Precommitment Politics

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INTRODUCTION

A n old and familiar debate sets a characterization of democratically elected representatives as the agents of their constituents against a view of politicians as autonomous actors who are inhibited only by periodic reviews reserved to the electorate. The latter view is associated with Edmund Burke, who championed the “trusteeship” notion, under which a representative ought to do what he or she thinks best in pursuit of constituents’ welfare. The contrasting position, that a representative is an intermediary, bound by “mandates” from constituents, suffers from some logistical problems but is easier to reconcile with notions of popular sovereignty. In short, there is a question as to whether representatives ought to be viewed as autonomous or automatons.
A related question is whether most citizens would prefer that their representatives promise to serve as thoughtful trustees or as pure intermediaries—and whether the Constitution insists on one of these visions. To the extent that incumbents are more like automatons as election day approaches, then there is at least some evidence that representatives think that voters prefer the mandate model of representation. There is, moreover, the positive question of whether aspiring politicians could seek to attract voters by committing to behave in the manner of anti-Burkean intermediaries, entirely guided by the preferences of voters and, in an important sense, beyond the reach of dreaded special interests. Put differently, in an era in which many voters

Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 831-37 (1985) (analyzing the implications of the trusteeship and mandate theories of representation for the concept of corruption in bribery law). Among other views, a modern, pessimistic, and positive account departs representatives as self-interested players who may be fueled by organized groups. In this account, representatives can be autonomous, in the sense that they are hardly mechanical arms of their legally assigned constituents, but automatons insofar as their other “employers” (for example, interest groups) are concerned. For a review of this hybrid account, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 12-37, 42-47 (1991).

3 Note that there is unlikely to be unanimous agreement among constituents whether to ask even the most conscientious legislator to serve as a mechanical or as a thoughtful agent. On the tension between politics and constitutional law, see generally Paul Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585 (1975) (arguing for a legislative duty to examine the constitutionality of proposed legislation, and to vote against proposals that appear unconstitutional). The precommitment strategies developed presently could be modified to include such conscientious behavior. Thus, the precommitting legislator could ask for an “opinion letter” on constitutional questions, especially when the legislator might be more aware (than reviewing courts) of legislative intentions. Brest suggests that the modern legislative committee would be capable of rendering advisory opinions, id. at 588, yet there is no reason why opinion letters could not issue from independent constitutional lawyers who developed reputations for political evenhandedness. For the most part, the discussion below sets aside these constitutional, moral, and strategic problems.

4 If voters experience corruption on the part of their “thoughtful trustees,” however, they may simply prefer the mandate model as second-best. In any event, where representation is geographic, politicians might be more responsive to their constituents than to their parties as election day approaches. See Martin Thomas, Election Proximity and Senatorial Roll Call Voting, 29 Am. J. Pol. Sci. 96, 109-10 (1985) (concluding that senators shift voting patterns toward the views of their probable opponents as elections approach, making themselves relatively more attractive to voters). Politicians might also take voter preferences more seriously in the period just after an election. Not only might recently-sent signals be better remembered, but also politicians would have more trouble believing or claiming that voters’ preferences had changed in response to a variety of events.
perceive their elected representatives to be remote, and dangerously responsive to interest group pressures, why do aspiring politicians not seek to attract the support of voters by precommitting to behave as instructed or as expected? These precommitments could focus on legislative votes regarding specific issues or could extend to virtually all matters likely to come before a representative. The normative version of this inquiry is to design a system that drastically reduces the influence of organized interest groups or simply reduces the agency problem between constituents and their political representatives.

One explanation for the failure of political candidates to take the leap from familiar campaign promises to more serious precommitments is that it is not easy to precommit. Superficially, at least, constitutional law (and in other legal systems, comparable law) inclines toward the autonomous view of elected representatives. Legally enforceable contractual commitments may seem efficient and fair in other contexts, but where political representation is concerned, law itself appears to limit the ways in which a representative can be held accountable for votes and other official actions. A buyer of a good or service who suffers from his seller’s broken promises can normally do something more than simply decline to deal with this seller in the future. But a voter who experiences broken promises must generally hope that some distant election day will offer an opportunity to join with other disappointed “customers” in order to discipline unresponsive politicians—and signal their

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5 I use the terms “precommitting” and “committing” interchangeably. The former has alliterative advantages and hints at the idea that promisors can often be understood as wishing to remain true to their own (earlier) selves.

6 And it is pointless to ask whether a candidate could make an enforceable promise to behave autonomously.

7 In William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875 (1975), there is the interesting suggestion that an independent judiciary can be understood as a means of interpreting “contracts,” which is to say legislation, according to the intent of the enacting rather than the current Congress. Id. at 885. One problem with this optimistic view is that judges might be rewarded by current, but not by enacting, legislatures. In any event, the present Article can be seen as following Landes & Posner’s line of thinking, but asking not simply how legislative deals are currently enforced but also how more convincing (and flexible) precommitments might be undertaken.
replacements and other agents—regarding broken promises. As such, it may be in the interest of some aspiring politicians to attract support by offering superior remedies in the manner of contract law.

Part I explores a variety of such precommitment tactics as well as the legal limits on these strategies. I suggest the possibility of "precommitment politics," by which I mean the fashioning of enforceable political promises. The most interesting precommitments—and perhaps the most palatable—may be flexible and general, such as a promise to cast votes in a legislative assembly as do a majority of the members of a specified political party or as a majority of contemporaneous constituents would prefer. Alternatively, candidates for political office might make specific, limited commitments as to how they will vote on, or otherwise decide, particular issues. These specific, or substantive, precommitments may do little to allay anxieties about the influence of most interest groups, but they may, at the very least, respond to constituents' concerns that their representatives will simply be self-serving rather than loyal agents.8 I suggest that there is something of a positive puzzle in the failure of aspiring politicians to explore precommitment strategies. There may also be something of a normative disappointment in the failure to combat interest group influences with more ambitious precommitment politics.

Part II turns to precommitment strategies that might be used to advance, rather than weaken, interest group politics. Subsets of voters, states, and elected representatives might try to promise that they will vote as a bloc in order to increase their political power. These precommitments might reduce agency costs, in the narrow sense that some voters can benefit from these coordinated ventures, but they are likely to threaten other voters because these arrangements aim to empower regional, ideological, or other political alliances. I suggest that because the aims and effects of these precommitments may be less consistent with democratic ideals, they may face greater legal obstacles than, for example, would precommitments by

representatives to be instructed by constituent preferences or to abide by specific promises relied upon by voters.

A contemporary window on these ideas about precommitment politics is the "Contract with America," signed by a large number of Republican Party candidates prior to the 1994 U.S. Congressional elections. Although there is some evidence that this unenforceable "Contract" played but a small role in the electoral success of many of these candidates, the coincidence of the Contract and Republican successes in the election may encourage other attempts at substantive or bloc precommitment in the future. Indeed, if there is a puzzle about the absence of experiments with, or tests on the legal limits of, precommitment politics, then it may be that this puzzle is an historical one, for the perceived success of the Contract with America may herald an age of precommitment politics.

I. PRECOMMITMENTS BY INDIVIDUAL CANDIDATES

A. The Utility of Enforceable Political Contracts

Successful political precommitments will often come in two parts. A candidate might attract voters by promising to follow a particular course of action if elected. But an enforcement mechanism is required to attract skeptical voters who might find the substantive promise appealing, but who have experienced broken promises in the past. The complementary character of

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9 On the impact of the "Contract with America" on the 1994 Congressional elections, see Everett C. Ladd, The 1994 Congressional Elections: The Postindustrial Realignment Continues, 110 Pol. Sci. Q. 1, 10 (1995) (indicating that most voters had little if any specific knowledge of "Contract" proposals, but that the idea of the Contract may have reinforced sentiments that the GOP was serious about challenging efficacy of governmental action). Another example of a movement to reduce agency costs was Ross Perot's concept of the electronic town hall. See David Schuman, The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System," 67 Temp. L. Rev. 947, 947 (1994) (suggesting that the popularity of Perot's idea was based in its potential to make representatives more automaton-like). Of course, it goes almost without saying that a town hall, electronic or otherwise, may be undesirable because it may simply be captured by those who have a comparative advantage in that sort of forum. See generally Dan Nimmo, The Electronic Town Hall in Campaign '92: Interactive Forum or Carnival of Buncombe?, in The 1992 Presidential Campaign 207 (Robert E. Denton, Jr. ed., 1994) (summarizing how some candidates were helped and others hurt by the emergence of the electronic town hall during the 1992 presidential campaign).
substantive promises and enforcement mechanisms is familiar in contract law. Much as many consumers prefer formal contracts in their commercial dealings, we might imagine that some voters would be attracted to a candidate who must pay damages, or at least suffer some tangible loss, upon breaking a serious campaign promise. And much as many sellers benefit from contract law, because the value of their warranties and other promises is greater when there is enforcement, many aspiring politicians can be expected to prefer a world in which their promises are valued because there are serious consequences to breach. In both commercial and political settings, the promisee recognizes that there is some chance the promisor will breach, and indeed may do so opportunistically. The original promise may have been an empty one, the promisor may come to believe that the assumptions underlying the original bargain have materially changed, or the promisor may develop new preferences. In turn, the promisor may calculate that there is gain to be had from reducing the promisee's risk. Indeed, politicians may have more to gain from legal enforcement than do other sellers of services; most disappointed customers can penalize their sellers by taking their business elsewhere, but a voter can only impose comparable costs when joined by a large number of other voters. Sellers of political services, like sellers of other goods and services, might sometimes wish to send signals in the form of unenforceable promises, but in both settings there will be occasions when binding promises are valuable. In both commercial and political contexts, parties may benefit from the presence of legal remedies alongside the more obvious tools of exit and voice.10

Among the most valuable substantive promises a candidate could make to attract voters would be those that suggested or even guaranteed detachment from organized interest groups. Other promises may solve agency problems that have nothing to do with interest groups; a candidate may, for instance, wish to make an enforceable promise11 to vote for a reduction in

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10 See discussion infra Part I.C.1.

11 I might say "binding" promise, for it may be that a candidate will gain most from committing in a way that is truly binding, but I use the term "enforceable" to emphasize the connection to contract law, where breaches are often welcome at a
legislators' salaries. More generally, if many politicians have regarded promises as a free currency with which to attract votes, the value of campaign promises may have fallen so far that many candidates will come to see enforceable precommitments as a useful means of increasing the vote-getting value of their promises.

The simplest promises suggest simple enforcement mechanisms. Thus, a candidate might focus on voters' concerns about interest groups and their maligned lobbyists by promising never to speak with one or by taxing contacts between lobbyists and (precommitting) legislators. We might even imagine a silly and unsubtle law, or an internal congressional rule, forbidding members of the U.S. Congress (or members who opt into such a rule) from meeting with "lobbyists," or taxing contacts between lobbyists and (precommitting) legislators.

But serious legal and political impediments doom such simple enforcement strategies. As a political matter, voters might not believe that Congress would follow through on its promise to enforce these "contracts." And as a legal matter, even if such unrefined constraints were politically successful in attracting voters, the direct limits on contact would likely offend either the First Amendment's right of the people "to petition the Government for a redress of grievances" or even a broader freedom of speech. It is hard to imagine courts' requiring legislators to hold office hours, in a manner of speaking, but it is easy to imagine these courts' making unenforceable legislative (and other) commitments to bar access to citizens.

price. The trick in both contracts and politics is to use an enforcement strategy that discourages opportunistic breaches.

Among the problems with this statute is the difficulty in defining "lobbyists." But because the example in the text is illustrative, and a more serious precommitment strategy is offered presently, I will not dwell on such problems.

See discussion infra Part I.C.2 (noting the problem of Congress revisiting and destroying earlier precommitment mechanisms). As it is, Congress does not get high marks for self-discipline. See, e.g., Harold H. Bruff, That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress, 48 Ark. L. Rev. 105, 129 (1995) (indicating that the infrequency of congressional disciplinary action suggests that the process is too lenient).

Nor can legislators tax interactions with interested groups or simply isolate themselves from petitioners. A tax on every contact with interested parties would probably be regressive and might simply offend the very voters it is meant to attract. In contrast, a tax applied only to organized groups has some redeeming qualities.
generally, given the Supreme Court's disinclination to permit direct controls on organized interest groups, such as limits on their contributions to political campaigns,\textsuperscript{15} it is plain that the

From a rent-seeking perspective, it is plausible that such charges would extract some of the resources that interest groups and elected officials would otherwise turn into deadweight losses. But a discriminatory tax of this kind simply aggravates the constitutional problems. It might be seen as impermissibly regulating the content of speech, inasmuch as a lobbyist or citizen could presumably speak with a legislator in the ordinary course of events, but would then be taxed when the conversation turned to political matters (that were, perhaps, not "grievances"). Moreover, there is the objection to discrimination against political "associations." See infra note 15.


As for isolating itself from petitioners, Congress can surely regulate the hours during which the Capitol is accessible to citizens (and lobbyists). It might limit access to the Capitol for security reasons, and it might even limit access in order to allow members to get their work done, but that is because these measures could survive the sort of "strict scrutiny" that would be applied to restrictions on petitions for the redress of grievances. Measures aimed at interest groups are likely to be doomed. See discussion infra note 15 and accompanying text.

\textsuperscript{15} The Court has expressed its distaste for discriminatory efforts to curtail campaign contributions by organized political interest groups:

- There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981) (striking down a local ordinance which limited to $250 contributions to committees formed to support or oppose ballot measures without any similar limit on personal expenditures). See also FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) (holding Federal Election Campaign Act provision prohibiting corporate expenditures on political campaigns an unconstitutional violation of the First Amendment as applied to non-profit public interest corporation). But see Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) (holding that a Michigan law prohibiting corporations from using general treasury funds for political purposes survived strict scrutiny because it was narrowly tailored to advance a compelling state interest in preventing political
most direct precommitments aimed at disadvantaging organized interest groups are also likely to be unenforceable.

