which to engage mass opinion: the subpoena power, for example, or authority to set the legislative agenda or trigger a popular referendum. I shall argue too that certain counterparts may develop significant persuasive authority with the electorate regarding which constitutional issues are properly deemed high priorities, even though average voters are unlikely to follow presumptively the counterpart's policy recommendations concerning the problem at hand. By moving new issues onto the public's radar screen, counterparts may influence the course of law reform beyond the election-law and government-

integrity domains. I shall suggest, moreover, that counterpart priority-setting and law-proposing is, on plausible normative views, more attractive than constitutional judicial review as a means of institutionalizing occasional popular engagement with the meaning and application of nominally constitutive ideals. The argument turns on the selection of issues for debate; the costs of the debate-forcing activity; and the character and consequences of the debate itself.

In addition to offering a sympathetic portrayal of what the counterparts have to offer, this Article provides a preliminary account of their characteristic weaknesses and downsides. Beyond the obvious risk of irrelevance—a risk that is also integral to the counterparts' appeal—there are two primary concerns. First, the counterparts may have an institutional interest in discrediting the elected branches of government. This institutional interest could make some counterparts less than innocuous, especially if they have coercive investigatory powers with which to pry into the doings and dealings of top government officials. Any number of problematic consequences could follow, ranging from distracted government leaders, to loss of public support for large-scale public undertakings, to the release of otherwise latent authoritarian sentiments within the citizenry. Second, the political forces that help to sustain the de facto independence of constitutional courts may not operate similarly with respect to the counterparts. Whatever normative license a counterpart's advisory status might provide for thoroughgoing insulation from the elected branches (at least as to counterparts whose investigatory powers are tightly circumscribed), independence in practice may be difficult to achieve.

I will proceed as follows. Part I surveys the worldwide emergence of nominally independent investigative and advice-giving bodies with jurisdiction over subjects widely thought foundational to liberal democracy. The heart of the Article comes in Part II, which compares constitutional courts and advisory counterparts along three dimensions: crafting remedies, engaging public opinion, and achieving independence. Here I develop my account of the counterparts' attractions, and also flag certain weaknesses and limitations. Part III briefly examines interactions between courts and counterparts.

A few caveats are in order before moving on. First, in drawing comparisons between courts and counterparts, I will refer to the U.S. Supreme Court and associated ideas about and evidence regarding constitutional judicial review within the American legal tradition. This obviously will not be the most sensible point of reference for

many countries that have established or might yet establish advisory counterparts. But for now it is a useful way to begin, in part because the U.S. constitutional tradition is the one with which I am most familiar, and in part because of its influence elsewhere.

Second, the advisory counterparts are as yet little-studied institutions. Although I will illustrate my arguments with suggestive anecdotes, this paper is best viewed as an exercise in informed conjecture. Insofar it succeeds, the payoff will take the form of a clearer understanding of questions worth investigating via empirical studies of the extant counterparts, and, relatedly, a better feel for the problems and possibilities with which proponents and designers of these bodies ought to be concerned.

Third, in fleshing out my argument with examples, I am not going to dig into the historical experiences and political cultures of different polities. Such matters undoubtedly have much to do with the successes and failures of particular advisory bodies, but they lie beyond the scope of this paper.

Fourth, although this paper is concerned with the functioning of different kinds of institutions in service of the "basic" ideals of liberal societies, I wish to bracket philosophical disputes about what, precisely, the concept of liberal democracy entails. I take it as given that the following characteristics are foundational, recognizing that there will often be philosophical disagreements about the liberal merits or demerits of specific policies:

Accountability. Liberal states require their legislators to stand occasionally for popular election, under conditions conducive to holding incumbents accountable for their achievements and failures while in office.

Political equality. Liberal societies enable their adult citizens to participate in the political process on equal footing. Excluding from the sphere of politics the inequalities that prevail in economic and social spheres is a necessary aspiration.[9] A perfect separation of these spheres will never be achieved, of course, and any attempted separation should be evaluated with an eye to costs as well as benefits, particularly insofar as those costs come in the coin of other

9. *Cf.* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3–6 (1993) (developing an account of liberal democracy centered on the maintenance of distinct "spheres" of activity, each with its own regulative norms).

liberal-democratic aspirations, such as accountability.[10] But a liberal polity will nonetheless attend to the goal of political equality, and not sacrifice it lightly—and never for illiberal reasons.

Tolerance. Liberal states do not pass or implement laws for the purpose of beating up on ethnic or religious minorities, or other out-groups. They provide space for individuals to live out their lives by the lights of their own basic values, even if those values are quirky.

Civil liberty. Liberal democracies do not treat civil liberty with nonchalance. In detaining and punishing putative wrongdoers, liberal states make concerted efforts to identify their targets correctly. Liberal societies confronted with tradeoffs between liberty and security may well conclude that there is no essential core of civil liberties or associated procedural protections that must at all times be respected, but the liberal state will nonetheless value liberty, and will not be arbitrary or rash in deciding when or how to curtail it.

I. A SURVEY OF ADVISORY COUNTERPARTS

Constitutional democracies have spawned numerous public advisory bodies whose missions pertain to basic liberal aspirations, but there is as yet no comprehensive, transnational survey of these institutions. The partial account provided here focuses on permanent and nominally independent governmental bodies whose advice-giving work concerns political accountability or equality, public integrity, personal autonomy, civil liberty, or the treatment of minority groups.[11] It has been pieced together from the smattering of writings and Internet resources about national human rights institutions, electoral commissions, privacy commissions, anticorruption commissions, and information commissions.[12] The existing scholarship

10. For an example of the (potential) clash between political equality and accountability, consider the question of whether individuals and organizations should be allowed to make large monetary donations to political campaigns. An unlimited right to donate favors the rich; at the same time, it may also help opponents of the government mount effective campaigns. *Cf.* McConnell v. FEC, 540 U.S. 93, 248 (2003) (Scalia, J., dissenting) ("[The Bipartisan Campaign Reform Act of 2002] prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice. . . .").

11. Omitted from my survey are temporary, ad hoc bodies created in response to the exigencies of the day, as well as permanent bodies, such as science advisory boards, whose work is not closely connected to basic liberal-democratic aspirations.

12. Notably absent from this list are criminal sentencing commissions. It turns out that permanent advice-giving commissions with jurisdiction over criminal punishment have rarely been created outside of the United States, Michael Tonry, *Parochialism in U.S. Sentencing Policy*, 45 CRIME & DELINQ. 48, 59–61 (1999), although government leaders in many countries

on these bodies is quite insular. Each subject seems to have its enthusiasts, and there is little cross-talk. The present survey, though undoubtedly incomplete, does tend to suggest that the establishment of an ongoing, independent body tasked with conducting research and investigations and giving advice is a recurring strategy for addressing threats to liberal-democratic values, and it also raises the question of what might be learned from studying these bodies in relation to one another.

A. National Human Rights Institutions

National human rights institutions (NHRIs)—governmental entities with a mandate to promote and protect human rights—are rapidly becoming commonplace around the world. One survey concluded that in 1990 there were only eight such bodies worldwide; by 2002, there were fifty-two.[13] These bodies have emerged in all sorts of countries, from well-established democracies to the rudest of dictatorships, and they vary hugely in their structure, powers, and subject matter jurisdiction.[14] Some cover human rights generally; others have narrower mandates concerned with, for example, prison conditions,[15] illicit discrimination,[16] or the status of women.[17]

NHRIs emerged from two distinct traditions, the ombudsman and the commission of inquiry,[18] and their activities differ

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have convened ad hoc advisory bodies for criminal law reform, Andrew J. Ashworth, *Sentencing Reform Structures*, 16 CRIME & JUST. 181, 202–09 (1992).

13. MORTEN KJAERUM, NATIONAL HUMAN RIGHTS INSTITUTIONS: IMPLEMENTING HUMAN RIGHTS 5 (2003).

14. For a voluminous survey of extant NHRIs, see HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD (Kamal Hossain et al. eds., 2000) [hereinafter NATIONAL EXPERIENCES].

15. In South Africa, for example, the Human Rights Commission initially did a considerable amount of work on prison conditions, but this responsibility has since been spun off to a statutory oversight body, the Judicial Inspectorate of Prisons. HUMAN RIGHTS WATCH, *supra* note 7, at 298–99; *see also* JUDICIAL INSPECTORATE OF PRISONS, ANNUAL REPORT 1999 § 1, *available at* http://judicialinsp.pwv.gov.za/Annualreports/annual2000.asp (explaining the context in which the Judicial Inspectorate of Prisons was established).

16. *See* INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 4 (noting that some countries that lack national human rights commissions have national anti-discrimination commissions).

17. South Africa's constitution, for example, establishes a Commission on Gender Equality, in addition to a Human Rights Commission. *See* HUMAN RIGHTS WATCH, *supra* note 7, at 296; Commission on Gender Equality, http://www.cge.org.za (last visited Jan. 4, 2007).

18. *See* INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 92.

accordingly.[19] A Swedish invention, the classical ombudsman is supposed to function as "the people's "representative" in the executive branch of government.[20] The paradigmatic ombudsman's office is headed by a single person, appointed by parliament, whose charge is to impartially investigate individuals' claims of administrative unfairness and to help the affected persons secure relief.[21] Commissions of inquiry, by contrast, are usually multi-member bodies set up to study large-scale societal problems and to propose policy reforms.[22] European NHRIs tend to operate like ongoing commissions of inquiry.[23] They make policy recommendations to the legislature and executive agencies but most do not handle individual complaints.[24] Outside of Europe, NHRIs typically respond to individual complaints in addition to launching investigations on their own initiative,[25] and many are authorized to compel testimony and the production of documents.[26] Whatever the

19. *See* Leonard F.M. Besselink, *Types of National Institutions for the Protection of Human Rights: An Overview of Legal and Institutional Issues*, *in* NATIONAL EXPERIENCES, *supra* note 14, at 157, 160 ("[T]he perceived function of ombudsman institutions is usually to exert powers of investigation and scrutiny of administrative and other acts and omissions of the executive. Human rights commissions, however, usually have as one of their primary tasks to give advisory opinions to the legislature.").

20. LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 12 (2004); *cf.* Besselink, *supra* note 19, at 161 (regarding ombudsman accountability to parliament).

21. U.N. CENTRE FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS 8–9 (1995).

22. Regarding the history of commissions of inquiry, particularly those in Great Britain, see generally CHARLES J. HANSER, GUIDE TO DECISION: THE ROYAL COMMISSION (1965), and THE ROLE OF COMMISSIONS IN POLICY-MAKING (Richard A. Chapman ed., 1973).

23. Morten Kjaerum, *The Experiences of European National Human Rights Institutions*, *in* NATIONAL HUMAN RIGHTS INSTITUTIONS: ARTICLES & WORKING PAPERS, *supra* note 7, at 113, 114–19.

24. Lindsnaes & Linholdt, *supra* note 7, at 25; Kjaerum, *supra* note 23, at 114–19.

25. Lindsnaes & Linholdt, *supra* note 7, at 25.

26. I have not been able to locate data on the percentage of NHRIs with coercive powers of investigation, but proponents of NHRIs clearly contemplate the exercise of such powers. *See, e.g.*, U.N. CENTRE FOR HUMAN RIGHTS, *supra* note 21, at 32 (describing appropriate powers of investigation); C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259, 274–75 (2003) (lauding delegation to the National Human Rights Commission of India of the "powers of a civil court"). NHRIs with coercive powers of investigation are found, for example, in El Salvador, Barbara von Tigerstrom, *Implementing Economic, Social, and Cultural Rights: The Role of National Human Rights Institutions*, *in* GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 139, 146–47 (Isfahan Merali & Valerie Oosterveld eds., 2001); India, Kumar, *supra*, at 274–75; Uganda, HUMAN RIGHTS WATCH, *supra* note 7, at 357–58; and South Africa, *id.* at 294–95. The influential "Paris Principles," described *infra* in the text accompanying

scope of their powers of investigation, however, the formal remedial power of most NHRIs is limited to giving advice.[27] Some may also litigate claims on behalf of victims,[28] or refer questions directly to the constitutional court,[29] but very rare is the NHRI that may issue legally binding remedial orders.[30]

Proponents of NHRIs have worked through the United Nations to establish benchmarks for the design of these institutions.[31] Issued in 1991 by a U.N. workshop, the "Paris Principles" prescribe that NHRIs shall be representative of "the [plurality of] social forces (of civilian society) involved in the protection and promotion of human rights"; functionally independent from the executive branch of government; and authorized to "submit to the Government, Parliament and any other competent body, on an advisory basis . . . opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights."[32] The Principles also urge NHRIs to take on a public education role, with

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notes 31–33, instruct that NHRIs "shall [be authorized to h]ear any person and obtain any information and any documents necessary for assessing situations falling within its competence." Principles Relating to the Status of National Institutions, G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993) [hereinafter Paris Principles], *available at* http://www.ohchr.org/english/law/parisprinciples.htm.

27. Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 28 (2000) ("[M]ost national human rights institutions cannot make binding decisions and are confined to giving non-binding recommendations, advice and reports, plus sometimes being able to refer matters to tribunals for a legally binding decision."); Carolyn Evans, *Human Rights Commissions and Religious Conflict in the Asia-Pacific Region*, 53 INT'L & COMP. L.Q. 713, 719 (2004) ("[T]he ability to make *binding* decisions is not a feature of [National Human Rights Commissions] in the Asia-Pacific region . . . ."); Lindsnaes & Linholdt, *supra* note 7, at 26 (noting that a majority of NHRIs "can recommend settlements of disputes or make decisions on complaints that are, however, not legally binding on the involved parties or the government").

28. This power is typical of the *Defensor del Pueblo*, an office established under a number of Latin American constitutions. *See* REIF, *supra* note 20, at 191.

29. Such referral powers are possessed by a number of the "human rights ombudsman" established by the post-Soviet constitutions of Eastern Europe. Reif, *supra* note 27, at 40–41 (Poland); *id.* at 43 (Slovenia). Human Rights Commissions in Australia, India, and Canada have also been authorized to intervene in court proceedings. Lindsnaes & Linholdt, *supra* note 7, at 28–29.

30. Exceptions include the Ugandan Human Rights Commission, which by the terms of the constitution may "order the release of a detained person, payment of compensation or any other legal remedy or redress," *id.* at 28, and the Ghana Commission for Human Rights and Administrative Justice and the Tanzanian Commission for Human Rights and Good Governance, which may obtain judicial orders enforcing certain of their recommendations, REIF, *supra* note 20, at 19.

31. Lindsnaes & Linholdt, *supra* note 7, at 10.

32. Paris Principles, *supra* note 26.

the aim of inculcating human rights norms, spreading awareness of violations, and encouraging the ratification of and compliance with "international human rights instruments."[33]

Within the United States, the nearest thing to an NHRI on the model of the Paris Principles is the U.S. Commission on Civil Rights, an investigatory and advisory body that dates back to the Eisenhower years.[34] Although encouraging the ratification and implementation of international human rights conventions is assuredly beyond its mandate, the Commission on Civil Rights is concerned with matters fundamental to human dignity: It is charged with investigating sworn complaints of deprivations on the basis of color, race, religion, sex, age, disability, or national origin;[35] and, more generally, with advancing equal-protection goals by "study[ing] and collect[ing] information," "mak[ing] appraisals of the laws and policies of the Federal Government," "serv[ing] as a national [information] clearinghouse," and "prepar[ing] public service announcements and advertising campaigns to discourage" illicit discrimination.[36]

B. Privacy Commissions

Specialized bodies concerned with data privacy have been created in every European Union member state and at least a dozen other countries.[37] These bodies help to implement and revise data protection laws. Some have licensing and related regulatory powers;[38]

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33. *Id.*

34. An in-depth history of the U.S. Commission on Civil Rights to the present day has yet to be written. For an introductory look at the body and its work, see Jocelyn C. Frye et al., Note, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449 (1987). The early history of the Commission is told in FOSTER RHEA DULLES, THE CIVIL RIGHTS COMMISSION: 1957–1965 (1968).

35. 42 U.S.C. § 1975a(a)(1) (2000).

36. *Id.* § 1975a(a)(2).

37. Robert Gellman, *A Better Way to Approach Privacy Policy in the United States: Establish a Non-Regulatory Privacy Protection Board*, 54 HASTINGS L.J. 1183, 1185 (2003). A European Union data privacy directive requires that each member state establish an independent authority for "monitoring the application within its territory of the provisions adopted by the Member States pursuant to [the directive]." Council Directive 95/46, art. 28, 1995 O.J. (L 281) 31 (EC). European data protection institutions are surveyed briefly in Herbert Burkert, *Institutions of Data Protection: An Attempt at a Functional Explanation of European National Data Protection Laws*, 3 COMPUTER L.J. 167, 176–80 (1981), and in much greater depth in HERBERT BURKERT, THE ORGANIZATION AND PRACTICE OF DATA PROTECTION AGENCIES, EEC JOINT STUDY ON DATA SECURITY AND CONFIDENTIALITY (1980).

38. Regarding information-privacy institutions that combine advisory and regulatory functions, see Burkert, *supra* note 37, at 180–88.

others operate in a purely advisory capacity.[39] Canada and Germany pioneered the advisory model.[40] There, at both the state and the national level, "data privacy commissioners" with some degree of independence from the government, badger ministries to do a better job of privacy protection.[41]

Within the United States, California recently established an advisory Office of Privacy Protection,[42] and in late 2004, Congress, at the behest of the 9/11 Commission, chartered the Privacy and Civil Liberties Oversight Board.[43] The Privacy and Civil Liberties Oversight Board has data privacy responsibilities,[44] but its potential reach is much broader than that. Congress found that "the "potential shift of power and authority to the Federal Government" [attendant to the "war on terrorism"] "calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life."[45] The scope of the Privacy and Civil Liberties Oversight Board's advisory jurisdiction is correspondingly large.[46] There are, however, serious questions about whether the Board will prove meaningfully independent of the White House and capable of investigating intransigent bureaucracies.[47]

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39. For case studies of the two models, see DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES (1989).

40. *See id.* at 21–90 (West Germany); *id.* at 243–301 (Canada).

41. *Id.* at 21–22, 243.

42. Gellman, *supra* note 37, at 1189.

43. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061, 118 Stat. 3638, 3684 (2004).

44. *Id.* § 1061(c)(2), 118 Stat. at 3685.

45. *Id.* § 1061(a), 118 Stat. at 3684.

46. "The Board shall ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism." *Id.* § 1061(c)(3), 118 Stat. at 3685.

47. *See, e.g.*, Press Release, ACLU, Bipartisan Civil Liberties Board Fix Bill Long Overdue, Measure Would Take Oversight Panel Out of the "Hip Pocket of the President" (Mar. 15, 2005), *available at* http://www.aclu.org/safefree/general/17570prs20050315.html (supporting proposed legislation that would make the Civil Liberties Oversight Board independent and bipartisan and give it more oversight power); Richard B. Schmitt, *Privacy Guardian Is Still a Paper Tiger*, L.A. TIMES, Feb. 20, 2006, at A1 ("Foot-dragging, debate over its budget and powers, and concern over the qualifications of some of its members—one was treasurer of [President] Bush's first campaign for Texas governor—has kept the board from doing a single day of work [for more than a year since its authorizing legislation was enacted]."). The proposed Protection of Civil Liberties Act, H.R. 1310, 109th Cong. (2005), would enhance the Board's subpoena powers and condition presidential appointments to the Board on the Senate's advice and consent. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., PRIVACY AND

C. *Information Commissions*

Much as privacy commissions have been established to guide the implementation and revision of data-protection laws, "information commissions" have been chartered to monitor the legal and administrative framework concerning governmental transparency.[48] In some nations, information commissioners serve as specialist ombudsmen, helping individuals to navigate the administrative labyrinth created by freedom of information acts.[49] In others, such as Ireland and the United Kingdom, the commissioners can issue binding orders of disclosure—subject, however, to ministerial override.[50] Whatever their administrative or regulatory responsibilities, information commissioners are typically charged with "general oversight of the [freedom of information] system [including] reviewing and proposing changes, training, and public awareness."[51] Most information commissioners have authority to act sua sponte.[52]

Within the United States, state-level information commissions have been established in New York and Connecticut.[53] New York's plays a largely advisory role, whereas Connecticut's also investigates and adjudicates claims brought under the state's open-government statute.[54]

CIVIL LIBERTIES OVERSIGHT BOARD: 109TH CONGRESS PROPOSED REFINEMENTS 6 (2005), *available at* http://www.fas.org/sgp/crs/misc/RS22078.pdf.

48. One recent survey found that more than a dozen nations had established information commissions with some degree of independence from the government. DAVID BANISAR, THE FREEDOMINFO.ORG GLOBAL SURVEY: FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 6 (2004), *available at* http://www.freedominfo.org/documents/global_survey2004.pdf (noting that such bodies exist in Belgium, Canada, Estonia, France, Hungary, Ireland, Latvia, Mexico, Portugal, Slovenia, Thailand, the United Kingdom, and on the regional level in Canada and Germany).

49. *Id.*

50. *Id.* For a helpful overview of the enforcement role of information commissioners in Europe, see HERKE KRANENBORG & WIM VOERMANS, ACCESS TO INFORMATION IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS OF EC AND MEMBER STATE LEGISLATION 22–23 (2005).

51. BANISAR, *supra* note 48, at 6.

52. KRANENBORG & VOERMANS, *supra* note 50, at 23–24.

53. *See* Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 192–209 (1984) (describing and comparing New York and Connecticut commissions).

54. *Id.* at 193.

D. *Anticorruption Commissions*

Following the lead of Singapore and Hong Kong in the early 1970s,[55] a number of countries have created specialized agencies to control corruption.[56] These bodies investigate criminal wrongdoing, design and encourage the adoption of reforms to reduce opportunities and incentives for corruption, and seek to challenge public complacency about the extent, permissibility, or inevitability of corruption.[57] Variations on the Singapore/Hong Kong model have cropped up in Botswana, Macau, New Zealand, Nigeria, the Philippines, Sri Lanka, Thailand, Zambia, and several states in Australia.[58] As with NHRIs, there is a transnational good-government movement spurring the establishment of anticorruption commissions and defining associated "best practices."[59]

Not all of the new anticorruption commissions are based on the Singapore/Hong Kong template.[60] In the United Kingdom, for example, a Committee on Standards in Public Life was created by Prime Minister John Major in 1994.[61] Essentially a permanent commission of inquiry, this body has no criminal investigation responsibilities, but it has played a significant role in crafting anticorruption legislation and related political process reforms.[62]

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55. Singapore's Corrupt Practices Investigation Bureau ("CPIB") became active in 1970; Hong Kong set up its Independent Commission Against Corruption ("ICAC") in 1974. *See* Michael Johnston, *A Brief History of Anti-Corruption Agencies*, *in* THE SELF-RESTRAINING STATE 217, 219–21 (Andreas Schedler et al. eds., 1999).

56. *See generally id.*

57. MELANIE MANION, CORRUPTION BY DESIGN 36–52 (2004) (describing the activities of the Hong Kong ICAC); Johnston, *supra* note 55, at 218–19 (noting that the typical anticorruption commission does both enforcement and corruption-prevention work).

58. Johnston, *supra* note 55, at 219.

59. The leader here has been Transparency International. *See, e.g.*, JEREMY POPE, TI SOURCE BOOK 2000, at 95–104, *available at* http://legacy.transparency.org/sourcebook.

60. Michael Johnston observes that "there is no single 'ICAC strategy,'" in that the extant independent anticorruption commissions differ widely in their jurisdiction, their powers, and their relative emphasis on policy reforms, education, or the investigation and prosecution of individual cases of wrongdoing. Michael Johnston, *Independent Anti-Corruption Commissions: Success Stories and Cautionary Tales*, *in* CORRUPTION, INTEGRITY, AND LAW-ENFORCEMENT 253, 254–55 (Cyrille Fijnaut & Leo Huberts eds., 2002).

61. Committee on Standards in Public Life, http://www.public-standards.gov.uk/about_us/index.asp (last visited Jan. 4, 2007).

62. *See* Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1392–93 & nn.117–21 (2005).

E. Electoral Commissions

In most democracies, a nominally independent agency runs or regulates elections.[63] Some electoral commissions double as advice-givers, and a few are principally or exclusively concerned with research and advice-giving.

South Africa's Electoral Commission illustrates the hybrid model. In addition to administering elections, this body has a mandate to "conduct research on electoral matters and to continuously review electoral legislation" in the interest of "strengthening . . . constitutional democracy."[64] Likewise, Spain's Junta Electoral Central, a regulatory agency, is authorized to "submit proposals for modifications to bills that are being discussed in Parliament."[65] The Australian Election Commission and Elections Canada, both election administrators, also have public education roles and a responsibility to report to parliament on the operation of the electoral laws following each general election.[66] Uruguay's Courte Electoral holds hearings on election law bills introduced in parliament.[67] And at various times the election administration agencies of Botswana, Pakistan, and Russia have had a hand in the development of reform legislation.[68]

The purely advisory variant on the independent electoral commission is exemplified by well-established districting commissions in the United Kingdom, Canada (at the provincial level), Germany, and Iowa.[69] These bodies periodically propose new constituency maps to the legislature, but they lack de jure power to revise district maps unilaterally.[70] Another example is the U.S. Election Assistance Commission, created in 2002, whose mission is to study "election

63. LÓPEZ-PINTOR, *supra* note 7, at 25–26. Most of these bodies are constitutionally entrenched. *Id.* at 20.

64. *Id.* at 40. The Electoral Commission's power of review is only advisory. *See* Electoral Commission Act 51 of 1996 s. 5(j).

