



## **If Men Were Angels.... Should the Checks & Balances System Include Electoral Reform Juries?\***

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September 5, 2009

### **Abstract**

Electoral Fundamentalism is the belief that unfettered competition for voter support among candidates for an elected office is adequate to maximize social welfare. It is analogous to Market Fundamentalism, the belief that unfettered competition for customers among private companies is adequate to maximize social welfare. Mixed Democracy, in contrast, is the belief that the quality of democracy can only be maximized if competition among “vertical agents” (such as candidates for an elected office) is managed by “horizontal agents” (officials from other branches of government). The Framers of the U.S. Constitution designed a system of mixed democracy: vertical and horizontal accountability mixed together. But they designed their system of horizontal accountability, popularly known as the “checks & balances system,” to enhance democracy writ large, not small; specifically, they generally granted elected representatives wide latitude to design the institutions and rules setting the terms for their own re-election—as long as they didn’t interfere with the powers of other branches of government. To rectify this type of omission in current systems of horizontal accountability, the Canadian provinces of British Columbia and Ontario each held a “Citizens’ Assembly on Electoral Reform” in the mid-2000s. These randomly selected public bodies are only one type of a larger class of randomly selected public bodies called “electoral reform juries,” which can be categorized along a continuum from low- to high-cost formats, including the citizen assembly jury as an intermediate-cost format. More institutional creativity is needed to realize the full democratic potential of such public bodies. The external-elected-official-bias and member-self-selection-bias associated with the citizen assembly format are not intrinsic to electoral reform juries but only their particular implementations to date.

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\* This working paper was presented at the Representation and Electoral Systems Division's theme panel, Citizens' Assemblies and Deliberative Democracy, at the Annual Meeting of the American Political Science Association, Toronto, Canada, September 3-6, 2009.

## **If Men Were Angels.... Should the Checks & Balances System Include Electoral Reform Juries?**

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

Historian Garry Wills reports that after Washington's first resignation, "The fame of the deed sped around the world (Wills 1984, p. 13)." King George III of England reportedly said when he heard the news: "If he does that, he will be the greatest man in the world (Wills 1984, p. 13)." Napoleon Bonaparte, who seized his crown shortly after Washington resigned from the presidency, observed: "They wanted me to be another Washington (Brookhiser 1996, p. 103)."

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

Napoleon's striving for power illustrates the widely observed willingness of those in power to sacrifice the quality of democracy to preserve and enhance their own power (e.g., Diamond 2008; Hamilton, Madison, and Jay 2004; Machiavelli 1964). Admittedly, the pursuit of power and the pursuit of democracy need not be incompatible, for the invisible hand of political competition often leads politicians to seek to enhance democracy in order to enhance their own power. But recognition of the beneficial effects of political competition is consistent with the view that the drive of successful politicians for improved democracy is usually secondary to their drive for power. Bolstering this view, a vast political science literature assumes that successful politicians are primarily re-election seeking (e.g., Mayhew 2004; Downs 1957; Arnold 1990). Assuming, then, that enhancing the quality of democracy is in the public interest and that politicians only pursue democracy as a means to power, we can say that politicians have at least a latent conflict of interest with the public, which is ready to be expressed when the conditions for political competition are less than perfect.

The Framers of the U.S. Constitution not only were keenly aware of this conflict-of-interest problem; they also recognized that elections per se were an inadequate institutional solution to it (Thompson 2002; Hamilton, Madison, and Jay 2004). So they took auxiliary precautions, including protecting free speech and assembly rights for political opponents

(embodied in the First Amendment) and designing competing branches of government that would hold each other in check (the checks & balances system).

Checking the anti-democratic tendencies among the politically ambitious is arguably the fundamental problem to be addressed in the design of democratic institutions. This paper explores different solutions to that problem, with a focus on recent attempts to use randomly selected groups of citizens granted jurisdiction over electoral reform issues.

The paper has four parts. Part 1 introduces the concept of Electoral Fundamentalism and contrasts it with Mixed Democracy. Mixed Democracy attempts to address the limits of elections in solving elected officials' conflict-of-interest problem.

Part 2 examines a novel solution to elected officials' conflict-of-interest problem tried in the Canadian provinces of British Columbia and Ontario in the mid-2000s. This type of solution seeks to avoid the conflict of interest by convening a large, randomly selected body of citizens to propose electoral reforms that citizens vote up or down in a ballot referendum.

Part 3 presents an incentive-based typology of the various solutions to elected officials' conflict-of-interest problem. It argues that the Framers and other democratic theorists did not adequately solve this problem, which helps explain the recent interest in the type of solution tried in British Columbia and Ontario.

Part 4 proposes low- and high-cost solutions—as opposed to the intermediate-cost solution tried in British Columbia and Ontario—to use large, randomly selected bodies of citizens to solve elected officials' conflict-of-interest problem. The family of such solutions is called an “electoral reform jury.” A key design criterion for electoral reform juries is to reduce the external-elected-official-bias and member-self-selection-bias found in the implementations to date.

## **Electoral Fundamentalism vs. Mixed Democracy**

Are elections adequate to solve the conflict-of-interest problem? By elections, I refer to the competition among candidates for the same elected office.

According to what I label “Electoral Fundamentalism,” the invisible hand of electoral competition is adequate to force elected officials to act in the public interest and bolster democracy. Electoral Fundamentalism is akin to Market Fundamentalism, the notion that the invisible hand of private competition is adequate to maximize social welfare.

The hard version of Electoral Fundamentalism is in disrepute today. The world has evidence of many regimes with elections but minimal democracy, often called “electoral authoritarian” regimes. Contemporary cases include Russia, Iran, Venezuela, and Nigeria (Diamond 2008, p. 63).

The soft version of Electoral Fundamentalism supplements electoral competition with strong government protections for political rights such as free speech and assembly. The world has evidence of many regimes with elections and written legal protections for such political rights—but that nevertheless have very poor quality democracy. Consider Russia. It has many written legal protections for a strong civil society, but they are ignored in practice (Freedom House 2009) due to weak checks & balances, including a weak judiciary, to enforce them.

Soft Electoral Fundamentalism is a close analog to Market Fundamentalism, a branch of Libertarianism. Market fundamentalists act as if they believe that competition among vendors, combined with government protected private intermediaries such as the press, are alone adequate to maximize social welfare. The protection for intermediaries is critical because even market fundamentalists wouldn't want it to be legal, say, for businesses to shoot critics of their products.

The alternative to Electoral Fundamentalism is what I call “Mixed Democracy,” where there is a government mix of internal and external electoral restraints on elected officials. The external constraints seek to mitigate electoral failure, ensuring that elections actually bolster democracy. The concept of Mixed Democracy is akin to the concept of a “Mixed Economy,” where social welfare is maximized when competition internal to markets is externally structured by government. Similarly, the concept of “electoral failure” is akin to the notion of “market failure:” that competition internal to markets is inadequate to maximize social welfare.

The American Constitution deeply embeds the concept of electoral failure. James Madison, for example, explained the need for the checks & balances system:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. (Hamilton, Madison, and Jay 2004, p. 63)

He goes on to observe that the need to divide power to ensure accountability is not limited to the design of governments:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.

We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state. (Hamilton, Madison, and Jay 2004, p. 63)

Although the Constitution seeks to address electoral failure by protecting political rights and dividing political power among the branches of the Federal government and between the Federal government and the states, there is a nagging sense today that the Framers—and those who later copied them—did not finish their work. They may have done a masterful job of creating checks & balances to prevent elected officials from usurping the powers of each others' office or usurping the political liberties of citizens—the result of which is that tyranny is not a high risk in the American system of government. But when it came to maximizing the democratic accountability of individual elected officials, their handiwork was much weaker. In part because of term limits on many elected executives in the U.S., including the Office of the U.S. President, this is less of a problem for the executive branch of government. In contrast, U.S. legislators have succeeded in creating a system with high barriers to entry for potential political opponents (McDonald and Samples 2006).

Legislators conflict-of-interest problem in designing democratic reform did not go unnoticed during the Federal Constitutional Convention of 1787 and its immediate aftermath. One of the delegates, George Mason, criticized a Congress-driven system for amending the Constitution because members of Congress “may abuse their power, and refuse their consent on that very account (cited in Korbach 1994, p. 1999).” A leading critic of the proposed Constitution, George Bryan, argued the point more vividly: “[W]e shall never find two thirds of a Congress voting or proposing any thing which shall derogate from their own authority and importance, or agreeing to give back to the people any part of those privileges which they have once parted with.... The greater the abuse of power, the more obstinately is it always persisted in (cited in Korbach 1994, p. 2000).”

In summarizing this literature for a contemporary audience, legal Professor Kris Kobach concludes: “Mason’s ghost continues to haunt the Constitution; indeed, his warnings are more relevant today than ever (Korbach 1994, p. 2001).”

Madison himself was wary of the danger of giving members of Congress control over their own re-election rules, and he successfully sought to give states control over setting rules for membership in Congress. Political ethics Professor Dennis Thompson calls this the Madisonian Proviso: “When representatives decide questions that affect their own status or that of their party, they will tend to preserve the privileges and more generally perpetuate the practices of the institution, regardless of what their constituents may desire or need. On such issues, we should be ‘jealous’ of assigning the representative body final authority (2002, p.

133).” Nevertheless, Madison endorsed a constitution that left many key electoral laws, such as campaign finance, within the control of Congress.