But what of the candidate who promises “no new taxes” or “universal health care” or some other, specific course of action? Such specific, substantive precommitments can be seen as responding either to concerns that the representative will be lazy or selfish\textsuperscript{16} or, more interesting, to fears that organized interests will prevail and that the representative will be corrupted or will genuinely come to hold views (as the result of an unhealthy mix of information) that this representative would not have accommodated before holding office. In a world in which elected representatives are known to do things contrary to the apparent preferences of their legal constituents, enforceable precommitments could be most useful in appealing to voters.\textsuperscript{17}

### B. Substantive Promises

Inasmuch as many campaign promises are about specific issues, with the candidate promising to oppose various taxes or to work for or against specific government projects and regulatory schemes, it is easy to imagine candidates’ attempting to increase the vote-getting value of their promises by marketing them as enforceable. A candidate who developed a method of enforceable or even binding precommitments might also be expected to emphasize the unenforceable character of an opponent’s promises. One set of problems with precommitments regarding specific issues, backed perhaps by promises of contract damages or legislative sanctions in the event of breach, is that courts may be disinclined to enforce promises that contradict norms of deliberation and flexibility. There is a tradition—though hardly constitutional in quality—of requiring members of Congress, and most deliberative assemblies, to be present in order to cast votes.\textsuperscript{18} And there is a constitutional corruption).

\textsuperscript{16} In the obvious case, raising taxes to finance salary increases.

\textsuperscript{17} When voters observe their legislators’ enthusiasm for such things as taxes used to subsidize industries located far from their homes, and the maintenance of intellectual property and health care systems which generate pharmaceutical prices many times higher than those found in other countries, their cynical outlooks cannot be surprising.

\textsuperscript{18} See, e.g., H.R. Doc. No. 102-405, 102d Cong., 2d Sess. 350-53 (1993) (House rule providing that members cannot vote by proxy and cannot authorize other members
law legacy opposed to binding instructions for legislators. Both of these norms might cause courts to be intolerant of precommitments regarding specific issues. I will turn presently to arguments that might encourage courts to overlook these problems, but it is useful first to sketch other styles of precommitment that aspiring politicians might try—and that courts might find more acceptable.

The flexibility problem alone might be alleviated if the precommitting candidate reserved the option to change course in the event that other politicians or constituents come to prefer a new path. Thus, a promisor might pledge to vote precisely as some well-known politician votes, or as a group of leaders vote; party discipline could in this manner come not from the party but from aspiring candidates. But a precommitter who is eager to attract cynical voters will prefer the idea of promising fealty to constituents. This promisor might remain flexible by committing, for example, to oppose all new taxes unless a careful survey of constituents reveals that they too have come to favor a new tax. In turn, voters might be expected to be especially attracted by promises that are enforceable against the promisor but forgivable by the promisees. This escape valve, in the form of consultation with one’s constituents, neither permits total flexibility nor credits legislative deliberation, but it does suggest the possibility of folding some flexibility into a contractual solution to political agency problems.

The ultimate combination of flexibility and contractual control might be found in a promise by an aspiring representative to follow the anti-Burkean ideal, voting always as instructed by surveys of constituents back home. Of course, in the best of all
worlds most voters would probably prefer a representative with some intelligence, a capacity to contribute to legislative debates, and the ability to form coalitions with other legislators. But in a world where organized interest groups appear to wield great power, where politicians can easily turn into unfaithful agents, and where individual voters understand firsthand the collective action problem facing dispersed citizens, it is plausible that voters would prefer a representative who could only remain true to median voters. Such a representative could be beyond capture by interest groups and even incapable of self-serving votes.23

and recorded parochial decisions." Gordon S. Wood, The Creation of the American Republic 194 (1969). This proposal can be seen as the forebear of the flexible precommitment strategy described in the text. The idea of using a survey group can also be found in Robert A. Dahl, After the Revolution?: Authority in a Good Society 149-50 (1970) (proposing randomly selected advisory groups for each public official) and in James S. Fishkin, Democracy and Deliberation: New Directions for Democratic Reform 81-104 (1991) (describing deliberative opinion polls and citing England’s experimental television program, Granada 500, and the original structure of the electoral college as vehicles through which citizens might participate in the political dialogue). One novel aspect of the text’s suggestion is that each council would be chosen to reflect the constituents of a given representative because the representative offers to follow the group’s instructions in order to be elected. These groups are not forced on anyone by a government or by a political scientist but are instead seen as serving the private interests of their initiators, who seek to enter into enforceable contracts in order to be elected.

As for the survey idea in the text, note that while a candidate will attract more voters if the survey group is chosen to represent likely voters or even some carefully chosen majority of these voters (drawn perhaps from one political party), judicial tolerance is likely to require the survey group to reflect or represent all voters or all citizens. See Brown v. Hartlage, 456 U.S. 45, 58 (1982) (protecting a candidate who promised briefly—in violation of a state statute—to serve for a reduced salary and noting that “[n]ot only was the source of the promised benefit the public fisc, but that benefit was to extend beyond those voters who cast their ballots for Brown, to all taxpayers and citizens”). Thus, even voters who are aligned with a preferred party or a narrowly-drawn survey group will regard the promise of obedience to their group as mere campaign rhetoric.

23 In the extreme, a representative might take instructions on all committee votes and the like and be relegated to a career as an automaton. The more voters prefer to weaken interest groups, and the more they are concerned about a variety of agency costs, the more they might be inclined toward the automaton or mandate model—and the more a candidate can appeal to these preferences by precommitting to follow instructions. Much as there is no single contract that will provide the right level of independence and fidelity for all principal-agent relations, so too there is no reason to think that any single style of precommitment politics is best. One can imagine precommitments limited to subject areas, and one can imagine politicians who gain the
There are, of course, a number of normative and political problems with this promise. Voters (and normatively-minded readers and courts) might think that some decisionmaking requires expertise or investment in information, and individual constituents whose preferences are reflected in surveys will have had little incentive to invest optimally in acquiring information. A second problem is that surveys may be corrupt or inaccurate. A third problem is that surveys do not normally or easily measure the intensity of preferences. A slim majority of constituents may prefer one course of legislative action while a minority may strongly prefer another. The minority might, at least hypothetically, be able to bargain with the majority to proceed as the minority would like, and a variety of democratic and utilitarian theories might suggest that the most faithful course of action for an agent of all these constituents would be to vote as this minority would like. A fourth problem with the idea of representation-by-survey is that a representative can normally benefit his or her constituents by joining forces, or logrolling, with other representatives; a legislator who is bound by surveys of constituents will surely miss some opportunities for these subtle and perhaps even secretive deals. If voters believe these problems to be serious, they will regard the prospect of representation-by-survey as something to be avoided rather than embraced. In turn, precommitment politics will be unattractive to aspiring politicians.

Most of these problems can be resolved, although we might expect candidates to explore diverse strategies in appealing to voters. One approach is to combine the survey strategy associated with television ratings with the deliberative qualities trust of their constituents and then modify their precommitments in each reelection campaign, or even rise to the level where they are trusted to be more autonomous in the manner of long-term agents.

24 Even if logrolling is not socially beneficial, it is surely the case that in a world where logrolling takes place, one is at a disadvantage in unilaterally abstaining from such transactions. On the possibility of socially beneficial logrolling, see James M. Buchanan & Gordon Tullock, The Calculus of Consent 132-34 (1962) (arguing that logrolling permits legislators to express intensity of preferences). A well-known refinement of the argument is that vote trading may be beneficial in individual transactions but detrimental in the aggregate. E.g., William H. Riker & Steven J. Brams, The Paradox of Vote Trading, 67 Am. Pol. Sci. Rev. 1235 (1973).

25 Prices for advertising time on American television are largely tied to the Nielsen
of juries or of the Congress itself; a candidate could promise to abide by the instructions of a representative sample of twelve or of one hundred constituents, whose identities would not be publicized, and who would be informed regularly about pending issues and options. This approach might provide a representative sample of voters, while maintaining the values of deliberation and flexibility. The fewer the participants the more the dangers of corruption, but the more the members of the sample group could be expected to invest in information.


There is no attempt to camouflage the identities of families included in the Nielsen television ratings sample, and yet there appears to be no serious problem of advertising agencies or television networks' bribing those who are surveyed. Billions of dollars are at stake and yet the survey system appears to function fairly well. Similarly, the intermediaries who conduct ratings seem to have integrity, or simply more to lose from tarnishing their reputations than to gain from short-term payoffs from agencies, program creators, or broadcasters.

The main purpose of guarding the identities of those surveyed is to avoid the problem of interest groups' seeking to influence these representative constituents. The idea is to convince voters that instructions will come from a representative survey group (comprised of likely voters who have found it worthwhile to study the issues) and to avoid the perception that this group is yet another organized interest or captured organization. A reliable intermediary might be used to monitor and replace survey group members who make their identities public or are suspected of seeking payments. Note, however, that television ratings do not seem to require secrecy. See supra note 25.

The earlier reference to juries illustrates both an example of delegated decisionmaking with popular appeal and the problem of balancing the psychological and factfinding advantages of a large group with the likelihood of each participant paying less attention as the probability of casting the deciding vote drops. Concerning the relative advantages of large-group deliberations, see Michael J. Saks, Jury Verdicts: The Role of Group Size and Social Decision Rule 90-91 (1977) (concluding that large juries are substantially more representative of the community than small juries); see also Ballew v. Georgia, 435 U.S. 223, 233 (1978) (Plurality opinion of Blackmun, J.) (holding that five-person jury in criminal case violates the Fourteenth Amendment and reasoning that decrease in jury size lowers the chance that a member will remember important piece of evidence or argument). In the voting context, it
But I make no attempt to describe the perfect precommitment strategy, for there is reason to think that the best strategy will vary according to the reputation and experience of particular candidates and constituents. And however the preferences of constituents are determined, candidates might experiment with the scope of their precommitment to the mandate model of representation. Some might promise to follow instructions on specific matters, others might agree to enforceability with respect to all issues that have been put before the survey group, and others might even rely on an intermediary to project the likely preferences of the group so that the precommitting representative would virtually never decide freely how to cast a vote. Much as manufacturers of goods follow diverse strategies

may be that as the sample increases, each member has less of an incentive to invest in information, but if there is a deliberative component then there may be more information in a larger group.

Note also that each member of a small group faces some reasonable chance of casting a critical vote—and may therefore be more likely to invest in information. Even the Senate and House occasionally decide things by a single vote, so that each member of a hundred-person survey group will know that his or her vote could (with similar likelihood) be the decisive vote in instructing the representative, whose vote could then be decisive in the Congress. See generally Geoffrey Brennan & James Buchanan, Voter Choice, 28 Am. Behavioral Scientist 185 (1984) (arguing that voters know of negligible value of their votes in general elections); Jean-Pierre Benoit & Lewis A. Kornhauser, Social Choice in a Representative Democracy, 88 Am. Pol. Sci. Rev. 185 (1994) (noting that voters in a representative democracy are removed from policymaking because at best they vote for legislators who then vote on policies). Finally, there is also some opportunity to influence fellow members of the survey group through electronic mail or whatever means might be used (if desired) to permit communication prior to polling.

28 One problem that is unique to a political survey which gives time for study and deliberation is that there will be occasions when the survey group has not been informed and polled about an issue that needs to be decided. Even a well-informed survey group cannot possibly anticipate all amendments made on the floor of a legislative assembly and other legislative surprises, and we might anticipate that the precommitted representative will often be uninstructed. Constituents are unlikely to gravitate toward a candidate who promises to abstain from voting in these situations. At the same time, there is the danger that organized interests will capture a representative who will then arrange for procedural zigs and zags in order to maximize the number of important votes for which no instructions have been given. The precommitting representative, in these situations, might promise to abide by the instructions of an intermediary who is asked to interpret recent survey data in order to advise the representative on how a majority (or supermajority) of the group would likely have voted. In any event, the point is not to design a pure mandate scheme but rather to insulate representatives from interest groups and to promise sufficient responsiveness to constituents so as to gain their trust.
as to warranties, quality, and so forth, we should not expect a single, best strategy to emerge in the design of political promises.

C. Promising Enforcement

1. Contract

I have suggested that a candidate for political office might appeal to voters by offering to make the task of representation as mechanical as constituents would like. There remains the problem of convincing a skeptical electorate that the precommitment promise will not be breached. The time-honored method of “enforcing” campaign promises is to turn a promise-breaker out of office at the next election. Insurgents can be expected to focus attention on incumbents’ broken promises. Nevertheless, it is likely that most voters devalue campaign promises and regard them as but weak signals. And even if voters turned every promise-breaker out of office, there remains the problem of candidates’ breaking promises when they have decided not to stand for reelection and the more general problem of candidates’ voting as certain interest groups like on issues that had not crystallized during past election campaigns.29

Most contracting parties do not, of course, react to breaches by triggering the legal remedies to which they are entitled. Many disappointed buyers, to take the plainest example, elect not to patronize a vendor who has been unreliable or even opportunistic. Nevertheless, buyers are empowered by the additional remedies offered by the law of contracts. Repeat business and reputation considerations do not appear to be enough to promote efficient breach. Other remedies, such as expectancy damages (not to mention restitution and specific performance), may be relatively rarely deployed, but these other legal tools play useful roles as they shadow promisors. Correspondingly, there is little reason to think that where political promises are concerned, deterrents associated with repeat play should suffice. Contract theorists must believe that

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29 Even cooperating voters might find it difficult to decide on the optimal rate of removing promise-breakers from office. The successor representative may also break promises—and the successor will have less seniority.
in the absence of contract law parties would try to precommit to performance and to promise-keeping. Contract law is thought to offer default rules which save parties from the expense of either designing their own precommitment devices or giving up the gains from trade. It is thus puzzling why politicians do not develop comparable precommitment devices. And there may be something of a puzzle if the law discourages rather than enables voluntary robust precommitments.