65. LÓPEZ-PINTOR, *supra* note 7, at 177.

66. *See* Colin A. Hughes, *The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality*, *in* REALIZING DEMOCRACY: ELECTORAL LAW IN AUSTRALIA 205, 209–10 (Graeme Orr et al. eds., 2003); Jean Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406, 406–07 (2004).

67. LÓPEZ-PINTOR, *supra* note 7, at 157.

68. *Id.* at 172–73, 199, 204–06, 217–19.

69. Elmendorf, *supra* note 62, at 1386–90 & nn.76–101.

70. *Id.*

administration issues"[71] and make associated recommendations to Congress.[72]

F. Integrative Variants

The degree of specialization among the advisory counterparts is curious. Although some nations make use of specialist electoral courts,[73] I know of no constitutional democracy that has partitioned responsibility for enforcing the justiciable provisions of its basic document among privacy courts, human rights courts, gender equality courts, separation of powers courts, and so forth. Such specialization appears to be quite common among the advisory counterparts. I have not been able to identify any ongoing, independent advisory body whose jurisdiction is spelled out in terms meant to capture the full sweep of the society's constitutive commitments or aspirations. There are, however, several real-world precursors for such an integrative advisory counterpart.

For starters, a handful of the new investigative/advisory bodies have missions encompassing more than one of the issue areas this Article has examined. The mandate of Ghana's Commission on Human Rights and Administrative Justice conjoins the protection of "fundamental rights and freedoms" with the fight against corruption.[74] Tanzania has assigned responsibility for advancing human rights and "good governance" principles" to a Commission for Human Rights and Good Governance.[75] Nations that give human rights or anticorruption responsibilities to an ombudsman often stipulate that the person who holds this office should also carry out the traditional ombuds-duty of ensuring "legality and fairness" in government administration."[76] Uganda's Inspectorate of Government, for example, has corruption detection and prevention functions, but is

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71. 42 U.S.C. § 15381(a) (Supp. 111 2003).

72. *Id.* § 15381(c). In important respects, however, the EAC's design is seriously flawed. *See* Elmendorf, *supra* note 62, at 1441–44.

73. Responsibility for adjudicating disputes over electoral outcomes is often lodged with the same independent body that administers elections. *See, e.g.*, Fabrice E. Lahoucq, *Can the Parties Police Themselves? Electoral Governance and Democratization*, 23 INT'L POL. SCI. REV. 29, 36–37 (2002) (describing electoral tribunals in Chile, Uruguay, and Costa Rica).

74. HUMAN RIGHTS WATCH, *supra* note 7, at 154.

75. Leonard G. Magawa, *Tanzania's Commission for Human Rights and Good Governance: A Critique of the Legislation*, INT'L OMBUDSMAN Y.B., Vol. 6, 2002, at 100, 101.

76. Reif, *supra* note 27, at 11–13 (describing emergence of "hybrid human rights ombudsman" institutions).

also tasked with "promoting fair, efficient, and good governance in public offices," and "stimulating public awareness about the values of constitutionalism."[77]

The concept of human rights may itself be so labile as to enable a commission charged with their promotion and protection to take up the privacy, the electoral, or even the freedom-of-information concerns that many nations have assigned to specialist advisory bodies. Thus, South Africa's Human Rights Commission has been a forceful proponent of transparency measures, drawing a linkage between freedom of information and human rights protection.[78]

Another potential antecedent for the integrative advisory counterpart is the law revision commission. For hundreds of years it has been commonplace for governments to convene temporary commissions of legal notables to identify anomalies and ambiguities in the law and to develop clarifying, simplifying reforms.[79] Starting mostly in the 1960s and 1970s, a number of countries—and a handful of states within the U.S.—established permanent commissions to carry out this legal housekeeping function.[80] At first, these permanent

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77. REIF, *supra* note 20, at 232–33. *See generally* Edmond R.B. Nkalubo, *Uganda Human Rights Commission Including the Office of the Inspectorate of Government*, *in* NATIONAL EXPERIENCES, *supra* note 14, at 579, 579–92 (describing the history and current powers of the Uganda Human Rights Commission and the Inspectorate of Government).

78. HUMAN RIGHTS WATCH, *supra* note 7, at 300; *see also* S. AFRICAN HUMAN RIGHTS COMM'N, THE GUIDE ON HOW TO USE THE PROMOTION OF ACCESS TO INFORMATION ACT - ACT 2 OF 2000, at 2–3 (2005), *available at* http://www.sahrc.org.za/sahrc_cms/downloads/PAIA%20GUIDE%20english.pdf (addressing linkages between information and human rights).

79. *See generally* Michael Kirby, *Are We There Yet?*, *in* THE PROMISE OF LAW REFORM 433 (Brian Opeskin & David Weisbrot eds., 2005) (noting historical examples of consultation as well as the more recent development of substantial commissions); Hon. J. Bruce Robertson, Law Reform: What Is Our Knitting? How Do We Stick to It?, Address to the Association of Law Reform Agencies in East and Southern Africa Conference 1–5 (Mar. 15–17, 2005), *available at* http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/7571ca2d-1bff-4af3-96da-21174f89f6fd//ALREASA%20speech%20170205.pdf (describing the development, functions, operations, and goals of law reform commissions).

80. Prominent adopters include England and Scotland (Law Commission Act, 1965), *see* Robertson, *supra* note 79, at 2 & n.7; South Africa (South African Law Commission Act, 1973), *id.* at 4; Australia (1975; now governed by the Australian Law Reform Commission Act 1996), *id.*; Ireland (Law Reform Commission Act 1975); New Zealand (1985), *id.* at 5; and Canada (which created a permanent law commission in 1970, terminated it in 1992, and set up a new one in 1997), *id.* at 3–4 & nn.15–16. Countries with law revision commissions today include: Bahamas, Bangladesh, Canada, Cyprus, England & Wales, Fiji, Gambia, Ghana, Hong Kong, India, Ireland, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Nigeria, Northern Ireland, Pakistan, Papua New Guinea, Rwanda, Scotland, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Uganda, Zambia, and

law commissions bore little resemblance to the bodies I have labeled "advisory counterparts." Their mission was interstitial, their agenda was typically subject to governmental control,[81] and they were populated with lawyer-technocrats who served at the will of elected officials.[82]

Many of the permanent law commissions have struggled to define their niche and justify their continued existence.[83] Their difficulties have been variously attributed to loss of public confidence in technocratic modes of policymaking;[84] to the emergence of new institutions for policy research and law reform within the legislative

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Zimbabwe. Austl. Law Reform Comm'n, Overseas Law Reform Sources, http://www.alrc.gov.au/links/overseaslawreform.htm (last visited Jan. 5, 2007). U.S. states with permanent law revision commissions include: California, Cal. Law Revision Comm'n, History and Purpose, http://www.clrc.ca.gov/background.html (last visited Jan. 5, 2007), Connecticut, Conn. Law Revision Comm'n, http://www.cga.ct.gov/lrc (last visited Jan. 17, 2007), Michigan, Mich. Law Revision Comm'n, http://www.council.legislature.mi.gov/mlrc.html (last visited Jan. 17, 2007), New Jersey, N.J. Law Revision Comm'n, http://www.lawrev.state.nj.us, (last visited Jan. 17, 2007), Oregon, Or. Law Comm'n, http://www.willamette.edu/wucl/oregonlawcommission (last visited Jan. 17, 2007), and Utah, Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 14–15 (1996).

81. *See* Peter Hennessy, *Independence and Accountability of Law Reform Agencies*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 72, 80 ("The work program of most law reform agencies in [Commonwealth countries] is determined by the government.").

82. *Cf.* Michael Tilbury, *A History of Law Reform in Australia*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 3, 12–13 (discussing the focus of early reform commissions on "'lawyers' law'"—mere technical niceties—and their eschewing of the "embedded policy issues"). Permanent law reform commissions whose organic acts exemplify the classical model are found in Australia (Australian Law Reform Commission Act, 1996), Ireland (Law Reform Commission Act, 1975), and the United Kingdom (Law Commission Act, 1965), among other places. (Notwithstanding the formal structure of the body, the first chairperson of the Australian Law Reform Commission publicly rejected the "'lawyer's law'" model of law reform and sought to develop, instead, a more policy-oriented and public-involving *modus operandi*. Tilbury, *supra*, at 13–15.)

83. *See* Roderick Macdonald, *Continuity, Discontinuity, Stasis and Innovation*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 87, 90 ("After a brief flourishing, many law reform agencies in Canada, Australia and other Commonwealth countries were disbanded, fiscally starved, or otherwise neglected during the 1990s."). Canada's Law Commission, which some observers consider exemplary, was disbanded in 1992, revived in 1997, and, as part of a Conservative assault on public institutions thought to have a liberal bias, abruptly defunded in 2006. *See* John Ibbitson, *Fatal Cuts to Law Panel Deeply Ideological*, GLOBE & MAIL, Sept. 28, 2006, at A4; Bert Archer, *Laying Down the Law*, GLOBE & MAIL, Sept. 30, 2006, at F2.

84. David Weisbrot sees the permanent law commissions as part and parcel of a "modernist" project, marked by faith in expertise, technocratic problem-solving, and big-law/big-government solutions to social problems. David Weisbrot, *The Future for Institutional Law Reform*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 18, 19–20. To prosper in the present day, they must shift from technocratic to consultative and public-involving modes of decisionmaking. *Id.* at 29–35.

and executive branches of government;[85] to anti-intellectualism;[86] and, in the case of some commissions, to ideological anachronism.[87] Yet as one commentator wryly remarks, "law reform commissions, like vampires, appear to be difficult to kill."[88] Some that were eliminated have been reconstituted anew,[89] and the concept of a permanent law revision agency continues to draw adherents: today there are, by one count, more than sixty general-purpose law reform commissions worldwide.[90]

As law commissions and their proponents seek contemporary foundations for the commissions' continued existence, they increasingly invoke the ideal of a law-revision body "independent" from everyday politics and therefore (so it is said) capable of offering a uniquely long-term, multi-disciplinary, and public-involving perspective on societal problems.[91] Some general purpose law commissions are beginning to assert their independence from the elected branches of government,[92] and to have that independence

85. *See, e.g.*, Macdonald, *supra* note 83, at 96 ("[T]here was no question that by the early 1990s the [soon-to-be-abolished] Law Reform Commission of Canada was not doing anything substantively different from the Department of Justice."); David Solomon, *Relations with the Media*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 175, 175 ("Law reform agencies are normally engaged by governments in particular tasks because the work is dry, technical and publicly unexciting. If the prospective reform is likely to excite public passion, it is far more likely to be handed over to a parliamentary committee to explore."); Weisbrot, *supra* note 84, at 20–21 (describing the emergence within Australia and her constituent states of joint ministerial councils, well-staffed and resourced parliamentary committees, specialist advisory bodies under the purview of the Attorney General, and more).

86. Macdonald, *supra* note 83, at 91 (suggesting that the critique of judges' and law commissioners' ability "to distil 'neutral principles'" provided "convenient cover for the anti-professionalism, anti-scientism and anti-intellectualism of many latter-day political movements").

87. Michael Tilbury suggests that some Australian law commissions, being "product[s] of a political era of welfare liberalism," failed to adapt to the "neo-liberal era." Tilbury, *supra* note 82, at 15.

88. Weisbrot, *supra* note 84, at 24.

89. *Id.*

90. Elton Singini, *Foreword* to THE PROMISE OF LAW REFORM, *supra* note 79, at v, v.

91. Hennessy, *supra* note 81, at 78–80 (characterizing benefits of independence in law reform work); Kate Warner, *Institutional Architecture*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 55, 67 ("Ministerial and parliamentary committees cannot offer . . . independent advice based on the different experiences, approaches and outlooks that are available to an independent body."); Weisbrot, *supra* note 84, at 27 ("It is fundamental to success that a law reform commission maintain its independence.").

92. *See, e.g.*, Rt. Hon. Sir Geoffrey Palmer, The Law Reform Enterprise in New Zealand, Address to the Board of the New Zealand Law Society 2 (Feb. 17, 2006), *available at* http://www.lawcom.govt.nz/SpeechPaper.aspx (stating that the New Zealand Law Commission

recognized.[93] Some have been authorized to undertake law reform projects sua sponte, without prior government approval.[94] And most intriguingly, a few law commissions now describe their mission in ways that echo the representation-reinforcing and fundamental-rights-protecting work of constitutional courts. Thus, in a recent speech, the President of the New Zealand Law Commission indicated that his body would focus on issues as to which the ordinary political process is prone to failure.[95] The Malawi Law Commission, which is

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"has the same sort of independence as Judges in formulating its recommendations"); Robertson, *supra* note 79, at 12 ("In my judgment a Law Commission must never be constrained in its ability to approach a problem as it sees fit, to assess an issue and all its ramifications and have the ability to recommend and report without inhibition or constraint."). Law Comm'n of Can., Operations Protocol (on file with author) ("The Commission will develop its research programme around general themes that reflect problems as experienced, regardless of how these problems are cast in federal legislation. . . . The Commission seeks to maintain a balance between its policy independence from the Department of Justice, and its accountability to the Canadian public through the tabling of its Reports in the Parliament of Canada.").

93. *See, e.g.*, DEP'T FOR CONSTITUTIONAL AFFAIRS, THE LAW COMMISSION AND GOVERNMENT: WORKING TOGETHER TO DELIVER THE BENEFITS OF CLEAR, SIMPLE, MODERN LAW para. 1.9 (2006), http://www.dca.gov.uk/pubs/reports/lawcomm_vision.htm (last visited Jan. 5, 2007) ("The Government is committed to respecting the independence of the Law Commission as a statutory body."); Austl. Law Reform Comm'n, About the ALRC, http://www.alrc.gov.au/about (last visited Jan. 5, 2007) ("[T]he ALRC is not under the control of government, giving it the intellectual independence and ability to make research findings and recommendations without fear or favour."); Letter from Gov. Theodore R. Kulongoski to the Program Committee of the Oregon Law Commission (Nov. 12, 2003), *available at* http://www.willamette.edu/wucl/oregonlawcommission/home/EthicsGovernorsProposal.pdf (explaining Governor's decision, following veto of government ethics bill, to refer to Oregon Law Commission the issue of "comprehensive" reform to public ethics law—and noting that the Commission, being a "unique non-partisan partnership," was "particularly well-suited to this task").

This is not to say that governments have consistently recognized and heeded the independence of those law commissions that lay claim to independence. In Canada, for example, the Conservative government of Stephen Harper completely defunded the Law Commission, a move that cheered his base but was attacked in other quarters as illegitimate and possibly illegal. *Compare* Tony Gosgnach, *Conservatives Slash Secret Liberal Excesses*, 15 CATHOLIC INSIGHT 34 (2007), *and* Frances Russell, *Harper Re-Engaging Far Right*, WINNIPEG FREE PRESS, Oct. 11, 2006, at A13 *with* Lindsey Wiebe, *Cutting Law Commission Funds May Be Illegal, Layton Says*, WINNIPEG FREE PRESS, Oct. 6, 2006, at A5. *See also* Kirk Makin, *Ontario Unveils Law Reform Commission*, GLOBE & MAIL, Dec. 1, 2006, at A6 (reporting on efforts to establish a provincial law reform commission "impervious to future political meddling" in the wake of the defunding of the Law Commission of Canada).

94. This is the case in, for example, Canada and New Zealand. *See* Law Commission Act of Canada, S.C., ch. 9, § 4 (1996); Law Commission Act 1985, 1985 S.N.Z. No. 151.

95. *See* Palmer, *supra* note 92, at 4–5 (stating that the commission's "comparative advantage" is to be found in "large, long-term projects that straddle electoral cycles"; projects that "[i]nvolve issues that span the interests of a number of government agencies and professional groups"; projects that "[n]eed to be done independently of central government

constitutionally entrenched, undertakes to "review all laws of Malawi for conformity with the Constitution and applicable international law."[96] The Law Commission of Canada claimed a mandate "to examine critically even the most fundamental principles of the Canadian legal system and to evaluate the performance of those institutions by which these principles are put into practice."[97] The Commission endeavored "to point out explicitly where the law is lacking in relevance and responsiveness, where it is inaccessible and where its principles or impacts are unjust."[98] This is a far cry from code-book housecleaning.[99]

Following public consultations, the Law Commission of Canada chose to work on such foundational and politically fraught projects as "Order and Security," "Electoral Reform," and "From Restorative Justice to Transformative Justice."[100] The Commission proposed far-reaching changes, including the replacement of first-past-the-post

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agencies because of the existence of vested interests"; and projects that "[r]equire independent consideration in order to promote informed public debate on future policy direction"). A similar theme recurs in the project selection criteria of the Law Reform Institute of Alberta, which include whether the "project [is one] that neither the political process nor the administrative process is likely to deal with effectively." J. Bruce Robertson, *Initiation and Selection of Projects*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 102, 106.

96. Mwangala Kamuwanga, *The Challenge of Law Reform in Southern Africa*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 422, 428.

97. Law Comm'n of Can., Mandate (on file with author).

98. *Id.*

99. Whether the Law Commission of Canada should be viewed as a harbinger of law commissions to come is an open question. On the one hand, the Commission was considered a model by leading figures in the law reform community worldwide. *See* Archer, *supra* note 83. But its ambitious agenda had an ideological sting, and led to conflicts with the Conservative government of Stephen Harper, which completely defunded the Commission shortly before this Article went to press. *See supra* note 83. Whether the Commission's defunding was a death knell remains to be seen. Some observers attacked the defunding as illegitimate or even illegal. *See* Ibbitson, *supra* note 83; Lindsey Wiebe, *Cutting Law Commission Funds May Be Illegal, Layton Says*, WINNIPEG FREE PRESS, Oct. 6, 2006, at A5. Some pointed out that the Conservatives resorted to financial "chicanery" to hobble the Commission because they "kn[ew] they would lose" if they asked Parliament to repeal the act that created the Commission. *See* Ibbitson, *supra*. In Ontario, the provincial government responded to the Law Commission of Canada's defunding with a proposal to establish a provincial law reform commission "impervious to political meddling." Kirk Makin, *Ontario Unveils Law Reform Commission*, GLOBE & MAIL, Dec. 1, 2006, at A6. In short, while the Commission is presently defunct, it is entirely possible that the next government will provide it with new funding and perhaps introduce legislation to shore up its independence. For the Commission to prosper over the long run, however, it will probably be necessary for it to develop new decisionmaking criteria and procedures to combat the perception that it is a tool of left-liberal activists.

100. Law Comm'n of Can., Research Projects, (on file with author).

elections (for seats in Parliament) with a mixed-member proportional alternative.[101]

Increasingly, law commissions are also being established to develop constitutional amendments and revisions. This has occurred at the state level in the United States,[102] and at the national level in other polities.[103] Constitution revision commissions are almost always ephemeral, disbanding upon the issuance of their recommendations, and in that sense unlike the other bodies surveyed here.[104] But their use is broadly consistent with the trend toward employing law reform commissions for much more than housekeeping.

A final institutional antecedent for advisory counterparts whose subject-matter jurisdiction would extend to the full sweep of the polity's basic aspirations is the vestigial second legislative chamber, such as the U.K.'s House of Lords. Historically, it was quite common for bicameral democracies to provide for the selection of upper-house members by appointment, heredity, or indirect election by political elites.[105] These selection procedures were designed so as to represent either the propertied classes or, in confederated nations, the constituent units of government.[106] Second chambers organized on the propertied-classes model foundered in the late nineteenth and twentieth centuries.[107] Increasingly out of step with democratizing cultures, some of these bodies were abolished, and many more were subjected to broad-based popular elections.[108] Others saw their powers drastically curtailed.[109] For example, the Parliament Act of 1911 replaced the House of Lords' power to block legislation with a

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101. LAW COMM'N OF CAN., VOTING COUNTS: ELECTORAL REFORM FOR CANADA 90 (2004).

102. *See* Williams, *supra* note 80, at 1–2 ("[T]he research leading to this article grew out of work performed for a state constitutional commission. Such appointed commissions and their growing impact on the evolution of state constitutions have not been adequately recognized.").

103. *See, e.g.*, Brij V. Lal, *Constitutional Engineering in Post-Coup Fiji*, *in* THE ARCHITECTURE OF DEMOCRACY 267, 268 (Andrew Reynolds ed., 2002); Bereket Habte Selassie, *The Eritrean Experience in Constitution Making: The Dialectic of Process and Substance*, *in* THE ARCHITECTURE OF DEMOCRACY, *supra*, at 357, 358–59; The Constitution of Kenya Review Commission (CKRC), http://www.kenyaelections.com/kenyareview.html (last visited Jan. 21, 2007).

104. One exception is Utah's Constitution Revision Study Commission, which has been in operation since 1969. *See* Williams, *supra* note 80, at 14–15.

105. *See generally* GEORGE TSEBELIS & JEANNETTE MONEY, BICAMERALISM 15–43 (1997).

106. *Id.*

107. *Id.* at 34–35.

108. *Id.*

109. *Id.* at 34.

"suspensive veto," subject to override by the House of Commons following a modest interval of time.[110] Populist pressures have not abated. Reformers continue to agitate for abolition or direct election of the "undemocratic" upper houses,[111] making members of these bodies reluctant to exercise even the modest power of the suspensive veto.[112]

It is possible, however, that if the process of appointing upper house members is reformed so as to strip away any remnants of propertied privilege and to ensure that the appointees are not just partisan hacks, the appointed second legislative chambers will come to play distinctive and useful roles as constitutional advice-givers, perhaps with a limited power of legislative delay.[113] This is the future for the British upper house envisioned by the Royal Commission on the Reform of the House of Lords (also called the Wakeham Commission), which Prime Minister Blair convened in the late 1990s.[114] The Wakeham Commission made several intriguing suggestions. It urged that the House of Lords institutionalize its constitutional safeguarding role by setting up "an authoritative Constitutional Committee . . . of distinguished people who . . . are under a duty to produce independent, dispassionate, and authoritative reports on problem areas within the constitution and on

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110. *Id.*

111. For case studies illustrating the tenuous position of the upper house in a number of advanced democracies, see generally SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD (Samuel C. Patterson & Anthony Mughan eds., 1999) [hereinafter SENATES]. In their concluding chapter, Patterson and Mughan observe that a "general lack of democratic legitimacy" often leaves upper houses "in a weak position to defend themselves against political opponents demanding their reform." Anthony Mughan & Samuel C. Patterson, *Senates: A Comparative Perspective*, *in* SENATES, *supra*, at 333, 340.

112. That a lack of democratic credentials has long made the House of Lords reluctant to exercise the suspensive veto is a recurring theme in British scholarship and commentary. *See, e.g.*, Denis Carter, *The Powers and Conventions of the House of Lords*, 74 POL. Q. 319 (2003) (describing this thesis).

113. Note that the idea that upper houses have an important role to play in countering the momentary "passions" of the citizenry is one with a long and illustrious lineage. *See* Samuel C. Patterson & Anthony Mughan, *Senates and the Theory of Bicameralism*, *in* SENATES, *supra* note 111, at 1, 13–15. Consistent with the idea that second chambers have a special constitutional safeguarding role, many have greater de jure authority to block or delay constitutional reforms than ordinary legislation. *See* MEG RUSSELL, REFORMING THE HOUSE OF LORDS 40 & tbl. 2.2 (2002).

114. Blair's initial agenda for House of Lords reform—including appointment of a Royal Commission to make recommendations—was set forth in MODERNISING PARLIAMENT: REFORMING THE HOUSE OF LORDS, 1999, Cm. 4183, *available at* http://www.archive.official-documents.co.uk/document/cm41/4183/4183.htm.

proposals for changing it,"[115] and by establishing a parallel or sub-committee "with a wide-ranging remit in relation to human rights."[116] The Commission further argued that a mostly appointed House of Lords could play this constitutional safeguarding role better than an elected House, not simply because of the appointed body's greater remove from partisan and electoral politicking, but also because an appointed body could in some respects be more representative of the citizenry as a whole than a directly elected body.[117] The strains of modern-day campaigning have winnowed the pool of potential elected officials, the argument went, and a suitably appointed body could be comprised of persons with a much wider range of experiences and outlooks.[118]

Issued in 2000, the Wakeham Commission's report was not wholeheartedly embraced by the Blair government, which chafed against the body's recommendation for separating the upper house from political party control.[119] Yet there has been incremental movement in the direction of some of the report's central recommendations,[120] and as the House of Lords becomes more broadly representative of the British populace, it is starting to behave more assertively.[121]

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115. ROYAL COMM'N ON THE REFORM OF THE HOUSE OF LORDS, A HOUSE FOR THE FUTURE 53 (2000).