Modern economic theory suggests a way to generalize the type of checks & balances reasoning critical of market and electoral fundamentalism. If companies have substantial market power due to the intrinsic characteristics of the market they serve, such as sellers providing vital but complex services to ill-informed buyers, then external government checks are necessary to prevent the abuse of that market power (Stiglitz 2000). The market for government representation—where voters are the buyers and candidates-for-an-office the sellers—is a classic case of such a market, with the difference that the external checks are on government rather than private sector competitors.

Just as the theories of electricity and magnetism were once unified, the theories of market failure and electoral failure can be unified. Central to this unification is a shift in conceptual focus from the distinction between non-government and government accountability to the distinction between what we shall call horizontal and vertical accountability. The former approach focuses on the differences between market and electoral accountability, whereas the latter approach, a generalization of checks & balances theory, focuses on their similarities

Note that the term “failure” in electoral failure and market failure only implies that social welfare is not maximized, not that it is stagnant or in decline. Even a monopolist, for example, is likely to improve the value of its products over time. But when faced with competition, the rate of improvement is likely to be greater. Thus, the fact that democracy is not declining or may be improving over time in no way proves that there is not substantial electoral failure.

Scholars have documented incumbents’ ability to rig elections in their own favor in a number of areas. In gross terms, as the incumbents’ advantage (McDonald and Samples 2006; Issacharoff and Pildes 1998). Or, in more fine terms, as the incumbents’ advantage in designing their own political district lines (Issacharoff 2002; Kubin 1997; Lowenstein and Steinberg 1985; Stephanopoulos 2007), designing the public records for their official actions (Snider 2009), designing the financing restrictions on their own election campaigns (Evans 2005; Jacobson 1980; Rieselbach 1994), designing their own conflict of interest disclosure and ethics enforcement (Thompson 1995), and designing the systems whereby votes for themselves are transformed into seats (Katz 2008; Thompson 2008; Ferejohn 2008).

It is also a staple of the popular literature on democratic reform. Many newspapers editorials on redistricting, for example, note that when politicians can draw their own political districts, they will tend to pick voters who increase their odds of re-election. Here is a recent sampling:

- **California's *Fresno Bee*:** "The politicians now draw legislative districts that guarantee their re-election. It's a conflict of interest that cheats our representative government." (Boren 2008)
- **Florida's *Orlando Sentinel*:** "Right now, politicians get to draw their own districts most any way they want. And boy, do they. They've turned this state into a psychopath's jigsaw puzzle, with misshapen legislative and congressional districts..... It's all designed to stifle competition and stack the deck before you even get to the polls." (Maxwell 2009)
- **Louisiana's *Advocate*:** "When the redistricting process is next undertaken, we hope it occurs through a reform model and not today's process of drawing lines to protect the interests of incumbent members of Congress." (Advocate 2008)
- **New York's *New York Times*:** "Every 10 years, legislators in effect create their own voting districts. So it is no surprise that the maps make it difficult-to-impossible for challengers to dislodge a sitting incumbent." (New York Times 2009)
- **Texas's *Fort Worth Star Telegram*:** "[T]here's a better way to draw voting districts than leaving it to politicians whose self-interest conflicts directly with the best interests of the electorate." (Fort Worth Star Telegram 2008)

The current U.S. president has written:

Of course, there are technical fixes to our democracy... that would strengthen the link between voters and their representatives.... But none of these changes can happen of their own accord. Each would require a change in attitude among those in power.... Each would demand that individual politicians challenge the existing order; loosen their hold on incumbency; fight with their friends as well as their enemies on behalf of abstract ideas in which the public appears to have little interest. Each would require from men and women a willingness to risk what they already have." (Obama 2007, pp. 133-4)

However, those in favor of removing electoral decisions from incumbent politicians' control exhibit substantial disagreement about how best to do so. In the next section, I describe the attempts in the Canadian provinces of British Columbia and Ontario to reduce Electoral Failure through the use of an "electoral reform jury." Both British Columbia and Ontario called this jury "The Citizens' Assembly on Electoral Reform."

### **Democratic Reform via an Electoral Reform Jury**

I define an "electoral reform jury" as a randomly selected government body that is statistically representative of the adult citizen population in the political district it represents and has binding government authority to decide one or more democratic reform questions where elected officials in a particular branch of government collectively have an inherent conflict of interest with their constituents.

The term *Jury* is being used as shorthand to describe a randomly selected government body that represents a political jurisdiction. This usage is akin to the usage in Federal law, where a

jury must be “selected at random from a fair cross-section of the community in the district or division wherein the court convenes.”<sup>1</sup>

A body can be randomly selected without being statistically representative. For example, a randomly selected body composed of three individuals is too small to be statistically representative of adult U.S. citizens. A typical U.S. petite or grand jury in the U.S. has less than 25 members and is also too small a sample to be statistically representative of a polity. In contrast, the randomly selected jury used in ancient Athens to create the agenda for its assembly and fulfill other administrative tasks had 500 members (Stockton 1990). An electoral reform jury must be reasonably statistically representative of the polity it represents, with 25 jurors too few and 500 a good benchmark, but one that may be needlessly large for all but the largest polities.

With a relatively small sample, stratification can enhance representation. For example, both bodies of 100 or 500 people are likely to be more representative if stratified by geography, age, and gender rather than purely randomly selected. The ancient Athenian jury mentioned above was stratified by geography; no females were allowed to serve.

*Binding government authority* means the ability of an electoral reform jury to force some type of government action on its recommendations. This includes forcing a vote on an electoral reform policy by another democratic body, which could be a representative institution such as a legislature or all citizens via a ballot referendum.

*An incumbent elected official's inherent conflict of interest with constituents* refers to an issue where 1) the interests of candidates who are incumbents and challengers systematically differ solely because one group holds an elected office and the other does not, and 2) incumbents have an interest in increasing institutional barriers to entry for potential electoral opponents in a way contrary to the interests of constituents. Note that incumbent candidates for office may have many conflicts of interests with constituents, such as undue attention to special interest groups, which are not inherent according to these criteria because challengers might also have such conflicts. The types of issues that meet the inherent conflict-of-interest test include an elected official's re-election campaign finance, district boundaries, public record of official actions, ethics disclosure and enforcement, and system of translating votes into elected offices.

To date, the only two public bodies to meet these definitional requirements for an electoral reform jury have occurred in the Canadian provinces of British Columbia and Ontario. Both were called a “Citizens’ Assembly on Electoral Reform.” In the nomenclature used here, they are merely one possible type of an electoral reform jury (a “citizen assembly electoral reform jury” or “citizen assembly jury” for short), other variants of which will be presented below.



**Table 1. Facts about the Citizens' Assembly's Process<sup>2</sup>**

	<b>British Columbia</b>	<b>Ontario</b>	<b>Netherlands</b>
<b>Dates</b>			
Meetings Start	January 2004	September 2006	March 2006
Meetings Finish	November 2004	April 2007	November 2006
Date of Final Report	December 10, 2004	May 15, 2007	December 14, 2006
1 <sup>st</sup> Referendum Date	May 15, 2005	October 10, 2007	N.A.
2 <sup>nd</sup> Refendum Date	May 12, 2009	N.A.	N.A.
<b>Members</b>			
# of Political Districts	79	103	12
Members/District	2	1	From 3 to 30
Members Selected From Districts	158	103	140
Members Selected at Large (Native Americans)	2 <sup>3</sup>	0	0
Government Selected Chair a Member?	Yes	Yes	No
# of Members (Including Chair)	161	104	140
Member Dropouts	1	1	6
Alternate Members Substitutions <sup>4</sup>	0	0	4
<b>Votes</b>			
Members Supporting Final Recommendation	95% (145/152)	84% (86/102)	90% (114/127)
Voters Supporting 1 <sup>st</sup> Referendum	57.7%	36.9%	N.A.
Voters Supporting 2 <sup>nd</sup> Referendum	38.6%	N.A.	N.A.
Votes Required to Pass Referendum	60%	60%	N.A.
Status Quo System	First-Past-the-Post	First-Past-the-Post	Party-Centered Proportional
Recommended System	Single Transferable Vote	Mixed Member Proportional	More Candidate-Centered Proportional
<b>Budgets (in local currency)</b>			
Budget for Member Deliberations	\$5.5 million	\$5.5 million	€5.1 million
Budget for Marketing the 1 <sup>st</sup> Referendum	\$.5 million	\$6.8 million	N.A.
Budget for Marketing the 2 <sup>nd</sup> Referendum	\$.5 million	N.A.	N.A.
Total Government Budget	\$6.5 million	\$12.3 million	€5.1 million
<b>Powers</b>			
Jurisdiction	Choose Electoral System	Choose Electoral System	Choose Electoral System
Formal Power	Place Referendum on Ballot	Place Referendum on Ballot	Issue report to Parliament
<b>Member Selection Process</b>			
Stratification Criteria for Random Sample	Gender, Age, District, Aboriginal	Gender, Age, District, Aboriginal	Gender, Age, District
Population of Political District	4.4 million	12.9 million	16.3 million
Initial Sample Size	23,034	123,489	50,400
Positive Responses	1,715	7,033	4,000
% Initial Yield	7%	6%	8%
2 <sup>nd</sup> Round Sample Size (invited to attend info. session)	1,441	1,253	N.A.
Number of Information Sessions	27	29	N.A.
Positive Responses After Info. Session	914	N.A. <sup>5</sup>	1,732
Final Round Sample Size	160	103	143

A third public body, for the entire country of the Netherlands, came close to the definitional requirement for an electoral reform jury but lacked the binding authority requirement because its recommendations were advisory only. Table 1 provides key facts about these three public bodies. (Compiled from press accounts and British Columbia Citizens' Assembly on Electoral Reform 2004; Warren and Pearse 2008; Ontario Citizens' Assembly on Electoral Reform 2007; Burgerforum kiesstelsel 2006)

### **British Columbia**

The model for both the Ontario and Netherlands electoral reform juries was the British Columbia "Citizens' Assembly on Electoral Reform," which has spawned a substantial academic literature, including edited volumes published by Cambridge University Press and Oxford University Press (Warren and Pearse 2008; Fournier et al. Forthcoming).