Much as contracting parties might prefer a world in which their breaches could be remedied by law, political candidates and constituents might try to enlist courts or political parties or, ex ante, Congress itself as an enforcer of political promises. Imagine first that a candidate simply promised to pay a specified sum of money to named parties for each violation of a political promise, but then breached and refused to pay. If the promise is unenforceable, then political precommitments of the kind sketched here will not impress voters—and aspiring politicians may also be worse off. But an enforceable promise may be quite effective in garnering votes, so that a candidate would wish for many promises to be enforceable.

One barrier to such serious political promises is that while the standard legal remedies for breach of contract require (at least the threat of) judicial intervention, there is a constitutional, if doctrinal, problem with this enforcement mechanism. Under the

30 The doctrinal requirement of consideration might be met by these parties' agreeing to read the candidate's platform papers in return for the candidate's agreeing to vote as instructed by the survey group. The same strategy might solve any problem relating to standing doctrine, although a claim for contract damages runs the risk of a court's ruling that the liquidated damages are excessive and unenforceable. The standing problem, if it is that, is that one who is simply disappointed by a politician might not be thought to have achieved the status normally required of a litigant. Of course, if Congress wished to create a cause of action in order to facilitate precommitment politics, it could easily do so. Finally, there is something of a causation problem, unless there is a single promise-breaker and the congressional decision was made by a one vote margin. The disappointed promisee may need to argue that other coalitions may have formed, that other promises would be made if all were enforced, and so forth. The easiest solution, as anticipated in the text, is a liquidated damages clause. This itself can be something of a small enforcement hurdle. See generally Charles J. Goetz & Robert E. Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554 (1977) (questioning the wisdom of traditional limitations on enforcing liquidated damages clauses).
Speech or Debate Clause, a member of Congress is not to be "questioned in any other place" for any speech or debate, and a suit by a promisee for money damages would on its face be a call for the promisor-representative to answer questions in another place, which is to say in a court rather than in the legislative chamber. The problem could be avoided with a literal reading of the text, because the contract claim will often be about a vote and not about a speech or debate. And it might also be avoided with an historical argument that the clause was probably intended to protect against attempts by the executive branch to control the legislature. The President, it

31 The full language of the clause is: "[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. This clause has been broadly interpreted to shield legislators from both civil and criminal liability. See Doe v. McMillan, 412 U.S. 306, 311-18 (1973) (civil liability); United States v. Johnson, 383 U.S. 169, 177-85 (1966) (criminal liability). It has, however, been limited to "legislative" as opposed to "political" activities, so that it does not shield a legislator from bribery laws. United States v. Brewster, 408 U.S. 501, 512 (1972).

Note that the clause forms a similar hurdle for legislators (or constituents or Presidents) who attempt to make logrolling agreements enforceable. In a world with no line-item veto, a contract to trade support for different measures may be accomplished by combining the measures in one bill. But I leave discussion of political precommitments of this kind for another day.

32 But see Gravel v. United States, 408 U.S. 606, 624 (1972) (noting that prior cases have read the Speech or Debate Clause broadly and that voting by members is protected).

33 The Speech or Debate Clause grew out of English Parliamentary immunity where speech and debate were considered vital to Parliamentary sovereignty. See Johnson, 383 U.S. at 177-78 (characterizing the speech or debate clause of the English Bill of Rights of 1689, the ancestor of the American Speech or Debate Clause, as the product of an ongoing effort by the monarchy to suppress and intimidate Parliament); see also Amar, supra note 8, at 1151 ("the very notion of free speech for citizens had grown out of an older tradition establishing legislative 'speech and debate' immunity from prosecution."). In turn, the clause is seen as a means of protecting the separation of powers. Steven N. Sherr, Note, Freedom and Federalism: The First Amendment's Protection of Legislative Voting, 101 Yale L.J. 233, 235-36 (1991); see also Brewster, 408 U.S. at 507 ("The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."); Johnson, 383 U.S. at 178-79 (observing that the Speech or Debate Clause reinforces constitutional separation of powers). At the same time, the modern conception of the reach of the clause plainly exceeds the scope of the historical understanding. See, e.g., Gravel, 408 U.S. at 609, 624-26 (holding that Senator and aide were protected when the Senator read classified documents—the Pentagon Papers—into the public record at a subcommittee meeting, but that an
should be noted, while not protected by the Speech or Debate Clause in Article I, would have trouble precommitting through contract because there are other sources of immunity which would make presidential precommitments unconvincing.34

2. Congressional Enforcement

An alternative which avoids the Speech or Debate Clause is for Congress to precommit to penalize (on its own) promise-breaking by members who had opted in to this form of precommitment politics. A chamber could, for example, take away a breacher’s staff, office, or committee membership.35 The agreement to publish the document privately would not be protected).

34 See Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that “petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts”). It should be noted, however, that in the Nixon case Congress had made no attempt to pass a law specifically making the President liable for civil damages.

There is also the question of whether political appointees could precommit in the fashion suggested in the text. One can imagine, for example, a president’s agreeing to appoint someone to the bench (or a Senate’s agreeing to confirm a judicial nomination) in return for a promise by that nominee to vote a certain way on specific matters or to be bound by later instructions. I have little doubt but that other federal courts would find such promises unenforceable. Conceptually, this precommitment seems inconsistent with an independent judiciary; technically, the deal might be regarded as a corrupt kickback. See 18 U.S.C. § 210 (1994) (criminalizing offers to procure appointive office). At its core, then, the argument in the text is based on the assumption that the anti-Burkean ideal does not offend the Constitution as other things might. I return to this point below.

35 A more straightforward plan would be for each chamber to waive its Speech or Debate Clause immunity, or to allow members to waive immunity for specific causes of action. The Supreme Court has specifically declined to rule on this question, although it has implied that the Clause is for individual members rather than for the institution as a whole. See United States v. Helstoski, 442 U.S. 477, 490-93 (1979).

The penalties suggested in the text are minor because the power of each legislative chamber to “punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member,” U.S. Const. art. I, § 5, cl. 2, is subject to the constraint that courts not find that these internal rules and remedies are themselves unconstitutional. See, e.g., United States v. Ballin, 144 U.S. 1, 5 (1892) (holding that rules may not ignore constitutional restraints nor violate fundamental rights and requiring a “reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained”); United States v. Richmond, 550 F. Supp. 605, 609 (E.D.N.Y. 1982) (voiding Congressman’s plea bargain to resign and not run for reelection as bartering “away constitutional protections which belong not to him but to his constituents”). It is possible, however, that courts would be tolerant of such internal remedies when applied in favor of implementing the wishes of constituents.
Speech or Debate Clause may constrain judicial enforcement, but by its very reference to accountability in "any other place" it implies that members can be held accountable within the Congress.

One problem with this internal enforcement strategy is that voters may expect Congress to prove unreliable as an enforcer of its members' promises. A breach is likely to occur when a precommitting representative is induced to join a prevailing coalition. But that coalition is likely to forgive its member's breach of an earlier promise inasmuch as the very point of the breach was to join this majority in passing a new program or tax, for example.

3. Third-Party Enforcement and Self-Enforcing Bonds

Perhaps the most intriguing enforcement strategy is to use carrots rather than sticks. Public-spirited entities\(^{36}\) could raise money and promise to reward politicians who abided by their precommitments, although there is the question of whether these secondary promisors can themselves make enforceable promises.\(^{37}\) But even fairly cynical constituents might think that

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Finally, Congress could reward members who abided by their promises. But this sort of internal promise will not satisfy voters who might expect Congress to prove unreliable when a majority finds itself in the position of being obliged to reward a minority. The discussion in the text does turn presently to the use of carrots (for promise-keepers) rather than sticks (for promise-breakers).

\(^{36}\) A danger of including government entities, such as states, in this category is that their presence might raise the objection that another source of power was competing with the national legislature. See infra note 57 and accompanying text. Note also that the entities may be self-serving rather than public-regarding because they may simply like the status quo enough to favor innovations that make future legislation more difficult.

\(^{37}\) The question is whether a potential donor can agree to make contributions if a candidate performs in a certain manner, and whether such an agreement is enforceable if the donor later decides not to make these payments. The discussion in the text has explored the first of these questions. The donor's own (secondary) promise might be enforced because a disappointed contributor to the donor-intermediary could claim a reliance or similar interest. Thus, if an organization raised money which it had agreed to divide among promise-keeping precommitters, then contributors to that organization's "promise-keeping fund" might be able to force the disbursement of these funds. Cf. Portland Section of the Council of Jewish Women v. Sisters of Charity, 513 P.2d 1183 (Or. 1973) (granting specific performance with respect to an endowed hospital bed). These contributors might be more attractive plaintiffs than disappointed politicians because the latter group might appear to be asking for
an established entity, with a reputation for bipartisan or politically-neutral activities, will keep its promise to reward those who keep their promises. These ex post subsidies to promise-keeping politicians, however, can easily run into bribery statutes, prohibitions on receiving illegal gratuities, or other federal ethics laws. There is an excellent theoretical case to be made for the idea that payments made to reward and encourage a politician who follows the independently monitored preferences of voters—as opposed to the preferences of donors—are and ought to be completely distinguishable from those payments addressed and forbidden by these criminal statutes. Nevertheless, the language and enforcement history of these statutes pose serious difficulties for precommitment politics. At the very least, payments made directly to promise-keeping representatives

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38 One can easily imagine a third-party movement supporting one of the major-party candidates, but withholding substantial contributions with a promise to pay over these funds if and when a series of specified promises or future survey results are followed.

39 See supra note 14; see also 5 U.S.C. § 7353 (1994) (Gift Statute). Although the Supreme Court has suggested that it will narrowly interpret federal ethics laws, see, e.g., Crandon v. United States, 494 U.S. 152, 158 (1990) (strictly construing the prohibition against supplemental compensation for government service and holding that an unconditional severance payment made to Boeing employees leaving the company to enter federal service was not illegal), the scheme described in the text seems too direct a violation of the limitation on outside earned income to be tolerated.

It is easy to overstate the relevance of these statutes to the questions raised by the idea of precommitment politics. These statutes are relatively modern, after all, yet precommitments of the kind suggested in this Article are essentially unknown. Even when a politician serves the interests of a subset of constituents, there is a recognized distinction between legitimate political behavior and graft:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. . . . Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another . . . . McCormick v. United States, 500 U.S. 257, 272 (1991).

Another feature of precommitment schemes that suggests judicial tolerance or support is that the promise is publicly known, whereas corruption is associated with secrecy. See Brown v. Hartlage, 456 U.S. 45, 56-57 (1982) (associating openness of candidate's promise to return official salary with disinclination to allow the election of that candidate to be voided simply because the promise was found to violate state law).
would quickly run afoul of the legislated limits on supplemental income.\footnote{See 5 U.S.C. app. § 501 (1994) (limiting outside income to 15% of salary). In United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995), the Court held that this limitation amounted to an undue interference with the First Amendment rights of some government employees, id. at 1012-15, but it implied that limitations on Members of Congress were acceptable. See id. at 1014. In any event, a central theme in this area of law appears to be that the closer the relationship between the outside payment and the nature of the official's public duties, the more likely the outside payment constitutes a violation of the ethics laws. And inasmuch as the purpose of the precommitment plan is to establish a nexus between a legislator's public service (or voting record) and the outside payment, a precommitment plan would have a difficult day in court. The difference between a precommitment payment and more traditional ethics violations is of course that the former is open, rather than secret, and it is arguably consistent with, rather than destructive of, democratic principles.

Congress could of course revise these statutes, explicitly permitting such payments for promise-keeping politicians, but it may be useful to consider alternatives in the likely absence of such new, or interpretative, legislation. It is noteworthy, however, that a 1983 Office of Government Ethics advisory letter stated that a non-profit organization giving a $5,000 award for meritorious public service did not violate any statutes or regulations. Letter from David H. Martin, Director, United States Office of Government Ethics, O.G.E. Letter 83 x 10: Letter to a Designated Agency Ethics Official, July 21, 1983, available in Westlaw, 1983 WL 31713 (O.G.E.) FETH-OGE database. It is arguable that any payment made to a representative who votes perfectly (as promised) could be regarded as just such an award.

Note that many states constrain payments to legislators in a manner similar to federal law. A 1990 survey of 40 states found that 35 restricted the use of public office to obtain private benefits, 34 regulated the provision of benefits to influence official action, 33 limited gifts given to public officials, 28 regulated the receipt of honoraria, and 27 restricted the outside employment of public officials. The District of Columbia restricted each of the five listed categories. Four states (Idaho, Minnesota, Utah, and Wyoming) possessed no substantive ethics laws. Data from Arizona, Colorado, Delaware, Kentucky, Missouri, Nevada, New Mexico, South Dakota, Virginia, and Washington was not available. The Council of State Governments, COGEL Blue Book: Campaign Finance, Ethics & Lobby Law 144-45 tbl. 26 (Joyce Bullock ed., 8th ed. 1990).

A campaign contribution is to be regarded as a bribe "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." McCormick, 500 U.S. at 273 (1991). Unfortunately, this means that inexperienced and unlucky donors may find themselves convicted of a
make campaign contributions to, or divide a given fund among the campaigns of elected officials who keep their promises.

An advantage of the third-party-subsidy strategy is that it plays on the possibility that even if courts are disinclined to enforce political contracts they may nevertheless be reluctant to intervene in order to make them unenforceable. An extension of this strategy exploits the asymmetry, or endowment effect, likely to be found with respect to judicial intervention regarding these (and so many other) legal rules, and attempts to avoid the orbit of anti-bribery laws and limits on campaign contributions as well. An aspiring representative could pay himself, as it were, for promise-keeping. For example, a candidate might convey personal funds or title to a piece of property to an intermediary who would be instructed to return such property only if a set of promises had been kept, and otherwise to transfer the property to a not-specified third party.

crime. See, e.g., People v. Brandstetter, 430 N.E.2d 731, 733 (Ill. App. Ct. 1982) (upholding bribery conviction where activist wrote a note to the candidate saying “offer for help in your election & $1000 for your campaign for Pro ERA vote”); see also Buckley v. Valeo, 424 U.S. 1, 28 (1976) (upholding federal campaign contribution limits as a means of dealing with the reality or appearance of corruption and noting that bribery laws deal with “only the most blatant and specific attempts of those with money to influence governmental action”). At least one commentator has argued that any campaign contribution allowed by the Federal Election Campaign Act should be immune from bribery laws. Note, Campaign Contributions and Federal Bribery Law, 92 Harv. L. Rev. 451, 461-66 (1978). While this is plainly not the law, otherwise valid campaign contributions do carry a strong presumption of legitimacy. In any event, state campaign finance law is often less restrictive than federal law so that subsidies to the reelection campaigns of promise-keeping state legislators may be useful for precommitment state politics.