116. *Id.* at 56.

117. *Id.* at 96–103 (setting forth "characteristics" that would be desirable to have in the membership of a reformed House of Lords); *id.* at 106 ("A wholly directly elected second chamber could not be broadly representative of the complex strands of British society.").

118. *Id.* at 106, 115.

119. *See* PAT STRICKLAND & OONAGH GAY, HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 02/002, HOUSE OF LORDS REFORM—THE 2001 WHITE PAPER 10–16 (2002), http://www.parliament.uk/commons/lib/research/rp2002/rp02-002.pdf (last visited Jan. 5, 2007) (comparing Wakeham proposal and the official Government response).

120. Blair unilaterally established an appointments commission modeled on the Royal Commission's proposal, and promised not to interfere with the Commission's choice of "independent" peers. *See* OONAGH GAY & RICHARD KELLY, HOUSE OF COMMONS LIBRARY, STANDARD NOTE SN/PC/2855, THE HOUSE OF LORDS APPOINTMENTS COMMISSION 2–5 (2006), http://www.parliament.uk/commons/lib/research/notes/snpc-02855.pdf (last visited Jan. 5, 2007). Blair has also promoted legislation that would provide a statutory foundation for the Appointment Commission's role. *Id.* at 10–12.

121. *See* RUSSELL, *supra* note 113, at 315 (suggesting that a long-quiescent House of Lords is showing new signs of life following recent changes which (i) eliminated the hereditary peers and (ii) brought the partisan balance of the House of Lords into alignment with the party preferences of the British electorate).

G. Summary

Any generalization about the gamut of institutions I have surveyed would be hazardous. But in the interest of concreteness, this Article will use the term *advisory counterpart* to refer to a publicly chartered body with the following attributes. First, as to subject matter: the body is concerned with one or more areas of law touching on the characteristic commitments of liberal democracy, such as the protection of minority groups, the maintenance of separate public and private spheres, the holding of fair elections, and the like.[122] Second, powers: the body has some coercive powers of investigation, and authorization to act sua sponte. It is charged with developing law reform recommendations and conducting educational campaigns but, absent a revocable delegation of authority from the legislature, it may not promulgate rules with the force of law. Third, independence: the advisory counterpart is constitutionally entrenched or otherwise designed for some degree of independence from the elected branches.

The advisory counterparts are kin to constitutional courts by dint of the foundational nature of the topics with which they are concerned and their putative independence from the other branches of government. In other respects, however, the advisory counterparts look much more like administrative agencies. But they are agencies of a peculiar breed, set up to challenge the elected branches rather than to do their bidding, encouraged not simply to implement statutes but to press for their reform.[123]

II. EXAMINING THE COUNTERPARTS: PROMISE AND PITFALLS

This Part develops a comparison of constitutional courts and advisory counterparts along three dimensions: crafting remedies, engaging public opinion, and achieving independence from the

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122. The body might invoke the text of a written constitution in justifying its proposals, but this is not strictly necessary. It might also flesh out its charge with reference to norms found in statutory law, cultural traditions, international conventions and treaties, and the moral intuitions of the body's members.

123. Others have recognized that administrative agencies can play an important advisory role in law reform. *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) (envisioning roles for a hypothetical risk-regulation super-agency); Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (exploring factors that make sentencing commissions successful). On Breyer's and Barkow's accounts, agencies wield influence by gradually building the trust of elected officials. I will argue, by contrast, that under the right conditions, advisory counterparts can wield influence by challenging elected officials, rather than by serving as the officials' dutiful agent.

elected branches of government. My goal is to depict how the advisory counterparts, seen in a favorable light, could contribute to the project of liberal, democratic self-government, and also to identify some of the practical impediments to realizing this vision. The best-light argument explains my excitement about these bodies and will, I hope, motivate other legal scholars to venture forth into this largely uncharted institutional terrain. The practical-problems arguments are designed to orient subsequent empirical research and institutional tinkering.

The best-light argument for what the counterparts have to offer runs on two levels. The first level concerns the establishment of structural remedies for—or prophylactics against—illiberal political dynamics. I focus more particularly on problems of top-down illiberality, wherein elected officials either take advantage of citizen inattention to pursue illiberal policies or actively try to shape ill-defined or plastic citizen preferences so as to create a base of support for the officials' illiberal ambitions.

With respect to the establishment of remedies for (and safeguards against) illiberal political dynamics, the counterparts have, or could have, four important advantages over constitutional courts. For one, the fact or the prospect of such illiberal dynamics is often best addressed through legal reforms that are "legislative" in character, in that they involve setting up and funding public regulatory or oversight bureaucracies (e.g., freedom of information laws), or complex adjustments to the design of electoral systems. Familiar concerns about the separation of powers discourage judicial efforts to craft such legislative remedies. By contrast, developing legislation is right up the counterparts' alley.

The counterparts are also better positioned than constitutional courts to figure out when and why liberal values are threatened, and how those threats might best be countered. Many counterparts wield coercive powers of investigation, and even counterparts that lack de jure authority to force top officials to testify or hand over documents are better positioned than appellate courts to assemble information on governmental conduct and societal conditions. The counterparts have the administrative resources and flexibility to commission studies, to consult with current and former political insiders, to hold public hearings, and otherwise to gather and filter information about government practices.

A third counterpart advantage is that advisory bodies can, in principle, be designed for greater independence from the elected

branches of government than constitutional courts, without posing much threat to democratic self rule—for however great its independence from the elected branches, a purely advisory body is unlikely to derail a governmental initiative without mustering a base of popular support for its position. This potential for greater independence is of no small significance insofar as the central purpose for the body in question is to guard basic constitutional ideals against illiberal ploys by then-serving elected officials.

Finally, the counterparts are, in certain respects, better positioned than constitutional courts to develop what I shall term *persuasive authority* with average citizens, such that citizens revise their own policy preferences (if any) in line with the independent body's recommendation. I concede that counterpart persuasive authority is likely to be weak in absolute terms, even inconsequential, as to many issues much of the time. But there is some basis for thinking—and some evidence—that counterparts can exercise significant persuasive authority on election-law and government-integrity questions, particularly in the wake of scandals. Enough, in fact, to get elected officials to accede to reforms they personally disfavor.

Put these pieces together—the wherewithal to design legislative solutions to structural illiberality, great independence from the elected branches of government, and persuasive authority with the citizenry (at least as to certain issues, at certain times)—and the picture that emerges is of an institution that could effect reforms that are wholly beyond the ken of constitutional courts, and do so in a manner that does not do violence to democratic sensibilities.

The second level of the best-light argument is concerned not with the counterparts' achievement of particular legal reforms but rather with the nature of the public dialogue and debate that the counterparts may bring about. My foil is the thesis that the principal function of, and justification for, constitutional judicial review as practiced in the United States is to induce the public to confront—and in the process to refine or even remake—constitutional principle.

Judicial review is a potentially powerful tool for catching public attention, and an independent body whose powers are merely advisory would seem much less well positioned to direct attention to the issues it deems important. But some counterparts wield other public powers that may be employed for debate-forcing purposes. Examples include the subpoena power, and, much less commonly, "legislative process rights," such as authority to trigger a vote of the

legislature or a referendum on counterpart-proposed reforms. Moreover, a suitably designed counterpart may be able to establish persuasive authority with the electorate regarding public priorities, even if the body wields little persuasive authority (outside the election law and government integrity contexts) regarding what, exactly, should be done about the "priority" problem it has identified. As a thought experiment, I propose a model under which a counterpart with jurisdiction over the full sweep of the polity's basic commitments is authorized to make "determinations of exceptional need," which determination (1) would operate as a condition precedent for the counterpart's exercise of its legislative process right, and (2) would formally preclude the counterpart from exercising this right again for at least *x* years. By credibly signaling the counterpart's big-picture judgment about constitutional priorities and by calling into a play a process that will result in a vote on whether to adopt the counterpart's proposed reform, the determination of need may be expected to move the counterpart's findings and recommendations to the center of public debate.

I conclude the dialogic argument with a brief, schematic account of how institutions set up for the purpose of instigating public dialogue about the meaning and application of a polity's nominally constitutive commitments might be compared and assessed. In terms of these normative criteria, it is at least plausible to think that vote-forcing by a priority-setting counterpart would prove more attractive than judicial review by constitutional courts. This argument is frankly speculative, in both its positive and normative dimensions. The point of the exercise is not to say that the United States or any other constitutional democracy should jettison constitutional courts in favor of priority-setting counterparts with legislative process rights, but simply to illustrate how one might go about comparing alternative ways of institutionalizing constitutional dialogue, and to draw out what is plausibly distinctive about the counterparts.

Taken together, the best-light arguments offer a vision of what advisory counterparts might realistically achieve. They do not purport to explain the successes and failures of counterparts extant in the world today. If the best-case scenario were uninspiring, there would be little point in trying to figure out how real-world counterparts measure up and why they sometimes fall short.

There are, of course, practical problems, the most basic of which is relevance. The recommendations of many existing counterparts seem to have little political traction. These entities wield little if any

persuasive authority with the proverbial median voter, and they lack appropriate tools for forcing problems to the center of public debate.

Advisory counterparts may also have an institutional interest in discrediting the elected branches of government, which could lead to overuse of their investigatory powers (if any), with worrisome consequences: distracted government decisionmakers, loss of public support for large-scale governmental initiatives; or even bottom-up illiberality.

Third, whatever the normative appeal of providing counterparts with great independence from the elected branches, this may be quite a challenge to achieve in practice. Some of the forces supporting constitutional courts' de facto independence from the elected branches are nonoperative as to the counterparts. And some of the institutional design strategies that might support the counterparts' de facto independence would also make them rather more dangerous entities, which undercuts the normative argument for great independence in the first instance.

* * *

My presentation of the best-light and practical problems arguments is organized around the focal topics of remedies, public engagement, and independence. As to each, I seek to adduce both the relevant theoretical considerations and some real world illustrations.

A. Crafting Structural Remedies for Illiberality

It is no secret that constitutional courts are uncomfortably positioned to give effect to liberal commitments where doing so requires not the elimination of a problematic statute, regulation, or administrative practice, but rather supplementation of the offending item (e.g., adding a new section to a statute), or initiation of some new governmental undertaking. To be sure, constitutional courts do have tools for establishing affirmative reforms. The structural injunction is one possibility.[124] As well, the nominally negative power of striking down statutes may be used to affirmative ends.[125] (If the

124. For a classic treatment of U.S. practice, see generally OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

125. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 61–91 (2000) (explaining how, in several European democracies, judge-made norms come to be encoded in statutes as legislatures respond to court decisions); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL

stricken law was popular and the court's opinion instructs the legislature on some other, constitutionally permissible way of achieving the same or similar ends, a favorable legislative response will often ensue.) Some constitutional courts are authorized to issue advisory opinions in which they make policy suggestions,[126] and others not so authorized may use dicta to much the same effect.[127]

Yet judicial forays into the crafting of affirmative remedies for constitutional problems are often—and properly—of quite narrow reach. It is not necessary for present purposes to get mired in the debate about what distinguishes an appropriate judge-made remedy from inappropriate "judicial legislation." Suffice it to say that there is considerable agreement that constitutional courts generally should not get into the business of crafting large regulatory programs, adding new provisions to statutes, setting budgetary priorities, and the like. These limitations are grounded in concerns about the likelihood of error (resulting from judges' lack of policymaking and policy-monitoring expertise and the limitations of their case-specific point of view), as well as normative ideas about democratic legitimacy and the separation of powers.[128]

REVIEW IN A SEPARATED SYSTEM (2004) (examining congressional response to judicial decisions).

126. Regarding the use of advisory opinions by state supreme courts within the United States, see Jonathan D. Persky, Note, *"Ghosts that Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005). Abroad, there is at least one judicial system, New Zealand's, in which bill-of-rights adjudication is *only* advisory. *See generally* ANDREW BUTLER & PETRA BUTLER, THE NEW ZEALAND BILL OF RIGHTS: A COMMENTARY (2005); THE NEW ZEALAND BILL OF RIGHTS (Paul Rishworth et al. eds., 2003).

127. *Compare* Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (explaining how advicegiving in dicta can be a valuable alternative to aggressive forms of judicial review), *with* Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998) (debating the propriety of Article III courts' use of dicta for policy advicegiving).

128. For notable articulations of and variations upon these themes within the U.S. legal tradition, see, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 136–204 (2001) (discussing the problem of "strategic judgment" in constitutional adjudication and associated limits on reach of the courts); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 640–47 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (setting forth legal theses of the legal process school concerning problems "appropriate for adjudication"); SUNSTEIN, *supra* note 8, at 221–37 (exploring possibilities for judicial enforcement of positive social welfare rights, consistent with familiar understandings of limits on the judicial role). For an important partial dissent from the prevailing view, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (arguing that constitutional courts can and should pursue large-scale institutional reform remedies, at least in circumstances where the legislature or other actors have created or can be induced to create

The judiciary's limited capacity to fix constitutional problems is implicitly acknowledged in many of the post-Civil War, rights-creating amendments to the U.S. Constitution, which authorize Congress to enforce the article "by appropriate legislation."[129] Constitution framers in other countries have recognized limits to judicial implementation of constitutional commitments by designating certain sections of the constitution as nonjusticiable.[130]

Reliance on legislative implementation may be a sensible response to worries about judicial capacity for crafting effective remedies, or to anxieties about judicial overreach, but what is to be done when members of the elected branches have a political incentive not to enact "appropriate legislation"? If the incentive results from the clamoring of an inveterately illiberal populace, perhaps nothing can be done. But to the extent that the incentive is an artifact of the ways in which public institutions channel and inform political competition, and if actors external to the elected branches are positioned to revise the problematic structures of representation or otherwise to effect liberal reforms, there may be some basis for hope.

This is, of course, the root hope of process-based theories of constitutional judicial review.[131] But courts can only do so much, thanks to their limited remedial capacities. Independent advisory bodies that combine the constitutional court's characteristic remove from everyday politics with the legislature's capacity for designing

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monitoring and standard-setting institutions on which the courts can rely). Illuminating perspectives from commentators within other traditions are found in COURTS AND POLICY: CHECKING THE BALANCE (B.D. Gray & R.B. McClintock eds., 1995) (surveying the status, across several Commonwealth nations, of the "balance in constitutional functions between the legislature/executive and the courts"), JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth M. Holland ed., 1991) (providing case studies of eleven countries), and Dieter Grimm, *Constitutional Adjudication and Democracy*, *in* JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 103 (Mads Andenas & Duncan Fairgrieve eds., 2000) (offering a German justice's perspective on maintaining balance between legislative and judicial authority).

129. These include the Thirteenth Amendment, which bans slavery and involuntary servitude; the Fourteenth Amendment, which establishes the national and State citizenship of all persons born or naturalized in the United States, and which subjects the states to due process and equal protection obligations; and the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments, which guarantee that the right to vote shall not be abridged on account of race, sex, failure to pay a tax, or age (in the case of citizens who are 18 or older), respectively.

130. Often these sections establish positive rights. For an illuminating discussion of the non-justiciable "directive principles" found in the constitutions of South Africa and Ireland, see Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898–1902 (2004).

131. The classic statement is in JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

reforms to public institutions and electoral structures have the potential to do much more. The balance of this Section makes this point concrete—and shows what's at stake—by highlighting several scenarios in which (1) political dynamics threaten to undermine liberal aspirations such as public accountability, political equality, tolerance, and civil liberty, even absent a powerful and incorrigibly illiberal faction within the citizenry; and (2) "appropriate" reforms lie beyond reach of the courts. In the Section that follows, I take up the question of how advisory counterparts can build public support for their proposed reforms.

1. *Political Accountability.* That elected officials must face the voters every so often gives those officials an interest in adjusting the rules of political competition in ways that disfavor challengers.[132] To be sure, a vigilant citizenry that closely monitors the doings of political insiders can retard this tendency. Voters who agree on the limits of legitimate behavior by elected officials, and who understand what those officials are doing, might be able to coordinate on a "throw the bums out" strategy.[133] But politicians whose careers are on the line will typically have much more information than do voters about how political competition is likely to be affected by, for example, particular reforms to information-disclosure regimes, campaign-finance laws, ballot-access rules, or electoral district boundaries.[134] Self-interested incumbents may take advantage of asymmetric information to erode political competition.

It bears emphasis that political accountability depends not only on familiar negative freedoms, such as rights to criticize the government and form advocacy groups, but also on the various statutes and administrative apparatuses that make the rights to

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132. *Cf.* Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 997 (2005) ("Perhaps more than any other political phenomenon, incumbents' capture of political institutions through the manipulation of the rules of the electoral game has commanded the attention of scholars of the law of democracy in recent years.").

133. *But see* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS IN HOW GOVERNMENT SHOULD WORK 36–60 (2001) (developing the idea of "process space"—a dimension of voter decisionmaking concerned with political process as such—and theorizing that two-party competition fails to generate convergence on the median voter's position in process space, as such competition has long been thought to do in policy space).

134. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 709 (1998).

criticize and associate meaningful sources of accountability. These statutes often implicate exceedingly delicate questions about institutional design. Consider the cross-cutting issues at stake in what might be termed the "transparency regime"—the set of rules, administrative protocols, and enforcement mechanisms that provide citizens with information about what their government is up to, about who has contributed what to the campaigns of elected leaders, and about the financial entanglements of government officials. The crafting of transparency policy requires close attention to incentives and opportunities for obfuscation, to the packaging and timing of information disclosures, and to such countervailing values as privacy, intragovernmental deliberation, and security.[135] Courts may be able to tinker productively at the margins of a statutorily created transparency regime,[136] but no one seriously argues that constitutional courts should dictate the basic contours of the regime, notwithstanding that government leaders often will wish to conceal far more information than is justifiable in public-interest terms.[137]

2. *Political Equality.* The regulative ideal of political equality presents any number of difficult questions about collective obligation. Should the government undertake to register all eligible voters, as opposed to putting the onus on citizens to self-register?[138] Should private campaign finance be augmented through voucher or matching-fund programs that would enable citizens of modest means

135. *See generally* Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 918–23 (2006) (discussing the tradeoffs and policy problems presented by open government laws); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) (same). *Cf.* Pablo da Silveira, *Representation, Secrecy, and Accountability*, 12 J. INFO. ETHICS 8 (2003) (linking information disclosure policies to theories of representation).

136. Samaha, *supra* note 135, at 956–76.

137. Much the same can be said about the role of courts vis-à-vis the technological and legal architecture requisite to the production, through digital speech, of what Jack Balkin terms "democratic culture." *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 52–54 (2004) (arguing that, in the digital age, free speech advocates ought to shift their attention from "speech rights" to "speech values," and claiming that it will fall to legislatures and administrative agencies rather than courts to protect these values, due to courts' inability to craft suitably comprehensive and technologically informed regulatory arrangements).

138. *Cf.* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 964–73 (2005) (calling for universal voter registration).

to be heard when politicians compete for dollars?[139] Does a commitment to political equality entail a commitment to high quality and publicly financed education?

However these questions are answered, two things are clear. First, judicial imposition of such affirmative remedies for political inequality would tax the technical competence and quite possibly the legitimacy of constitutional courts. Second, the elected officials and political parties who hold the reins of power will assess possible reforms to the laws that regulate political participation in terms of the likely electoral payoff. They will weigh the probable electoral fallout from denying political equality claims against the likely change in the composition and orientation of the electorate that would result from recognizing those claims. Consequently, electoral competition can generate sharp expansions *or* curtailments of political equality.[140]

The early efforts of the United Kingdom's recently established Electoral Commission illustrate how an independent advisory body can articulate a vision of political equality and encourage the passage of legislation responsive to that vision. With the aim of securing "the widest possible participation in democracy,"[141] the Commission has proposed reforms that would facilitate voting by the blind and by non-English speakers;[142] called for public matching funds for small political donations (up to £200);[143] and encouraged experimentation

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139. *Cf.* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS (2002) (proposing voucher program); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 640–66 (2005) (proposing matching fund program); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004) (same).

140. The curtailment dynamic is sadly illustrated by the history of the African-American franchise following Reconstruction. For a succinct history see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

141. ELECTORAL COMM'N, STANDING FOR ELECTIONS IN THE UNITED KINGDOM 8 (2003), *available at* http://www.electoralcommission.org.uk/files/dms/Standing_9846-7972__E__N__S__W__.pdf; *see also* ELECTORAL COMM'N, VOTING FOR CHANGE: AN ELECTORAL LAW MODERNISATION PROGRAMME 13 (2003) [hereinafter ELECTORAL COMM'N, VOTING FOR CHANGE], *available at* http://www.electoralcommission.org.uk/files/dms/Votingforchange_16305-7978__E__N__S__W__.pdf (proposing more than one hundred "electoral law modernization" reforms, with the aim of "creat[ing] the best possible conditions for the widest possible range of political parties and candidates to engage with the electorate").

142. ELECTORAL COMM'N, EQUAL ACCESS TO DEMOCRACY 4 (2003), *available at* http://www.electoralcommission.org.uk/files/dms/Access_9786-7962__E__N__S__W__.pdf (recommending that Braille and large-print paper ballots be made available, and that non-English speakers be aided with foreign language instructions and pictorial guides).

143. ELECTORAL COMM'N, THE FUNDING OF POLITICAL PARTIES 4–5, 97–101 (2004), *available at* http://www.electoralcommission.org.uk/files/dms/partyfundingFINALproofs_15301-11394__E__N__S__W__.pdf.

with new voting technologies that could lower the cost (to voters) of casting a ballot.[144] At the same time—and much to the chagrin of the Labour government—the Commission has forcefully advocated switching from a household to an individualized system of voter registration.[145] The Commission has defended its registration-reform proposals not only on grounds of preventing fraud and coercion, but also on the "point of principle" that "the nature of voting itself is a fundamental individual right."[146] Because "[e]lectoral registration is the basis for voter participation," the Commission explained, "it too should be based on the individual."[147]

3. *Group Animus.* The holding of elections can affect, in predictable ways, the degree of tolerance or intolerance that prevails among the ethnic and religious groups that make up a citizenry. Donald Horowitz and others have shown that under the right conditions—basically, where the electoral system is structured such that politicians have to develop cross-group support in order to get elected—the effects can be very salutary.[148] But where the electoral system aligns with preexisting social cleavages, enabling politicians to win office with the support of a single group, the effects can be devastating. Here, the fact that office-holders must periodically stand for election can result in a terrific incentive for politicians to foment

144. ELECTORAL COMM'N, SECURING THE VOTE 37–40 (2005), *available at* http://image.guardian.co.uk/sys-files/Politics/documents/2005/05/20/eleccommission.pdf (assessing prospects for "multi-channel" elections); ELECTORAL COMM'N, VOTING FOR CHANGE, *supra* note 141, at 34–35 (embracing voting technology pilot programs).

145. ELECTORAL COMM'N, DELIVERING DEMOCRACY? THE FUTURE OF POSTAL VOTING 7 (2004), *available at* http://www.electoralcommission.org.uk/files/dms/DeliveringDemocracyfinalcomplete_16306-10935__E__N__S__W__.pdf (describing individual electoral registration as "the key building block on which safe and secure remote elections can be delivered); ELECTORAL COMM'N, SECURING THE VOTE, *supra* note 144, at 41–42. On the Labour Government's chagrin, see Elmendorf, *supra* note 62, at 1396–1404 (describing tensions between Electoral Commission and Blair Government).

146. ELECTORAL COMM'N, COMMISSION'S RESPONSE TO DCA PAPER ON ELECTORAL ADMINISTRATION 6 (2005), *available at* http://www.electoralcommission.org.uk/files/dms/ECresponsetoDCApolicypaper_17721-13100__E__N__S__W__.pdf.

147. *Id.*

148. *See generally* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 601–52 (2d ed. 2000); BEN REILLY, DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT (2001). Quantitative, cross-national results on the impact of electoral systems on cleavage politics—in particular, the choice of "bonding" or "bridging" strategies by political parties and the extent to which group membership determines voting behavior—are provided in PIPPA NORRIS, ELECTORAL ENGINEERING: VOTING RULES AND POLITICAL BEHAVIOR 97–124 (2004).

intergroup hatred,[149] particularly insofar as out-group members have exit options, and can be harassed into leaving the jurisdiction.[150] The important point for present purposes is that illiberal racial or religious sentiments are not just a given—a fact of life that politicians must deal with. They can be exacerbated or assuaged through political campaigns and public programs, and whether the dominant politicians happen to be flamethrowers or reconcilers is not just a matter of chance, but of the interplay between electoral and social structures.