In 1996, the Liberal Party in British Columbia, led by Gordon Campbell, received the most votes of any party in the provincial election. Nevertheless, the second place party won a majority of the seats in the legislature. To correct this perceived democratic failure, Campbell promised to create a Citizens' Assembly on Electoral Reform if the Liberals came to power, which they did in the next election in 2000. The Citizens' Assembly was intended to address the conflict of interest elected officials would have if they designed their own electoral system.

Campbell appointed a former leader of the Liberal Party, Gordon Gibson, to propose a detailed implementation plan for the Citizens' Assembly (Gibson 2002). With only minor changes, the recommendations he came up with in 2002 were approved by the legislature in 2003 and implemented the following year.

In 2004, the government, led by the Liberal Party, created a Citizens' Assembly of 161 near-randomly selected citizens and gave it the job of recommending the best possible electoral system for British Columbia. If the Citizens' Assembly recommended a system different from the current one, its recommendations would be placed on the ballot at the next provincial election as a referendum item.

Members were chosen via a stratified random sample. To ensure that the resulting Citizens' Assembly looked like the population of British Columbia, the random selection was stratified over three selection rounds by riding (the name for a political district in British Columbia), gender, and age. Invitations to become members were initially sent to a stratified random sample of 23,034 individuals. Of those, 1,715 expressed an interest in learning more information about becoming a member. Of those, 1,441 were selected via a second round stratified random sample to attend a local informational session describing the Citizens' Assembly's work and the significant commitment being a member would entail. After the informational sessions, 914 agreed to participate. Of these, 158 (a male and female from each of British Columbia's 79 ridings) were selected via a third round stratified random sample.

After this final selection, when it was discovered that no native American British Columbians (called “First Americans” in British Columbia) were in the final 158, two were randomly selected, thus bringing the total to 160, plus an additional vote for the government appointed Chair of the Citizens’ Assembly.

All selected members of the Citizens’ Assembly were paid \$150/day for their participation, plus travel and hotel expenses. The total budget, excluding promoting the Citizens’ Assembly’s referendum ballot item in 2005 and 2009, was \$5.5 million (in Canadian dollars).

The Citizens’ Assembly deliberated for close to a year, mostly on weekends, before making its recommendation. The deliberations occurred from January through November 2004, with the first referendum on its recommendation on May 15, 2005. Deliberations were divided into three stages: learning (January-March), public hearings and written comments (May-June), and member-to-member deliberations (July-November). The Citizens’ Assembly recommended replacing British Columbia’s First-Past-the-Post (FPTP) electoral system with one based on the Single Transferable Vote (STV). This included changing and enlarging the political districts.

The first referendum received 57.1% of the popular vote but needed 60% to pass. After failing to pass by such a close margin, the government, still led by Campbell, ruled that the Citizens’ Assembly’s recommendation would be placed on the ballot again on May 12, 2009, when it received only 38.6% of the vote.

## **Ontario**

In the campaign leading up to the 2003 provincial election, Ontario’s Liberal Party leader, Dalton McGuinty, promised that if his party won control of the Government (after failing in the last election), he would make democratic reform one of his major priorities and put the resulting proposal on the ballot for a referendum. After he won the election on October 2, 2003, he set about fulfilling his promise. In November he met with Gordon Campbell, his fellow provincial Liberal premier, and publicly announced that a Citizens’ Assembly on Electoral Reform might be a good idea for Ontario (Perkel 2003). The Democratic Renewal Secretariat he created on October 23, 2003 then helped develop a plan to implement a Citizens’ Assembly based on the British Columbia model.

The Ontario Citizens’ Assembly on Electoral Reform met from September 2006 to April 2007 and submitted a recommendation for electoral change that was placed on the ballot in October 2007 and received 36.9% of the vote, far short of the 60% needed for passage. Although the Ontario Citizens’ Assembly was inspired by the British Columbia Citizens’ Assembly and closely hewed to the model it established, it also differed procedurally in important respects, including assembly size, duration, and in-house expertise.

**Assembly Size.** The Assembly in British Columbia was more than 50% larger (161 members) than the Assembly in Ontario (104 members). British Columbia chose to have two members, a male and female, from each riding, whereas Ontario chose to have one. Since Ontario has 103 ridings as opposed to 78 in British Columbia, this accounts for the bulk of the difference in size. The smaller size suggests a less representative assembly.

**Duration.** The Assembly in British Columbia met for eleven months. This included a summer of no face-to-face meetings but extensive members-only deliberation online. Ontario cut out the summer months, meeting for eight months, about a 30% shorter duration than in British Columbia. Eliminating the summer break reduced use of the members-only website and the length of the member-to-member deliberations stage by 50%. Given the complexity of choosing a new electoral system, the reduced opportunity for member-to-member deliberation may have led to fewer options being seriously considered and more reliance on expert opinion.

**In-House Expertise.** Ontario's Citizens' Assembly Chair chose as his Research Chair an academic with less electoral expertise than the Research Chair in British Columbia. The disadvantage of this decision is that it may have made it harder for the Ontario Assembly members to get quick, authoritative answers to their questions. The advantage may have been less elite information bias, as the Research Chair in British Columbia, despite a scrupulous attempt to present information impartially, had previously published work favoring the electoral system ultimately chosen in British Columbia.

The referendum results in British Columbia and Ontario indicate a discrepancy between the theory and outcome of the citizen assembly jury. In theory, a citizen assembly jury should represent the public's enlightened preferences, with the public recognizing this and thus voting in support of the citizen assembly jury's recommendations. Indeed, the percentage of citizen assembly jury members and members of the general public who voted for the citizen assembly jury's recommendation should be the same. As it turned out, however, a much greater percentage of citizen assembly jury members voted for the recommendation than members of the general public.

Many different explanations have been offered for this discrepancy (Carty, Cutler, and Fournier 2009; Snider 2007; Saumur 2007; Oliveira 2007; Yaniszewski 2007; Rodrigues 2007; Milner 2007; Daily News 2009; Barron 2009; Fournier et al. Forthcoming). Supporters of the ballot referendums tended to argue that failure stemmed from information problems: poor marketing and media coverage. Opponents of the referendums tended to argue that failure stemmed from substantive problems: poor policy recommendations, possibly as a result of a flawed citizens assembly process. The extent to which the proposed referendums went down to defeat because of information or substantive problems remains unclear, and I do not want to sift through the various arguments here. What I do want to highlight are the high hurdles to getting even a good citizen assembly jury proposal approved

by the general public in a ballot referendum. That is, it may be far more difficult to win public trust for complex, democratic reforms than advocates of the various citizen assembly juries hoped and expected.

At the root of this problem is that, after citizen assembly jury members have gone through their deliberative process, they are no longer like the general populace. They are different in two important ways: 1) their knowledge, and 2) their interests.

**Knowledge.** At the end of the citizen assembly jury process, the jurors have much more knowledge about how a recommendation differs from the status quo than members of the general public. Assuming that it is impractical to educate the public to the same level as the jurors, this knowledge gap will never go away. If the public is risk averse about proposed changes to the status quo that it doesn't understand, then it will always vote against a referendum recommended by a citizen assembly jury.

One exception is if the proposed recommendation is easy to understand and uncontroversial. In contrast, the citizen assembly jury recommendations in British Columbia and Ontario were both hard to understand and controversial. Opponents focused on the most controversial parts of the plans (such as adding multimember political districts in British Columbia and increasing the size of the legislature in Ontario) and hammered away at them. A consequence is that the odds of success could be increased if the controversial and uncontroversial recommendations of a citizen assembly jury could be separated and placed on different referenda. Unfortunately, such division is not always feasible. In British Columbia and Ontario, such separation wasn't feasible not only because of the integrated nature of the recommendations, but also because the terms by which the juries were created suggested that the juries could only add a single referendum item to the ballot.

A second exception is if members of the public decide to trust the recommendations of the citizen assembly jury because the jurors as a whole are perceived to represent their interests. This, of course, merely articulates the statistical rationale for picking a random sample of citizens to represent the general public. This line of reasoning suggests that media coverage of the jury's recommendations should focus on its trustworthiness, not substance. This, in turn, might require that the public receive a basic tutorial in statistical reasoning. In contrast, the overwhelming focus of the media coverage in British Columbia and Ontario focused on the policy merits and electoral mechanics of the proposed changes. On the other hand, given legitimate questions about the unbiased composition and leadership of both the British Columbia and Ontario citizen assembly juries, a focus on the substance of their recommendations may have been reasonable.