43 See generally Cass R. Sunstein, The Partial Constitution (1993) (criticizing the tendency in constitutional law to empower the status quo by distinguishing between action and inaction, and neutrality and partisanship).


45 Success may again depend on whether a court views the underlying plan as promoting democracy or as inconsistent with constitutional principles. For example, courts will find a way to invalidate the enforcement mechanism if the conveyance strategy is normatively offensive. See Martin v. Francis, 191 S.W. 259, 260 (Ky. 1917) (implying that neither party could collect a $500 bond given to a neutral party to secure performance of an (illegal) contract under which Republican candidate for
The precommitting politician must legally part with the bond, or legal intervention will be required to extract it in the event of a breach. There is, however, the danger that "repayment" to the promise-keeping politician will still be regarded as a bribe (not to mention as a taxable transfer). The advantage of the bond-posting scheme is that a court (or prosecutor who contemplates bringing a bribery claim) is less likely to view the politician as gaining an illicit benefit than as avoiding a loss; this benefit-loss distinction is sometimes critical, rather than silly, in the context of these anti-corruption statutes.

To be sure, courts have shown little inclination to approve, or make enforceable, promises by officials to serve for less compensation than that jailor agreed to drop out of race and Democratic candidate agreed to appoint him deputy, on grounds that the contract violated public policy.

Another problem with the transfer-and-expected-return strategy concerns the legal validity of a conditional gift, if it is that, especially because the condition is here in the control of the grantor. Compare Raim v. Stancel, 339 N.W.2d 621, 623-24 (Iowa Ct. App. 1983) (invalidating deed where it was the subject of conditional gift over which grantor retained control) with Turner v. Mallerner, 640 S.W.2d 517, 521-24 (Mo. Ct. App. 1982) (enforcing unrecorded deed as having been delivered subject to the condition that the grantor not require expensive medical treatment before his death) and Videon v. Cowart, 241 So. 2d 434, 435-36 (Fla. Dist. Ct. App. 1970) (holding conditional delivery of deed valid where condition renouncing a right to the rest of the grantor's estate was to be performed wholly by the grantee and could not be influenced by the grantor).

The intermediary should probably not be a non-profit organization, because it may jeopardize its status by making the payment to the promise-keeper. One way to think about the bond posted with an individual or other reliable intermediary is that there are no tax consequences to its posting and then none to the repayment. It is something like a refundable deposit. Another possibility is that at the time of repayment the precommitting politician would have income to report—but then there might be a deduction for the earlier transfer to the holder of the bond. The payments in both directions might be made on an annual basis in order to make the deduction most useful.

Thus, a candidate could be prosecuted for promising to pay $10,000 if elected, but not for promising to forgo any and all opportunities to earn outside income while in office. The distinction is between a private faction "buying" a politician and a politician "buying" an office, on the one hand, and a candidate providing a benefit to potential voters or suffering a penalty in order to attract voters on the other. In Brown v. Hartlage, it will be recalled, the Supreme Court essentially invalidated a state law which criminalized promising voters to serve at a salary less than that officially provided. On the other hand, it is hardly clear that voters could have forced the successful candidate to serve at the lower salary, as promised. 456 U.S. at 57 (noting that the precommitment could have been enforced only with the approval of public officials).
provided by statute. But this disinclination to encourage homemade salary reductions might be linked to the notion that jurisdictions may prefer more rather than less official compensation in order to attract qualified rather than merely affluent candidates, and to reduce the inclination of struggling or resentful officials to accept illicit payments in return for political favors. In any event, the essential point is that if the precommitment scheme is structured in a way that requires the breacher to change his mind and then sue for a return of funds, it is easy to imagine courts' declining to intervene on his behalf. There is, however, no direct precedent for this conjecture about asymmetries in judicial sensibilities.

48 The time-honored rule is that a politician may not be bound by an agreement to serve for less than the prescribed salary. See, e.g., Glavey v. United States, 182 U.S. 595, 605-10 (1901) (holding that the Secretary of the Treasury could not condition an appointment as inspector of foreign vessels on the appointee's accepting less than the statutory salary); Sparks v. Boggs, 339 S.W.2d 480, 484 (Ky. 1960) (holding that candidates offering to serve for $1 and spend their $500 salary on public projects violated Kentucky's Corrupt Practices Act). But see Schwarz v. City of Philadelphia, 12 A.2d 294, 296-98 (Pa. 1940) (holding that a coroner could not recover portions of his salary which had been deducted as part of a voluntary effort to economize government during the Depression).

49 See Hartlage, 456 U.S. at 59-60.

50 An interesting but ultimately unhelpful case is Fisher v. Lane, 149 P.2d 562 (Or. 1944), where plaintiff, a justice of the peace, sued to collect unpaid statutory fees for his having issued writs, attachments, and other orders. Plaintiff had agreed to collect these fees only if defendants' legal actions were successful, and defendants, who operated a credit bureau, in return brought a good deal of "business" to plaintiff that they would otherwise have filed elsewhere. The court allowed the plaintiff to recover his statutory fees by voiding the (contingency) agreement as against public policy. It is indeed easy to imagine that the contingency fee contract encouraged excessive or even biased legal actions.

The case may be relevant (and unfriendly) to the discussion in the text to the extent that the case illustrates the unwillingness of courts to enforce contracts regarding the behavior of public officials. Indeed, it is arguable that the best way to discourage the sort of entrepreneurial activity engaged in by Fisher would have been to hoist him by his own contract, denying recovery against those who used his services. Had the court denied the claim for the statutory fees, I might well have argued that it did so because the underlying behavior was thought socially undesirable, but that precommitments of the kind explored in this Article would be treated more kindly by courts.

But there are at least two reasons why the decision in Fisher v. Lane is not easily translated to other precommitments. First, the Oregon statute provided that each justice of the peace make a monthly accounting and forward to the general fund of the county all fees collected in excess of $200 per month. Id. at 566. Deterring the misbehaving justice might therefore penalize the fisc. Second, maximum deterrence might well be advanced by a system that not only deterred private parties from
In short, some precommitment strategies involve courts more than others do, but no strategy can succeed without a dash of judicial tolerance. I turn, therefore, to the question of whether courts might be expected to regard political precommitments as attractive, or at least as something less than constitutionally abhorrent.

D. Tolerating Precommitments

A cleverly designed precommitment to engage in a crime while in political office would surely induce a court to void the underlying contract or otherwise remove the incentive to do wrong. I suggested earlier that a precommitment to vote against all tax increases proposed during one's term in office might, for example, also be intolerable. The argument in favor of such a precommitment is that it reduces agency costs; the promisor can not support a large class of self-serving tax policies once in office and, if the precommitment is enforceable, it reduces the potential power of many organized interests. But the argument against this sort of precommitment is that it so completely violates the democratic norm of deliberation as well as the constitutional norm, if it is that, of flexibility. On the other hand, there is room for a view that the Framers did not entering into such contracts by making them pay but also deterred the public official through the criminal law. We can presume that Fisher's public position (and perhaps even his liberty or future employment opportunities) was at risk after this case.

51 The primary argument in the first Congress against adopting a right to instruct representatives as part of the First Amendment was the requirement of deliberation, which would be defeated by binding instructions. See generally 11 Documentary History of the First Federal Congress of the United States of America, Debates in the House of Representatives: First Session, June-September 1789, at 1264-82 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) (reporting debates in the House of Representatives concerning the right of states to instruct representatives). The debates offered early examples of the concern with flexibility. Thomas Hartley (of Pennsylvania) asked:

And were all the members to take their seats in order to obey instructions, and those instructions were as various as it is probable they would be, what possibility would there exist of so accommodating each to the other, as to produce any act whatever? Perhaps a majority of the whole might not be instructed to agree to any one point . . . .

Id. at 1266. William Smith (of South Carolina) thought that a right to instruct legislators "will operate as a partial inconvenience to the more distant states; if every member is to be bound by instructions how to vote, what are gentlemen from the extremities of the continent to do?" Id. at 1271.
contemplate or anticipate the future of campaign finance, and that a legal system constrained by the First Amendment to forbid direct limits on interest group contributions might be especially inclined to tolerate innovations that reduced the power of organized interest groups. I could imagine some courts tolerating limited, specific precommitments more readily than broader promises to abide by surveys of (even the most informed and deliberative) constituents, but other courts may prefer the latter to the former. An important characteristic of all these precommitments is that they are not forced upon representatives by state legislatures, Congress, or even voters. The idea, instead, is that some candidates might experiment with these contractual arrangements in order to attract voters (or perhaps just bind themselves). To be intolerant of such voluntary agreements between candidates and voters is to read the Constitution as insisting on the trusteeship model of representation even where a precommitment accommodates flexibility.

In a somewhat similar vein, consider the argument against precommitment politics derived from the constitutional history of direct-democracy initiatives. The Framers rejected the idea of allowing the people to "instruct" their representatives and, since their time, attempts by state legislatures to instruct senators have never been held to be legally binding. Similarly, a promise to vote as one's party leaders vote, or to vote as a given, respected politician votes, may be the most or least preferred precommitment in the eyes of a given court. See supra notes 20-22 and accompanying text.

The most glaring disadvantage of the mandate model would seem to be inflexibility as circumstances change, but at least one of the precommitment strategies discussed in this Article is quite flexible in requiring the representative to vote according to the contemporaneous—rather than past election-day—preferences of constituents. See supra text accompanying notes 22-28. It is noteworthy that the literature on trusteeship versus mandate models of representation tends to emphasize deliberation rather than flexibility. See Pitkin, supra note 2, at 63-64, 83-84; see also supra note 18 and accompanying text (discussing deliberation and rules against absentee voting in deliberative assemblies).

The Framers rejected a right for the people to instruct their senators. Most subsequent attempts to instruct came from state legislatures—whose instructions might be more threatening to the national legislature than those of the people—and were directed at sitting senators. See Kris W. Kobach, Note, Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, 103 Yale L.J. 1971, 1974-76 (1994). In 1812, the General Assembly of Virginia did resolve to instruct future representatives and it warned that "no man ought henceforth to accept the
an attempt by the voters of Ohio to amend their state constitution in order to require referendum approval for amendments to the United States Constitution was rejected by the Supreme Court, which held that the Constitution required ratification by "deliberative assemblages representative of the people" and not by popular elections.\textsuperscript{55} Finally, the Court's recent term limits decision can be seen as a strike against direct appointment of a Senator of the United States from Virginia, who doth not hold himself bound to obey such instructions." Resolution of the General Assembly from Feb. 20, 1812, 1812 Va. Acts 152. But state governments were never able to gain concrete legal support for their attempts to bind legislators. See generally Robert Luce, Legislative Principles 460-91 (1930) (recounting the history of instructions to Congressional representatives). At the same time, states can use what might be called formal advisory referenda in order to tell their representatives what they think. See, e.g., Kimble v. Swackhamer, 439 U.S. 1385 (1978) (Rehnquist, Cir. J.) (denying application for relief from Nevada Supreme Court holding that advisory referendum on Equal Rights Amendment was consistent with Article V). Finally, there is an optimistic view that the desire to instruct died out because as communication improved and interest groups organized, citizens had alternative means of reaching the "same result." Henry Cabot Lodge, The Public Opinion Bill, in The Democracy of the Constitution 1, 10 (1915).

\textsuperscript{55} Hawke v. Smith, 253 U.S. 221, 227 (1920). Following Hawke, there has been something of a mixed reception to precommitments and related questions. In Coleman v. Miller, 307 U.S. 433 (1939), the Court reacted to the question of whether Kansas had ratified a proposed amendment to the Constitution (regarding child labor), when Kansas first rejected and then approved the amendment twelve years later, by declaring that this was a political question and in the hands of Congress. Id. at 450. Plainly, the Court could have said the same in Hawke, and it could have said the same in the term limits decision discussed presently. See infra notes 56-59 and accompanying text.

Decisions that come closest to the central questions associated with precommitment politics include In Re Opinions of the Justices, 148 So. 107 (Ala. 1933), dealing with Alabama's convention to consider ratification of the Twenty-First Amendment. The state organized the required convention—but delegates, chosen and allocated by county, had to take an oath to abide by the results of a statewide referendum. See id. at 108. The court advised that the scheme was acceptable, noting that deliberation would precede the convention and that the manner of instructing delegates was little different from the pledge of electors to follow the popular choice of the people for the offices of President and Vice President. Id. at 111. Note, however, that in the Alabama scheme the state legislature was involved in pledging the delegates—and was not required to abdicate its constitutional role in the amendment process by an external or even populist force. In contrast, in AFL-CIO v. Eu, 686 P.2d 609 (Cal. 1984), the court disallowed a ballot initiative which, if passed, would have called for the state's legislators to request a constitutional convention on the subject of a balanced-budget amendment—upon penalty of losing their salaries. See id. at 622; accord State ex rel. Harper v. Waltermire, 691 P.2d 826, 828 (Mont. 1984) (reasoning that "[t]he electorate cannot circumvent their Constitution by indirectly doing that [legislative resolution] which cannot be done directly").
democracy and against precommitment experiments more generally.\textsuperscript{56} The term limit qualification for congressional candidates came to the Court from the voters of Arkansas who amended their state constitution, and not from a state legislature, whose initiatives might be rejected because of a view that the Framers were careful to protect Congress from other sources of political power.\textsuperscript{57} But Justice Stevens noted that "[t]he people of the State of Arkansas have no more power than does the Arkansas Legislature to supplement the qualifications for service in Congress,"\textsuperscript{58} and that to allow citizens of one state to exercise such power would undermine "the uniformity and the national character that the Framers envisioned and sought to ensure."\textsuperscript{59}

But these bits of precedent need not doom precommitment politics. Attempts to instruct representatives have historically come from state legislatures and not from aspiring candidates themselves. Moreover, at least one of the precommitment plans advanced here accommodates a degree of flexibility that "instructions" did not.\textsuperscript{60} The history of judicial hostility to instructing representatives does not, therefore, say much about


\textsuperscript{57} See id. at 1858. Twenty years earlier, a lower court apparently underestimated the threat to the national legislature from nonuniformity and state legislatures. See Dyer v. Blair, 390 F. Supp. 1291, 1308-09 (N.D. Ill. 1975) (holding that Illinois had not ratified the Equal Rights Amendment because the Illinois General Assembly's majority approval of the amendment fell short of Illinois General Assembly rule requiring three-fifths vote). One alternative view is that Justice Stevens, the author of both \textit{Dyer} and \textit{Thornton}, developed something of an inside-the-Beltway perspective in the years between these two decisions. Another is that states are individually empowered by Article V and not so empowered with regard to general elections to fill Congressional seats. The decision in \textit{Dyer} is framed in terms of Article V's delegation to the states. See id at 1294.