Horowitz indicates that ethnically and religiously fractured societies often fare best under democratic rule when legislators are elected from multimember districts using "alternative vote" balloting.[151] The alternative-vote rule rewards candidates who manage to become the second choice of voters, which encourages cross-cleavage electioneering.[152] Districted elections can be advantageous too, in that they reward legislators who pursue low-conflict political strategies like constituent service and provisioning of pork, rather than more ideological programs.[153]

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149. HOROWITZ, *supra* note 148, at 349–60; *see also* Rogers Brubaker & David D. Laitlin, *Ethnic and Nationalist Violence*, 24 ANN. REV. SOC. 423, 433–34 (1998) (reviewing empirical literature on group leaders' "deliberate staging, instigation, provocation, dramatization, or intensification of violent or potentially violent confrontations with outsiders" which is "ordinarily undertaken by vulnerable incumbents seeking to deflect within-group challenges to their position by redefining the fundamental lines of conflict as inter- rather than (as challengers would have it) intragroup"); *cf.* Tom Ginsburg, *Democracy, Markets and Doomsaying: Is Ethnic Conflict Inevitable?*, 22 BERKELEY J. INT'L L. 310, 330 (2004) ("Ethnic tension is generally a top-down phenomenon, not one that emerges from the grassroots.").

150. Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1 (2005).

151. Donald L. Horowitz, *Electoral Systems: A Primer for Decision Makers*, 14 J. DEMOCRACY 115, 122–25 (2003); Donald L. Horowitz, *The Alternative Vote and Interethnic Moderation: A Reply to Fraenkel and Grofman*, 121 PUB. CHOICE 507 (2004) [hereinafter Horowitz, *Alternative Vote and Interethnic Moderation*].

152. Horowitz, *Alternative Vote and Interethnic Moderation*, *supra* note 151, at 508.

153. NORRIS, *supra* note 148, at 11–13, 230–46. There is, of course, no one-size-fits-all "electoral solution" to the problem of ethnic conflict, and many other structural features of government (beyond the choice of a vote-aggregation rule) can affect the incentives for conciliation, or otherwise help to avert ethnic conflict. *See generally* Donald L. Horowitz, *Ethnic Conflict Management for Policymakers*, *in* CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 115 (Joseph. V. Montville ed., 1990) (discussing federalism, devolution, vote distribution requirements, the reservation of positions for members of specific groups, and more); Milton J. Esman, *Ethnic Pluralism: Strategies for Conflict Management*, *in* FACING ETHNIC CONFLICTS: TOWARD A NEW REALISM 203 (Andreas Wimmer et al. eds., 2004) (cautioning against generalizing about ethnic conflicts).

Needless to say, it would be a radical move for a constitutional court to demand an end to at-large elections with proportional representation in favor of geographic constituencies, or to order the replacement of single-member district, first-past-the-post elections with a "specially designed for tolerance" multi-member district, alternative-vote setup.[154] But as the Law Commission of Canada has demonstrated, some advisory counterparts are capable of pursuing wholesale reforms to the structure of representation.[155]

4. *Liberty and Security.* The question of what sorts of institutional arrangements best encourage prudent policymaking in the face of suddenly elevated security risks is very much open.[156] I take it that a good arrangement would accommodate liberty infringements that yield genuine and roughly commensurate security benefits, while hindering the use of security measures for purely political gain (e.g., rally-round-the-flag effects, the harassment of political opponents, etc.). Whatever the particulars, it is certainly plausible to think that most such arrangements would subject the executive to oversight by a body (1) that is not controlled by persons who have an interest in the political success of the head of the government, and (2) that is positioned to evaluate the extent of liberty-infringement and the achievement of security benefits under the program in question. Constitutional courts might contribute at the margins to this process by, for example, policing the separation of powers as between the government and oversight bodies.[157] But it

154. Note in this regard that while the Voting Rights Act has provided the U.S. Supreme Court with an open-ended statutory platform for redesigning representational structures with an eye to better integrating minority groups into the political process (so that Justices who wish to pursue this agenda need not resort to the big gun of a constitutional holding), the Court has been exceedingly reluctant to entertain structural remedies beyond (1) the substitution of districted for at-large elections; and (2) the redesign of single-member districts so as to ensure that geographically concentrated minorities are able to elect responsive representatives under conditions of polarized voting. *Cf.* Holder v. Hall, 512 U.S. 874, 881 (1994) (rejecting vote-dilution challenge to structure of county government for want of a "principled . . . benchmark of comparison").

155. *See supra* note 101 and accompanying text.

156. For a useful compendium of views see THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark V. Tushnet ed., 2005).

157. *See infra* Part III. Constitutional courts might also have an important role to play in categorically defending certain core liberties during tumultuous times, but their track record in this respect is checkered at best. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 162 (1999) ("We can look around the world for examples of [judicial] resistance [to *extreme* cases of oppression], and we will not find enough to take heart

strains credulity to think that courts could do a good job of seeing to the establishment of such bodies, let alone of assessing for themselves the achievements and limitations of different security initiatives. Constitutional judicial review is no substitute for sound framework legislation that limits or expands executive discretion in relevant respects; that imposes appropriate reporting and auditing requirements; that partitions responsibilities among electorally accountable and electorally insulated institutions, and majority and minority parties; and that sunsets or otherwise provides for its own periodic review and re-assessment.[158]

India's National Human Rights Commission illustrates how a persistent advisory body may afford a line of defense against the unwarranted curtailment of civil liberties. The Commission has contributed to the development of better interrogation practices, and has been a forceful critic of anti-terrorism legislation. Regarding the former, the Commission's investigations into mistreatment and death of detainees led it to conclude that post-mortem examinations of persons who die in custody should be videotaped.[159] Twenty Indian states have since adopted this policy.[160] The Commission also convened a group of forensic experts to develop better postmortem procedures, and produced a Model Autopsy Form.[161] These interventions may not resolve the problem of detainee abuse, but

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from."); George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1 (1984) (reviewing the history of court involvement in the regulation of emergency situations arising in common law countries); K.D. Ewing, *The Futility of the Human Rights Act*, 48 PUB. L. 829 (2004) (critically surveying the contemporary and historical record of British judges in addressing liberty, privacy, and freedom-of-association concerns in the face of national security threats). *But see* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 550 (2004) ("[T]he [U.S. Supreme] Court has a long, if uneven, record of fulfilling its constitutional responsibility to protect civil liberties—even in time of war.").

158. For illustrative framework-legislation proposals, see Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (proposing framework legislation to check executive powers during a state of emergency); John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 ELECTION L.J. 597, 610 (2005) (proposing a framework for delaying presidential election in the event of a terrorist attack); Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 J. AM. MED. ASS'N 622 (2002) (proposing a framework for emergency measures in the face of dire public health threats). *See also* Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006).

159. *See* Evans, *supra* note 27, at 720–21.

160. *Id.* at 721.

161. *Id.* at 721 n. 57.

they at least put in place a framework for monitoring what detainees have suffered through, and for exposing abuses to public scrutiny.[162]

The Commission has also taken up the question of how India should answer terrorism. Soon after it was established, in 1993, the Commission conducted a major inquiry into alleged abuses under the Terrorist and Disruptive Activities (Prevention) Act, or TADA.[163] TADA came up for renewal in 1995, at which point the Commission sent a public letter to members of parliament recounting its findings and calling for "this draconian law [to be] removed from the [s]tatute book."[164] Parliament let the statute lapse.[165] Pressure for expanded governmental powers to combat terrorism did not abate, however, and in 2001 a revised version of TADA was enacted over the Commission's first equivocal and then forceful objection.[166]

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162. For more on the Commission's successful efforts to get Indian states to enact standardized procedures for reporting custodial deaths to the Commission, and videotaping interrogations, see the Commission's annual reports for 1993–94, 1995–96, 1997–98, 1990–2000, 2000–01, and 2002–03, *available at* http://nhrc.nic.in (follow "Archives" hyperlink). The Commission appears to have induced state cooperation through a combination of public pressure (naming laggard states in its annual report, and releasing frank and potentially embarrassing letters written to state officials), and threats of Commission-led investigations. The Commission has taken the position, for example, that a state's failure to report a custodial death within twenty-four hours "give[s] rise to a presumption . . . that an effort was being made to suppress knowledge of the incident." NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1993–1994 para. 5.4 (India) [hereinafter NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1993–1994], *available at* http://nhrc.nic.in (follow "Archives" hyperlink). While no *legal* consequences as such attach to a Commission "finding" of prisoner abuse resulting in death, the Commission may recommend compensation and/or prosecution, *see, e.g.*, NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1996–1997 para. 3.26 (India), *available at* http://nhrc.nic.in (follow "Archives" hyperlink), and state leaders evidently seek to avoid being singled out for such misdeeds.

163. *See* NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1993–1994, *supra* note 162, para. 7.3; NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1994–1995 paras. 3.1–3.3, 4.1–4.6 & annexure I (India), *available at* http://nhrc.nic.in (follow "Archives" hyperlink).

164. NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1994–1995, *supra* note 163, annexure I.

165. NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1995–1996 para. 4.1 (India), *available at* http://nhrc.nic.in (follow "Archives" hyperlink).

166. The new anti-terrorism bill was drafted by the Law Commission of India, a body which, unlike certain of the law commissions noted above, appears to be under the Government's control. *See* Early Developments, http://www.lawcommissionofindia.nic.in/main.htm#POST-INDEPENDENCE_DEVELOPMENTS (last visited Jan. 8, 2007) (indicating that "[t]he Seventeenth Law Commission was constituted through a Government order [and] will have a three-year term," and that "[t]he Commission is empowered to have a few part-time Members and/or Consultants depending upon the need and on the Approval of the Government"). At the first meeting on the Law Commission's draft, the chairperson of the Human Rights Commission apparently spoke of need for "safeguards" and "legislation with a human face," but did not reject outright the Law Commission's draft. LAW COMM'N OF INDIA, 173RD REPORT ON

B. *Engaging the Citizenry*

That advisory counterparts are better positioned than constitutional courts to craft legislative remedies is of little moment unless the counterparts can also do something to bring about the enactment of their proposed reforms. Reforms meant to check then-serving elected officials are unlikely to be adopted out of the goodness of those officials' hearts.[167] In this respect, however, the counterpart's "problem" is not that different from the constitutional court's. Neither commands a police force or military.[168] For the court to win elected-branch compliance with its orders, or for the counterpart to win elected-branch enactment of its proposed reforms, the independent body generally must collaborate with some other actor that can apply sanctions to elected-branch officials. In principle, any number of actors might play the sanctioning role. For example, the military, which might threaten a coup; or foreign powers, which might withhold trade concessions or deny entry into trans-national organizations. Although there are important questions to investigate about how courts and counterparts might win compliance on account of international pressure,[169] this Article focuses on that ultimate backstop of democratic political orders: the citizenry.

PREVENTION OF TERRORISM BILL, 2000 ch. 3, para. 3 (2000), *available at* http://lawcommissionofindia.nic.in/tada.htm. Later, however, the Human Rights Commission denounced the bill as "unnecessary." *See* NAT'L HUM. RTS. COMM'N, ANNUAL REPORT 2000–2001 annexure I (India), *available at* http://nhrc.nic.in/annexDoc00_01.htm#no2.

167. This is not to deny that advisory counterparts sometimes play a useful role by collaborating with like-minded but less well-informed legislators. Illustrative examples can be found among state-level sentencing commissions in the United States, *see* Barkow, *supra* note 123, at 771–98 (2005); privacy commissions in Europe, *see* FLAHERTY, *supra* note 39, at 37–38, 64–66, 89 (discussing the politics of privacy and security in Germany); and anticorruption commissions in Asia, *see* MANION, *supra* note 57, at 51–52, 204 (marveling at the "remarkable . . . role of [Hong Kong's Independent Commission Against Corruption] as a consultant at the stage of policy formulation or legislative drafting"). But this strategy for counterpart influence obviously will not do in circumstances where the dominant coalition in the legislature faces political incentives not to enact "appropriate legislation."

168. "Rare and partial exceptions include the Commission on Elections in the Philippines, which has been authorized to deploy the armed forces when necessary to ensure the conduct of free and fair elections." John Murphy, *An Independent Electoral Commission*, *in* FREE AND FAIR ELECTIONS 25, 36 (Nico Steytler et al. eds., 1994).

169. The Danish NHRI, for one, appears to have gotten reforms enacted by appealing to multinational organizations. *See* Kjaerum, *supra* note 23, at 115–16. Other countries have established human rights commissions to defuse international criticism of their rights records, *see* Sonia Cardenas, *National Human Rights Commissions in Asia*, *in* SOVEREIGNTY UNDER CHALLENGE: HOW GOVERNMENTS RESPOND 55, 58–70 (John D. Montgomery & Nathan Glazer eds., 2002), and it would not be surprising if a similar dynamic occasionally makes it hard

Suppose that the elected branches have enacted policy x, which the median voter does not oppose.[170] The court or counterpart favors y instead. Broadly speaking, there are two different ways in which a court or counterpart might bring about pressure (mediated by public opinion) for the elected branches to accede to y. The independent body might do this by exercising *authority* with the median voter concerning policies x and y; alternatively, the body might *foster public debate* about the question at hand, as a result of which the median voter revises her views about the relative merits of x and y.[171]

This Section develops a comparison of constitutional courts and advisory counterparts as loci of authority and as instigators of public debates about the meaning and application of a polity's nominally constitutive commitments. My aims are both positive and normative. On the positive front, I advance some tentative hypotheses concerning (1) the counterparts' comparative advantage in establishing what I shall term "persuasive authority" with the electorate; and (2) the circumstances under which counterparts are most authoritative. As well, I explore (3) how counterparts that do not wield much authority regarding what should be done about the policy question at hand may nonetheless get a public debate underway; and (4) how counterpart-instigated debates differ from court-triggered debates. On the normative front, I present a bare sketch of how institutions set up to foster public discourse about constitutional matters might be evaluated, and on this basis offer a tentative defense of one model for debate-prompting counterparts.

1. *Courts, Counterparts, and the Problem of Authoritative Prescription.* In a reasonably well-functioning democracy, it is to be expected that independent (i.e., politically insulated) institutions will often find it difficult to develop enough authority with the electorate to mount an effective challenge to policies that are favored by the

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to wave off the commission's recommendations. Note also that foreign policy considerations are sometimes said to account for compliance with constitutional court judgments in new democracies. *See, e.g.*, Ackerman, *supra* note 1, at 776–77 (arguing that elected branches in the new democracies of Eastern Europe accepted binding judicial review as the price of admission into the European Union).

170. Throughout this paper I will use "median voter" as shorthand to refer to the decisive or "swing" segment of the electorate.

171. I shall bracket for purposes of this discussion a third possibility, namely, that the independent body (e.g., a counterpart with investigatory powers) might be able to win elected-branch acceptance of its proposal by threatening to reveal to the general public politically damaging information about elected-branch officials.

elected branches of government. There are, however, several different bases on which an independent body might claim the median voter's allegiance in disputes with the elected branches.

For one, the persons who serve on the body may occupy a social station that commands deference. Perhaps they lead a religious denomination to which the median voter belongs. Perhaps their class is one to which "common" people regularly defer. This basis for authority ought to wane, however, as national cultures democratize, and I will set it aside for purposes of this Article.

Conventions about legality represent a second basis on which the independent body might found its claim to authority. Regardless of whether policy *y* (favored by the independent body) is a better fit with the citizen's underlying interests and concerns than policy *x* (favored by the elected branches), citizens who understand the independent body to have *legal authority* to make policy on behalf of the polity, and who believe that the body has chosen *y* in the legally authorized manner, may be prepared to retaliate against elected officials who challenge that decision (unless the challenge itself runs through the legally authorized channels, e.g., negating a Supreme Court decision by constitutional amendment, or through the appointments process, rather than by flouting a court order). The vehemence with which citizens retaliate is likely to depend, *inter alia*, on their commitment to rule-of-law values, and their confidence that the independent body has complied with the relevant legality convention.

Legal authority should be distinguished from *persuasive authority*.[172] An actor exercises persuasive authority if her

172. Note that I am using the terms "legal authority" and "persuasive authority" to refer to bases on which an independent body may convince *citizens* to accept its prescriptions. Similar terminology is employed in the literature concerning when and how U.S. *judges* should employ foreign precedents for purposes of interpreting and applying the U.S. Constitution. *See, e.g.*, David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445 (2004) (using terms "persuasive authority" and "binding authority" to characterize treatment of foreign constitutional court decisions in U.S. constitutional adjudication). Needless to say, my analysis has little to do with that debate, and I do not mean to allude to it with my choice of terminology. I am concerned with the circumstances under which a public actor can get its target audience (citizens) to accede to its prescriptions; presumably foreign judges do not often issue decisions with the goal of seeing them followed in analogous cases by U.S. judges. In any event, the foreign-law-in-domestic-constitutional-interpretation literature is more concerned with the normative question of when and how U.S. judges should look to foreign precedents, rather than the positive question of the circumstances under which U.S. judges will treat foreign decisions as having persuasive or binding authority.

endorsement of a policy provides information to listeners about the balance of reasons that, from the listeners' perspective, count in favor of that course of action.[173] In short, persuasive authority is concerned with the substantive merits of the policy—whether it well suits contemporary conditions and needs—whereas legal authority provides a basis for following the authoritative actor's directive independent of the directive's wisdom.[174] When an electorally accountable official and a politically insulated actor disagree about policy, the fact that the elected official must face the voters every so often should tend to make her judgment more persuasive with those voters. But under the right conditions, the independent actor may develop persuasive authority with the electorate superior to that of the nominally more accountable official.[175] The independent actor should prove comparatively persuasive insofar as (1) citizens think the independent actor has information or expertise that the electorally accountable official lacks; (2) citizens doubt the efficacy of the electoral mechanism as a means of inducing public-regarding behavior by the elected official (either in general or as to the specific issue at hand); and/or (3) citizens regard the decisionmaking procedures adopted by the independent actor as substantially aligning that actor's policy choices with the citizens' concerns.

a. The Counterparts' Persuasive Authority Advantage. The central difference between constitutional courts and advisory counterparts is that courts (in their adjudicative capacity) lay claim to legal authority whereas counterparts (in their advisory capacity) do not.[176] But the counterparts are better positioned than constitutional courts to develop persuasive authority. The counterparts' persuasive authority advantage derives from three factors: better information;

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173. This idea is explored and formalized in ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998).

174. *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 28–31 (1986) (contrasting "recognitional authority," equivalent to what I have termed "persuasive authority," with legal authority).

175. By "persuasive authority with the electorate," I mean the capacity to shift aggregate public opinion (among likely voters) in the direction of the actor's preferred policy.

176. This is not to say that constitutional courts, though they *claim* legal authority, will exercise much authority in practice. In well-established democracies with long-standing constitutional courts, the citizenry does tend to recognize the legal authority of those courts. In new democracies, the picture is mixed. *See generally* James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POL. 1, 3–6 (2003), and sources cited therein.

the ability (in the case of some counterparts) to initiate and carry out investigations of official wrongdoing; and greater flexibility to develop democratic credentials for the body's decisions without undermining other sources of authority.

i. Information. Advisory counterparts can assure the public that their recommendations derive from careful study and an empirically grounded understanding of the problem at hand. The counterparts may commission studies, develop in-house technical expertise, hold hearings open to anyone interested or curious, talk through possible remedies with interest groups and lawmakers, and more. Appellate courts, by contrast, typically have little policymaking expertise and minimal fact-finding capacity. To be sure, policy expertise, without more, is unlikely to yield substantial persuasive authority for constitutional courts or advisory counterparts. The project of specifying and implementing a democratic society's basic ideals, or, less grandiosely, of making human-rights or open-government or election-law policy, is given to normative disputation. It is not a merely technocratic endeavor. But insofar as average voters overcome their initial skepticism about policymaking in such domains by a politically insulated body, they are more likely to be persuaded of the merits of counterpart-issued reforms than judge-made policies. The counterpart, as the better informed body, is less likely to miss its mark.

ii. Investigations. Several advisory counterparts have scored legislative victories following investigations that revealed high-level abuse of office. In Ghana, for example, an inquiry by the Commission for Human Rights and Administrative Justice into corruption among government ministers and the President's staff was widely covered in the press and resulted in several resignations.[177] The Commission urged the government to adopt new asset disclosure requirements.[178] Initially the government balked, but after a public outcry it reversed course and adopted the Commission's proposals.[179] In New South Wales, Australia, the anticorruption commission's investigation into travel-allowance abuses by members of parliament created such a stir

177. HUMAN RIGHTS WATCH, *supra* note 7, at 160–61; INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 17.

178. HUMAN RIGHTS WATCH, *supra* note 7, at 161.

179. *Id.*

that, grudgingly, the legislature finally acceded to the commission's proposal for a formal legislative Code of Conduct and changes to travel voucher administration.[180] In Queensland, Australia, an investigation into police and electoral corruption by an ad hoc independent commission generated such a public outcry that "all political parties pledg[ed] to implement [the commission's] recommendations, *prior to* the report being completed."[181] In the United Kingdom, governmental foot-dragging on the Electoral Commission's ballot security recommendations became an issue in the 2005 general election campaign, thanks in part to the fortuitously timed conviction of six Labour Party city councilors on charges of vote fraud.[182]

That independent advisory bodies have prevailed following scandal should not come as a surprise. Analyzing U.S. data, the political scientist Luke Keele has shown that scandals have large effects on public trust in government, often for a period of years, and that in the wake of scandals lawmakers typically put on a big show of supporting structural, putatively "good government" reforms.[183] Insofar as the elected branches have fallen into disrepute, reforms issuing from a politically insulated body should look comparatively appealing.

This scandal dynamic could work to the advantage of courts as well as counterparts. The key difference is that counterparts with de jure authority to initiate and carry out investigations of governmental wrongdoing are better positioned than constitutional courts to "create" scandals in the first instance (by undertaking to reveal official malfeasance), and in so doing to claim credit and bolster their image in the public's eye.[184]

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180. Elmendorf, *supra* note 62, at 1390–91.

181. Colleen Lewis & Jenny Fleming, *The Everyday Politics of Value Conflict: External Independent Oversight Bodies in Australia*, *in* GOVERNMENT REFORMED: VALUES AND NEW POLITICAL INSTITUTIONS 167, 176 (Ian Holland & Jenny Fleming eds., 2003).

182. For a brief narrative of the politics of ballot security reform in the U.K., see Elmendorf, *supra* note 62, at 1396–1404.

183. Luke Keele, Social Capital, Government Performance, and the Dynamics of Trust in Government 20 (Oct. 23, 2004) (unpublished manuscript), *available at* http://www.nuff.ox.ac.uk/Politics/papers/2005/Keele%20MacroTrust.pdf.

184. Which is not to say that the creation of such scandals is normatively desirable. For a discussion of some of the problems, see *infra* Part II.B.2.a.ii.

iii. Tradeoffs Between Legal and Persuasive Authority. That the median voter has suspicions about the good faith or competence of her elected representative does not mean that she will necessarily trust the policymaking judgment of some comparatively insulated body. She might just as well end up distrustful of both. The counterpart (or court) that seeks persuasive authority with the electorate must somehow establish that its own structure and method of decisionmaking result in sensible policy prescriptions—prescriptions that respond to the citizenry's ideals and concerns.

To this end, many advisory counterparts consult extensively with the public in developing recommendations, and seek to defend their proposals on the basis of these consultation practices. At the forefront are the law revision commissions, which have no investigative or administrative responsibilities to go with their law reform role and, as such, must justify their existence entirely in terms of their contributions to law reform.[185] Illustrative is the Law Commission of Canada, whose organic act establishes an Advisory Council composed of twelve to twenty-four persons "broadly representative of the socio-economic and cultural diversity of Canada."[186] The Council is to "advise the Commission on . . . strategic direction and long-term program[s] of stud[y] and [to] review . . . the Commission's performance."[187] As well, the Commission is authorized to set up "study panel[s]" of affected or especially knowledgeable persons in relation to particular projects.[188] The Commission embraced a participation-oriented vision for law reform. In its own words: the Commission aimed to "address the concerns of Canadians about the law, legal process and legal institutions," by making "creative," "balanced," and "responsive" law reform recommendations.[189] "Inclusiveness" came first on the Commission's list of self-ascribed Guiding Principles.[190] The Commission committed itself to "open[ness]" in its "day-to-day activities" and to

185. That law commissions are attempting to carve out niches grounded in public-consultation practices is a recurring theme in THE PROMISE OF LAW REFORM, *supra* note 79, a collection of essays on law reform commissions around the world.

186. Law Commission of Canada Act, R.S.C., ch. 9, § 18(1.2) (1996).

187. *Id.* § 19.

188. *Id.* § 20(1).