**Interests.** At the end of the citizen assembly jury process, the jurors have different interests than the public. Data from British Columbia indicate that if voters in the majority party believe a democratic reform will hurt their favored party, they will tend to oppose the

reforms in a referendum (Carty, Cutler, and Fournier 2009). In contrast, such reasoning did not appear to characterize the deliberations of the citizen assembly juries, where participants argued in terms of what would be good for their province as a whole, not for their own partisan interests. It appears that the act of deliberating in a small group such as a citizen assembly jury changes the incentives of those who participate such that they are no longer a microcosm of the general public. Since many participants developed a reputation among their peers for arguing in terms of the public interest, they would have deprived themselves of their peers' social esteem by casting a public, highly visible vote on what would have appeared to be self regarding grounds. Indicative of at least some type of significant social pressure on voting is that in both British Columbia and Ontario members of the Citizens' Assembly voted for the proposed ballot referendum by a margin of over 90%.

Given that state constitutional conventions and citizen assembly juries are both independent representative assemblies that tend to propose complex democratic reforms for approval by ballot referendum, it may be useful to add the contemporary experience with constitutional conventions to understand the defeat of the citizen assembly juries in British Columbia and Ontario. Consider the last major wave of U.S. state constitutional conventions, which took place in the wake of the U.S. Supreme Court's 1962 *Baker v. Carr* reapportionment decision. The ballot referendums proposed by five of the seven constitutional conventions went down to defeat (Cornwell, Goodman, and Swanson 1974, pp. 17, 161; see also Dinan 2006).<sup>6</sup>

On the other hand, there are important differences between the two types of electoral reform bodies. Most notably, their memberships greatly differ. Constitutional conventions are primarily composed of political elites, with many dependencies on political parties and elected officials; citizen assembly juries are primarily composed of average citizens without such dependencies.

Could it be, given the relative success of constitutional conventions during the 19<sup>th</sup> and first half of the 20<sup>th</sup> century, that something fundamental has changed in modern Western democracies that privileges status quo democratic practices? One possible explanatory factor might be the growth of mass media, with its reliance on partisan disagreement and the objectivity norm to structure news. The reliance on partisan disagreement fails when incumbents of the two dominant political parties have a common interest in conflict with the public. And the reliance on objectivity norms, whereby news reports give equal credibility to both sides of complex democratic reform issues, forces a decision making burden onto voters that they may be unwilling or unable to take on, thus encouraging them to take the lower risk option of voting for the status quo. In any case, more outside-the-box thinking needs to be done to understand the unique politics not only of the British Columbia and Ontario referenda but of all referenda dealing with complex democratic reforms that incumbents and their special interest allies do not want.

## Netherlands

The Dutch *Burgerforum* was also inspired by the British Columbia Citizens' Assembly on Electoral Reform. Accordingly, its English translation has commonly been "Citizens' Assembly on Electoral Reform" (e.g., see Fournier et al. Forthcoming). Creating such an assembly was championed by D66, a small Dutch political party. It made creating such an assembly a condition for forming a majority coalition in 2005 with the Christian Democrats and Conservative Liberals.

The Dutch Citizens' Assembly covered the entire country rather than a region. It met from March 2006 to November 2006 and submitted recommendations for electoral change to Parliament. While the Citizens' Assembly was meeting, a new government was elected. On April 18, 2008, the new government sent a letter to Parliament saying it would not implement the Citizens' Assembly's recommendations.

Compared to both British Columbia and Ontario, the Dutch citizen assembly jury met for a briefer amount of time, had more trouble motivating its members to participate, and made much more modest electoral reform recommendations. The nature of the citizen assembly jury sponsors also differed. In Canada, it was political parties that had recently taken power as the majority party. In the Netherlands, it was a small minority party with a delicate toehold on power as part of a coalition with much larger political parties.

\* \* \*

The citizen assembly juries in British Columbia, Ontario, and the Netherlands were created by elected officials through existing institutions of representative democracy. Relying on this method of creating electoral reform juries, as opposed to the ballot initiative, may have significant downsides.

The elected officials built significant restrictions into the design of the citizen assembly juries. In the Netherlands, the primary restriction was the lack of any binding authority for the citizen assembly jury, so its recommendations could be easily ignored. In British Columbia and Ontario, two high hurdles were set for passage of the citizen assembly juries' recommendations in the ballot referendum. First, 60% of voters had to support it. Second, 60% of political districts had to support it. In contrast, American state constitutional conventions have generally required only majority support for passage of their ballot referendums (Dinan 2006). If such a voting rule were applied in British Columbia, the first ballot referendum in May 2005 would have passed. For all three citizen assembly juries, elected officials both appointed the jury leaders and set boundaries, albeit loose ones, on their agendas. For all three juries, too, the role of the juries was limited to deliberating and making policy recommendations; they were disbanded before they had the opportunity to defend and promote their recommendations.

The political conditions that led elected officials to support the citizen assembly juries may also not be easily replicable. The powerful politicians in British Columbia and Ontario who championed the citizen assemblies made democratic reform a central part of their platform while they were a minority party seeking more power. After winning office and making a good faith effort at democratic reform, their enthusiasm for citizen assemblies seemed to have waned. This was vividly illustrated in British Columbia, where Liberal Party voters, with the quiet acquiescence of their leaders, turned most negative about the recommendations of the citizen assembly in the second referendum, when the Liberal Party had already been in power for eight years (Carty, Cutler, and Fournier 2009).

Of greater importance, the United States presidential system differs in significant respects from the British Columbia and Ontario parliamentary systems. The Canadian parliamentary system breeds strong party leaders, whereas the U.S. presidential system decentralizes power, creating many more veto points for elected officials who don't want change that might weaken their hold on power. To succeed in creating a citizen assembly jury, for example, the U.S. President would have to win over Congress—a much more daunting political obstacle given America's individual- rather than party-centered congressional politics. As a general political rule, convincing a single individual to act altruistically—especially when he is highly visible and so gets public credit for it—is a lot easier than convincing hundreds of relatively anonymous individuals to do so. This may help explain why, in California's Assembly, a bipartisan bill to create a citizen assembly received large amounts of positive press coverage but never got even a hearing in committee; and why, in Hawaii's Senate, a citizen assembly bill repeatedly introduced by a senior senator also never got even a committee hearing.

Such considerations help explain the observation that when U.S. elected officials have a conflict of interest with constituents, such as passing laws to create term limits on themselves or bipartisan redistricting commissions with binding authority, states with ballot initiatives are far more likely than those without to see such laws passed (Kurtz, Cain, and Niemi 2007, p. 193).

## **A Principal-Agent Framework for Categorizing Democratic Reform Processes**

Principal-Agent theory—with extensions to analyze the links between vertical and horizontal accountability—provides a useful way to place electoral reform juries in a larger democratic framework. It does so by offering a way to categorize and evaluate the strengths and weaknesses of the different types of independent democratic reform institutions based on their incentives to act on behalf of voters', rather than elected officials', interests.

In principal-agent theory, a principal delegates a task to an agent. There are a number of reasons why a principal might delegate a task to an agent, but the most common one is that the agent can more efficiently perform the task. Voters, for example, delegate democratic



governance tasks to elected representatives for the same reason they delegate legal tasks to lawyers, medical tasks to doctors, and car production tasks to car companies: it is impractical and inefficient for them to take on all these tasks themselves.

The major problem with delegation is that agents may have an incentive to act opportunistically; that is, to act in their own rather than the principal's interest. Legislators, for example, may have an interest in weighing the preferences of their campaign contributors more than their constituents, or have an interest in designing campaign finance laws to raise barriers to entry for potential competitors for their seats when their constituents might like more competitive elections.

Agents can be divided into two major categories: vertical agents and horizontal agents.<sup>7</sup> The vertical agent is the agent with the responsibility to perform the principal's primary task. In the case of a corporation, the primary task of the manager/agent is to generate profits on behalf of shareholders/principals. In the case of a member of Congress, the primary task of the legislator/agent is to represent the interests of their constituents/principals.

Horizontal agents monitor and sanction vertical agents who act opportunistically. In the case of a corporation, a horizontal agent is the Securities & Exchange Commission. In the case of Congress, a horizontal agent is the U.S. president. Note that horizontal agents are only horizontal in relation to the vertical agent, not the principal. In relation to the principal, they are also a vertical agent.

Principals delegate oversight of primary vertical agents to horizontal agents when the horizontal agents can perform such oversight more efficiently and effectively than they can. This explains why horizontal agents are ubiquitous in any successful complex institution and why the use of such agents is a universally recognized principle of good management. For example, the audit functions on organization charts are typically horizontal to the various product manufacturing, distribution, and marketing functions.

Horizontal agents fall into two broad categories: private and public. In relation to the legislature, private agents include the political press, interest groups, and political parties. In relation to corporate governance, private agents include the financial press, accountants, and ratings agencies. In politics, the common label for private agents is civil society.

Public agents include all competing branches of government and all public officials whose job it is to evaluate other public officials who do not report to them. In relation to federal agencies, public agents include the U.S. Office of Management and Budget, agency-level inspectors general, and the Federal judiciary.

In reality, there are no pure private agents. All private agents tend to rely on various types of government free speech, assembly, property, and personal safety protections. Thus, I

categorize such horizontal agents as quasi-private, even though they may think of themselves as purely private.

Unlike quasi-private horizontal agents, public horizontal agents may have the full backing of the state, such as subpoena power, to force primary vertical agents to disclose information about their actions. They need not rely on the information primary vertical agents voluntarily disclose about themselves.