\textsuperscript{58} \textit{Thornton}, 115 S. Ct. at 1864 n.32.

\textsuperscript{59} Id. at 1864. One reading of the decision is that some Justices regard a constitutional amendment as the only route to term limits. On the other hand, what if Arkansas passed a law allowing candidates to contract in advance not to run for a third term of office? Such a law may be doomed, but there is room to argue that the Court has not said that politicians and voters cannot precommit to the term limits idea. Perhaps a bare legislative majority simply cannot bind an unwilling minority to term limits. In any event, most of the precommitments discussed in this Article are even more remote from \textit{Thornton}.

\textsuperscript{60} See supra text accompanying notes 22-28 (advocating a precommitment strategy binding representatives to the results of contemporaneous constituent surveys or juries).
the likely reaction to precommitments designed by candidates themselves. Similarly, the hostility toward precommitments by a state legislature regarding its role in ratifying a constitutional amendment is somewhat inapposite. Article V of the Constitution is rather specific about the possible methods of ratification; indeed, it comes close to declaring that its listed provisions are exclusive. In comparison, campaign promises are simply not addressed in the Constitution and, apart from the Speech or Debate Clause, the enforcement of political precommitments trespasses on no explicit constitutional provision. Finally, term limits are not only more closely implicated than are precommitments in the text of the Constitution, because the Qualifications Clause might be read as exclusive, but also they generate a kind of inflexibility that precommitment politics does not, and they are imposed even on unwilling representatives—while the constraints explored in this Article are to be "imposed" only on volunteer precommitters. Much as courts are generally inclined to enforce contracts between consenting parties, but to be cautious about imposing obligations on all citizens or all businesses, so too we ought to expect that (even those) courts which are prepared to tolerate enforceable political promises made by individual candidates will nevertheless be suspicious of precommitments forcing all future voters and candidates to limit political service to a specified number of terms.

Campaign finance law provides a useful illustration of the legal potential of precommitment politics. At first blush, the

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61 By its terms, Article V expressly vests in Congress the right to determine ratification procedures:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. Const. art. V (emphasis added).

62 See supra notes 31-33 and accompanying text.

63 At least the brand of precommitment politics that tracks the changing preferences of informed voters. See supra notes 22-28 and accompanying text.
Supreme Court's decision, in *Buckley v. Valeo*, that it is unconstitutional for Congress to set expenditure limits on political campaigns would seem to be yet another indication that politicians cannot be bound and, more important, that there is no particular tolerance for innovations designed to reduce the power of organized interest groups. But *Buckley v. Valeo* does not bar voluntary expenditure limits. In fact, the surviving strategy of campaign finance law has been for most presidential candidates to agree to spending limits—with an implied liquidated damages clause in the form of the forfeit of public money. Precommitment politics of the kind described in this Article can thus be consistent with current campaign finance law, for a precommitting candidate would voluntarily agree to a course of action that could not otherwise be required, and would forfeit campaign funds or other economic benefits if this agreement were broken.

### E. Summary

There may not be much of a puzzle in why aspiring politicians do not precommit either to be responsive, anti-Burkean representatives or simply to be taken seriously with regard to issue-specific campaign promises. It may simply seem difficult or even impossible to offer one's constituents convincing, enforceable precommitments. The simplest enforcement mechanisms would seem at odds with constitutional provisions or understandings, while more complicated schemes run the risks created by bribery and other statutes. And to the extent that there remains an historical puzzle as to why precommitments of the kind suggested here were not made before many of these statutes were passed, it may be enough to note that voters' disgust with interest groups and unresponsive politicians may have been less complete. On the other hand, I have suggested

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64 424 U.S. 1 (1976).

65 The impact on interest groups is complicated by the fact that the Court is more protective of First Amendment interests infringed by expenditure limits than by contribution limits. See generally Laurence H. Tribe, *American Constitutional Law* §§ 13-27 to 13-29 (2d ed. 1988) (discussing campaign contribution and expenditure limits).

66 See id. at § 13-30 (discussing subsidies to candidates, which are predicated on the willingness of candidate-recipients to forgo private contributions).
that there are precommitment strategies that have not been tried and that could be legally and politically acceptable. In large part, the success of precommitment politics, if seriously attempted, would depend on the willingness of courts to read the Constitution as somewhat hospitable to the notion of representation that fuels these precommitment notions. One would not expect courts to tolerate similar precommitments by aspiring federal judges, for instance, but these same courts might afford aspiring representatives room to create this sort of alternative to prevailing political practices. In particular, I have suggested that courts might (or even should) be most tolerant of precommitment strategies that rely on incentives funded by disinterested parties or by the promisors themselves. It is also possible that the substance of these precommitments matters more than their form; a precommitment to a flexible procedural mechanism may be more attractive than one inflexibly geared to specific votes.

There is, however, an advantage to inflexible, specific promises. Some courts may be disinclined to enforce political contracts either because they prefer to avoid the task of determining when political promises have been breached or because they fear that these determinations will involve them in the world of politics in a way that is inconsistent with some ideal conception of the separation of the branches of government. If so, then it is noteworthy that specific promises are more easily supervised than are promises to adhere to flexible procedural mechanisms. And the problem of judicial over-involvement suggests that effective precommitments might include third-party arbiters. The problem of judicial involvement also suggests the importance of the expectation of some social gain from political contracts. Thus, we might expect courts to tolerate commitments to vote against agricultural subsidies more readily than they would help enforce a promise by a presidential candidate to nominate someone for a cabinet post in return for support during the election process.

A very different reaction to the failure of politicians to test the legal limit of precommitment politics is that voters may not

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67 See supra note 34.
68 See supra Part I.C.3.
be as unhappy with their representation as are some positive political theorists. There is both a positive and normative component to this point. As a positive matter, politicians may correctly sense that most voters are not terribly concerned about organized interest groups or even about broken promises. Alternatively, voters may think that a representative who either abides by instructions from home or woodenly keeps to campaign promises will miss out on too many opportunities to bring home the bacon. And as a normative matter, precommitment schemes may be a bad idea, so that courts should use existing statutes and constitutional interpretations to enfeeble them, because (the argument goes) neither organized interest groups nor cheap campaign promises are much of a problem. Finally, there is a reaction to precommitment schemes that says more about those who react than it does about the puzzle of political behavior or normative suggestions: Readers who find themselves hostile to attempts to precommit to survey groups may simply be revealing that they do not find "politics as usual" so bad as to be worth overhauling. 69 On the other hand, those who think that commercial contract law and theory has something to offer politics and those who see the Burkean model as ignoring the ability of organized interests to capture representatives or political parties may regard the precommitment idea as something more valuable than a mere tool with which to explore the world we know where politics and contracts do not much mix.

69 The mixed evidence on these matters is well known. Voters favor term limits at the same time that they claim to like their own representatives (but not others) just fine. On the paradox that voters like their representatives but dislike Congress, see Bruce Cain, John Ferejohn & Morris Fiorina, The Personal Vote: Constituency Service and Electoral Independence 198-206 (1987). Note that the lack of party discipline in the United States facilitates this phenomenon, because representatives have a good deal of freedom to take positions popular in the district but not supported by the party as a whole. In Great Britain, for example, where party discipline is stronger, this phenomenon is much less dramatic. Id. at 200-01.
II. COORDINATED PRECOMMITMENTS

A. Introduction

Once we entertain the idea that politicians might try to appeal to voters (or even to precommit to their own public-regarding instincts) with political precommitments—and that courts might tolerate this importation of contracts into politics—there is the question of what other kinds of precommitments might materialize. The most interesting precommitments might be those in which the promisors attempt to increase their aggregate political power and therefore their individual political strength as well. Put differently, if political contracts can reduce agency costs, as discussed in Part I, then such contracts may also be used among principals (or among agents) with shared preferences. Strategic voters or legislators might, for example, contract in order to overcome collective action problems. A constitutional amendment requiring a balanced budget, for instance, may seem attractive to legislators who seek to promote fiscal responsibility but who, in the absence of a means of cooperation, find themselves favoring spending programs that benefit their constituents or themselves at the expense of the nation as a whole. I have already suggested that individual politicians may be able to precommit in an effective manner without going through the trouble and time of a constitutional amendment.

B. Cooperation by Self-Selected Individuals

1. Bloc Voting

Consider first the political power of a unified and homogeneous group such as that which resided in Kiryas Joel, a village entirely populated by a Hasidic sect, and made famous by the Supreme Court's recent invalidation of New York State's unusual arrangement to carve out a local school district that could use tax-generated funds to provide statutorily-required special-education teachers and facilities for handicapped children while allowing these children to remain segregated and separated

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70 For a discussion of this distinction, see Saul Levmore, Parliamentary Law, Majority Decisionmaking, and the Voting Paradox, 75 Va. L. Rev. 971, 985 n.43 (1989).
It is apparent from the decision, and from the actions which followed it, that the residents of Kiryas Joel had substantial political power. The Governor of New York appears to have been eager to please the village, or perhaps to keep a bargain with the members of the sect, and there seems to have been little fear of disapproval by other voters in that state. There is every reason to think that the residents of Kiryas Joel, as members of the Hasidic sect, enjoyed regular communication with their leaders. The leadership is able to generate high voter turnout; the demographic concentration of the group (in Kiryas Joel and elsewhere) simplifies ex post monitoring by outsiders.

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71 See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994). Kiryas Joel is an incorporated village in New York populated entirely by Satmar Hasidim, an Orthodox Jewish sect. A brief history of the village and the sect is contained in Justice Souter's opinion for the Court. Id. at 2484-86. As for the arrangement between the state and the sect, "[i]t is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 . . . ." Id. at 2489.

72 Within two weeks of the Supreme Court's opinion in the case, the then-Governor of New York, Mario Cuomo, signed a new bill which sought to keep the school open while complying with the Court's ruling. Cuomo Signs a Bill to Keep a Hasidic School Open, N.Y. Times, July 9, 1994, § 1, at 24. The new law attempted to win (at least Justice O'Connor's) approval by allowing any community meeting specific conditions to form its own school district, see Kiryas Joel, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment), and was in this way technically, or superficially, religiously neutral (although critics consider it a sham and claim that only Kiryas Joel can meet the specified requirements). See Alison Wheeler, Recent Developments, Separatist Religious Groups and the Establishment Clause—Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct 2481 (1994), 30 Harv. C.R.-C.L. L. Rev. 223, 241-46 (1995) (arguing that the decision in Kiryas Joel was too narrow and advocating application of an equal protection strict scrutiny test). The law was then upheld by the very lower court judge who had struck down the original legislation. Joseph Berger, Court Affirms Public School for Hasidim: District for the Disabled is Ruled Constitutional, N.Y. Times, March 9, 1995, at B1.

73 Opponents of the law claimed that it was the result of interest group politics and concern for Jewish votes. See Berger, supra note 72, at B4; see also A Poor Solution for Kiryas Joel, N.Y. Times, July 28, 1994, at A22 (criticizing legislature's behavior as a "swift election-year move . . . [that] suggests more concern for politics than law").

74 Hasidic sects are among those groups that seem inclined to follow leaders with little fear that the leaders' views are self-serving. Inasmuch as the leaders do not appear to value personal wealth, and give instructions and advice that appear to be in the interests of the constituents, however socially constructed these interests may seem to outsiders, there is little danger that the leaders will be unable to deliver the votes and actions they promise. For a discussion of Hasidic political culture, see Abner S. Greene, Kiryas Joel and Two Mistakes About Equality, 96 Colum. L. Rev. 1 (1996).
politicians; and it is even plausible for the group to switch its support to a competing political party if a better deal is available or if the long-term returns from such a demonstration seem positive. The tightly-knit nature of this group facilitates some of these capabilities, but other aspects of the collective action problem are naturally overcome by the similarity of interests among group members. The leaders do not need to convince members to sacrifice short-term interests in order to obtain greater long-term gains, for it is likely that the very reasons the leaders prefer a given candidate cause virtually all members of the group to prefer that candidate as well.

The apparent political success of the residents of Kiryas Joel suggests that other, less homogeneous, groups might do well to attempt to do that which comes easily to the residents of Kiryas Joel. Relatively like-minded voters might agree to vote as a bloc. What is necessary in the way of like-mindedness is sufficient homogeneity to cause each member to calculate that on average he or she will be better off if the group as a whole gets its way more often than in the absence of cooperative voting. The residents of Kiryas Joel might have calculated that they were virtually always better off voting as a bloc, but other groups, with greater than average homogeneity of preferences, might see that they too would more often than not benefit from bloc voting.