189. LAW COMM'N OF CAN., STRATEGIC AGENDA AND RESEARCH PLAN (on file with author).

190. *Id.*

"consult[ing] widely—not just with jurists and those who have a professional concern with the law—but with Canadians generally."[191]

In the U.K., the Electoral Commission has made a point of calibrating its campaign finance recommendations to the findings of Commission-sponsored public opinion studies.[192] The Electoral Commission is no slave to public whim, however. The Commission has tried to draw attention to internal inconsistencies in the public's policy preferences, and to differences between pre- and post-deliberation opinion.[193] I suspect that as new techniques for taking the measure of "informed" public opinion are tested and refined (such as James Fishkin's Deliberative Polls[194] and the British Columbia Citizens' Assembly[195]), many advisory counterparts will prove to be enthusiastic adopters and will increasingly anchor their recommendations to public opinion so revealed. This, in turn, will bolster public confidence in the counterparts' prescriptions.[196]

For constitutional courts, however, the pursuit of persuasive authority through participatory decisionmaking procedures can be rather more hazardous. Persuasive authority is undoubtedly useful for policy-minded courts,[197] but so too is legal authority, and the pursuit of one may come at some cost to the other. In the United States, for example, the citizens who most strongly support the Supreme Court subscribe to what political scientists John Scheb and William Lyons call the "myth of legality," the notion that constitutional holdings are driven mainly by original intent and precedent.[198]

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191. LAW COMM'N OF CAN., *supra* note 92.

192. *See* Elmendorf, *supra* note 62, at 1439–40 & nn. 313–316.

193. *Id.*

194. Information about which is available at Ctr. for Deliberative Democracy, Deliberative Polling: Toward a Better-Informed Democracy, http://cdd.stanford.edu/polls/docs/summary (last visited Jan. 6, 2007).

195. Citizens' Assembly on Electoral Reform, Improving Democracy in B.C., http://www.citizensassembly.bc.ca/public (last visited Jan. 6, 2007); *see also* DESIGNING DEMOCRATIC RENEWAL (Mark E. Warren & Hilary Pearse eds., forthcoming).

196. *Cf.* Fred Cutler et al., *The B.C. Citizens' Assembly as Agenda-Setter: Shaking Up Voter Choice*, *in* DESIGNING DEMOCRATIC RENEWAL, *supra* note 195 (analyzing how perceived "legitimacy," "ordinariness," and "expertise" of the Citizens' Assembly affected how poll respondents intended to vote on Assembly-proposed electoral reforms).

197. This is because orders whose substance the citizenry deems favorable are less likely to suffer foot-dragging implementation by the executive branch. Over the long run, moreover, constitutional courts that exercise persuasive authority should be able to pursue a wider range of policies without undercutting public support for the practice of constitutional judicial review.

198. John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000).

This creates something of a dilemma for the Court. On the one hand, the Court might well develop more persuasive authority if the Justices acknowledged their discretion and cashed out the open-textured clauses of the Constitution in ways that appear substantially responsive to citizens' concerns[199]—but doing so might undermine public faith in the idea that constitutional adjudication is a distinctly legal undertaking.[200] Conversely, by acting as if decisions in constitutional cases are determined by text, precedent, and original intent, the Justices can shore up their legal authority, yet this hardly builds confidence that judicial rulings fit contemporary conditions and needs. There is also some basis for thinking that plain-old obscurantism about how judges reach decisions may reinforce the legal-authority convention,[201] although judicial obscurantism certainly doesn't help citizens to infer whether the court's decisions are likely to make sense on policy grounds.

To be sure, there is no *logical* incompatibility between a constitutional court's development of persuasive authority and its maintenance of legal authority. One can imagine a legal order in which—as Ethan Leib has recommended—large questions about the

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199. *Cf.* ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 67–69 (2004) (recommending that the Supreme Court involve deliberative assemblies of citizens in identifying and fleshing out the contours of fundamental rights).

200. *Cf.* John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181 (2001) (demonstrating that citizens' ratings of Supreme Court performance can be explained, in part, by perceptions about whether the Court relies on proper or improper factors in making decisions).

201. *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2617 (2003) (discussing work by political scientists suggesting that "diffuse support for courts is highest the less people know about what courts are doing"); *id.* at 2631–35 (discussing ways in which the U.S. Supreme Court may sustain diffuse support for the Court and its work by keeping a low profile). Some political scientists have argued that non-outcome-based support for constitutional judicial review is highest among persons who know enough to be familiar with judicial symbolism, but not so much that they grasp the substance of many court decisions. *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658–60 (1992) (describing differential bases of support for U.S. Supreme Court among mass public and self-reported "opinion leaders"); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 349–51 (1998) (describing results from a twenty-country survey which show that awareness of constitutional courts—which the authors interpret as "greater exposure to the legitimizing symbols associated with high courts"—tends to be correlated with diffuse support); *cf.* Scheb & Lyons, *supra* note 198, at 934–35 (summarizing results from national survey showing that "the most attentive segment of the public is far more likely to espouse the myth of legality than are the less attentive segments").

content of rights are referred by the constitutional court to deliberative assemblies composed of randomly selected laypersons.[202] But where citizens adhere to another, quite different idea about what it means for a court to decide constitutional questions *in the legally authorized way*, it is doubtful that constitutional courts can move in Leib's direction without putting their legal authority at risk.

Notice finally that the counterparts are less likely than constitutional courts to squander whatever persuasive authority they do accumulate by inadvertently alienating powerful blocs of voters. Before launching an all-out campaign for the enactment of reforms, counterparts can test the waters with public opinion studies, float tentative ideas, and monitor reactions to their investigations. The counterparts may time their selection of issues to moments of heightened public interest, and openly adjust their stance in response to public feedback (thereby demonstrating responsiveness).[203] By contrast, the judicial conventions of speaking to an issue only when called upon, and only through the confines of a formal opinion, makes it comparatively difficult for the court to time its interventions adroitly and to defuse adverse public reactions to particular holdings—even as it reinforces the impression that constitutional courts act in uniquely legal (as opposed to political) capacity.[204]

iv. Summary. Policy-minded constitutional courts and advisory counterparts face somewhat different problems of authority. Courts

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202. LEIB, *supra* note 199, at 67–69.

203. To be sure, justices of constitutional courts may choose to speak in a variety of ways, not just through judicial opinions. Thus, as Judith Resnik has shown, the late Chief Justice Rehnquist of the U.S. Supreme Court actually employed a double-barreled, adjudication-plus-advice-giving strategy to advance his federalism objectives: on the one hand deciding cases that establish new sovereign immunity doctrines and restrictive glosses on Congress's Commerce Clause and Section 5 powers, and on the other using his annual report to Congress on the federal judiciary and his position as chair of the Judicial Conference to counsel against the creation of new federal rights of action (nominally on the ground that the federal courts are backlogged). *See* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000). It is significant, though, that when the Judicial Conference speaks to Congress, it does so nominally to address the institutional needs of the judiciary, not to weigh in on constitutional questions or priorities. *See id.*

204. *Cf.* Rosalee A. Clawson & Eric N. Waltenburg, *Support for a Supreme Court Affirmative Action Decision: A Story in Black and White*, 31 AM. POL. RES. 251 (2003) (noting that the U.S. Supreme Court "is in a remarkably weak position when it comes to constructing or 'framing' the way in which the public understands its articulation of policy," and testing effects of media-furnished frames on public response to the Court's affirmative action decisions).

may enhance the probability of elected-branch compliance with their constitutional decrees by bolstering their legal authority, persuasive authority, or both. The counterparts depend on persuasive authority. Although this dependence puts the counterparts at some risk of being ignored, the counterparts are also, in certain respects, better positioned than constitutional courts to develop persuasive authority. This follows from the counterparts' superior policy expertise; from (some) counterparts' authority and capacity to undertake investigations of elected branch officials; and from the counterparts' freedom to pursue strategies for enhancing their persuasive authority that, if followed by a constitutional court, could jeopardize the court's legal authority.

b. On Issue- and Occasion-Specific Influence. That counterparts have a persuasive authority advantage over constitutional courts does not reveal anything about the conditions, if any, under which counterparts can mount an effective challenge to policies that are favored by the dominant faction in the elected branches. The U.S. Supreme Court exercises little persuasive authority.[205] To say that a counterpart is likely to develop more persuasive authority does not mean that it will develop enough to make a difference.

My working hypothesis, consistent with the available evidence (all anecdotal), is that advisory counterparts can wield significant

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205. For summaries of the literature, see VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 8–9, 16–21 (2003); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1290–94 (2004). A few laboratory studies have indicated that persons who say they trust the Court will, after learning of a Court decision, adjust their views on the merits of the question at hand. *See* Valerie J. Hoekstra, *The Supreme Court and Opinion Change: An Experimental Study of the Court's Ability to Change Opinion*, 23 AM. POL. Q. 109 (1995); Jeffery J. Mondak, *Institutional Legitimacy, Policy Legitimacy, and the Supreme Court*, 20 AM. POL. Q. 457 (1992); Jeffery J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 12 POL. BEHAV. 363 (1990); Jeffery J. Mondak, *Political Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675 (1994); *cf.* Clawson & Waltenburg, *supra* note 204, at 251 (finding the effect mediated by media framing). *But see* Larry R. Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AM. POL. Q. 335 (1984) (finding no effect). Outside the laboratory, however, the evidence for such effects is weak. *See* HOEKSTRA, *supra*, at 87–93. Most Court decisions seem to go largely unnoticed beyond the community where the underlying dispute originated. *Id.* at 51–53. Within the community of origin, public awareness is often high, yet the Court's influence on local opinion about the merits is small and not readily explained, *id.* at 87–113, 151–53, although locally unpopular decisions have substantial and negative repercussions for local opinions about the Court itself, *id.* at 115–47, 154–55.

persuasive authority with the electorate on election law and government integrity questions, particularly in the wake of scandals, but that as to other kinds of issues counterparts will rarely develop enough persuasive authority to pressure elected officials into adopting counterpart-proposed reforms.

I have already noted several examples of anticorruption bodies that, following scandals, rallied public opinion and prevailed upon the elected branches to adopt reforms about which the lawmakers were less than keen.[206] Even without a boost from scandal, a number of election-law advisory commissions appear to have achieved a significant level of influence. The advisory redistricting commissions found in the United Kingdom, Canada, and the state of Iowa are cases in point.[207] These bodies periodically draw up proposed revisions to constituency boundaries, which are then forwarded to the legislature for deliberation and a vote. Typically the advisory body's proposal is accepted by the legislature—even if it disadvantages incumbents.[208] Local observers report that lawmakers' fear of a public backlash (should they ultimately reject the nonpartisan proposal) is a significant factor behind this pattern of deference.[209]

In Canada, the Chief Electoral Officer (CEO)—the nonpartisan and long-tenured head of the national election administration agency—has become an influential figure in electoral reform debates.[210] The CEO successfully prevailed upon the government to enact caps on independent expenditures in electoral campaigns, among other reforms. The government typically seeks CEO input before floating election law proposals to the public, and elected officials have been lampooned for disregarding the CEO's recommendations.

Consider also the still-unfolding controversy in the United Kingdom over postal voting and ballot security.[211] Although the timing of the Labour city councilors' vote-fraud conviction surely had much to do with making the Electoral Commission's ballot-security recommendations an issue in the 2005 general election campaign, this

206. *See supra* Part II.B.1.a.ii.

207. *See* Elmendorf, *supra* note 62, at 1386–90.

208. *Id.* at 1388–90.

209. *Id.* at 1389.

210. Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 426 (2006).

211. Elmendorf, *supra* note 62, at 1396–1404.

was not the first time the government has come under pressure to act on Commission-proposed reforms. Since 2003, the Electoral Commission has been pressing the government to improve ballot security; the Commission proposes, among other things, switching from the current household-based registration system to one based on the individual.[212] The incumbent Labour government apparently fears that adoption of the Commission's preferred voter registration system might diminish turnout among traditional Labour constituencies.[213] The Commission itself has offered only muted criticism of the government's failure to adopt its central recommendations.[214] However, leading opposition figures have been vociferous critics of the government's foot-dragging on Commission recommendations, charging the government with venal partisanship and pledging their own support for the Commission's proposals.[215] (This despite the fact that the Commission and the government share many objectives, including lowering the cost of voting and introducing other measures to improve turnout among the disaffected.[216]) In focusing their attack on the gap between what the Commission has urged and the government has done, opposition figures have managed to ridicule the government for "playing politics" with the integrity of the electoral system, while insulating themselves against the symmetric countercharge.[217] The government, in response, has labored to show its support for other Electoral Commission proposals.[218] During the heat of the 2005 election campaign, the Labour government finally said that, if returned to power, it would introduce a voter registration bill in line with the Commission's recommendations.[219] Several months after the election the Government brought forth a bill that

212. *Id.* at 1395–1404.

213. During the spring 2005 general election campaign, a front-page story in the *Sunday Times* featured leaked minutes from a cabinet committee meeting the previous year, revealing that the government had drawn up legislation to enact key Electoral Commission recommendations, including individualized voter registration, but that the project was mothballed "after a government-commissioned study showed it would reduce the turnout of key Labour voters such as the young and poor." Robert Winnett & David Leppard, *Ministers Ditched Vital Measures to Stop Voting Fraud*, SUNDAY TIMES, Apr. 10, 2005, at 1.

214. *See* Elmendorf, *supra* note 62, at 1395–1404.

215. *Id.*

216. *Id.* at 1396–97, 1400.

217. *Id.* at 1397–1404.

218. *Id.* at 1400.

219. *Id.* at 1401–03.

goes part way toward the Commission's position, and the debate continues.[220]

The counterparts' apparent strength on election-law questions is, I suspect, related to the scandal phenomenon. This is not just because scandals (in a temporal sense) and election-law questions (in an issue-specific sense[221]) both draw into doubt the usual presumption that the prospect of a coming election is enough to make the elected branches responsive to the voters' interests and concerns. I have argued in previous work that a politician's opposition to an independent body's electoral reform recommendation can signal that she has elevated her self interest above what she understands to be the public interest.[222] For the large number of voters who have weak policy preferences but a strong desire for lawmakers to behave in a public spirited fashion, this signal may function as a rare and important cue to the lawmaker's character.[223]

If I am right about this, the counterparts' influence on election-law and government-integrity issues may well *depend* on their exercise of persuasive authority, without being wholly *explained* by the exercise of authority. The body's persuasive authority matters because if citizens didn't think the counterpart-proposed reform was in the public interest, they would have little basis for inferring venality from their elected representative's opposition. But the strength of the public reaction reflects much more than disappointment over the representative's failure to support a sensible reform.

Beyond the election law and anticorruption domains, the anecdotal evidence suggests that advisory counterparts rarely if ever wield enough authority with the electorate to generate bottom-up pressure for the enactment of counterpart-proposed reforms.[224]

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220. Information about the recently introduced Electoral Administration Bill is available on the Electoral Commission's website, Electoral Administration Act, http://www.electoralcommission.org.uk/elections/eladbill.cfm (last visited Jan. 7, 2007).

221. The risk is that incumbents will favor electoral regulations that thwart political competition.

222. Elmendorf, *supra* note 62, at 1421–23.

223. *Id.*

224. To be sure, it does not follow that these bodies are inconsequential. They may contribute to public discourse in various ways. They might collaborate productively with like-minded legislators, *see supra* note 167, or even with constitutional courts, *see infra* Part III. And some may be able to use their powers of investigation to pressure administrative agencies or even lawmakers into enacting reforms. For example, I suspect that the success of the National Human Rights Commission of India in reforming custodial interrogation practices may be due

Elected officials seem quite comfortable disregarding the recommendations of law reform commissions, human rights commissions, privacy commissions, and the like.[225] This is not

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in part to the Commission's declaration that it "is of a prima-facie view that the local doctor [in conducting autopsies] succumbs to police pressure which leads to distortion of the facts." *See* NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1995–1996, *supra* note 165, annexure IV. By adopting the Commission-recommended videotaping protocol, local authorities may have been able to reassure the Commission of their good faith and thereby reduce the likelihood of costly and potentially embarrassing Commission-led investigations into custodial deaths.

225. Michael Kirby, the former chairperson of the Australian Law Reform Commission and a long-time observer of law commissions worldwide, remarks:

> There remains . . . an institutional flaw that has yet to be solved. This is how to secure governmental, legislative and official attention once law reform reports are produced. Nowhere has this issue been tackled institutionally and effectively. . . . [A]ll too often, law reform proposals go to the bottom of the ministerial and legislative pile. They secure much less attention than the political ideas and personality and party schemes that dominate contemporary politics.

Kirby, *supra* note 79, at 445. The Chief Commissioner of the Northern Ireland Human Rights Commission reports that while the Commission has established memoranda of understanding with many government agencies and commented on their practices to good effect, "we cannot honestly claim that the UK Government has taken our concerns on legislative proposals seriously." Brice Dickson, *The Contribution of Human Rights Commissions to the Protection of Human Rights*, 47 PUB. L. 272, 278–80 (2003). "[S]ome of us," he laments, "are beginning to wonder whether the effort we put into our work is worth it." *Id.* at 280. Sonia Cardenas, who studied the NHRIs of India, Indonesia, and the Philippines, concludes: "All three national commissions have been unable to enforce their recommendations in the face of concerted government opposition . . . . When government officials have not had an interest in implementing the recommendations of these Commissions, they have simply not done so." Cardenas, *supra* note 169, at 69.

For their work on prison conditions, human rights commissions in South Africa and Mexico have been lambasted in the media as "soft on crime." INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 96–97. South Africa's parliament has declined even to debate the recommendations put forth in its human rights commission's annual reports. HUMAN RIGHTS WATCH, *supra* note 7, at 307–08. The commission, in protest, quit making legislative recommendations. *Id.* at 308.

The examples can be multiplied. Early proponents of the United States Sentencing Commission envisioned a body with the practical moral authority to cool down the heated politics of crime and criminal sentencing. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 118–24 (1972). As well as issuing guidelines for judges to follow, the Commission would, over time, encourage the legislature to remove arbitrary disparities in the criminal code that "politics of crime" frenzies occasionally ensconce. Yet the Commission's repeated efforts to get Congress to reduce the massive disparity in sentences for federal drug crimes involving crack and powdered cocaine, a disparity whose burden falls on the African-American community, have come to naught. Barkow, *supra* note 123, at 767–68. Barkow's comparative study of state-level sentencing commissions suggests that some commissions have had an impact by producing fiscal-impact data for the consumption of budget-minded legislators. But there is no evidence that any commission has made a mark by appealing to the moral sensibilities of lawmakers or citizens.

Similarly, David Flaherty's careful study of privacy commissioners in Europe shows that they have worked effectively with privacy advocates in parliament, but Flaherty does not

surprising. The conflicts of interest that arise when elected officials legislate on matters concerning the ground-rules of political competition or legislative ethics do not generally contaminate human rights or privacy policy. There is little reason for voters to doubt the efficacy of the electoral mechanism in securing responsive policymaking in these domains (insofar as it secures responsive policymaking at all), or to infer that elected officials who reject the recommendations of an independent advisory body have done so out of self-interest.

2. *Commanding Attention, Focusing Debate.* Suppose I am right that independent advisory bodies can wield significant persuasive authority with the electorate regarding election law and government integrity policies—particularly in the wake of scandals—but that such authority is improbable as to other policy problems, especially at other times. The next question to investigate is whether counterparts that lack persuasive authority concerning their proposed reforms might nonetheless move onto the public agenda the problems they've identified, and get a vigorous debate underway.

Debate-triggering might enable counterparts to effect structural reforms beyond the election-law and government-integrity domains. Suppose that a counterpart calls for certain reforms which are likely to win favor with an engaged, informed public, but which currently have little citizen support. The instigation of a high-profile debate through which voters learn about the issues could produce bottom-up pressure for the enactment of those reforms. A counterpart's fomenting of public debate might also be valued in its own right, whether or not it leads to the enactment of normatively attractive reforms. Some proponents of judicial review advance a related argument. Barry Friedman, for example, posits that "[p]rompting, maintaining, and focusing [public] debate about constitutional meaning is the primary function of judicial review."[226]

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indicate that commissioner reports have in any way changed the politics of privacy. *See* FLAHERTY, *supra* note 39, at 37–38, 64–66, 89 (discussing the politics of privacy and security in Germany). Statist and security-minded legislators pay no heed to privacy recommendations and apparently suffer no political cost for this. *Id.* at 64–66.

226. Friedman, *supra* note 205, at 1295–96; *see also* EISGRUBER, *supra* note 128, at 96–107 (explaining the Supreme Court's role in framing constitutional questions for public debate); ROBERT J. LIPKIN, CONSTITUTIONAL REVOLUTIONS 228–237 (2000) (defending judge-led "constitutional revolutions" as means of inducing considered, society-wide reflection on meaning of constitutional commitments). *But see* TUSHNET, *supra* note 157 (defending

The convention of binding judicial review gives constitutional courts a powerful tool with which to attract public attention. Strike down a law that has a significant base of popular or interest-group support, and the people will hear about it. Opponents of the court's decision will put up a fuss; politicians may threaten retaliation against the court (budget cuts, jurisdiction stripping); and the decision will be trotted out in future confirmation hearings.[227] Or uphold a law in a manner that seems to curtail some widely treasured right, and in short order legislatures will be debating new rights-protective bills.[228]

"populist" constitutional law, while suggesting that judicial interventions undermine rather than support popular engagement with constitutional meaning).

227. There is a nascent political science literature on the agenda-setting effects of Supreme Court decisions. Analyzing the impact of the thirty-one decisions concerning school desegregation, church-state relations, or free speech between 1947 and 1992 that were contemporaneously rated as "major" by *Congressional Quarterly*, researchers found that seven appeared to have a significant impact on the frequency of media coverage of associated issues (although in two of these instances, there were confounding events), and that four of the seven cases had a significant, long term "step effect" on media coverage. *See* Roy B. Flemming et al., *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947–92*, 41 AM. J. POL. SCI. 1224 (1997) [hereinafter Flemming et al., *One Voice Among Many*]. Those four cases (which dealt with school desegregation, religious instruction in public schools, school prayer, and flag burning) put an issue on the agenda, and it stayed there. (Note that the authors used media coverage as a proxy for public attention, for want of adequate time-series data on the public opinion concerning issue importance.)

In a subsequent study of civil rights, civil liberties, and the environment, Flemming and his colleagues analyzed the interplay among the "systemic agenda" (media coverage) and the "institutional agendas" of the president, Congress, and the Supreme Court, as measured, respectively, by the president's attention to the issue in State of the Union addresses, by the percentage of congressional hearing-days given over to the issue, and by the share of the Court's docket pertaining to the issue. *See* Roy B. Flemming et al., *Attention to Issues in a System of Separated Powers: The Macrodynamics of American Policy Agendas*, 61 J. POL. 76 (1999). They concluded that "[t]he Supreme Court appears extremely important in the areas of civil rights and civil liberties policy," affecting the attention paid to these issues by the elected branches and the media. *Id.* at 104. The results "suggest a pattern in which the Supreme Court alters attention by elected institutions, which in turn produces greater media attention for civil rights. This pattern also implies that Supreme Court attention may increase the level of conflict, subsequently drawing the president, Congress, and larger system into the fray." *Id.* at 92.

The intuition that the Supreme Court can draw attention to a problem by striking down high-profile laws and creating controversy is also suggested by empirical studies of the impact of the Court's abortion and capital punishment decisions on public opinion concerning these issues, which show a polarization effect. *See* Danette Brickman & David A.M. Peterson, *Public Opinion Reaction to Repeated Events: Citizen Response to Multiple Supreme Court Abortion Decisions*, 28 POL. BEHAV. 87 (2006); Charles Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299 (1998).

228. Consider the responses to *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Kelo v. City of New London*, 545 U.S. 469 (2005). The former, of course, gave rise to the

This Section discusses several methods by which advisory counterparts may generate public debate. Then, as a thought experiment, I suggest a model for debate-initiation predicated on what might be termed "constitutional priority setting." The Section concludes with a preliminary treatment of the normatively significant differences between constitutional courts and priority-setting counterparts as dialogic institutions.

One terminological note before moving on: I shall use the terms "debate forcing," "debate triggering," and "public agenda setting" interchangeably, to refer to any process by which an advisory counterpart or constitutional court bolsters an issue's salience to the citizenry.

a. Advisory Counterparts and the Public Agenda: Three Methods for Inducing Debate.

i. Education. Advisory counterparts have tried to move issues onto the public agenda using a range of educational and propagandistic techniques. In South Africa, the Human Rights Commission has promoted human rights awareness through major-media advertising campaigns.[229] Ghana's NHRI has worked with traditional community leaders to change the customary mistreatment of women considered to be witches.[230] NHRIs have also worked closely with public schools to introduce human-rights themes into the classroom.[231]

On the public integrity front, Hong Kong's Independent Commission Against Corruption is credited with dramatically transforming public opinion about both the extent and the propriety

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Religious Freedom Restoration Act at the national level, and eventually many "state RFRAs" as well. (For a compendium of state RFRAs, see Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 607 n.4 (1999).) Regarding the response to *Kelo*, see David Barron, *Eminent Domain is Dead! (Long Live Eminent Domain!)*, BOSTON GLOBE, Apr. 16, 2006, at D1; Marcilynn A. Burke, *Much Ado About Nothing:* Kelo v. City of New London, Sweet Home v. Babbitt, *and other Tales from the Supreme Court* 24–50 (Univ. of Houston Law Ctr., Working Paper No. 2006-W-02), *available at* http://search.ssrn.com/sol3/papers.cfm?abstract_id=895008 (last visited Jan. 16, 2007); the National Conference of State Legislatures, Eminent Domain, http://www.ncsl.org/programs/natres/emindomain.htm (last visited Jan. 7, 2007).