Combining our new generalized language of accountability with the sector specific terminology described earlier, Electoral Fundamentalism and Market Fundamentalism seek accountability either exclusively via vertical mechanisms (their hard versions) or via a combination of vertical mechanisms and quasi-private horizontal mechanisms (their soft versions). Mixed Democracy and Mixed Markets seek accountability via horizontal mechanisms, including public horizontal mechanisms.

In the context of a representative democracy, public horizontal agents fall into two broad classes: elected and randomly selected. For Congress, elected horizontal agents include the executive branch and state legislatures. The citizen assembly juries discussed above were a randomly selected horizontal agent.

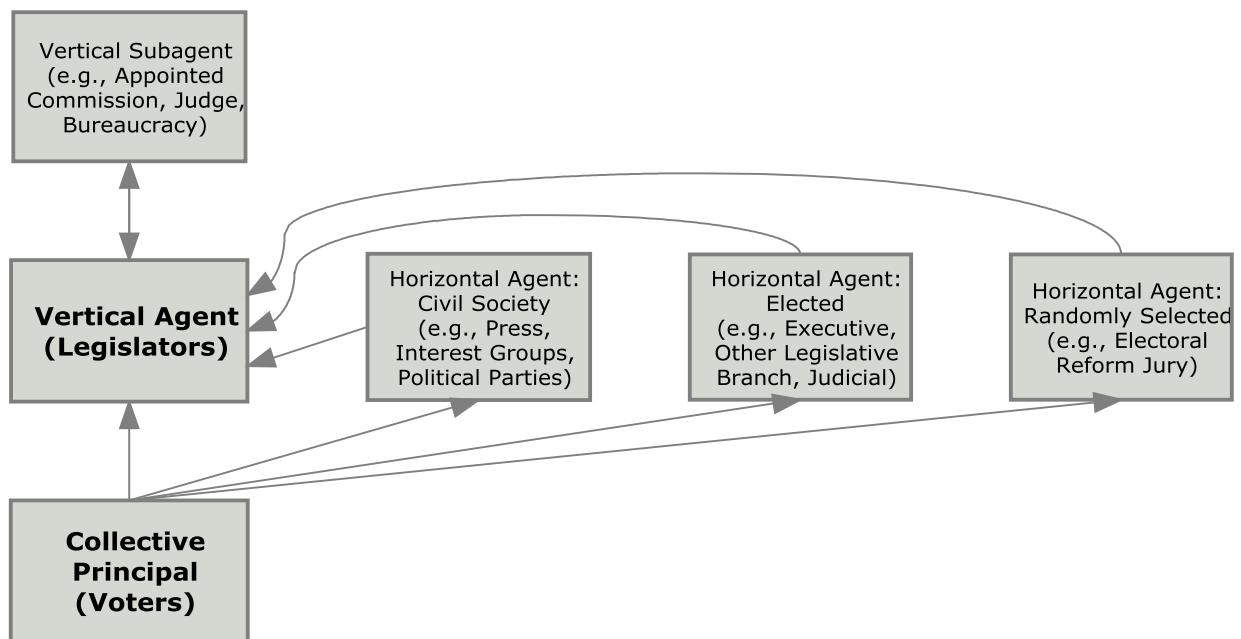
Vertical agents can delegate work to sub-agents. In the case of a legislature, sub-agents include bureaucrats, advisory committees, and commissions. By their nature, any delegated entities, including sub-agents, have a degree of independence from those who delegated a task to them. But independence does not mean lacking derived conflicts of interest. A sub-agent that is independent may nevertheless be designed to work on autopilot to represent the interests of the agent who appointed it (McCubbins, Noll, and Weingast 1987). On critical issues affecting incumbent legislators' re-election, we would expect that the autopilot features of sub-agents, such as redistricting commissions, would be tightly constrained to represent the agents' interests.

This helps explain why redistricting commissions, even those with binding authority to impose redistricting plans over incumbents' objections, have a decidedly pro-incumbent and/or partisan bias (Lowenstein and Steinberg 1985; Mann and Cain 2005, chapter 5; Winburn 2008, chapter 6). As one advocate of bipartisan redistricting commissions concluded, paraphrasing Winston Churchill, "commissions are the worst method of redistricting except for all those other methods that have been tried from time to time (Kubin 1997, p. 840)."

The large literature observing that the U.S. Supreme Court expresses great deference to the political branches of government in the design and implementation of democratic laws, even when those laws conflict with the norms of democratic theory, provides evidence that appointed judges face similar incentives (Gerken 2004; Persily 2002; Issacharoff and Karian 2004; National Conference of State Legislatures 2009).

Figure 1 diagrams the different types of vertical and horizontal principal-agent relationships. It illustrates the case where a legislature is the primary vertical agent. The arrows point in the direction of accountability. Sub-agents have two-sided arrows because they are appointed by vertical agents but are also expected to hold the vertical agents accountable. The randomly selected horizontal agents are given a special box to highlight their importance. The principal's relationship with the primary vertical agent is highlighted because, in terms of the delivery of goods and services, the horizontal agents provide the principal with a service of vital but nevertheless secondary importance.

**Figure 1. Typology of Redistricting Models, with a Legislature the Primary Vertical Agent**



All these principal-agent categories are ideal categories; that is, they are analytical constructs that help us think clearly about a problem but don't necessarily exist in the real world. In practice, most electoral reform institutions are combinations of these ideal types. Examples include appointed judges in Maryland who must stand for re-election in an up-or-down approval vote; and Florida's Constitutional Revision Commission, which is appointed by Florida's governor, president of the senate, speaker of the house, and chief justice of the Supreme Court.

Table 2 elaborates on the strengths and weaknesses of the various incentive-based electoral reform models. The first five columns correspond to the actors depicted in Figure 1. The sixth column is for possible mixes of those actors.

**Table 2. Advantages and Disadvantages of the Various Accountability Mechanisms**

	Collective Principal (Citizens)	Vertical Agent		Horizontal Agent			Mixed Agent
		Direct	Indirect	Civil Society	Elected	Randomly Selected	
<b>Examples</b>	Ballot Initiative, Town Meeting	Elected Legislature	Appointed Partisan or Bipartisan Commission, Judiciary	Mass Media, Interest Groups, Political Parties	Executive or Judicial Branch, State Legislature, Constitutional Convention	Electoral Reform Jury (e.g., in British Columbia)	Mixed Member Commission (e.g., California's Redistricting Commission)
<b>Social Cost to Develop Expertise</b>	Prohibitive	Low	Low	Low	Low	Medium	(?)
<b>Conflict of Interest with Voters</b>	Low	High	High	Low	Medium	Low	(?)
<b>Type of Power</b>	Legal	Legal	Legal	Normative	Legal	Legal	Legal

The different models are characterized along three dimensions: social cost to develop expertise, conflict of interest with voters, and type of power.

**Social cost to develop expertise** includes the cost both to motivate an individual to become an expert and then educate that person. Average citizens presumably start with less expertise than elected officials and elected officials' appointees. This is because expertise in the art of getting elected is critical for winning elections; it is also a byproduct of serving in office. Social costs increase with the size of the group that must be educated. This is partly because the marginal cost of educating an individual is greater than zero and partly because as the size of a group increases, the incentive of group members to free ride on other group members' efforts increases.

**Conflict of interest with voters** indicates the propensity to act opportunistically. Incumbent elected officials and their appointees presumably have the greatest conflict of interest. This is because only those with a strong desire to win elections are likely to win. To the extent that elected officials can increase barriers to entry for potential electoral opponents without electoral retribution from voters, they should be expected to do so.

This political logic creates a tradeoff in institutional design between expertise and conflicts-of-interest. Expertise and conflicts-of-Interest tend to be directly proportional; those with the most expertise also tend to have the greatest conflict of interest (Olson 1971). The task for the institutional designer is to minimize this tradeoff (Dahl 1989, pp. 332-341).

**Type of Power** is divided into legal and normative power. Legal power includes the ability to exercise the coercive authority of the state. It is contrasted with normative power, which includes only the ability to influence public opinion. A major advantage of legal power, which civic entities such as the press lack, is the ability to force agents to reveal information about their actions.

We can distinguish seven types of democratic reform decision makers: collective principal (citizens), direct vertical agent, indirect vertical agent (sub-agent), quasi-private horizontal agent (civil society), elected horizontal agent, randomly selected horizontal agent, and mixed agent.

**Collective Principal (citizens).** For large-scale democracy, this refers to direct democracy via ballot initiative. For small-scale democracy, such as small towns in Vermont, it could also include town meetings. As a collective principal, citizens, by definition, have no conflict of interest with themselves. But it would be prohibitively costly and probably impossible to turn all or even most citizens into experts on even a single democratic reform issue (Dahl and Tufte 1973).

**Direct Vertical Agent.** Direct vertical agents often have great expertise on electoral issues, especially on issues conducive to their winning. But they also have the greatest conflict of interest in using this information to benefit voters. This is why public advocates constantly pressure them to appoint sub-agents, usually characterized as “independent” electoral bodies, to conduct electoral reform.

**Indirect Vertical Agent (sub-agent).** Vertical Sub-agents appointed by vertical agents are likely to have substantial expertise in the area of electoral reform for which they are selected. Vertical sub-agents, however, may have a different type of conflict-of-interest with principals than vertical agents. So-called “independent” sub-agents only reflect the preference of agents at the time the agents select them and structure their decisions. New information may change the preferences of these agents. But to the extent the sub-agent is truly independent, the sub-agent will not incorporate these changed preferences.