Consider, by way of illustration, an individual, A, who has experiences which suggest that about fifty-five percent of the time she approves of the politicians or policy options which surveys suggest her fellow citizens prefer. At the same time, there is a subset of the population, group G, that A finds herself in agreement with seventy-five percent of the time. A is unable to refine further these connections; A may not know that her agreements or disagreements are about social issues or tax policy or any particular subset of legislative matters. A may simply have things in common with other members of G such that A and G agree significantly more often than do A and the population or even the Congress as a whole. Indeed, we can imagine further that every member of G has the same expectation as A; every member of G expects to agree with the majority of G seventy-five percent of the time. The members of
G may share ethnic, racial, or economic characteristics, or they may all be college graduates living in the Northwest, and so forth.

Imagine next that voter A is offered the option of a rule under which G alone elects public officials or under which the Congress delegates all its decisionmaking authority to G. Generally speaking, A might like these (inconceivable and unconstitutional) rules because A’s preferences are closer to G than to those of the population or of Congress as a whole. A gains when G’s votes carry more weight. But bloc voting by G is little more than a step in this direction. A would like to agree to vote with the majority in G if all other members of G do the same, because to do so increases the expected value of A’s vote. If all members of G always vote as the majority of G suggests, and if A is in this majority seventy-five percent of the time, then seventy-five percent of the time A’s vote will be magnified—because the twenty-five percent of G that disagrees will feel bound to vote as A and the majority of G prefer. Much less frequently, or in this case one-third as often, A will be in the minority and, if A follows the precommitment strategy, A will then vote with the majority. But if all members of G keep to the plan, this sacrifice is worthwhile because it is three times as likely that A’s vote will be multiplied (by 1.33) than that it will be suppressed or indeed perverted by the “obligation” to vote with the majority of G. As discussed presently, the intuition behind this example is illustrated by the inclination of some members of the United Nations to form voting blocs.75

One example of such a group, which might have a strong degree of “like-mindedness” across the spectrum of political issues or likely candidates, is a labor union. Unfortunately, perhaps, the agency problem may dominate this example, as members may be insufficiently confident in their leaders to abide by seemingly wrongheaded and even self-serving instructions. It is interesting that while endorsements by labor union leaders of political candidates are common, union leaders do not attempt to increase the long-term political power of their members by polling the rank and file, in order to determine the majority

75 See infra note 104 and accompanying text.
position, and advising all members to vote as one with this majority. A union leader who sought to be something more than a passive intermediary might estimate (or discover) members' preferences and then bargain with candidates or other groups in a way that increases the power of the precommitting members. The leader could then explain to the members why there is gain to be had from bloc voting. In any event, greater gains are available the more the leader is able to generate voter turnout and the more it is credible that the leader might endorse—and that constituents might then follow—any candidate. In contrast, the more a given politician or political party can take the support and turnout of a specific group for granted—regardless of the bargains it strikes around the present election—the less political power that group is likely to enjoy.

It should be noted that the amount of power gained from the ability to threaten (and in fact) to switch the party "loyalties" of a large group is difficult to calculate. This is because of the complicating influence of agenda-setting and candidate selection by parties through primaries and other means. Reliable constituent groups may well have substantial power when it comes to choosing a party's candidate. In short, although there is the familiar question of whether markets and politics respond best to marginal or inframarginal players, or to transient or long-term customers, it is at least plausible that, other things being equal, there is something to be gained from a credible threat to exit.

It is unclear whether the best candidates for these bloc precommitment plans are newly-created groups of like-minded voters or established interest groups. Members of the National Rifle Association or the Sierra Club or the Friends of St. Raphael's Hospital may find that while ninety-nine percent agree on their central mission (for that is why they belong to a common organization), seventy-five percent agree on which candidate to vote for in any given election (or indeed on any issue likely to come before the representatives they elect). We

76 Note that politicians court modern labor union leaders more for the financial support and human resources they command than for their influence on voting behavior. See Graham K. Wilson, Interest Groups in the United States 34-53 (1981).

might expect these organizations, formed around a single issue, to expand to other concerns (either because the managing agents gain by expanding or because a seventy-five percent majority agrees on each expansion in incremental fashion). On the other hand, this sort of growth, or diversification, might lead to defections from the original organization. The defectors might form new organizations committed to the original, single issue or perhaps devoted to the original position plus the minority position on a secondary matter. It is difficult to predict the evolutionary pattern. The National Organization of Women and the American Association of Retired Persons appear to follow the diversification strategy, while the National Rifle Association and the Sierra Club do not. It is thus unclear whether the best vehicle for a precommitting voting bloc would be something like the group of African-American college graduates living in Manhattan or the members of the Alumni Association of Oberlin College (assuming for the sake of argument that both groups have about the same level of "like-mindedness"). The latter group has already organized, so it has transaction cost advantages but something to lose from defections.

It goes almost without saying that the thought experiment I have been conducting with (largely) self-selecting, precommitting voting blocs cannot proceed much longer without some recognition of the practical problems that would be encountered in any attempt to carry out such a scheme. The central problem is that when a member of the bloc is called upon to cast an unattractive (in the short term) vote, there will be a tendency for that person to defect. Member A may precommit because she sees that she will be in a majority of the group seventy-five percent of the time, but when A sees that the agreement calls for her to vote for a candidate she does not much like, A will wish to defect and vote for the candidate of her choice. Some

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78 This question of diversification and expansion has been studied in the context of voting blocs of members of the United Nations. See Frans N. Stokman, Roll Calls and Sponsorship: A Methodological Analysis of Third World Group Formation in the United Nations 168-69 (1977).

79 Citizen A may instead wish simply to abstain from voting or to cast a blank ballot, perhaps as a way of compromising between her promise to vote with the group and her personal inclination to do otherwise. But there is no need to pursue this part of the precommitment problem inasmuch as the "puzzle" of non-precommitment is found
part of this problem can be associated with the institution of the secret ballot. There is also an agency problem inherent in this sort of precommitment scheme—and in this sense the cooperation problem is something more than a simple prisoner’s dilemma. The strategy requires virtually all members of the precommitting group to vote as a bloc, even or especially when their short-term preferences suggest a different vote. But it is precisely when such votes are required that members of the group will fear that their leaders are selfishly misinstructing them. In short, precommitments by a like-minded group would appear to collapse because of collective action problems, including somewhat subtle agency problems.

A more academic—but still collective action-related—objection to this idea of rationally participating in a plan to vote with the majority of a like-minded group, is that an individual voter cannot possibly think that her vote is likely to affect the outcome of the larger election. A may vote in a general election, the argument goes, because A gets consumption value from voting, but A cannot possibly expect to have the tie-breaking vote that carries one politician rather than another into office. But this objection strengthens rather than weakens the precommitment idea. If A would normally reason that her vote is worthless, then she would also reason that she loses nothing worthwhile by voting as she precommits even though it is contrary to her short-term preferences. It is even tempting to suggest that A might now reason that her vote is finally worth casting because it is often magnified. But the better claim may

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80 One way around this problem is to precommit only to vote as a majority of the group decides to vote. Imagine, for example, that members of a union thought both that they had enough in common to make the long-term advantages of a precommitment strategy worthwhile and that their leadership would not necessarily provide instructions that reflected their preferences. The members might simply agree to employ a pollster or to use the union mailing list in order to ascertain the preferences of the majority—and then all members would vote as a majority of the members indicated. Members who found themselves in the minority might abide by their precommitments in anticipation of long-run advantages.

81 For an overview of the debate on the rationality of voting, see Dennis C. Mueller, Public Choice II 348-61 (1989).

82 The matter is complicated and therefore only tempting. When A votes for X rather than X’s opponent Y, that decision is worth more to X than one made by A to vote for X instead of “rationally” staying home. The intuition in the text is similar to
simply be that the best explanation for A’s energy on election day is that A enjoys sentiments associated with patriotism or bonding with other voters. In turn, this explanation for individual voting behavior is consistent with the idea that a voter might gain utility from cooperating and bonding with like-minded voters.

2. Cooperation and Contract

There remains, of course, the central problem that A and other “rational” members of G will freeride, hoping that other (self-selecting) members abide by their promises but reasoning that there is no gain from voting in a way that is selfishly unappealing. There are at least two kinds of reactions to this point. The first is to note that real people cooperate in myriad settings despite the apparent rationality of freeriding, and we might therefore expect that many members of G will in fact cooperate when it comes to voting behavior. Charitable contributions, political participation, protest rallies, and various elements of etiquette come to mind in this regard. But since this is hardly the place to develop a theory of the development of effective social norms, I claim only that precommitment strategies of the kind sketched here are not impossible to carry out. In any event, because it seems that the most likely setting in which cooperation could dominate defection is where ballots are not secret, I turn presently to bloc precommitments by or among elected representatives whose votes are, of course, public.

The second reaction to the stubborn collective action problem is to consider, once again, contractual mechanisms for the enforcement of political precommitments. If members of G wish to cooperate, and they realize that each member will have an incentive to defect even though in the aggregate these defections will destroy the potential gains from trade, then they may welcome ex ante contracts that bind them to their common mast. This returns us, of course, to the discussion in Part I. One difference between that setting, with precommitting aspiring

the idea that charitable giving, which suffers from a very similar collective action problem, might be encouraged by magnifying each gift with the promise of “matching funds.”
Precommitment Politics

representatives, and the present one, involving voters in a general election, is that the institution of the secret ballot in the general election makes enforcement yet more difficult. A second difference, the absence of any explicit constitutional problem, may be liberating.83 Finally, it is possible that commitments among voters are even more vulnerable to claims of “vote buying” than are arrangements between candidates for office and the voters they court.84 The central idea is that like-minded voters might wish to precommit simply to gain the rewards available to bloc voters, but if the collective action problem in a dispersed group makes cooperation difficult, then like-minded voters might wish to precommit to make financial sacrifices in the event of breaches. But because the point of these precommitments will often be to empower a group of voters at the expense of other voters—and there is no reason to think that this kind of precommitment politics will enfeeble organized interests or promote popular sovereignty—courts are (or should be) unlikely to tolerate what can be described as vote buying.

The contrary argument, in favor of tolerating and therefore enforcing these precommitments by individual voters to vote as a group, is that inasmuch as there are presently well-organized groups that are able to wield political power, the democratic process would be improved by allowing other groups to compete on equal terms. Members of an Hasidic sect may live near one another and members of a labor union may have a legal means of taxing one another and avoiding freerider problems, but other

83 A textualist might have objected to agreements by legislators as to how they would vote as running into something of a Speech or Debate Clause problem. See supra notes 31-33 and accompanying text.

84 See 18 U.S.C. § 597 (1994) (criminalizing expenditures to influence voting); 18 U.S.C. § 594 (1994) (criminalizing intimidation of voters). In response, the argument advanced here is that vote buying concerns us because it is likely to disadvantage disenfranchised and less wealthy citizens; the sort of vote buying, which is to say mutual precommitting, suggested here might be unobjectionable because it is likely to benefit these very groups. For a recent discussion of the relationship between vote buying and election laws, see Pamela S. Karlan, Not By Money But By Virtue Won? Vote Trafficking and the Voting Rights System, 80 Va. L. Rev. 1455 (1994) (arguing that voting laws are designed not to protect voter autonomy but to advance broader social goals). Note that the institution of secret ballots makes all forms of voting bargains more difficult.
like-minded citizens may be at a relative disadvantage in overcoming collective action problems. There is no reason why constitutional or voting rights law should favor groups that happen to have geographic (or various other) advantages. Indeed, it is plausible that historically disenfranchised voters would be the primary beneficiaries of a decision to tolerate contracts to vote as a group. There remains, of course, the question of how to design such contractual arrangements.

It goes almost without saying that contractual commitments of this sort will seem preposterous to most courts and readers. Even if a group of voters had a method of monitoring members' votes, it would seem that any agreement to vote as a majority of the group instructs (or as a leader or designated third party instructs) is unenforceable. It is implausible that courts will order either specific performance or the invalidation of votes cast contrary to the agreement—even though such remedies are not unknown with respect to voting agreements in corporate law. The remaining, now familiar, option is for the parties to precommit to financial penalties in the event of breach. Again,

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85 Labor unions might enjoy advantages bestowed by labor law itself, but even these advantages in overcoming collective action problems were not granted in order to facilitate bloc voting at the expense of other interest groups. Of course, the optimistic story about labor unions and geographically advantaged groups is that such groups will join in national debates and promote the republican ideal. In some sense the legal arguments for and against many of the schemes explored in this Article mirror the arguments about the wisdom or constitutional basis for "reviving" republicanism. See generally Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988) (describing those aspects of republicanism that have the strongest claim to contemporary support).

conventional wisdom is that such agreements must be unenforceable because they amount to vote buying.⁸⁷

There is, however, something to be said for enforcing mutual precommitments to vote as a bloc. First, the paramount objection to raw vote buying—that wealth will prevail where it should not—is eliminated or even reversed because the precommitments are mutual. The parties could even agree to larger penalties for breaches by wealthier members of the group. Second, the contractual freedom to enter into enforceable⁸⁸ mutual precommitments will empower many voters, and as a general rule there is no legal objection to contracts that simply prove, ex post, to burden a right. Much as a contract to rent a pew for a religious service is surely enforceable against a party who later wishes to worship at a different church but is discouraged by the prospect of contract damages, so too a contract to vote for a candidate (who may be determined by some survey) could be enforceable against a voter who came to regret the agreement to vote cooperatively. Both contracts are used to overcome collective action problems and both have the potential to raise the value of a fundamental legal right in ex ante terms—even though both can be said to constrain the exercise of a right (occasionally) in ex post terms. Finally, there is some precedent for this sort of enforcement. Political parties can require mutual support, or loyalty agreements, and they can exclude candidates who have not supported the party's candidate in the past.⁸⁹

⁸⁷ For an interesting early case, exhibiting hostility to agreements linking financial incentives to participatory democracy, see Denney v. Elkins, 7 F. Cas. 464, 466-67 (C.C.D.C. 1831) (No. 3790) (voiding promissory note given as wager on whether or not Andrew Jackson would receive Kentucky's electoral vote despite the fact that neither gambler could vote in Kentucky election). Other cases are collected in 17 C.J.S. Contracts § 218 (1963).