229. HUMAN RIGHTS WATCH, *supra* note 7, at 297–98.

230. Lindsnaes & Linholdt, *supra* note 7, at 43.

231. *Id.*

of bribe-paying.[232] The Commission's early, high-profile investigations of police syndicates may have had much to do with this,[233] but the Commission has also worked assiduously to convey its message through "television dramas, radio call-in shows, posters, and public announcements," and by "meeting with community groups, visiting door to door, going to factories and schools, and working in a variety of other ways to directly contact ordinary citizens . . . ."[234]

I am not aware of any academic studies that evaluate counterparts' success in influencing the terms of political debate through such endeavors. One should not discount the possible efficacy of agenda-setting by noisy harping, however, particularly where the counterpart is well-funded and has authority to sponsor advertisements. There is a school of political psychology which holds that voters' judgments about public priorities are partly sub-rational.[235] In any given election, the story goes, voters focus on issues to which they are "primed" to attend by mass media coverage, issue-advertising campaigns, and the like.[236] If this is so, a counterpart that can fill the airways may affect the issues that come to mind when voters evaluate candidates, even if the counterpart has no influence whatever on what voters consider to be sound policy with respect to the issue at hand.

ii. Investigation. Investigations offer another way for counterparts to move their issues to the center of public debate. Recall the hope of the lawmakers who launched the U.S. Commission on Civil Rights: that a steady stream of Commission inquiries would reveal to the American people the true horrors of the Jim Crow South, generating public support for aggressive federal civil rights legislation. To a significant degree this hope was realized: early investigations by the U.S. Commission on Civil Rights were widely covered in the press and helped to frame the first generation of

232. *See generally* MANION, *supra* note 57, at 27–83.

233. *See id.* at 34–36, 40.

234. *Id.* at 43–48.

235. *See generally* STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS 15–23 (2005) (reviewing political psychology literature on agenda-setting and priming).

236. *Id.*; *see also* SHANTO INENGAR & DONALD R. KINDER, NEWS THAT MATTERS (1987) (tracing effects of news coverage on citizen perceptions of issue importance).

national civil rights legislation.[237] NHRIs in other countries have occasionally led high profile investigations as well,[238] and investigations by anticorruption commissions often prove newsworthy. The Hong Kong ICAC's probe into police syndicates received substantial public attention, and marked the beginning of the ICAC's successful effort to transform public opinion about the extent and propriety of bribe paying.[239] In Ghana and in New South Wales, Australia, investigations by anticorruption commissions forced top government officials to resign and spurred the adoption of new laws.[240]

As an agenda-setting strategy, the carrying out of an investigation can work on two levels. Most basically, the investigating body may change the focus of public discourse by releasing into the public domain previously suppressed information. On another level, the very act of investigating may be dramatic and attention-grabbing, especially if top government officials are forced to testify under oath or turn over documents.[241] The whiff of scandal—are the top guns telling the truth?—may be enough to corral public attention.

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237. DULLES, *supra* note 34, at 38 ("[T]he Alabama [voting] registration officials' contumacious defiance of the Civil Rights Commission and its Attorney General's outspoken challenge to [the Commission's subpoena] authority were headlined and editorialized about from coast to coast."); *id.* at 63–64 ("Newspapers throughout the country gave the [Commission's First] Report extensive coverage. . . ."); *id.* at 105 ("[The Commission] enjoyed, at least in the North, a very good press.").

238. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 7, at 298 (noting that the South African Human Rights Commission stirred controversy with its investigation into alleged racism in the mainstream media); INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 73–74 (describing inquiries pursued by Australian NHRI with goal of getting structural reforms on the public agenda); Evans, *supra* note 27, at 719 (noting general significance of NHRI investigations, and giving example investigation into military and police brutality in Indonesia); Lindsnaes & Linholdt, *supra* note 7, at 43 (noting successful investigation into police cells and prison conditions by Ghanaian NHRI, which led Government to introduce reforms).

239. MANION, *supra* note 57, at 39–41, 44, 46 (describing early investigations and noting role of "(favorable) media coverage of enforcement actions" in "publiciz[ing] the ICAC and its reliability as an anticorruption organization").

240. *See* HUMAN RIGHTS WATCH, *supra* note 7, at 160–61 (regarding resignations brought about by corruption investigations in Ghana); Lewis & Fleming, *supra* note 181, at 173–74 (regarding resignations brought about by corruption investigations in New South Wales, Australia).

241. *Cf.* Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419 (2005) (discussing the social and political impact of ad hoc commissions set up to investigate public wrongdoing, and remarking on the drama of testimony by top government officials).

As an institutional design solution to the "problem" of public disinterest in counterpart-proposed reforms, however, equipping the advisory body with coercive powers of investigation is both limited and problematic. It is limited because the release of information, as such, will only spur public debate insofar as there is latent public concern about the question at hand. It is problematic because politically insulated counterparts may have incentives to scandal monger—and, more particularly, to go on the attack against top government officials. Counterparts that succeed in "exposing" elected officials as short-sighted, corrupt, venal, in the hock to special interests, etc., stand to gain in effective authority.[242] But such muckraking is far from costless. The officials under investigation may be seriously distracted from the business of governing.[243] Public attention may be diverted away from the substantive problems that the polity actually faces.[244] Citizen support for large-scale policy initiatives may dry up.[245] Worst of all, there is some risk that scandal-mongering could actually shock the citizenry in ways that release latent illiberality. A significant body of new research into the psychodynamics of authoritarianism shows that loss of confidence in government causes citizens who are predisposed to authoritarianism to turn against others who embody difference, be they racial and religious minorities, political dissidents, or moral deviants.[246] Effective political leadership and the appearance of consensus in group opinion operate to suppress these authoritarian tendencies; leadership failures and normative dissensus draw them out.[247]

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242. *See supra* Part II.B.1.a.ii.

243. This is a recurring theme in the U.S. legal academic literature on the former "independent counsel" statute, the Ethics in Government Act. *See, e.g.*, Erin Daly, *Review Essay: What We Knew or Should Have Known About the Independent Counsel*, 5 WIDENER L. SYMP. J. 259 (2000) (reviewing RICHARD A. POSNER, AN AFFAIR OF THE STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999), and BOB WOODWARD, SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE (1999)).

244. *Cf.* Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2275–80 (1998) (arguing that the (now former) Independent Counsel Act "diminishe[d] substantive discussion of real questions, by focusing attention on imagined scandals or wrongdoing").

245. That the loss of public trust in government undermines public support for governmental problem-solving is an important new theme in public opinion scholarship. *See* MARC HETHERINGTON, WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM (2006); Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government*, 64 PUB. OPINION Q. 239 (2000).

246. The research is recapped in KAREN STENNER, THE AUTHORITARIAN DYNAMIC (2005).

247. *See id.*

None of this goes to say that it is a bad thing for advisory counterparts to possess coercive powers of investigation. Equipping a counterpart with such powers may do much to enhance the informational base of the body's law-reform recommendations. But in view of the risks, the delegation of coercive powers of investigation to advisory counterparts will need to be carefully circumscribed and checked, particularly where the body's investigations may reach or implicate elected officials.[248]

iii. The Exercise of Legislative Process Rights. A third tack for empowering counterparts to "prompt, maintain, and focus" public debate about basic societal commitments is to give these bodies a limited, formal role in the legislative process—what I shall term a "legislative process right." A counterpart's exercise of its legislative process prerogative could have public discourse effects in virtue of what the counterpart causes to happen as a formal matter, and, as important, in virtue of what the counterpart's action signals. I shall take up each of these points in turn, and then offer a few comparative remarks on constitutional courts and "legislative process" counterparts as public-agenda setters.

Formal Roles. There are three extant models for counterpart legislative process rights. First is the *delay* paradigm, exemplified by the House of Lords' suspensive veto.[249] (Or consider the milder possibility of a fixed period for counterpart comment on pending legislation.[250]) The suspensive veto and other modalities of delay may have discourse effects simply by increasing the amount of time and rounds of voting that lawmakers must give over to the bill in question before it can become law. The longer the bill remains the subject of legislators' attention, the more debate and discussion among the wider public it and possible alternatives are likely to receive.

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248. To some degree, the check may be provided by governmental immunities against being called to account for actions taken in an official capacity. *Cf.* MARC VAN DER HULST, THE PARLIAMENTARY MANDATE: A GLOBAL COMPARATIVE STUDY 63–78 (2000) (offering a comparative perspective on the legislative privilege); Steven F. Heufner, *The Neglected Values of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221 (2003) (discussing the status of legislative privilege among the U.S. states).

249. *See supra* text accompanying note 110.

250. *Cf.* LÓPEZ-PINTOR, *supra* note 7, at 157 (noting the practice in Uruguay of election commission hearings on pending electoral legislation); Simon Evans, *Improving Human Rights Analysis in the Legislative and Policy Process* (Univ. of Melbourne Legal Studies, Research Paper No. 124, 2005), *available at* http://papers.ssrn.com/abstract=771225 (proposing procedure for human-rights analysis of pending legislation).

The second paradigm, *initiation*, is exemplified by redistricting in Iowa. Following each decennial census, the Iowa redistricting authority draws up a proposed map of legislative districts, which it forwards to the legislature.[251] Lawmakers are free to vote down the proposed map, but they may not take up a reapportionment bill of their own creation until they have twice rejected, by closed-rule vote, successive offerings from the redistricting authority.[252]

Although a vote of the legislature hardly guarantees public attention for a counterpart's proposal, it should, at the margin at least, boost that proposal's political salience.[253] It may also help challengers make a campaign issue out of the incumbent's stance on counterpart recommendations, particularly if, as in Iowa, the legislative vote takes place under a closed rule.[254] And if the incumbent's vote does become a campaign issue, the counterpart will have prevailed in its battle for public attention.

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251. IOWA CODE ANN. § 42.3 (West, Westlaw through Acts of 2006 Reg. Sess.).

252. *Id.*

253. The political science literature is divided on the extent to which votes of the legislature register with (and affect) the voting public. A number of studies have found that roll call votes in Congress do have consequences for public opinion and ballot-box outcomes—that someone seems to be paying attention. *See, e.g.*, ALAN I. ABRAMOWITZ & JEFFREY A. SEGAL, SENATE ELECTIONS (1982); Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 AM. POL. SCI. REV. 385 (1988); Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136 (2001); Walter Dean Burnam, *Insulation and Responsiveness in Congressional Elections*, 90 POL. SCI. Q. 411 (1975); Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 AM. POL. SCI. REV. 127 (2002); John K. Dalager, *Voters, Issues, and Elections: Are the Candidates' Messages Getting Through?*, 58 J. POL. 486 (1996); Robert S. Erikson, *The Electoral Impact of Congressional Roll Call Voting*, 65 AM. POL. SCI. REV. 1018 (1971); Robert S. Erikson & Gerald C. Wright, *Representation of Constituency Ideology in Congress*, *in* CONTINUITY AND CHANGE IN HOUSE ELECTIONS 148 (David W. Brady et al. eds., 2000); John R. Johannes & John C. McAdams, *The Congressional Incumbency Effect: Is It Casework, Policy Compatibility, or Something Else? An Examination of the 1978 Election*, 25 AM. J. POL. SCI. 512 (1981); George Serra & David Moon, *Casework, Issue Positions and Voting in Congressional Elections: A District Analysis*, 56 J. POL. 200 (1994); Gerald C. Wright, Jr., *Candidates' Policy Positions and Voting in U.S. Congressional Elections*, 3 LEGAL STUD. Q. 445 (1978). Other studies portray an electorate that pays little attention to issues and candidates' voting records in most elections. For a survey of this literature, see HIBBING & THEISS-MORSE, *supra* note 133, at 19–34, 150–56; NICHOLSON, *supra* note 235, at 10–13. Various attempts have been made to reconcile the two sets of findings. *See generally* VINCENT L. HUTCHINGS, PUBLIC OPINION AND DEMOCRATIC ACCOUNTABILITY: HOW CITIZENS LEARN ABOUT POLITICS 5–15 (2003) (reviewing theories concerning electoral district homogeneity, collective intelligence through preference aggregation, interest group activity, and the potential for activation of "latent" political preferences).

254. This argument is elaborated in Elmendorf, *supra* note 62, at 1382–85, 1418–21.

The third paradigm, *end-run*, has the advisory body issuing legislative proposals to citizens at large, who then vote on whether to enact the proposal. Illustrative is the Florida Constitution Revision Commission, convened once every twenty years to consider the need for constitutional change.[255] The Commission has authority to draft reforms and put them to a vote of the people.[256] Proposals that receive a majority vote take effect as constitutional amendments.[257]

As a general matter, one should expect more citizen engagement and learning from a counterpart-triggered referendum than a required vote of the legislature. Direct democracy has been shown to enhance voter knowledge and rates of political participation; citizens also come to feel a greater sense of political efficacy.[258]

Signaling Priorities. The extent to which an advisory counterpart's exercise of its legislative process right catches and holds public attention seems likely to depend, in large measure, on what cues voters receive about the issue's importance. Some votes of the legislature receive scant public attention. Referendum questions may not be all that different, at least in jurisdictions like California where they have become quotidian.[259] Ultimately, the counterpart's ability to "prompt, maintain, and focus" debate through the exercise of legislative process rights may be closely connected to the issue of persuasive authority: though the counterpart need not convince

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255. FLA. CONST. art. XI, § 2 (2006). *See generally* Symposium, *The 1997–98 Constitution Revision Commission*, 52 FLA. L. REV. 275 (2000).

256. FLA. CONST. art. XI, §§ 2, 5 (2006).

257. *Id.* § 5(e).

258. Regarding voter knowledge, see DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004); Matthew Mendelsohn & Fred Cutler, *The Effect of Referendums on Democratic Citizens: Information, Politicization, Efficacy and Tolerance*, 30 BRIT. J. POL. SCI. 685 (2000); Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 64 J. POL. 892 (2002). Regarding participation, see Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700 (2001); Caroline J. Tolbert et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RES. 625 (2001). Regarding the sense of political efficacy, see Shaun Bowler & Todd Donovan, *Democracy, Institutions, and Attitudes About Citizen Influence on Government*, 32 BRIT. J. POL. SCI. 371 (2002); Mendelsohn & Cutler, *supra*. Ballot initiative campaigns can also have a large influence on voters' sense of the relative importance of different issues, even to the point of "setting the agenda" for seemingly unrelated campaigns for elected office. *See generally* NICHOLSON, *supra* note 235 (setting forth and testing this hypothesis).

259. *See* Stephen P. Nicholson, *The Political Environment and Ballot Proposition Awareness*, 83 AM. J. POL. SCI. 1393 (2003) (reviewing California ballot propositions between 1956 and 2000).

voters of the ultimate wisdom of its proposed remedy, it must be able to persuade them that the problem it has identified really matters (or at least deserves a serious second look).

This leads to a pair of questions. First, what counterpart attributes would tend to make the body more persuasive (with the median voter) as a priority setter? Second, is it plausible to think that even a relatively persuasive counterpart's claims about priorities would be taken seriously by average voters in the teeth of elected officials' statements to the contrary?[260]

As to the first question, four attributes would seem key. The first is *breadth of jurisdiction.* Other things equal, the larger the domain over which the counterpart ranges in comparing issues and setting priorities, the more likely it is that the counterpart's judgment of priorities will correspond to that of hypothetically omniscient voters. The second is *information.* Voters are more likely to take seriously the counterpart's statement of priorities to the extent that they believe it to be well informed.[261] The third is *ideology.* The median voter is more likely to credit a statement of priorities from a body she regards as ideologically mainstream or first-order diverse.[262] The fourth attribute is a *credible and easily understood signaling device.*[263] To illustrate, imagine a counterpart authorized to make a "determination of exceptional need," perhaps by qualified majority, which determination would qualify the body to exercise its legislative process right while simultaneously precluding the body from exercising that right again for at least x years, perhaps five or ten or twenty.[264] Under these conditions, the counterpart's decision to call

260. Compare my earlier treatment of the problem of persuasive authority concerning proposed reforms. *See supra* Part II.B.1.

261. Note that there may be a tradeoff between breadth of jurisdiction and information. The broader the body's jurisdiction, the less likely it is to have special expertise as to any given issue.

262. Here I follow the terminology introduced by Heather Gerken. *See* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1106–08 (2005) (distinguishing between first-order and second-order diversity, defining the former as proportional representation of the relevant variation within the citizenry on a public decisionmaking body, and the latter in terms of "variation among decisionmaking bodies, not within them").

Notice that a first-order diverse body—in contrast to a centrist body—might be persuasive with voters well to the left and right of the median, assuming that members of the body reach substantial consensus on a priority.

263. On credible communication and citizen learning, see LUPIA & MCCUBBINS, *supra* note 173.

264. Another, more fanciful possibility is to set up the counterpart with a dedicated funding source and authority to run advertising campaigns. The body would then have the option of hoarding its resources in anticipation of rare "big bang" campaigns on issues it deems truly

into play the special legislative procedure would communicate that of all the manifold issues with which it is concerned, *this one*, *right now* is the most important it expects to encounter for at least *x* years.[265]

This model is, admittedly, pretty far removed from most extant counterparts, and even from advocates' proposals for the creation of one or another such body.[266] As noted earlier, specialist advisory bodies predominate.[267] Proposals abound for new privacy commissions,[268] information commissions,[269] anticorruption commissions,[270] human rights commissions,[271] and electoral commissions.[272] But one rarely sees proposals for merging existing bodies or creating new advisory bodies whose jurisdiction would span these various domains.[273] Also, proponents of human rights commissions, privacy commissions, and the like typically seek to populate such bodies with advocates for the proponents' special

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momentous. *Cf. id.* at 209–210 (explaining how an actor's expenditure of resources on ballot campaigns credibly signals how much it cares about the ballot question). Of course, the signal would be weaker insofar as the funds expended were restricted in the uses to which they could be put.

265. Or, at least, the most important as to which a solution/improvement is politically feasible or potentially so.

266. Note, though, that the concept of remedying constitutional problems through a special legislative procedure also has a precedent in the U.K. Human Rights Act, *see* David Fontana, Secondary Judicial Review (Jan. 2007) (unpublished manuscript, on file with the *Duke Law Journal*), though the Human Rights Act does not afford a privileged position to any independent advisory body.

267. Though in the law commissions and perhaps in some human rights commissions there are precursors for a counterpart whose jurisdiction would be co-extensive with the society's basic commitments, somehow defined. *See supra* Part I.F.

268. *E.g.*, Gellman, *supra* note 37.

269. *E.g.*, Vaughn, *supra* note 53.

270. *E.g.*, Petter Langseth et al., *The Role of a National Integrity System in Fighting Corruption* (Econ. Dev. Inst. of the World Bank, Working Paper, 1997), *available at* http://www.respondanet.com/english/anti_corruption/publications/documents/nis_e.pdf; *cf.* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 161 (1999) ("Independent anticorruption agencies are a popular reform proposal in developing countries.").

271. *E.g.*, INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 1 ("These days every country has to have a national human rights commission."); UNITED NATIONS CENTRE FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS (1995) (setting forth recommendations for NHRIs); C. Raj Kumar, *Developing a Human Rights Culture in Hong Kong: Creating a Framework for Establishing an Independent Human Rights Commission*, 11 TULSA J. COMP. & INT'L L. 407 (2004) (proposing human rights commission for Hong Kong).

272. *E.g.*, Elmendorf, *supra* note 62.

273. One exception is that in South Africa, the proliferation of independent bodies concerned with different aspects of human rights has led some to call for partial consolidation under the umbrella of the national human rights commission. *See* HUMAN RIGHTS WATCH, *supra* note 7, at 306–07.

concerns, rather than to compose centrist or first-order diverse institutions.[274] Finally, I am not aware of any extant counterpart with a legislative process right designed as I suggest.[275] So what I envision here as a counterpart designed for constitutional priority setting is really no more than a thought experiment.

That said, is it plausible to think that such a counterpart's determinations of need could move sidelined issues to the center of public attention and debate? Would the issue that the counterpart flags still be worth a second look for voters whose electorally accountable representative flatly rejects the counterpart's judgment of priorities? An affirmative answer is plausible. For one, if the counterpart's determination debars it from exercising the legislative process right for a number of years, the counterpart's assertion is not just "cheap talk." It is a step to be taken with great care. By contrast, the legislator who simply waves off the counterpart's statement of priorities puts nothing on the line. (Unless she mounts an expensive advertising campaign to defeat the counterpart's recommendation—in which case, the counterpart has already scored a victory in the battle for public attention.) Second, legislators are pushed and pulled by all sorts of day-to-day pressures: meeting with constituents, raising money, dealing with the umpteen bills circulating through the legislature or in the offing, searching out media opportunities, and more. The legislator's institutional position encourages responsiveness to her constituents' demands, but does not conduce to

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274. *See, e.g.*, FLAHERTY, *supra* note 39, at 390–91 (arguing that the job of a privacy commission is simply to articulate concerns that a legislature might give short shrift, rather than to strike a balance among competing considerations); Kumar, *supra* note 26, at 294 (arguing that NHRIs are needed because "the judiciary is concerned with all disputes in society and may not have sufficient time and resources to focus exclusively on human rights issues"); *cf.* MANION, *supra* note 57, at 201 ("Policy analysts tout . . . . the exclusive anticorruption mission of the [Hong Kong Independent Commission Against Corruption]: The ICAC is not embedded in the civil service or any larger organization with multiple goals."). The influential Paris Principles for NHRIs instruct:

> The composition of the [NHRI] and the appointment of its members . . . shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) *involved in the protection and promotion of human rights* . . . .

Paris Principles, *supra* note 26, § 1 (emphasis added). A degree of diversity is welcome, but not if that means the appointment of commissioners who think that human rights proponents generally suffer tunnel vision and undersell competing values.

275. Compare Iowa redistricting and Florida constitution revision, where the special legislative procedure has been routinized, recurring automatically once every ten years in Iowa and twenty years in Florida, and as such conveys little information about priorities.

sustained study and big-picture reflection on priorities. The counterpart's remove from the day-to-day struggles of politics may put it in a better position to identify important issues that for one reason or another have remained peripheral to the course of political debate—especially if the importance of the issue is only manifest to observers whose time horizon extends well beyond the next election.

b. Constitutional Courts and Priority-Setting Counterparts Compared. There is some basis for thinking that priority-setting counterparts (with suitably circumscribed legislative process rights) would compare favorably to constitutional courts (with authority to enjoin duly enacted laws) as institutions for prompting, maintaining, and focusing public debate about the meaning and application of the polity's nominally constitutive commitments. Before proceeding with the argument, let me emphasize the limited and tentative nature of the claims I shall advance. My ambition is, first, to illustrate how one might go about comparing different ways of institutionalizing a commitment to constitutional dialogue, and, second, to advance a few preliminary conjectures about how the debate attendant to a priority-setting counterpart's determination of need is likely to differ, in normatively relevant ways, from the debate that follows a constitutional court's striking down of high-profile laws. My argument certainly does not prove anything. It will have served its purpose if it provokes further thought about how dialogic institutions should be assessed—and about the merits and demerits of different ways of designing advisory counterparts and involving them in the legislative process.

The following considerations are, I think, germane to the normative inquiry, and I will pursue the comparison of courts and counterparts in these terms: (1) whether the issues that get served up for debate are important or trivial; (2) whether the debate-forcing activity is costly; and (3) the character and consequences of the debate itself.

i. Issue Selection. Because citizens' energy and enthusiasm for thinking about public matters is limited, a counterpart's (or a constitutional court's) foisting of a previously peripheral issue into the center of public debate will inevitably displace public and legislative attention from other matters. It may be argued, then, that one measure of a "good" mechanism for inducing public debate about constitutional questions is whether the issues that end up getting aired

are issues that would, upon considered and informed reflection, be deemed truly important by a majority of the citizenry.

Constitutional litigation represents a fairly haphazard way of "selecting" constitutional issues for public debate. In the United States, the Supreme Court decisions that register on the public agenda are generally marked by two qualities: (1) they concern "highly affective" topics (e.g., flag burning, school prayer, school desegregation, capital punishment, abortion, the use of eminent domain against owner-occupied homes),[276] and (2) they antagonize well-organized interest groups or the citizenry at large.[277] The Justices may well make an implicit determination about priorities before they take the risky step of striking down a law that has substantial popular or interest-group support, yet the Court is not well equipped to function as a priority setter. It lacks the requisite breadth of perspective, resources for legislative fact-finding, and exposure to the concerns of citizens.[278]

There is, of course, no guarantee that a priority-setting counterpart's judgment about priorities would correspond to the considered views of a hypothetically well-informed citizenry. But at least the counterpart, unlike the constitutional court, would be both well positioned to make priority determinations (because of its fact-finding resources), and structurally encouraged to do so (because of the temporal limitation on its legislative process right). And if I am right that the counterpart's determination of priorities would itself garner public attention, the range of issues that the counterpart might move onto the public agenda should prove considerably broader than the range of issues to which the courts attract attention. Important but less affectively salient issues concerning, for example, the structure of representation and government accountability, may lie within the counterpart's reach.