To the extent that this time shift between the moment of delegation and moment of decision leads to a *veil of ignorance* effect, the conflict of interest is likely to be lessened. Let’s say Congress designs a U.S. presidential succession system without knowing the specific individuals and party affiliations of those who would succeed to the presidency and vice presidency in the rare and unpredictable event that both elected officials left office simultaneously and before their terms expired (due to, say, a nuclear bomb dropping on

Washington, DC and killing the president and vice president). According to veil of ignorance reasoning, this will result in the design of a more just selection process, assuming that the succession system cannot be easily redesigned once Congress knows the specific individuals and political groups that will benefit from a particular succession system (Vermeule 2001). (In this case, because the presidential succession rules are part of the U.S. Constitution, they are indeed very hard to change.) However, when it comes to incumbent protection, a veil of ignorance effect is likely to be weak because an incumbent already knows he is an incumbent and can reasonably expect to be one in the future.

**Quasi-Private Horizontal Agent (civil society).** Quasi-private horizontal agents, such as the press and broad-based interest groups, may have a high degree of expertise on electoral matters combined with relatively little conflict of interest with voters. Their biggest weakness is a lack of binding government authority: if a primary vertical agent has a strong preference not to take a certain action, such as reveal information or pass a law, there may not be much a private horizontal agent can do. For example, every ten years, after the U.S. Census is taken and political districts must be redrawn, newspapers rail against pro-incumbent gerrymanders. But their complaints have done little to eliminate the gerrymanders. According to Sam Hirsch, associate editor of the *Election Law Journal*, the last “round of Congressional redistricting was the most incumbent-friendly in modern American history (2003, p. 179).”

**Elected Public Horizontal Agent.** At their best, elected horizontal agents will have substantial electoral expertise and less of a conflict of interest than vertical agents. And unlike quasi-private horizontal agents, they have binding government authority. But their binding authority does not generally extend to making vertical agent elections more competitive. It is primarily restricted to ensuring that no branch of government seizes too much power and thus endangers liberty. Even assuming that elected horizontal agents, if given control over vertical agent elections, could be prevented from seizing too much power, such agents would likely have strong incentives to collude with vertical agents at the expense of the public. The reason is that elected horizontal agents are unlikely to be completely independent of vertical agents. They may depend on each other to pass legislation, raise campaign contributions, and achieve favorable visibility with their constituents. A state legislator may depend on his members of Congress for district pork, campaign fundraising help, and blue ribbon cutting PR opportunities. If politicians are of the same political party, they may campaign together and depend on each other’s support within the party. And if politicians are on the same level of government, such as U.S. senators, U.S. representatives, and the U.S. President, they may need each others’ support to pass legislation. The result is that an elected horizontal agent will often find alienating a primary vertical agent to be politically costly.

**Randomly Selected Public Horizontal Agent.** A well-designed randomly selected horizontal agent starts with less expertise than an elected horizontal agent. This is

counterbalanced by an electoral reform jury's greater potential independence from vertical agents. This is facilitated by the jury's relatively narrow jurisdiction, short duration, and tightly regulated ex parte contacts; it is also facilitated, more fundamentally, by the jury's mode of selection: its avoidance of mass elections, which have historically required party linkages across branches and bias in favor of special interests in order to secure campaign resources. Of course, realizing this promise of independence requires careful attention to many details of institutional design.

On the other hand, electoral reform juries are the Rolls Royce of horizontal accountability. By adding a new type of democratic body to the already existing mix of democratic institutions, such a jury adds to the cost of democratic governance. Moreover, such a jury is more expensive than a public body made of up experts because its members take longer to train and more members are necessary for the public body to be statistically representative of the polity.

**Mixed Agent.** Since the mix of horizontal and vertical agents in a mixed system can vary substantially, making a general assessment of its democratic implications is impossible. Consider the mixed agent redistricting commissions in California and Alaska. In California, the redistricting commission, created with the passage of Proposition 11 in November 2008, includes a complex combination of elected and randomly selected horizontal agents plus vertical agent selection. Specifically, citizens apply to the independently elected State Auditor to serve on the commission; the auditor randomly selects three state auditors to serve on an Applicant Review Panel; the Applicant Review Panel whittles the applicant pool to 60 individuals; House and Senate leaders can each strike two names from the applicant pool; the Applicant Review Panel then randomly selects eight applicants, who then select another six individuals from the applicant pool vetted by House and Senate leaders. In Alaska, the governor selects two redistricting commission members, the president of the Senate one, the speaker of the House one, and the chief justice of the Supreme Court one.

### **Alternate Ways to Implement an Electoral Reform Jury**

An electoral reform jury could be implemented in many other ways than was done in British Columbia and Ontario. Here I propose low and high cost versions. In this framework, a citizen assembly jury is an intermediate cost version. By costs, I refer to the time commitment incurred by jurors, which represents an opportunity cost to both jurors and society.

The primary advantage of the proposed low cost electoral reform jury is that it is politically much easier to implement because it heavily relies on existing institutional infrastructure, asks much less of jurors, and, due to its very narrow jurisdiction, is less threatening to political elites. The low cost approach requires that the issue addressed by the jury can be grasped relatively easily by lay people.

The primary advantage of the proposed higher cost electoral reform jury is that, once it is set up, it has much more institutional capacity. It can tackle all the issues the lower cost electoral reform jury can plus more. It can also choose its own leadership, set its own electoral reform agenda, and then oversee the implementation of its policies.

### **Redistricting Juries: An Illustration of a Low Cost Electoral Reform Jury**

To illustrate how a low cost electoral reform jury could work, I propose the creation of a “Redistricting Jury” to remove redistricting from the jurisdiction of incumbent elected officials. In this proposal, the judiciary provides the physical facilities, selects the jurors, moderates the discussion, and operates the websites; interest groups propose and critique the redistricting options; and the jury chooses among the options. Here are more specifics of the proposal:

- 1) To limit expense, the redistricting jury would use the extensive jury infrastructure already developed by the U.S. court system, including random selection of jurors, the courthouse, the use of judges to preside, the adversarial system to present options to jurors, and the procedures to insulate jurors from bribery and personal lobbying.
- 2) To be representative of the general populace, the redistricting jury would have at least 100 members—significantly larger than a typical judicial jury.
- 3) To keep the jury to a reasonable size while being representative, the random selection of jurors would be stratified by geographic region, age, gender, and party affiliation (e.g., Democrat, Republican, and Independent).
- 4) To limit the burden on jurors, jurors would not be asked to devise their own redistricting plan but only to choose among the complete redistricting plans submitted to the court; jurors would have control over which redistricting plans would have advocates present their case in court; and then the jurors would successively eliminate plans from contention.
- 5) To make it easy for civic groups to design redistricting plans to submit to the jury, the government would publish online all redistricting related data in an easily accessible structured format; and nonprofit foundations would be encouraged to fund the development of redistricting software that could automatically access this redistricting data and apply democratic redistricting principles to it. Examples of such principles include districts characterized by equal population, contiguity, and compactness.
- 6) To reduce the risk of external-elected-official-bias while ensuring professional moderation and administration, the redistricting jury would be moderated by a randomly selected panel of, say, five judges, with a rotating presiding judge for the jury-as-a-whole and rotating judges-as-moderators or their designees to moderate the face-to-face deliberations of the jury in sub-groups.
- 7) To ensure transparency and broad public participation, the redistricting jury would have an accompanying website for interested citizens and groups to submit redistricting plans, open source redistricting software, comments on the various submissions, and thumbs up recommendations on comments and submissions.



- Those proponents selected to present their plans in court would have their testimony webcast and made available on the website.
- 8) To prevent corruption, all attempts to influence jurors would have to be done via the public website and courtroom.
  - 9) To facilitate jury deliberation, each juror would be given a laptop with Internet access for the duration of the jury, and the jury as a whole would be provided with a private, internal messaging system.
  - 10) To prevent self-selection bias in the selection of jurors, jury service would be mandatory.
  - 11) To prevent an undue burden placed on jurors, jurors would be asked to devote no more than ten days of courthouse service to complete their deliberations and choose a redistricting plan.
  - 12) To ensure protection of minority rights, all jury recommendations would be subject to judicial review and the Voting Rights Act.

Such a redistricting proposal is more viable now than ever before because new information technology is democratizing the ability to develop redistricting expertise and design districts with actual data. Previously, redistricting was a hugely complex undertaking involving highly skilled manual labor, expensive tools, hard-to-access public datasets, and proprietary software. Hence designing the particulars of a redistricting plan was well beyond the reach of not only the average citizen but also all but the most motivated and well-heeled interest groups.

Information technology has empowered unskilled individuals in countless walks of life. For example, publishing a flyer used to be very expensive and required specialists highly skilled in design, typesetting, and printing. Now it can easily be done by the average individual thanks to modern computers, software, and printers. Similarly, searching for all published use of a particular word or phrase was an impractical task that could cost tens of millions of dollars and require many lifetimes of manual effort. Today, thanks to Google, it can be done nearly instantaneously. The same technology revolution can happen to redistricting.