⁸⁸ Note, once again, that enforceability may amount to nothing more than token damages. But this piece of contract law may be more than enough to keep voters from defecting.

⁸⁹ See Polly v. Navarro, 457 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1984) (upholding state law prohibiting the nomination of candidates who had been nominated by another political party within the previous six months); Lippitt v. Cipollone, 337 F. Supp. 1405, 1406-07 (N.D. Ohio 1971), aff'd, 404 U.S. 1032 (1972) (upholding law prohibiting the nomination of candidates who had voted in another party's primary within the previous four years). But see Kay v. Brown, 424 F. Supp. 588, 594 (S.D. Ohio 1976) (holding unconstitutional the same Ohio statute upheld in Lippitt as
The preceding arguments are surely academic. There is every reason to think that while courts would not regard mutual precommitments as criminal or wrong, in the manner of outright vote buying, they would refuse to enforce them. But there is also reason to think that if a state specifically authorized such contracts and their enforcement, courts would have no constitutional reason to demur. That state legislatures do not invite such precommitments with statutory authorization and enforcement may reflect either a failure of imagination or the intuition that precommitments would empower relatively unorganized groups and therefore weaken the position of organized groups.

Given the possibility that legislatures would authorize these precommitment contracts and even the chance that courts might enforce them without legislative intervention, it is useful to explore the problem of designing these precommitment contracts in the real world—where secret ballots would seem to make the problem of monitoring contractual performance an impossible one. Of course, a state legislature might also decide to do away with secret ballots, or to permit voters the option of voting openly (in which case a precommitment to bloc voting might entail an agreement to pay damages if one defected or if one chose to cast a secret ballot). But the immediate question is

applied to a candidate who had voted in the primary of the American Independent Party—which was defunct by the time of the court's decision). The court in Kay v. Brown and the drafters of the statute seem to have been concerned about the claim that the two major parties will collude in obstructing the formation of third parties. As a constitutional matter the states have broad latitude in setting election procedures because “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4, cl. 1. See also, e.g., Burdick v. Takushi, 504 U.S. 428, 438-39 (1992) (holding that state ban on write-in voting was constitutional even when only one candidate was on the ballot); Storer v. Brown, 415 U.S. 724, 728-37 (1974) (upholding California's restrictions on candidate access to ballots). If, however, a state law results in the diminution of a protected minority's voting strength, then federal courts would likely intervene under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), which prohibits any voting practices which result in discrimination. See generally Thornburg v. Gingles, 478 U.S. 30 (1986) (holding that the test for violations of the Voting Rights Act is broad-based and results-oriented). Another possible argument against the hypothetical state statute would be that such a contract constituted intimidation interfering with a citizen's right to vote for the candidate of her choice in violation of 42 U.S.C. § 1971(b) (1994).
whether precommitments to bloc voting are possible within the current institutional framework, in which the secret ballot is a sacred fixture.

One possible method of precommitting, where voters in a general election with secret ballots are concerned, is to tie contractual incentives to the results of precinct tallies. Another possible focal point is the simple single fact of an election result. Finally, exit poll data may be of some use.

Beginning with the available data from individual precincts, members of a precommitting group like G might be geographically concentrated, in which case there will be some ex post monitoring of G’s ability to deliver on its promises. We might even imagine that each member of G would precommit to pay or forfeit a sum, perhaps to a charity or other entity unlikely to be accused of vote buying, if the member’s precinct does not deliver more than p% of its vote to the candidate recommended by the majority of G in a kind of pre-election primary limited to G, or by the leadership of G which might strike bargains or poll members before giving election-day instructions. Indeed, there may be no need to specify a triggering percentage; members of G may simply agree to forfeit their bonds if the candidate they chose by majority “vote,” in a pre-election survey or “primary,” fails to win. If, for example, a majority of G favors candidate X for the Senate in a pre-election survey, and each member of G precommits long in advance to forfeit a sum if G’s chosen candidate does not prevail, then every member of G may have a decent incentive to get out and vote for X—even if in this particular election candidate Y seems slightly more attractive to this minority of G.

Where members of G are not geographically concentrated in any meaningful way, there is some possibility of using information exacted through exit polls. The hope is that even if the organizing principle of G is something like membership in the Sierra Club, so that precinct results fail to capture the effectiveness of G’s precommitment strategy, it may be possible to ask voters as they exit from the polls whether they are

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91 These results may provide the most detailed information available in a system with secret ballots.

92 Where p is chosen based on previous election results and so forth.
members of G and how they voted. The question is whether this information is more useful than that obtained by the simple fact of the election result. Each member of G might precommit to forfeit some sum if G’s candidate fails at the polls, and each member might also (or instead) precommit to forfeit a sum if exit poll data suggest that more than z% of G’s members defected. At first blush, the exit poll information seems useless because a defecting member of G might be expected to vote for Y but then to insist that she had voted for X in order both to avoid any penalty for defection and to advertise the power of G in future elections (when this member expects to be in the majority of G). But it is possible that each defector would respond honestly either because each perceives that the marginal impact of dishonesty is virtually zero or because each wants to register his or her intensity of preferences and disagreement with other members of G.

These enforcement schemes are patently weak and, as suggested earlier, likely to be offensive to courts. If defectors must pay, courts will regard the underlying contract as unenforceable. And if all members of G must pay upon some event or poll result, then the underlying contract is likely to be regarded as unenforceable because it amounts to illegal gambling on the outcome of the election. In short, there is no shortage

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93 Put differently, a member of G who is motivated to conform rather than to defect because of the penalty tied to the overall election result might seem unreliable in exit polls because there is the very same incentive to contribute to the aggregate exit poll data in order to avoid a penalty. But a member of G who is insufficiently motivated by an incentive tied to the simple fact of the election result might be similarly indifferent to the financial consequences associated with an honest response in the exit poll. There is reason to think that these exit polls should employ secret ballots rather than personal interviews. George F. Bishop & Bonnie S. Fisher, “Secret Ballots” and Self-Reports in an Exit-Poll Experiment, 59 Pub. Opinion Q. 568 (1995) (finding in a controlled experiment that secret ballot produced more accurate self-reports than face-to-face interviews).

94 Gambling on elections is illegal even in Nevada. Nev. Rev. Stat. Ann. § 293.830 (Michie 1995). See also Kyne v. Kyne, 106 P.2d 620, 621-22 (Cal. 1940) (barring gamblers from collecting from sheriff’s levy inasmuch as their gamble had been on outcomes of an election and was therefore illegal). And recall Denney v. Elkins, 7 F. Cas. 464 (C.C.D.C. 1831) (No. 3790), where the court voided a wager over whether Andrew Jackson would receive Kentucky’s electoral vote even though neither gambler could vote in Kentucky. It may be possible, however, to place bets in other countries on American elections. In any event, there are jurisdictions where one can gamble on local elections. See, e.g., Julian Gibbs, Sideways Glance: Placing a Bet on the
of doctrinal objections to these schemes and no easy way for courts to find this kind of precommitment politics to be constitutionally desirable or in the public interest. It is possible that such a scheme might succeed if advanced by a group that was historically disenfranchised, but because this seems unlikely I will not explore these schemes any further.

I do not mean to leave the impression that because cooperation and precommitment by individual voters is unenforceable if done by contract it is therefore nonexistent. There may be something of a puzzle in why we do not see more precommitment politics but it is almost surely the case that some groups are able to overcome the collective action problems associated with bloc voting. Some unions, and some racial and ethnic groups, have probably improved their positions by bloc voting; individual, somewhat self-selecting, members of these groups have no doubt chosen to vote as they perceive the group will vote even where their short-term inclinations might have been to vote (or indeed to encourage the entire group to vote) for a different candidate. These members understand that in

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Outcome of the General Election with the IG Index, Money Marketing, Feb. 6, 1992, available in Lexis, World Library, ALLWLD File (reviewing methods of betting on date of election and on number of seats to be won by Tory and Labour parties in British elections); Nick Comfort, Kennedy Can Keep His Cash from the Bookies, Scottish Daily Record, June 17, 1994, available in Lexis, World Library, ALLWLD file (reporting case of Scottish party chief betting against his own slate and announcing intention of turning over any winnings to party); Tommy's Sure Thing, Scottish Daily Record, July 2, 1994, available in Lexis, World Library, ALLWLD File (reporting case of assistant general secretary winning bet on election and announcing he was looking for a cause in need of a donation).

95 It is noteworthy that for the most part the group is nothing more than self-selected. If, for instance, A is identified by skin color or place of worship as belonging to group X, but in fact A has either short-term or long-term political preferences that are unlike those held by the majority of X, then A will simply not vote as “instructed” by the leaders of X. If X is geographically concentrated, polling results will show that some presumed members of X did not in fact vote as members of X. And even if X is geographically dispersed, exit polls and other survey data will show that some percentage of people who had self-identified (or other) characteristics that superficially associated them with X did not in fact vote “with” X. X will be shown to be of a particular size that may well be smaller than first thought. But “defectors” such as A do not pose much of a precommitment problem for the rest of X or for politicians who would bargain with X, because voters such as A have little reason to misrepresent their allegiances. Thus, if most Catholics vote for Democratic candidates, and most African-Americans also vote for Democrats, and a very high percentage of Catholic African-Americans vote for Democrats, but A, a Catholic African-American, generally
the long run there are benefits to higher turnout and bloc voting, so long as they expect to find themselves significantly more often than not in the majority of their group or in accord with the leaders of their group. Such groups must surely extract more valuable promises from politicians.

It is probably also the case that many more "groups" would be better off than they are presently if they encouraged such bloc voting, emulating what I imagine occurs in Kiryas Joel. I emphasize that these groups can be largely self-selecting. Members will be those who think they share enough characteristics and preferences with other self-selecting members such that they could expect to be in the majority of the group on most matters. Exit polls and other data will eventually define the group. We may think in political terms of all African-Americans, or all Jews, or all unionized factory workers as groups. But it may turn out that the best candidates for bloc voting are voters who are Latino lawyers, Jews who have visited Israel, residents of Detroit, union members who own their own homes, or users of the World Wide Web—because these groups or subgroups can be tracked through exit polls and may succeed in voting as suggested by their "leaders" or by a smaller majority of the group in pre-election polls. Much as some powerful interest groups form even though their members would seem to be dispersed and to suffer from collective action problems, so too some voting blocs are likely to emerge for reasons that are difficult to identify. Success, it should be noted, does not mean that home-owning union members voted for a candidate who promised to maintain the deduction for interest payments on residential mortgages—for that is a policy this group could be expected to favor in the short run and in the absence of any implicit or explicit precommitments. But if, for example, ninety

prefers Republicans, A has very little reason to tell pollsters anything other than that she is a Catholic African-American who voted for the Republicans. Agents who seek to bargain regarding the majority of Catholic or African-American voters will simply learn over time the true size of this group.

Mancur Olson, The Logic of Collective Action 159-60 & n.90 (1965), suggests that non-economic interest groups succeed through the provision of non-public goods to their members. One survey suggests that "citizen groups" that are independent of a particular profession or industry tend to rely on outside funding for their formation and growth. See Jack L. Walker, The Origins and Maintenance of Interest Groups in America, 77 Am. Pol. Sci. Rev. 390, 397-401 (1983).
percent of the members of this group voted for a candidate whose distinguishing platform plank was to favor subsidies to colleges, and other survey or economic data suggested that this policy appeals on its own to seventy percent of this group, then we might have good evidence of successful bloc voting in the sense of long-term power enhancement or magnification.

3. Proxies

If courts or state legislatures were willing to tolerate or authorize enforceable precommitment contracts, but the problem with such precommitments was the inability of the parties to monitor one another's performances, then a dramatic but familiar contractual and legal solution would be to allow voting by proxy, as is common in corporate law. Put in contractual terms, like-minded voters, forming a subset of all voters in a single election or political jurisdiction, could overcome collective action problems by delegating their franchise to a reliable intermediary. Even if these proxies were revocable, as agency law might like,97 their amalgamation in the hands of someone who could bargain with other coalitions or simply vote in the manner preferred by a majority of the principals would go a long way toward solving the problems associated with self-selecting precommitments of the kind discussed here. Proxy voting is such a familiar and unobjectionable practice in corporate law that it can be difficult to explain why the rules of corporate law and politics are in this respect so different.98

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If proxies were permitted in general elections and were effective for more than one election cycle there would be the potential for truly powerful bloc voting. Proxies would also increase voter "turnout," which is itself part of the collective action problem associated with bloc voting. Of course, election law, unlike corporate law, does not permit the use of proxies. Absentee ballots may be a step in the direction of proxies, but not a single state presently permits "blank" proxies, which could be used to threaten, bargain, and otherwise maximize the power of a voting bloc.

Proxies are not accepted on the floor of Congress. Congressional Quarterly, Guide to Congress 468 (4th ed. 1991). Nevertheless, there is something of a substitute for proxies in the longstanding tradition of pair voting, in which opposing members agree not to vote so that one or both can be absent from the voting. The pairing arrangement is not legally binding, but it is widespread. In a "live pair" arrangement, one member is absent and the member who is present votes but then withdraws the vote, announcing how both parties would have voted on the issue. In a "general pair," members who will be absent from a vote inform the clerk, who then pairs up legislators. A "specific pair" is a general pair whose positions on the issues are listed in the record. These pairing arrangements allow members to show both that their absences were unlikely to have affected substantive results and how they stood on the issue. See id. at 431. For an example of the rare case where pairing determined outcome, see William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 101-02 (1988) (floor amendment failed on a tie vote although a bare majority of thirty-four Senators favored it, because the thirty-fourth Senator was part of a live pair with an absent Senator).