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276. Flemming et al., *One Voice Among Many*, *supra* note 227, at 1247; *see also supra* notes 227–28 and accompanying text.

277. *Cf.* Flemming et al., *One Voice Among Many*, *supra* note 227, at 1243–46 (contrasting the meager public-agenda impact of the "accommodationist" church/state decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), with the large and enduring impact of the "separationist" church/state decisions in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), and *Engel v. Vitale*, 370 U.S. 421 (1962)).

278. Yet to some degree the Court may gauge an issue's importance based on the number of amicus briefs filed by interest groups. *See* Gregory A. Caldeira & John R. Wright, *Organized Interest and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

ii. The Cost of the Debate-Forcing Activity. Debate-forcing comes at a price. Beyond the opportunity cost of displacing other issues from the public agenda, there are costs that the independent body may incur or impose in the very act of putting questions on the agenda. These costs may be financial (e.g., if the issue is moved onto the agenda with an advertising campaign), or democratic (e.g., if the issue is moved onto the agenda by striking down laws whose constitutionality is subject to reasonable disagreement).[279] The priority-setting counterpart is normatively attractive in that the body's debate-forcing technique does not incur the democratic costs of judicial invalidation.[280] Nor does it require the counterpart to make large financial outlays; the body should be able to credibly convey its judgment about priorities by invoking its legislative process right, without more.

iii. The Character and Consequences of the Debate. The trickiest questions—positive and normative alike—presented by any project of institutional reform on behalf of dialogic constitutionalism pertain to the character and consequences of the debate itself. What differentiates "good" from "bad" public discourse about constitutional questions is not altogether straightforward, nor is it easy to predict the dialogic consequences of replacing one independent institution with another or adding a new institution to the existing mix.

As a way to get started, I would suggest the following normative criteria:

- Learning. Debate that results in citizens assimilating new information and revising their views accordingly is preferable to debate in which the participants merely vent and the onlookers cheer and jeer.
- Heart of the Matter. Debate that hones in on the meaning and application of the nominally constitutive commitment is preferable to debate that skirts the big issues.

279. There will also be financial costs to the debate itself, as interest groups and others join the fray. But it is not clear that these costs depend in any systematic way upon the "trigger mechanism" for getting the debate started.

280. One might discount these "democratic" costs in the case of judicial invalidations of laws whose unconstitutionality is beyond doubt. But if there is not a reasonable basis for disagreeing with the court's determination, it is unlikely that the determination would induce much debate.

- Political Efficacy. Debate that leaves citizens feeling that they can understand politics and participate effectively is preferable to debate that gives rise to a sense of political alienation.
- Tolerance and Mutual Respect. Debate that fosters tolerance and mutual respect among citizens with disparate worldviews is preferable to debate that ratchets up feelings of animus or disgust.
- Policy Support. Debate that results in enhanced citizen support for "good" policy reforms—insofar as there exists an objective, ascertainable metric for what is good policy—is preferable to debate that does not.

Bracketing for now the last of these criteria (I certainly do not claim privileged knowledge of the requisite metric), I would submit that a priority-setting counterpart may well fare better than a constitutional court along the first four dimensions. Consider how the court- and counterpart-triggered debates might differ on account of (1) differences in constitutional context; (2) the existence (or lack thereof) of areas of public agreement concerning the problem at hand; and (3) the legibility of what the independent actor offers up for discussion. First off, let's be clear about these underlying distinctions.

Constitutional context. Assuming that norms of legality have been established and that the constitution is entrenched, the court's decision will not be reversible through the ordinary legislative process. The public response to the issue served up by the court is a response to a policy settlement that is difficult to override. By contrast, the public response to the advisory counterpart's determination of need would be a reaction to a pending decision, still up for negotiation, which will be made (if at all) by the people or their elected representatives and which may later be reversed in the same way as any other legislative enactment.

Areas of agreement. Insofar as the counterpart succeeds in rallying public attention to the problem at hand, this will probably be due, in large measure, to the fact that the electorate is initially persuaded by the counterpart's judgment about constitutional priorities. Also, the counterpart is unlikely to waste its rare legislative process right on problems for which there is no reasonable prospect of forging a politically saleable remedy. By contrast, judicial holdings of unconstitutionality need not be predicated on any broad

agreement concerning the importance of the issue or the viability of political compromise.

Legibility of the offering. Courts present conclusions about how the constitution applies to the facts of the case at hand, along with an explanation—typically obscure to the nonspecialist—cast in terms of legal doctrine and precedent.[281] The priority-setting counterpart, by contrast, offers an account of why the problem at hand matters—why it deserves the public's attention—and some ideas about how the problem might be remedied. Because the counterpart's claim to authority, if any, is persuasive rather than legal, the body's offering is more likely to be framed in terms that are intelligible to average citizens, and more likely to be developed through a process of public consultation.[282]

The upshot. The debate following the counterpart's intervention should ultimately have a very different flavor and focus than the debate that ensues in the wake of prominent constitutional court decisions. High-profile Supreme Court decisions are polarizing.[283] Think of abortion, the death penalty, and the like. Social scientists have argued that public opinion polarizes because political contestation in the wake of the Court's decisions helps previously inattentive citizens to align their policy preferences with their underlying normative intuitions.[284] I suspect, however, that the Court's high-profile interventions have also been polarizing because they are uniquely threatening to supporters of the laws struck down. Individual decisions are difficult for opponents to get reversed, and possess a generative potential for "worse" decisions down the line. The likely course of a new line of jurisprudence is hard to foretell,

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281. *Cf.* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION (1992) (lamenting that the U.S. Supreme Court has failed to justify its holdings in terms that are intelligible to the citizenry at large); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1381 (2006) ("[C]ourts . . . tend to be distracted in their arguments about rights by side arguments about how a text like the Bill of Rights is best approached *by judges*." (emphasis added)).

282. *See supra* Part II.B.1.a.

283. *See, e.g.*, Brickman & Peterson, *supra* note 227 (regarding abortion); Franklin & Kosaki, *supra* note 227 (same); Johnson & Martin, *supra* note 227 (regarding abortion and capital punishment); Vincent Price & Anca Romantan, *Confidence in Institutions Before, During and After "Indecision 2000,"* 66 J. POL. 939 (2004) (regarding *Bush v. Gore*); *cf.* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HISTORY 81 (1994) (regarding "backlash" to Supreme Court desegregation decisions).

284. Variations on this argument are developed in Brickman & Peterson, *supra* note 227, and Franklin & Kosaki, *supra* note 227.

and the case-or-controversy norm discourages judicial conversations with the elected branches of government (or citizens, or interest groups) about cases yet to come, conversations that might alleviate some of the opponents' worst fears.

A counterpart's statement about the constitutional values at stake in a particular problem—think here of the determination of exceptional need—should not be nearly so threatening. The statement does not portend anything more disruptive than, for example, the introduction of counterpart-drafted legislation, or a referendum ballot, or a suspensive veto. The statement really does operate as an invitation to a conversation, rather than as a demand to speak up on pain of suffering through a string of adverse constitutional rulings. Also, the processes by which the counterpart develops its proposed remedy—public hearings, focus groups, consultations with interest groups and politicians, and the like—facilitate the consideration of alternatives and can accommodate compromise. And, as noted above, the counterpart is unlikely to expend its legislative process right on issues as to which there's little hope of forging a compromise that could win majority support in a vote of the legislature or of the citizenry.

On balance, the counterpart's intervention is likely to foster a rather pragmatic, solution-oriented debate about the problem that has been identified. The image of a pragmatic, solution-oriented debate in which possibilities for compromise stand out may be contrasted with the kind of debate that attends high-profile judicial determinations of unconstitutionality. The contestants in Court-unleashed debates focus mainly on vivifying the stakes, questioning or bolstering the legitimacy of the Court's intervention, and trying to locate some viable doctrinal basis on which to design and defend a replacement for the law struck down.[285] The main object is to move the Court, and the politicians who appoint Justices to the Court, not to figure out how best to remedy the problem the Court purports to have identified.

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285. *Cf.* TUSHNET, *supra* note 157, at 58–60 (explaining how a Supreme Court flag-burning decision, *Texas v. Johnson*, 491 U.S. 397 (1989), engendered "distort[ed]" legislative response, in which the question that mattered—"whether the flag's symbolic value is so great that we should protect it even at some cost to the protection of free expression"—was never squarely faced because the Court had removed it from the menu of permissible bases on which to found the regulation of flag-burning).

How does all this fit with the normative criteria outlined above? Very quickly (and speculatively):

Learning. A debate in which neither side is relegated to fighting against a constitutionally entrenched policy, and which admits of compromise, seems more likely to foster open-mindedness on the part of the participants and their audience.

Heart of the Matter. As Mark Tushnet and Jeremy Waldron have argued, constitutional dialogue free of "judicial overhang"—and therefore free of institutional concerns specific to the electorally unaccountable, precedent-oriented, and informationally impoverished judiciary—is much more likely than court-oriented discourse to air the issues of political morality and shared obligation that the idea of a constitutive political commitment evokes.[286] To be sure, one might object that politically prudent counterparts will try to avoid fomenting debate over the most contentious of questions, whereas the same tendency among constitutional courts is now and then happily overcome thanks to ideological litigants or the courts' political obtuseness. Whether public institutions should be designed to encourage the airing of the citizenry's most intractable values disagreements is, however, open to doubt. Political discourse that gets at the heart of those matters may be harmful to social tolerance and mutual respect.[287]

Political Efficacy. A constitutional dialogue in which citizens are called to participate by a visibly responsive institution (as by a counterpart seeking democratic credentials for its recommendation) should contribute to the development of citizens' sense of "external" political efficacy.[288] Efficacy will be further enhanced if the decision to enact or reject the counterpart's recommendation turns on a referendum vote.[289] By contrast, constitutional court decisions that

286. TUSHNET, *supra* note 157, at 57–65; Waldron, *supra* note 281, at 1384–85.

287. *See infra* note 291 and accompanying text.

288. Political scientists define "internal efficacy" as the citizen's sense of her ability to comprehend politics and governmental institutions, and "external efficacy" as the citizen's sense of whether governmental institutions are responsive to the respondent and others similarly situated. *See, e.g.*, STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION AND DEMOCRACY IN AMERICA 15 (1993) (explaining these concepts).

289. On the linkage between direct democracy and efficacy, see Bowler & Donovan, *supra* note 258, and Mendelsohn & Cutler, *supra* note 258.

reallocate policy questions from the legislative to the judicial arena are likely to undermine citizens' sense of external efficacy.[290]

Social Tolerance and Mutual Respect. The relationships between constitutional discourse, social tolerance, and mutual respect are undoubtedly complex, perhaps too complex for this criterion to be useful as a normative referent. However, there is a significant body of evidence which suggests that tolerance for difference is enabled by public confidence in the institutions of government, and, ironically, by the papering over of deep values disagreements among different groups of citizens.[291] With these precepts in mind, one might suppose that constitutional discourses are more likely to be tolerance-enhancing insofar as they culminate in policy decisions that ideologically disparate factions can support on the basis of "incompletely theorized agreements"[292]—and that actually get implemented (such that government looks like it works). Constitutional dialogues predicated on determinations of need that command widespread assent, and aimed at shaping a compromise legislative response, offer the prospect of some such denouement.

3. *Engaging the Citizenry: Conclusions.* This Section has explored how advisory counterparts may engage public opinion in pursuit of legal reforms. Though the counterparts lack the constitutional court's legal authority to negate duly enacted law, they are, in certain respects, better positioned to develop persuasive authority with the electorate, such that voters revise their policy preferences in line with the counterparts' prescriptions. The evidence to date is only anecdotal, but it appears that elected officials sometimes face ballot-box sanctions for rejecting counterpart-proposed election law and anticorruption reforms, particularly in the aftermath of scandals. This dynamic arguably reflects both the counterpart's exercise of persuasive authority with the electorate concerning the merits of the reform in question, and voters' suspicion that legislators whose oppose the reform have done so out of self interest.

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290. There is, however, the exception of constitutional rulings designed to increase opportunities for political participation.

291. *See generally* STENNER, *supra* note 246 (developing and testing theories of what causes intolerance and its expression as, for example, racism, punitiveness, and/or political and moral hostility to difference).

292. For elaboration of the concept, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

Beyond the election law and anticorruption domains, it is doubtful that counterparts exercise much persuasive authority concerning their preferred reforms. Counterparts that are not persuasive in this way may nonetheless play an important role in moving new issues to the center of public debate. Depending on the counterpart in question, this might be achieved through public education and advertising campaigns; through the carrying out of high-profile investigations into governmental malfeasance and cover-ups; or through the exercise of a legislative process right, such as authority to delay enactment of pending legislation or to put a proposed reform to a vote of the legislature or the citizenry. A counterpart's effort to get a vigorous debate underway is more likely to succeed insofar as (1) the issue chosen for debate emerges from a priority setting process; (2) the counterpart has broad subject-matter jurisdiction and a membership that is ideologically centrist or representatively diverse; and (3) the counterpart has a credible and easily understood device with which to signal its determination of priorities, such as a legislative process right that may be exercised no more frequently than once every x years.

The public discourse attendant to such a counterpart's exercise of its legislative process right is likely to have a rather different flavor and focus than the debate following high-profile judicial holdings of unconstitutionality. There is some basis for thinking that constitutional dialogues engendered by priority-setting counterparts would be normatively preferable to the debates occasionally unleashed by constitutional courts, but this claim is quite tentative.[293]

C. *The Puzzle of Independence*

At the outset of this Part, I suggested that one of the attractions of the "advisory counterpart method" for giving life to basic liberal

293. Indeed, one might argue that counterparts should be set up not to foster debate in which deep values disagreements are bracketed, as I have suggested, but rather to induce popular majorities occasionally to confront problems and proposed solutions as defined by minorities—whether or not there is a reasonable prospect of compromise or accommodation. *Cf.* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990) (developing a normative account of a just society centered on citizens' respect for and appreciation of group differences); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (defending forms of political organization that enable political minorities to make certain decisions on behalf of the citizenry as a whole, on the theory that "dissenting by deciding" can "generate a productive conversational dynamic between dissenters and the majority, between the periphery and the center").

commitments is that an advisory body may be more thoroughly insulated from the elected branches of government without risking the creation of an anti-democratic monster. Any democracy that delegates to its constitutional court the power to negate statutes and enter remedial orders binding on the government will also ensure that the elected branches of government have an array of tools for checking the court's power.[294] Familiar examples include the power of the purse, impeachment, and jurisdiction stripping.[295] Constitutional courts do their work in the shadow of a power of retaliation that inheres in the elected branches.

As Barry Friedman, Mark Tushnet, and others have pointed out, the twin narratives that frame generations of debate about constitutional judicial review—one of countermajoritarian hope, the other of countermajoritarian threat—both badly misrepresent the actual practice of judicial review (in the United States, at least).[296] The Supreme Court has rarely fought the combined will of the president and Congress. This is not surprising in view of the forms of control that the elected branches retain over the Court. These controls are entirely appropriate given the Constitution's high hurdle for reversing a Supreme Court holding of unconstitutionality.

If, however, the prospect of top-down illiberality provides the most compelling reason for establishing independent bodies to tend to basic liberal commitments, then perhaps the risk of overreach would be better addressed by making the body's power more directly dependent on public opinion—e.g., by relegating the body to an advisory role, perhaps with limited powers of legislative initiation or

294. *Cf.* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 972 (2002) (cataloguing political checks on the power of the Article III judiciary).

295. *Id.*

296. TUSHNET, *supra* note 157, at 129–53 (offering an historical perspective on judicial review in the United States); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 33–112 (2004) (assessing the Rehnquist Court and future possibilities); Friedman, *supra* note 205, at 1267–82 (discussing insights from political science); *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (evaluating the relationship between judicial decisionmaking and political ethos); Neal Devins, *The Majoritarian Rehnquist Court*, 67 LAW & CONTEMP. PROBS. 63 (Summer 2004) (examining the social and political forces that impacted Rehnquist Court decisionmaking).

delay—rather than by giving the elected branches a large measure of control over the body.[297]

But there is a catch. Effective independence depends on more than de jure protections, and some of the political dynamics that support the de facto independence of constitutional courts may not work similarly for advisory bodies. This Section sketches an account of the problem of de facto independence for advisory counterparts, framing a number of questions for future research.

The existing counterparts are muffled with disappointing regularity. Some human rights commissions have one shining moment, after which the government responds with budget cuts, personnel replacements, and the like.[298] When the heat is on, human rights commissions frequently emphasize education or conciliation, in lieu of the investigation of serious abuses.[299] Anticorruption commissions have overemphasized the prosecution of bureaucrats, at the expense of structural reforms that would reduce incentives and opportunities for corruption.[300]

Quiescence is not simply an emerging-democracy phenomenon. Anticorruption commissions in New South Wales and Queensland, Australia, both suffered severe retaliation after challenging legislators' abuse of travel privileges, and have since avoided controversy.[301] Some observers complain that the Australian Electoral Commission has "settled for a condition of peaceful coexistence" with elected lawmakers, rather than pestering them to adopt loophole-closing measures the Commission has suggested.[302] In the United Kingdom, it was opposition leaders and a daring judge who blasted

297. In previous work, I have described a range of formal techniques by which independent advisory bodies might be made exceptionally independent from the elected branches of government. *See* Elmendorf, *supra* note 62, at 1405–14.

298. This is a recurring theme in HUMAN RIGHTS WATCH, *supra* note 7. *See also* Cardenas, *supra* note 169, at 69 (noting that "national governments have curtailed the power of [all three NHRIs the author studied], albeit to varying degrees").

299. HUMAN RIGHTS WATCH, *supra* note 7, at 5 (discussing human rights commissions in Africa); INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 7, at 50–51 (noting that the Mexican Human Rights Commission has shied from investigating human rights abuses in the military in favor of providing human-rights education).

300. ROSE-ACKERMAN, *supra* note 270, at 162. Regarding the importance of structural reforms in dealing with corruption, see *id.* at 227–28.

301. *See* Elmendorf, *supra* note 62, at 1392 & nn. 111–118.

302. BARRY HINDESS, DEMOCRATIC AUDIT OF AUSTL., REPORT NO. 3, CORRUPTION AND DEMOCRACY IN AUSTRALIA 18 (2004), *available at* http://democratic.audit.anu.edu.au/papers/focussed_audits/200408_hindess_corruption.pdf.

the Government for its failure to adopt the Electoral Commission's ballot security reforms, not the Commission itself.[303]

There are several respects in which the de facto independence of specialist investigatory and advisory bodies seems likely to be more precarious than that of a constitutional court with the same de jure independence protections.

First, the effectiveness of investigative/advisory bodies may be more budget-sensitive. Advisory counterparts need substantial financial resources for conducting investigations, for sponsoring research, for traveling and holding public hearings, for publishing reports and pamphlets, for advertising their existence and achievements, etc., all in the service of building a base of support for their recommendations. They cannot make law simply by deciding cases and entering remedial orders, like a constitutional court.

Second, the de facto independence of constitutional courts is often attributed to the fact that these courts can be useful as well as threatening to the elected branches, and it's not clear that counterparts can be useful in the same ways. Matthew Stephenson theorizes that courts help to sustain informal pacts between the major political parties, whereby the parties agree not to govern too far from the center or to lock out the party that at a given moment is out of power.[304] Stephenson's theory finds support in his 80-country dataset, and maps nicely onto Alec Stone Sweet's discursive account of the ascendance of constitutional judicial review in Western Europe.[305] Marc Graber argues that constitutional courts can help otherwise fractious governing coalitions hold together by reducing the dimensionality of ordinary politics.[306] *Roe v. Wade*, he suggests, enabled low-tax libertarians to cohabit with social conservatives in

303. Perhaps it is significant, though, that none of these bodies has been formally entrenched by a written constitution.

304. Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003).

305. SWEET, *supra* note 125, at 73–79, 139–52 (2000) (explaining how minority legislative factions strategically refer statutes to constitutional court, and how the court then "splits the difference" between contending factions so as to build legitimacy); *see also* Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LATIN AM. RES. REV. 56 (2004) (arguing that ruling parties seek to establish independent judicial review as an "insurance policy" when their hold on power becomes tenuous); Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 46 LATIN AM. POL. & SOC'Y 87 (2004) (same).

306. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993).

the Republican Party.[307] With abortion effectively off the table, libertarians were willing to stomach the symbolic social conservatism of Republican lawmakers—a small price to pay for lower taxes. Keith Whittington suggests that in political systems with multiple veto points (characteristic of federal and separated-powers regimes), constitutional courts can win political support over time by "interposing a friendly hand," helping national coalitions to overcome regional obstructionism and entrenched interests, as well as fractiousness within the coalition.[308]

Whether specialist advisory counterparts can fulfill these functions seems doubtful. Lacking the constitutional court's power of negation, they cannot undertake old-statute demolition on behalf of current legislative majorities, or strategically remove coalition-splitting issues from the domain of ordinary politics. Restricted by their narrow subject-matter jurisdiction, they cannot roam across the range of issues that are germane to informal pacts among competing political parties.

Moreover, the advisory counterparts stand to threaten the electoral fortunes of incumbent lawmakers. A body that is authorized to hold public hearings and develop statutory proposals in consultation with the citizenry may encroach on legislators' control over the policymaking agenda. It may effectively force legislators to address questions they would prefer to avoid, exposing lawmakers to political risk. By contrast, a constitutional court's overruling of the legislator's pet enactment often creates political opportunity. The legislator can make hay by criticizing the court's decision and pledging her support for a different kind of judge come the next round of appointments.[309]

None of this means that quiescence is the inexorable fate of the advisory counterparts. But students of these bodies ought to be attentive to the problem of de facto independence, and to study the design choices that bear on this critically important attribute. In addition to assessing such important formalities as (1) appointment and removal procedures; (2) conflict-of-interest rules; and (3)

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307. *Id.* at 53–60.

308. Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

309. *Cf.* SWEET, *supra* note 125, at 77 (mentioning legislators' use of constitutional courts as scapegoats).

mechanisms for guarding budgets;[310] one should pay attention to how the design of an advisory counterpart affects the likelihood (4) that it will develop a base of support within the electorate that discourages assaults on its independence;[311] and (5) that elected-branch officials will come to see the body as politically useful in some respects, even if threatening in others.

In particular, I would urge close attention to several issues which on the surface might not appear germane to independence: breadth of subject-matter jurisdiction; constitutional entrenchment of non-advisory responsibilities in the counterpart; and constitutional limitations on the legislature's authority to delegate further responsibilities—especially non-advisory ones—to the counterpart.

As to the breadth-of-jurisdiction issue, there is some basis for thinking that de facto independence will be less of a problem for generalist than specialist advisory bodies. A broad-jurisdiction body should have a wider range of constituencies to fall back on in the event that its independence is threatened. One might also anticipate that broad jurisdiction would, over time, help the counterpart to achieve a higher public profile,[312] such that attacks on its independence are more likely to register with the citizenry. Finally, a body with broad jurisdiction should be better positioned to palliate

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310. Appointments procedures, conflict-of-interest rules, and mechanisms for guarding budgets are treated in Elmendorf, *supra* note 62, at 1405–14. That article concerns advisory electoral commissions, but the "design guidelines" adduced therein would seem more generally applicable.

311. Note that the base of citizen support needed to sustain de facto independence differs in key respects from the base of support needed to get counterpart-proposed policies adopted. For citizen support to sustain a counterpart's independence, citizen support must be (1) ongoing (as opposed to arising now and then at opportune moments, such as in the wake of scandals, or at the time of the counterpart's exercise of a legislative process right); and (2) comprehending of how various legal reforms or budgetary decisions would affect the counterpart's independence. That these conditions can be difficult to satisfy is suggested by the saga of the anticorruption commissions in New South Wales and Queensland, Australia, which despite apparently broad popular support suffered severe retaliation in the wake of their conflicts with parliament over parliamentary travel voucher administration and legislative ethics. *See* Elmendorf, *supra* note 62, at 1391–92 & nn. 102–118.

312. Broad jurisdiction may help the counterpart achieve a higher public profile for two reasons. First, the broader the advisory body's jurisdiction, the more likely it is to reach whatever happens to be the political "issue of the day," and hence newsworthy. Over the long run, then, the broad-jurisdiction advisory body is likely to enjoy more media attention than any given specialist body. Second, the combination of interestingly varied subject matter and newsworthiness is likely to make the broad-jurisdiction counterpart a more attractive perch for many persons of significant public renown, and the appointment of luminaries to serve on the body is one way of boosting public awareness about the body itself.

the powers that be. It has more room to soften the impact of its more threatening proposals (e.g., redistricting reform) by recommending friendly measures on other fronts (e.g., a bill to raise lawmakers' salaries so as to make them harder to bribe). Yet the literature on law revision commissions—whose jurisdiction is not subject-limited at all—suggests that these bodies have often struggled to build popular support.[313] The same goes for second legislative chambers whose members were not popularly elected.[314] Broader jurisdiction, then, does not necessarily equate to stronger de facto independence. To generate popular support for counterpart independence, then, it may be necessary to define the body's responsibilities in terms of issues as to which the ordinary political process is thought prone to failure. The rationale for independence should be transparent to average citizens.