With advanced redistricting software tied to actual redistricting data, even an average citizen could instantaneously draw a technically polished redistricting plan at the push of a button. And with less than a day's worth of learning about basic redistricting principles (such as one-person, one-vote, and contiguous, compact districts), a citizen's plan could conceivably be more democratically appealing than the districts designed by today's political-elite controlled redistricting bodies after months of effort and extensive use of highly-paid professionals. Partisan and incumbent-protection gerrymanders, for example, are typically misshapen and immediately obvious to the naked eye. A juror could simply eyeball such gerrymanders and rule them out.

The redistricting software could also generate countless statistics to evaluate proposed political district plans. These could include how many counties are split, how close districts are to the one-person, one-vote standard, the extent to which geographic barriers are crossed,

and the displacement of incumbents. Over the years, there have been many efforts to develop publicly available redistricting software (e.g., see Redistricter, BARD, and Districting for ArcGIS). But the potential for developing sophisticated, easy-to-use software has barely been scratched. The Joyce Foundation is currently funding the development of such software.

None of this should imply that redistricting is in any way simple. On the contrary, it involves many, often conflicting principles. Even experts who have devoted much of their lives to thinking about redistricting often disagree on what would make an ideal redistricting plan (Lowenstein and Steinberg 1985).

But to make reasonably informed decisions, jurors wouldn't have to deal with all this complexity, any more than they need to have endless discussions about the merits of candidates competing for elective office or complex products like cars that must be evaluated before purchase. The jurors can significantly and reasonably simplify their decision making process by focusing on just the differences in the submitted redistricting plans and focusing their efforts on deciding which sources of redistricting plans are most trustworthy.

Jurors may also decide to simplify their task by following redistricting minimalism, the belief that the conceptual complexity and corresponding subjective tradeoffs used to rationalize current redistricting plans is unnecessary or even harmful. For example, designing districts based on the core and internally consistent principles of one-person, one-vote, contiguity, and compactness may result in more democratic redistricting plans than most current plans that incorporate more and often inconsistent principles such as protection of incumbents, preservation of political subdivisions, and preservation of communities of interest. Alternatively, jurors could primarily rely on the core principles above and then accept adjustments for special circumstances, such as a large body of water dividing two parts of a district.

A strong civil society is vital to the success of redistricting juries because civil society groups would bear the brunt of both designing the proposed redistricting plans and analyzing their relative merits. To empower such civil society groups with the tools to efficiently both learn about and design actual political districts, foundations should fund ambitious open source software redistricting projects and nonprofit websites that collate and publish government and non-government redistricting data in ways helpful to such groups.<sup>8</sup>

A precedent for such linkages between government, foundations, and nonprofit groups has already been established in the open government community, which, with foundation backing, has created innovative nonprofit websites to access and transform government data in ways that empower civil society groups that otherwise couldn't afford to access this information and have their voices heard (Snider 2009).

Since elected officials would have a conflict of interest passing legislation to create a redistricting jury, the most politically feasible way to create one might be through a ballot initiative at the state level. Close to half the states in the United States allow such ballot initiatives. Another variation on this idea would be to simply add redistricting juries to the toolkit of judges. If a legislature approved redistricting plan was contested in court and suffered from an egregious political gerrymander, a judge could create a redistricting jury to design a better plan. A precedent for this type of judicial power is the Hawaii Federal District Court's 1965 ruling calling for a Constitutional Convention to reapportion state legislative districts (Cornwell, Goodman, and Swanson 1974). In *Davis v. Bandemer* (1986), the U.S. Supreme Court ruled that political gerrymanders were justiciable. But, as reaffirmed in *Vieth vs. Jubelirer* (2004), it has yet to find a bright line test of such justiciability (Issacharoff and Karian 2004; National Conference of State Legislatures 2009). A redistricting jury could represent the path out of this dilemma. The judge would call into existence the redistricting jury, but the jury would determine which of the contested plans best corresponded to the public interest.

The redistricting jury proposal is timely because of the upcoming decennial census in April 2010 and the ensuing redistricting cycle. But many other low cost electoral reform juries could be created where appropriate.

For example, a term limits jury could be created to decide whether term limits were desirable and, if so, which of many proposed alternatives best implements them. Term limits have historically been very popular with the public but, due in part to elected officials obvious conflict of interest on this issue, have only been implemented in states with the ballot initiative (Kurtz, Cain, and Niemi 2007; Cain and Miller 2001).

Similarly, a legislative audit jury could be created to decide whether legislatures should publish roll call votes in a structured form on a public website (so the public, for example, could look up legislators' votes by legislator as well as chronologically or by bill). Although such a reform has been highly publicized since 1995, is easy to do, and obviously enhances the accountability of a representative democracy, the vast majority of legislatures in the United States haven't found it in their interest to provide this basic information to the public (Snider 2009). A legislative audit jury could probably decide in less than an hour of public deliberation that posting structured roll call votes online would be in the public interest.

### **Solonic Juries: An Illustration of a High Cost Electoral Reform Jury**

A high cost electoral reform jury differs from a low cost one in being a standing rather than ad hoc body and having the complete possible jurisdiction of an electoral reform jury. Jurors would be expected to serve for a year rather than a maximum of a few weeks, as with the low cost electoral reform jury. Unlike both a low cost and intermediate cost jury, an executive council elected from jury members would administer the jury and set its agenda.

In honor of the ancient Athenian, Solon, who was credited by Plutarch with inventing large, randomly selected juries to propose public policy legislation, I suggest calling this type of standing electoral reform jury a solonic jury, and its members, solonic jurors (Plutarch and McFarland 1967, chapter 19). Of course, the precedent isn't perfect, partially because the original solonic jury wasn't limited to proposing legislation where elected public officials have a conflict of interest. But the precedent is close enough. The name of the U.S. Senate, for example, is derived from the Roman Senate, even though the U.S. Senate differs in significant ways from the Roman Senate. In addition, the word solon has come to mean being a wise lawgiver. Thus, the name solonic jury is both historically resonant and indicative of the power and trust invested in it.

Here are more specifics of the solonic jury proposal.

- 1) To maximize independence, the jury would have its own buildings, staff, and internal policies; similar to the U.S. Constitution's limits on the legislature's funding of judges, it would be illegal for a legislature to reduce the jury's funding; on the other hand, any change to the jury's funding could come from a ballot referendum.
- 2) To be representative, the jury could have as many as 500 members—more than twenty times larger than a typical judicial jury.
- 3) To facilitate deliberation, reduce transportation costs, and enhance the accountability of the executive council, the jury would be divided into geographic sections of approximately 50 individuals each; the jury as a whole and each section would be provided with a private, internal messaging system.
- 4) To keep the jury to a reasonable size while being representative, the random selection of jurors would be stratified by geographic region, gender, and party affiliation (e.g., Democrat, Republican, and Independent).
- 5) To avoid member-self-selection-bias and enhance expertise, jury duty would be limited to but mandatory for those reaching retirement age.
- 6) To give juries substantial power but retain checks & balances, juries would have the power to either 1) pass legislation subject only to a legislative veto passed by a majority of legislators or an executive veto not overridden by a two-thirds legislative supermajority (the legislature and executive would have ten days, say, to cast their veto or the proposed legislation would automatically become law), or 2) create a referendum so the voter could decide; all jury proposed legislation, including disputes over the jury's jurisdiction, would also be subject to judicial review.
- 7) To ensure transparency and broad public participation, the jury would have an accompanying website for interested citizens and groups to submit electoral reform proposals, comment on the submissions, and provide thumbs up recommendations on the submissions and comments.
- 8) To develop expertise in administration and agenda setting, as well as bear the brunt of the jury's work, the jury would have an executive council of approximately 50 individuals. Subject to the approval of the jury, the executive

- council would select expert administrators, approve budgets, and decide which proposals for electoral reform to submit to the jury.
- 9) To make the executive council accountable to the jury, the jury would elect the executive council; at the end of its one-year term of office, each section of the jury would elect a member to the executive council as well as multiple alternates, who would be, say, the second, third, fourth, and fifth place finishers in the section election. Members of the executive council would have a five year term of office and be subject to an at-will retention vote by each succeeding section of the geographic region he or she represents. If the executive council member lost a retention vote, one of the alternates would replace him or her.
  - 10) To prevent corruption, all attempts to influence jurors and the executive council would have to be done via the public website and public meetings; no ex parte communications would be allowed.
  - 11) To keep the job of the juror relatively simple, the executive council would present all legislation to the jury for an up or down vote; a section could propose germane amendments to the proposed executive council legislation and force an up or down vote on the amendment by the entire jury; germaneness would be determined by an initial majority vote on the amendment by the entire jury.
  - 12) To avoid conflicts of interest within the jury, no juror or executive council member would be allowed to vote to change their own compensation or length of service; all such changes would only be effective for future terms for new jurors and executive council members.

Compared to low cost juries, a solonic jury would be more versatile. It could more efficiently tackle *easy-to-decide* issues, such as an issue that could be decided within an hour (e.g., the previously mentioned proposal to make it easy for citizens to access a legislature's floor roll call votes by legislator). This is because a solonic jury doesn't have to incur the fixed cost of setting itself up; it is already in operation.

It could more effectively tackle *urgent* issues, such as approve the hiring of an administrator. Again, this is because a solonic jury is already set up; it doesn't have to spend the extra time to organize itself and train its members.

And it could more effectively tackle *complex* issues, such as the overhaul of the electoral system taken on by the British Columbia and Ontario citizen assembly juries. This is because such issues need more time and expertise to resolve than that allowed for a low cost jury.