Turn now to the constitutional entrenchment of nonadvisory responsibilities in the counterpart. The universe of governmental functions and powers that might plausibly be assigned to a politically insulated body is large, including, for example, authority to audit public accounts, to initiate and carry out investigations of high-level malfeasance, to prosecute corruption, to exercise what I have termed "legislative process rights" in relation to the body's law reform recommendations, to administer and regulate elections, to direct a central bank, or even to perform constitutional judicial review.

Within the confines of this introductory Article I cannot hope to say much about the optimal combination of advisory and non-advisory responsibilities as a constitutional matter. The answer is likely to vary from one polity to the next. Suffice it for now to point out some of the interesting questions that merit further study. The constitutional combination of advisory and non-advisory functions within the same independent body might serve the goal of independence by raising the public profile of the nominally independent body;[315] by giving citizens who discount the body's law-reform role other reasons to defend the body's independence;[316] by giving legislators an affirmative reason to support the body's

313. *See supra* notes 83–90 and accompanying text.

314. *See supra* notes 105–12 and accompanying text.

315. Recall that Hong Kong's Independent Commission Against Corruption made a big splash early on with its investigations into police syndicates. *See supra* note 239.

316. Perhaps the value of independent election administration or anticorruption enforcement is, for example, more tangible to many citizens than the value of an independent, constitutionally inflected voice for law reform.

independence;[317] or by equipping the independent body with tools with which it may credibly threaten elected officials who might otherwise encroach on the body's independence.[318]

On the other hand, to the extent that the counterpart has significant non-advisory powers, the normative case for exceptional political insulation would seem more tenuous. This is especially true if the body's nonadvisory powers include coercive authority to investigate high level malfeasance, given that advisory counterparts can have an institutional interest in discrediting the elected branches of government.[319] Note also that administrative or regulatory powers with which the counterpart could threaten particular elected officials—think here, in particular, of authority to administer elections, or to investigate alleged corruption—might be employed not simply to secure the body's independence, but also to advance its law reform agenda without recourse to public opinion.[320] Such powers might also make the counterpart a more attractive target for would-be partisan capturers of the institution.

The de facto independence of a constitutionally entrenched advisory counterpart may be affected not only by whether the constitution delegates non-advisory responsibilities to the counterpart, but also by whether it authorizes the legislature to do so. Elected lawmakers sometimes seek to avoid political controversy by delegating contentious questions to government agencies, or to the courts. Occasionally it is helpful to delegate the matter at hand to an agency with a public reputation for being non-political. Consider the

317. For example, electoral competition and oscillation in party control of government may create incentives for the delegation of election administration to independent agencies. *See* Elmendorf, *supra* note 210, at 431.

318. For example, coercive powers of investigation that may be deployed against then-serving elected officials or their aides or supporters. (To be sure, it is not altogether clear whether de jure authority to exercise such powers will tend to make the counterpart more or less independent over time. While it could discourage some assaults on the body's independence, it might also make legislators more eager to hamstring the body when doing so looks politically feasible.)

319. *See supra* Part II.B.2.a.ii. (discussing costs of "scandal mongering").

320. The leverage that electoral administration may provide is suggested by the remarkable success of Benin's new constitutional court, which is regarded as one of the most powerful in Africa. *See generally* Anna Rotman, *Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights*, 17 HARV. HUM. RTS. J. 281, 289–90 (2004). Rotman attributes the elected branches' acquiescence to the fact that the court has authority under the constitution not only to exercise the power of judicial review, but also to administer elections. *Id.* No politician wants to be on the outs with the vote counter.

setting of lawmakers' salaries.[321] Lawmakers hoping to detoxify what voters would otherwise take to be a self-serving reform (such as a pay raise) probably would do better to delegate the decision to a well-regarded and constitutionally ensconced independent body than to an ad hoc entity of the lawmakers' own making.[322]

To be sure, a constitutional structure that authorizes the delegation of statutory responsibilities to the advisory counterpart may have costs as well as benefits for the body's independence. Lawmakers empowered to delegate might try to divert the advisory body from its constitutionally mandated responsibilities by weighing it down with make-work. Or perhaps the possibility of augmenting an advisory body's powers through delegation would increase the incentives for lawmakers to try to capture the advisory counterpart and redirect it for partisan purposes. With an eye to judicial independence, the U.S. Supreme Court has interpreted Article III to substantially restrict congressional delegations of non-judicial functions to the federal courts.[323] Perhaps it would be best for legislatures to be similarly precluded from delegating non-advisory responsibilities to constitution-chartered counterparts. I raise the possibility of non-advisory delegations only to point out that, in the case of advisory counterparts, these risks might be worth incurring.[324]

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321. Roger H. Davidson, *The Politics of Executive, Legislative, and Judicial Compensation*, *in* THE REWARDS OF PUBLIC SERVICE 53, 76–87 (Robert W. Hartman & Arnold Weber eds., 1980) (discussing congressional efforts to establish "objective, automatic decisionmaking process," led by appointed commission, to set lawmakers' salaries).

322. Congress's efforts to lodge responsibility for lawmakers' pay in obscure commissions have not succeeded in quelling voter outrage over pay increases. *See* David W. Brady & Sean M. Theriault, *A Reassessment of Who's to Blame: A Positive Case for the Public Evaluation of Congress*, *in* WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 175, 178–80 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (sketching the history of congressional strategies to raise lawmakers' pay).

323. Morrison v. Olson, 487 U.S. 654, 677–78 (1988) ("As a general rule, we have broadly stated that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution. The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches." (internal citations and quotation marks omitted)).

324. It might be possible to achieve some of the benefits of legislative delegation without the independence costs by stipulating in the constitution that additional, non-advisory tasks may be delegated to the advisory counterpart *but only if consented to* by that body.

III. COURTS AND COUNTERPARTS TOGETHER: CONFLICT OR COMPLEMENTARITY?

In comparing constitutional courts and advisory counterparts in terms of remedy design, public opinion, and independence, I have treated courts and counterparts as if they were institutional alternatives for giving effect to basic liberal aspirations. Constitutional judicial review is, however, a firmly established practice in most democracies today. When institutional reform opportunities do arise, the available choice is less likely to be "court or counterpart" than "court and counterpart, or court alone." It is worth asking what problems or synergies might arise from courts and counterparts working side by side. I see two plausible bases for concern, which I shall briefly address in this Part (recognizing that the topic deserves much closer attention than I have space to give it here).

To begin, one might worry that courts and counterparts will collaborate to create more interventionist bodies of constitutional law than the court alone would otherwise have created. The judiciary's willingness to use its remedial powers to pursue large-scale policy reforms is plausibly constrained, in part, by judges' sense of the limitations of their case-specific point of view, their meager fact-finding abilities, and the difficulties they would face in monitoring policy implementation.[325] These factors together create a likelihood that judge-made policies would miss the mark. If the court could lift a remedial scheme, as it were, out of the policy recommendations of an advisory counterpart, and if the court could further rely on the advisory body to monitor or even administer the policy's implementation, the court might become more aggressive.[326]

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325. *Cf.* Grimm, *supra* note 128, at 116–18 (arguing that courts' informational limitations and the sequencing of legislative and judicial decision soften the "democratic risks" associated with constitutional judicial review).

326. *Cf.* Kirby, *supra* note 79, at 439 ("In 20 years as an appellate judge, I have noticed a distinct change of attitude among the Australian judiciary concerning the citation and use of law reform reports. Whereas two decades ago this was comparatively rare and treated with suspicion or even hostility, today that attitude has virtually disappeared. Partly, this is . . . [due to the fact that] law reform agencies have the time and purpose to identify the issues of principle and policy that are otherwise neglected in . . . the submissions that courts typically receive from the Bar table."); *id.* at 440 (speculating that law commission report concerning aboriginal customary land rights, and the attendant "national discussion of the operation of Australian law upon the indigenous people of the nation," "resulted in attitudinal changes in the legal profession and judiciary," culminating in a High Court decision which, reversing a century of land law, determined that the acquisition of sovereignty over the continent by the British Crown

By way of illustration, consider how the Indian Supreme Court has made use of the National Human Rights Commission. In a case in which the plaintiffs alleged "flagrant violations of human rights on a mass scale," the Court delegated to the Commission the task of investigating abuses and ordering compensation.[327] Though the Commission was time-barred by its authorizing legislation from investigating the alleged killings, the Court held that insofar as the Commission was acting on the Court's behalf, the Commission was *sui generis* and had "a free hand . . . not circumscribed by any [statutory] conditions."[328] In this capacity, moreover, the Commission could issue orders binding on the government, notwithstanding the lack of any statutory or constitutional authorization for the Commission to play a more-than-advisory role.[329] As the Commission proposed, and the Court held, "[t]he shackles and limitations of the [Commission's organic act] are not attached to this body [when] it . . . function[s] under the remit of the Supreme Court."[330]

On the other hand, it may be doubted that the presence of the Commission made the Court more aggressive than it otherwise would have been. A famously activist body,[331] the Indian Supreme Court has

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did not fully extinguish aboriginal title); Sir Anthony Mason, *Law Reform and the Courts*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 314, 325 ("[A]s a judge and as a lawyer, I have derived very considerable assistance from reports and issues papers published by law reform commissions . . . . To the extent that community standards, values and policy considerations are relevant, the reports of the law reform commissions . . . provide a source of material that the courts otherwise lack."); Michael Sayers, *Cooperation Across Frontiers*, *in* THE PROMISE OF LAW REFORM, *supra* note 79, at 243, 252 ("Law reform agency reports . . . have a significant effect in changing views and in providing guidance to the courts . . . . This can lead to a gradual change in the law by developments through the courts. In a recent two-year period, over 40 reported English cases referred to the work of the Law Commission for England and Wales.").

327. CRL. M.P. No. 4808 of 1998 in Writ Petitions (Criminal) Nos. 447 & 497 of 1995 (Oaramjit Kaur v. State of Punjab), at 2 (on file with the *Duke Law Journal*).

328. *Id.* at 3–6.

329. *Id.* at 3, 6.

330. *Id.* at 4, 6.

331. *See generally* Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 77 (Donald W. Jackson & C. Neal Tate eds., 1992) (explaining the practice of "social action litigation" fostered by the Indian Supreme Court); S.P. Sathe, *India: From Positivism to Structuralism*, *in* INTERPRETING CONSTITUTIONS 215, 258 (Jeffrey Goldsworth ed., 2006) (describing Indian Supreme Court's use of "direction" remedies in cases challenging legislative and executive inaction); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)*, 14 AM. U. INT'L L. REV. 413, 439–59 (1998) (chronicling fundamental rights jurisprudence of Indian Supreme Court since 1970s).

on other occasions "appointed . . . social activists, teachers, scholars, journalists, bureaucrats, and judicial officers, to act as 'commissioners' and assist in . . . gathering evidence."[332] The Court has also solicited remedy recommendations from ad hoc, Court-appointed commissions.[333]

The extent to which informational and administrative limitations curtail judicial activism is uncertain. Judicial restraint or its absence may depend much more on powers of retaliation that inhere in the elected branches,[334] and on normative understandings about the judicial function that develop organically.[335] In the abstract, then, it's hard to say whether the prospect of court-counterpart collaboration resulting in an emboldened court should be viewed as problematic. The answer may vary with the details of different constitutional orders and traditions. Indeed, one cannot rule out a priori the counterhypothesis that establishing a substantially independent advisory counterpart will result in less aggressive judicial review. Perhaps the chartering of a counterpart would cause some justices to adopt less expansive understandings of their representation-reinforcement responsibilities, for example, figuring that there is now a complementary institution positioned to play that role in other more democratic ways.

There is a second basis for objecting to court-counterpart collaboration: the prospect of victory through the courts could dilute the counterpart's incentive to develop effective practices for engaging popular opinion.[336] The Indian experience suggests that in countries with strong constitutional courts, advisory counterparts will undertake their work with an eye to judicial review. In challenging the Terrorist and Disruptive Activities (Prevention) Act (TADA), the National Human Rights Commission "pursued a threefold strategy," which consisted of (1) "monitor[ing] closely the manner in

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332. Sripati, *supra* note 331, at 456; *see also* Baar, *supra* note 331, at 80 (describing the use of monitoring agencies by the Indian Supreme Court).

333. Sripati, *supra* note 331, at 456 (mentioning the case of *Tarun Bhgat Sangh, Alwar v. Union of India*, A.I.R. 1993 S.C. 293, in which the Supreme Court sought from the commission "appropriate recommendations for addressing potential threats to the environment").

334. *See generally* Ferejohn & Kramer, *supra* note 294.

335. *Cf.* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 20–71 (1999) (explaining that the Samuel Chase impeachment served to "construct" an understanding, shared by judges and members of the elected branches, about both the limits of the judicial role and permissible grounds for impeachment).

336. Thanks to David Fontana for raising this issue in commenting on an early draft.

which the Act was being implemented"; (2) "prepar[ing] a dossier [for] possible recourse to the Supreme Court"; and, as the date neared for the legislature to extend the Act (3) "prepar[ing] a direct approach to all Members of Parliament seeking an end to this law."[337] But the opportunities presented by an activist and sympathetic constitutional court haven't led the Commission to forsake broadly stated appeals to political morality and national self-understanding. The public letter that the Commission circulated when TADA came up for renewal focused on the Act's "draconian . . . effect and character . . . ."[338] The letter portrayed TADA as inconsistent with basic ideals embedded in India's constitution and long-standing statutes, and honored throughout history by "civilized beings and civilized nations . . . ."[339] Likewise, the Commission's formal opinion against the proposed Prevention of Terrorism Bill, 2000, undertook to analyze the bill "not strictly from the point of view of constitutional validity . . . which, if necessary, would be a matter for the courts to decide, but on the need and wisdom of enacting such a law particularly in the light of the earlier experiences with TADA . . . ."[340] The gist of the Commission's opinion was that India's liberal traditions, her obligations under international covenants, and the security of her people, would all be better served if terrorism were battled through institutional reforms to the police, public prosecutors, and the courts, and by passing new laws targeting terrorist finances, rather than by doing what the bill proposed to do—to wit, creating presumptions of guilt, allowing confessions before police officers to be admissible in evidence, and extending the period for which terrorist suspects could be held uncharged and without bail.

In short, what Mark Tushnet calls "judicial overhang"[341] may cause advisory counterparts to peg some of their findings to judge-made doctrine, and perhaps even to defer to judges on the ultimate question of what the constitution requires or prohibits, but overhang seems unlikely to lead the counterparts to abandon other promising strategies for influencing the course of events. If the goal is to foster

337. NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 1994–1995, *supra* note 163, para. 4.5.

338. *Id.* annexure I.

339. *Id.*

340. NAT'L HUMAN RIGHTS COMM'N, *supra* note 166, para. 3.0.

341. Tushnet uses the phrase "judicial overhang" to refer to the impact of anticipated judicial review on legislators' constitutional deliberations and their crafting of statutes. *See* TUSHNET, *supra* note 157, at 57–65.

popular engagement with questions about foundational ideals, then the answer, from an institutional design perspective, is to give the counterparts tools and resources that facilitate such engagement.[342] Perhaps Tushnet is correct that this goal also counts in favor of abolishing constitutional judicial review. But however aggressive the constitutional court, it seems doubtful that adding an advisory counterpart to the institutional mix would, on balance, debilitate popular engagement with questions about the polity's basic commitments and how well they are being served.

It should be noted, finally, that constitutional courts and advisory counterparts may prove to be complementary institutions in many respects. Constitutional courts could be quite useful for policing the separation of powers between counterparts and the elected branches, defending the political independence of the counterparts while also checking the counterparts' use of potentially disruptive powers of investigation.[343] Conversely, the counterparts' research and recommendations, and the public's reaction thereto, could usefully inform constitutional court decisionmaking without leading the court to be more aggressive overall.[344]

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342. *See supra* Part II.B.2.

343. *See, e.g., New Nat'l Party v. Gov't of Republic of S. Afr.*, 1999 (3) SA 191 (CC) at 231 (S. Afr.) (stating that Electoral Commission is entitled to "financial independence," defined as "funding reasonably sufficient to enable the Commission to carry out its constitutional mandate," and "administrative independence," defined as "control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the [Electoral] Act"); *cf.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGe] 1 (F.R.G.), *translated in* 5 HUM. RTS. L.J. 94 (1984) (introducing the concept of "informational separation of powers," and contending that "basic [information privacy] rights protection cannot be left purely to the discretion of the [government] administration" but rather "effective control by data protection commissioners is required").

344. *Cf.* Elmendorf, *supra* note 210, at 434–40 (exploring ways in which independent electoral commissions may help constitutional courts more effectively to regulate the political process). Also of interest in this regard is Charles Sabel and William Simon's argument that institutional reform litigation is most productive where (1) there are standard setting organizations on which the courts may rely in making liability determinations; and (2) legislatures assist the courts by setting up ongoing monitoring agencies. *See* Sabel & Simon, *supra* note 128, at 1063–64 (regarding liability determinations); *id.* at 1072 (contrasting education and public housing, where litigation has been aided by public monitoring agencies, with police conduct and prisons, as to which "sophisticated monitoring systems" do not yet exist); *id.* at 1051–52 (regarding exclusionary zoning litigation and the legislative establishment of monitoring agencies). Advisory counterparts might usefully contribute to the "experimentalist" mode of public law litigation championed by Sabel, Simon, and others by recommending standards, by undertaking monitoring, and perhaps even by rallying public attention to the issues at hand. *Cf. id.* at 1072–73 (discussing difficulties with judicial formulation

Finally, the existence of a court with de jure authority to enjoin the implementation of unconstitutional statutes may help to sustain the convention that the counterpart's recommendations really are just advisory. Were there no constitutional court to stand in as the ultimate backstop against the abuse of state power, a convention might emerge under which certain kinds of counterpart "recommendations" are understood to bind the elected branches. A widespread popular fear of untrammeled state power, plus a few historically salient occasions on which the counterpart successfully challenged such abuses, might be enough to bring such a convention into being.

CONCLUSION

In recent years, constitutional theorists have begun to question the longstanding premise that constitutional courts occupy a privileged epistemic position with respect to the meaning of constitutional texts.[345] Calls for dialogue between the court and the citizenry, or the court and the elected branches of government, are increasingly widespread.[346] Yet very little attention has been paid to the question of what kinds of non-judicial institutions might be—or are being—employed to elaborate or enforce the basic commitments of liberal democracies.[347] This Article has started to explore one such class of institutions. Advisory commissions are familiar to Americans mostly in their ad hoc, crisis-response incarnation, but ongoing

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of sanctions and concluding that the experimentalist model for public law litigation ultimately "pins its hopes largely on the effects of transparency . . . exposing poor performance as clearly as possible [and thereby] open[ing] the system to general scrutiny").

345. Among the recent and noteworthy works exploring non-judicial constitutional interpretation are: SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY (1991); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004); TUSHNET, *supra* note 157; JEREMY WALDRON, LAW AND DISAGREEMENT (1999); WHITTINGTON, *supra* note 335.

346. *See generally* Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006) (surveying theories of dialogic constitutionalism in the United States, Canada, Australia, and New Zealand).

347. *Cf.* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897 (2005) (surveying political science literature and raising doubts about the practicality of popular engagement with questions of constitutional meaning); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 676 (2005) ("[T]he new theoretical scholarship [on extrajudicial constitutional interpretation] has largely overlooked questions of how the political branches effectuate the Constitution, or how they might do a better job of it.").

investigatory and advice-giving bodies with jurisdiction over foundational commitments of liberal democracy are becoming fixtures of many constitutional democracies.

I have advanced a preliminary account of what the advisory counterparts might offer by way of sustenance to liberal democracy. Instrumentally, the counterparts are or could be, in key respects, better positioned than constitutional courts to put in place structural safeguards against illiberality. This follows from their capacity to craft "legislative" remedies; from their resources for scrutinizing the government and engaging public opinion; and from the normative possibility of greater independence from the elected branches of government. To be sure, the circumstances under which a purely advisory body can build a base of public support sufficient to transform the political calculus of elected officials vis-à-vis the counterpart's preferred reforms are probably quite narrow. But there is anecdotal evidence that, in the wake of scandals and on election law and government integrity questions, elected officials' flouting of counterpart recommendations sometimes elicits public backlash.

Advisory counterparts may also perform a dialogic function, prompting, maintaining, and focusing public discourse about the import of nominally constitutive ideals for contemporary problems. Counterparts may foment debate by conducting educational campaigns, by carrying out high-profile investigations, or by exercising legislative process rights. Counterparts whose jurisdiction covers the gamut of the polity's constitutional aspirations would seem particularly well-suited to play a debate-forcing role; such bodies may be able to exercise significant persuasive authority with the electorate regarding constitutional priorities even if they are not ultimately persuasive concerning what should be done about the problem at hand.

As dialogic institutions, the counterparts have a number of plausibly attractive properties when compared to constitutional courts. For one, the reform proposals that counterparts offer up for discussion are more likely than judicial opinions to be intelligible to the general public, and more likely to emerge from an open, participatory process. This follows from the counterparts' dependence on persuasive rather than legal authority. As well, the constitutional context in which the counterpart makes its proposal is more likely to sustain a public discourse that focuses on the substance of the constitutional obligation in question (rather than judicial roles), and which is conducive to learning, compromise, and mutual respect.

My account of what the counterparts have to offer is fueled by a fair amount of conjecture. It is meant to provoke further inquiry, not to settle anything. Looking ahead, I see three avenues for future research. First, there is a pressing need for careful empirical work, both quantitative and qualitative, on the extant counterparts. Empirical studies could help to illuminate the nature of counterpart effects on public opinion; the methods by which counterparts seek to credential their recommendations; the modalities of counterpart influence on the decisionmaking of constitutional courts;[348] the impact of activist constitutional courts on counterparts' choice of strategy; the sources of political support for counterpart independence; and more. Basic questions I have bracketed in this paper remain to be explored, including the ways in which counterparts might bring about the enactment of proposed reforms without appealing to domestic public opinion.[349] Another path for future research—this one normative in nature—is to more clearly define the basis for thinking that some sort of public engagement with questions of constitutional policy is a good thing, and on this basis to offer a more refined comparison of courts and counterparts, and better prescriptions for counterpart design. The present Article has given an account of how courts and counterparts may differ as dialogic institutions, but my normative premises remain underdeveloped. Nor have I traveled very far down the path of institutional possibility: there is a wide range of possible de jure relationships among courts, counterparts, and legislatures that remain to be explored and evaluated.[350]

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348. It would be useful to understand the conditions under which counterparts either embolden the courts, make the courts more forgiving of the democratic process, or simply encourage the courts to pursue different regulatory strategies.

349. For example, by appealing to international opinion and thereby putting the home-country government's foreign policy objectives at risk; or by using administrative or investigative powers to pressure government leaders or recalcitrant bureaucracies.

350. To give but one example: might there be something to be said for constitutional orders in which the constitution contains three kinds of provisions: the justiciable, the nonjusticiable, and *the justiciable but not judicially remediable*? Perhaps the constitutional court would have authority (upon concluding that a provision in the third category had been violated) to authorize the counterpart to trigger a special legislative procedure through which counterpart-proposed remedies could be adopted. Call this a variation on the political question doctrine. Although it would be utterly foreign to present-day constitutional practice in the United States, there is already a near precedent in the United Kingdom. Under the U.K. Human Rights Act, a judicial determination of "incompatibility" between the challenged law and the Human Rights Act does nothing to alter the legal effect of that law, yet it does authorize the relevant government minister to introduce (in her discretion) remedial legislation which proceeds on a fast track. *See* Fontana, *supra* note 266.

The third avenue for future research is country-specific institutional tinkering: What opportunities exist for creating new counterparts, or improving existing ones? Within the United States there already exists a range of public advisory bodies, with varying degrees of political insulation, whose missions (again to varying degrees) touch on basic constitutional ideals. Examples include the U.S. Commission on Civil Rights, the U.S. Sentencing Commission, the Privacy and Civil Liberties Oversight Board, the Election Assistance Commission, the Inspectors General, the Government Accountability Office, and sundry state-level law reform commissions, information commissions, privacy commissions, electoral or redistricting commissions, and sentencing commissions. There is a lot to ask about how these bodies might be enhanced.

In light of the global spread of investigatory and advice-giving bodies concerned with the basic aspirations of liberal democracy, the anecdotal successes of some of these bodies, and the limitations of constitutional courts as participants in public discourse and as sources of statutory and administrative reforms, the advisory-counterpart model for giving effect to liberal ideals merits new attention from scholars of constitutionalism.

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