Compared to the intermediate cost citizen assembly juries used in British Columbia and Ontario, there would be minimal opportunity for external-elected-official-bias or member self-selection bias.

External-elected-official-bias occurs when a jury does not set its own agendas or administer itself, thus making it heavily dependent on the vertical agents it is supposed to be holding accountable. In both British Columbia and Ontario, the elected provincial assemblies

narrowed the electoral reform jury's agenda and appointed its leadership. A solonic jury would eliminate external-elected-official-bias because it would manage these tasks internally via its internally elected executive council.

Member-self-selection-bias occurs when participation on a jury body is voluntary and only a small fraction of those randomly selected to serve on the jury agree to do so. In both British Columbia and Ontario, fewer than 10% of those initially randomly selected agreed to serve on the electoral reform jury. A solonic jury would have no member-self-selection-bias because jury service would be mandatory, although restricted to a single age group: those who have reached a designated retirement age.

The most controversial part of this proposal may be this limiting of jury service to those who have reached retirement age. This could be defined as the age citizens are eligible to receive full social security benefits. There are two primary advantages to this limitation.

First, serving on such a jury would be a huge time commitment and something unreasonable to ask of young people with jobs and families. It would also be unreasonable to ask of the elderly. Consistent with this analysis of relative burdens, in both British Columbia and Ontario, those in their late middle age were far more likely than the young and elderly to agree to serve on the electoral reform jury (Snider 2005).

A second advantage of older people serving as jurors is greater political expertise. An eighteen year old, for example, will probably have never voted in an election. Somebody recently retired, in contrast, is likely to have done so dozens of times. Similarly, the very elderly are more likely to have reduced cognitive capacities.

The big disadvantage of restricting jury duty to those of a specific age is the loss of democratic representation. Not all age groups have the same interests and experience, so this may bias the electoral recommendations. This concern is tempered by seven factors.

First, there would be significant checks on the jury. Their proposals would either have to be approved by voters via referendum or by members of a duly elected legislature. The democratic burden on bodies that do not have final binding authority is less than on those that do.

Second, other democratic bodies are also not perfect. The representatives who constitute legislatures are typically highly unrepresentative of the general populace in terms of age, occupation, socioeconomic status, gender, and ethnicity. This demographic bias often occurs in part because of the design of legislators' job descriptions, including part-time work, low wages with a high risk of job loss, long work days, and extensive travel away from home. Many legislatures have age requirements to serve that are higher than the voting age (e.g., the U.S. Senate age requirement is 30). And even when such age requirements do not exist, the fraction of 18 year olds who serve in legislatures is a tiny fraction of their distribution in the

populace. This suggests the general population is not eager to have the very young or old to serve as their representatives in proportion to their distribution in the population.

Third, most retirement age people have children and grandchildren whose welfare they passionately care about, so the young have virtual representation. Those at retirement age also know that they will one day be elderly themselves; in addition, they may have parents who are still alive. Thus, the elderly also have virtual representation.

Fourth, unlike issues such as healthcare and education, electoral reform rarely pits different age brackets against each other. Insofar as all age brackets have common interests in electoral reform, it is in the interests of all age brackets to support representation by those most able to serve.

Fifth, civil society and elected officials would always be on the lookout for any evidence of age bias and use it as an excuse to oppose any such biased recommendations coming out of the jury. This should keep the jury relatively impartial if it wants to be effective.

Sixth, the jury could ask a court to convene a special low cost jury, as described above, to propose any change from the status quo involving the appearance of significant age bias. Since the low cost jury would have mandatory service across all age brackets, the problem would be solved.

Seventh, since the jury would be subject to judicial review, any unconstitutional age bias would be vetoed by the courts.

As with low cost juries, high cost juries may be most politically feasible to implement in states with the ballot initiative, especially the constitutional ballot initiative. At the national level and in most states, the ballot initiative is not constitutionally allowed. Assuming that legislators have an intractable conflict of interest preventing them from giving up power to a solonic jury, the most plausible way to pass a constitutional amendment to empower a solonic jury in such jurisdictions would be through a constitutional convention. The U.S. Constitution and most state constitutions provide multiple ways to amend themselves, including a constitutional convention. At the national level, the procedures for creating and operating a constitutional convention are ambiguous, but the key idea is that states rather than members of Congress call for a convention and choose the delegates, thus mitigating the conflict-of-interest problem members of Congress have in amending the Constitution. On the other hand, a constitutional convention has not been convened at the national level since the U.S. Constitution was written in 1787. Given the hundreds of failed attempts to create a constitutional convention since then, many scholars have concluded that the practical hurdles to creating a national constitutional convention are all but overwhelming (Benjamin and Gais 1996).

Since most states have convened constitutional conventions over the years, a state level constitutional convention would face a much lower political hurdle than a national one. Recently there have been high profile calls in California and New York for state constitutional conventions, including a constitutional convention composed of randomly selected citizens (Los Angeles Times 2009; Confessore 2009). 9

Other countries, especially new democracies, may be better positioned to overcome constitutional hurdles than in the U.S. But this might be counterbalanced by the need to overcome other hurdles preventing the use of electoral reform juries. These include lack of a strong civil society and advanced transportation and information technology infrastructure.

To avoid the difficult task of amending a constitution to include a solonic jury, the solonic jury's power could be limited to proposing legislation for a timely up-or-down vote by the legislature. The solonic jury, in this weakened form, would be analogous to a powerful legislative committee, which proposes bills for the entire membership of the legislative body to vote upon in an up or down vote. Since democratic reform bills usually pass by overwhelming margins once they finally reach the floor for a high visibility roll call vote, this type of agenda setting control would still be powerful. But without constitutional protection, the jury would be constantly at risk and thus easily intimidated; it would be too dependent on the legislature for it to fulfill its duties.

Perhaps the biggest immediate obstacle to implementing electoral reform juries is the current mindset of the U.S. democratic reform community, including foundations, advocates, and think tanks. This mindset overwhelmingly frames democratic reform within the confines of Electoral Fundamentalism. Moreover, there is a suffocating focus on pursuing reforms that seem politically realistic in the short-term. Since elected officials largely determine the parameters of what is considered politically realistic, the folks with a conflict of interest in setting the democratic reform agenda have been given de facto control over it.

## **Conclusion**

The Framers of the American Constitution were well aware of the limits of Electoral Fundamentalism ("vertical accountability"), which is why they created a system of checks & balances ("horizontal accountability") to curb the anti-democratic tendencies of the politically ambitious. But they didn't finish their task. They did a brilliant job of crafting a constitution to create a government that would protect liberty and prevent the different branches of government from usurping each others' power. But when it came to reducing barriers to political entry for political offices, they did a much poorer job because they left control of so many key electoral variables to the incumbents who would be most effected by them and thus have an incentive to slant the electoral system in their own favor.

America's current horizontal accountability mechanisms are ill-suited to tackle this conflict-of-interest problem. They were designed to prevent the concentration of power by dividing



power among the different branches of government. But this very division of power limits their ability to audit and structure the electoral affairs of another branch. Their multifaceted relationships with the other branches also make it politically foolish to pursue electoral reform at the expense of alienating needed political allies. The use of electoral reform juries as a horizontal accountability mechanism solves these problems. The jury is designed to prevent political dependencies across branches; and its jurisdiction over electoral matters doesn't destabilize the checks & balances system because that jurisdiction is its contribution to that system.

States with the ballot initiative and new democracies are probably the best prospects for implementing electoral reform juries. But getting democratic reform donors and advocates to recognize that they don't already have all the answers may be the biggest immediate political problem. Shifting from the paradigm of vertical to horizontal democratic reform, from direct democratic reform to reforming the process of democratic reform, ultimately may require the emergence of a whole new generation of democratic reformers.

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## Notes

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1 "jury." Webster's Revised Unabridged Dictionary. MICRA, Inc. 30 May. 2009. <Dictionary.com <http://dictionary.classic.reference.com/browse/jury>>.

2 Compiled by J.H. Snider from news articles and the various reports published by the citizen assemblies.

3 Only the aboriginal members were selected at large.

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

5 The absence of this information in the 262 page official report summarizing the Ontario Citizens' Assembly on Electoral Reform deserves note. The only discussion of this dropout rate is the observation: "Throughout the meetings, only a handful of people declined to enter their names." (Cornwell, Goodman, and Swanson 1974, p. 23)

6 Opponents of the referenda focused on the most unpopular elements of the reform plans, with the result that the public tended to evaluate the whole reform package based on the featured unpopular elements. Consequently, the only two constitutional conventions that succeeded in passing reforms were those that divided their reforms into separate ballot items, so the public could distinguish between reforms it favored and did not.

7 Scholars of comparative politics have distinguished between vertical and horizontal accountability to assess the strengths of checks & balances in various countries, but they have not tightly coupled this distinction to principal-agent theory (Diamond 2008; Schedler, Diamond, and Plattner 1999).

8 In an email dated April 28, 2009, Yale Law School student, Travis Crum, informed Snider that he has launched an Open Redistricting Project. Snider believes this is an excellent idea. George Mason University Professor Michael P. McDonald, a redistricting expert, is pursuing similar ideas.

9 One can at least conceive of a similar constitutional convention at the national level, if states collectively agreed to randomly select their delegates, possibly as a result of local initiatives. Consequently, although a solonic jury with the power to force binding votes on statutes would require a change in the U.S. Constitution, a constitutional convention designed along the lines of a solonic jury would not.