Absentee voting first became an issue during the Civil War, when states passed special voting laws for soldiers. Absentee balloting has come to be universal, see...
In deliberative bodies, the case against proxies is that deliberation is devalued by absentee principals. But in general elections the argument against proxies is likely to have more to do with the (perhaps unnoticed) link between proxies and open ballots. Thus, there is no tradition of a secret ballot in corporate law where proxies are common. Proxy voting is not easily combined with secret ballots, and the logistical problems associated with this combination may be sufficient to explain the fact that proxies and secret ballots rarely if ever coexist on a large scale. Proxies and secrecy might coexist if each

Edward B. Moreton, Jr., Note, Voting by Mail, 58 S. Cal. L. Rev. 1261, 1261-62 (1985) (noting that absentee ballot statutes are found in every American jurisdiction), and imitative of the qualities of general elections. See, e.g., Peterson v. City of San Diego, 666 P.2d 975, 978 (Cal. 1983) (holding that a mail ballot election did not violate the California Constitution's requirement for secret voting). Indeed, whenever absentee ballot voting begins to take on the characteristics of proxy voting, courts are quick to invalidate the suspicious votes. In Gooch v. Hendrix, 851 P.2d 1321 (Cal. 1993), the Black American Political Association of California (BAPAC) conducted a comprehensive school board election campaign which the court found to be illegal. BAPAC encouraged voters to ask that absentee ballots be mailed to its office. BAPAC then hand-delivered the ballots to these voters, encouraging them to complete them on the spot, and offering to mail the ballots on the voter's behalf. The court insisted that such delegation by absentee voters did not satisfy the statutory requirement that the voter deliver the ballot either personally, directly by mail, or by way of a family member designated in the statute as authorized to hand-deliver the ballot when the voter is unable to do so because of illness or other physical disability. Id. at 1329; see also Bolden v. Potter, 452 So. 2d 564, 567 (Fla. 1984) (invalidating all absentee ballots in school board election due to extensive vote buying and other fraudulent behavior).

The Contract with America generated a ban on proxy voting in committees of the House of Representatives. See H.R. Res. 6, 104th Cong., 1st Sess. § 104 (1995). Four months later the ban was modified to permit limited and specific proxy voting (on specific issues rather than more general delegations of voting power) by committee members. H.R. Res. 142, 104th Cong., 1st Sess. (1995). In the Senate, committees may allow proxy voting, but only if the absent Senator has been informed on the issue and has affirmatively requested that his or her position be recorded. Guide to Congress, supra note 99, at 468.

My claim is not that all open ballot systems will permit proxies, but that it is easy to allow proxies where voting need not be secret.

Although most corporations use open voting procedures (with proxy voting), confidential proxy voting—managed by an intermediary—is used by many large companies. See Carol Goforth, Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late, 43 Am. U. L. Rev. 379, 462 n.496 (1994).

During the colonial period, proxies were permitted in Massachusetts Bay and Plymouth Colonies, Connecticut, Rhode Island, Maryland and New Jersey, and balloting was apparently open. See Luce, supra note 54, at 96-112 (recounting...
registered voter were issued a card which could be deposited with an agent. The agent needs to know how many proxies have been received, but the agent need not know the identities of the principals. At the same time, many kinds of fraud, corruption, and vote selling are best uncovered when there is less secrecy rather than more; proxies must at least be traceable in order to prevent gross abuses. It is perhaps not much of a puzzle, therefore, that would-be participants in a voting bloc do not lobby their state legislatures for rules which would allow proxies in general elections.

I hesitate to take a position on the desirability of proxy voting in general elections. Despite the risks of such a precommitment strategy, proxies might empower groups that are disadvantaged in a world of organized interest groups. And in the absence of proxy voting, there is likely to be little in the way of precommitment agreements among like-minded individuals empowered to vote in general elections.

C. Cooperation by Elected Representatives and by Jurisdictions

1. Precommitments by Like-Minded Politicians

If millions of voters who are free to cast secret ballots face grave collective action problems in cooperating to form voting blocs, then it is apparent that elected representatives, who share regional or ideological interests, may be better candidates for a cooperative precommitment scheme. One way to think of this is as a substitute for party discipline. If twelve senators perceive that they are like-minded, each, for instance, experiencing a correlation of exactly .75 with respect to how the majority of the group votes on matters before the Senate, then these twelve
senators might gain power by precommitting to vote according to the instructions of the majority of their group. Each participant could reason (and explain to constituents) that for every vote in which independence is grudgingly sacrificed there will be three votes in which the participant's vote is magnified. This kind of precommitment approaches the idea of a political party—although a political party might suffer from agency costs that a precommitting group need not encounter. The precommitment idea is also related to the familiar institution of a congressional caucus, but it comes closest perhaps to the behavior of a number of groups of self-selecting countries in the United Nations. Open ballots and repeat play surely facilitate such bloc voting.

American political history is not without its own examples of groups of elected representatives who appear to have voted together in ways consciously calculated to sacrifice the short-term preferences of some members in return for greater overall power. Indeed, the best explanation for a dearth of such “subparties with discipline” may be that elected representatives rarely have the kind of reliable but unspecifiable like-mindedness necessary to make a disciplined subparty advantageous. The contrary explanation is that without

104 See Frederic L. Kirgis, Jr., International Organizations in Their Legal Setting 214 (2d ed. 1993). Some of the decision-making procedures followed in the U.N., such as the practice of meeting in regional caucuses to formulate policy, seem designed to further these objectives. Indeed, the practice of apportioning elected positions in the General Assembly among formally-recognized regional groups derives from early precommitment strategies. See Robert E. Riggs & Jack C. Plano, The United Nations: International Organization and World Politics 60-64 (2d ed. 1994). At the same time, roll call voting analyses show less solidarity than might have been expected. See generally Stokman, supra note 78, at 168-76 (1977) (providing a quantitative analysis of voting cohesion among groups of developing countries in the United Nations).

105 See, e.g., Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 Or. L. Rev. 1007, 1025 (1994) (describing pre-Seventeenth Amendment practice of candidates for Senate campaigning on behalf of state legislators who promised to vote for them); David S. Bogen, The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers, 44 Md. L. Rev. 939, 1004 (1985) (describing precommitment by Republican caucus in drafting the Fourteenth Amendment).
powerful leaders\textsuperscript{106} to punish defectors, agreements collapse in the absence of legal enforceability.

The potential advantages of—but legal problems with—substantive and procedural voting precommitments by representatives have been detailed in Part I. But agreements among elected representatives are not at all like those which might be made by candidates who promise either to abide by the will of their constituents or, more simply, to adhere to their own specific promises. Political precommitments by individual politicians to their constituents may offset the influence of organized interest groups, counteract the realities of modern campaign finance, and be consistent with the structure of our Constitution.\textsuperscript{107} In contrast, agreements among elected representatives may be seen as less likely to serve some democratic interest—and perhaps as even less healthy than agreements by individual voters to form voting blocs. The danger, of course, is that organized interest groups or self-serving politicians could use this precommitment tool to increase their power. We might therefore expect courts to be less tolerant of attempts by representatives to make serious promises to one another than of attempts by representatives to make enforceable promises to their own constituents.\textsuperscript{108}


\textsuperscript{107} Which is to say that this particular notion of popular sovereignty, imposed on no one but rather entered into as a kind of contract, may not offend the Constitution's careful balance among the various sources of political power. A Court that did not like term limits arising out of direct democracy could nevertheless tolerate an enforceable contract by a candidate to vote as constituents instructed.

\textsuperscript{108} Precommitments among large numbers of voters, as described in Part II.B.1, probably fit somewhere between anti-Burkean precommitments and agreements among elected representatives. The pro-democracy argument is that such precommitments might provide an antidote to more easily organized interest groups. The negative argument is that the device is available only to groups that happen to be able to self-select and to reveal and prove their power and ability to control defections (through precinct data or other means). But the winners and losers are unclear. If, for example, proxies were permitted (by courts or by state law), previously weak
Congress could, however, enable and even encourage "subparties," or precommitments by groups of elected representatives, both by creating internal rules which allow the wider use of proxies and by altering committee and staffing rules to reward those who join subparties. Courts would be most unlikely to interfere with these "internal" rules. In turn, given that Congress has not gone as far as it might to encourage party (or any subparty) discipline, courts might be thought likely to refrain from enforcing agreements that raise constitutional problems because such "intervention" would work changes equivalent to direct (and unadopted) changes to the internal rules. Thus, few objections are raised to explicit congressional precommitments, in the form of irrevocable delegations of power, such as the decision to vote for or against (with no modifications of) the recommendations of a commission set up to recommend the closing of some military bases. At the same time, in the absence of this explicit delegation or

109 See discussion supra note 35 (speculating that courts might be more tolerant of internal rules); supra note 101 (indicating that both chambers of the U.S. Congress currently allow proxies to be used at the committee level). On the relationship between Article I, Section 5 and the political question doctrine, see generally Michael B. Miller, Comment, The Justiciability of Legislative Rules and the "Political" Political Question Doctrine, 78 Cal. L. Rev. 1341 (1990) (reviewing the justiciability of legislative procedural rules and concluding that such rules should be deemed nonjusticiable when they raise inherently political questions, such as suits by legislators challenging legislative procedures); see also Nixon v. United States, 506 U.S. 224 (1993) (rejecting as nonjusticiable the claim that the Constitution requires the entire Senate to hear evidence in an impeachment trial). There are, however, occasional warnings that the courts might intervene in the event of truly extreme congressional rules. See id. at 239 (White, J., concurring in judgment) ("the Senate has wide discretion . . . [but] I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction . . ."); id. at 253-54 (Souter, J., concurring in judgment) ("[i]f the Senate were to act in a manner seriously threatening the integrity of its results . . . judicial interference might well be appropriate.").

precommitment, we would not expect courts to enforce an agreement among a subset of legislators to vote up or down when deciding on some future program.

This conclusion, or conjecture, applies with some force to precommitments that appear to be aimed at solving collective action problems. Thus, if a group of senators precommitted to pay liquidated damages in the event that they voted to raise the federal debt ceiling or to create exceptions to a balanced-budget measure, courts might be expected to refuse to enforce the promises in the event that a promisor breached (and refused to pay as promised). Part of the argument in favor of judicial tolerance is that the arrangement between each promisor and his or her constituents is voluntary, and that the matter can be distinguished from cases where precommitments and populist initiatives have met judicial hostility. On the other hand, such coalitions of representatives introduce inflexibility and may threaten the national legislature. Moreover, it may seem safe for courts to reject such innovations because the Senate itself could create enforcement mechanisms to support precommitments among its members. In the absence of internal rules supporting these alliances, those who favor dramatic solutions to political collective action problems may need to resort to constitutional amendments.

2. Unions of Jurisdictions

Regional preferences and problems can, quite plainly, generate political alignments. It is therefore possible to imagine a set of states attempting to bind their representatives to vote as a bloc, in order to combat the agency costs associated with elected representatives who self-servingly value the Burkean ideal, either because they have their own preferences or because they benefit from the attention paid to them not so much by their legally assigned constituents but rather by organized interest groups. Again, the idea is that these states might have sufficiently aligned interests so as to make it worthwhile for the residents of each state to sacrifice the independence of its representatives in return for the magnifying power of bloc voting.

See supra Part I.D.
If the collective action problems surrounding this sort of plan were overcome by using state governments—which might seek to penalize defectors or reward cooperators—then a new legal hurdle is the constitutional ban on interstate compacts.\textsuperscript{112} Inasmuch as the very point of this kind of agreement would be to increase the political power of a subset of states with respect to the other states, there is every reason to think that the Court would be hostile to this variety of precommitment politics.\textsuperscript{113} Again, ex post subsidies to cooperating, faithful representatives might also run into the bribery or supplemental income problems.\textsuperscript{114} As a practical matter, therefore, precommitment schemes among jurisdictions may be possible only where the Federal Constitution is of tangential relevance; an agreement by a group of counties or other (legal or self-designated) entities within a single state might, for example, be a testing ground for the kind of precommitment politics suggested here.

\textsuperscript{112} "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art. I, § 10, cl. 3. Even though this clause has been construed narrowly by the Supreme Court, a compact designed to increase the political power of member states could easily run afoul of its prohibition. See Tribe, supra note 65, at § 6-33. There is even a question as to whether or not Congress could approve such a compact. See Cuyler v. Adams, 449 U.S. 433, 440 (1981) (observing that Congress can consent to a compact that is an appropriate subject for congressional legislation). The basic test, originating in a boundary dispute settlement, is that the clause prohibits an agreement which increases political power in the states at the expense of the federal government. See Virginia v. Tennessee, 148 U.S. 503, 519-20 (1893). Thus, an agreement on apportioning state taxes was upheld in U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978), even though a more federally-minded Court might have insisted that such an agreement increased the relative power of states with respect to multistate businesses or avoided putting the states in a position where they would have needed congressional approval (and might have needed to bargain away something or other in order to obtain such approval). For arguments that the Compact Clause need not be a bar to interstate agreements to engage in voting blocs and the like, see infra note 113.

\textsuperscript{113} The obvious problem is that states are likely to engage in bloc voting in order to gain voting power at the expense of other (nonaligned) states. One way around this constitutional problem would be for state governments to stay out of the way in favor of allowing organized groups of citizens within each state, or elected representatives themselves, to fashion agreements. Another possibility is for a group of states to take advantage of the Court's history of asking only whether an interstate agreement unsubtly seeks to appropriate federal power to a set of states, see supra note 112, by coordinating their incentives to legislators in the name of "regional economic development." The larger issue is that the Court needs a better theory of the Compact Clause in order to evaluate its impact on interstate precommitment politics.

\textsuperscript{114} See supra notes 14 (bribery and illegal gratuity) and 39 (supplemental income).
III. CONCLUSION

The case against precommitment politics is itself about precommitment. It is arguable that the Constitution, or even perhaps the common law and constitutional law of democracy everywhere, precommits to a political world with no remedy for breach of "contract" other than reputational losses for the promisor and the possibility of voter disapproval in future elections. There are small pieces of textual evidence in favor of this view of American law, including the absence of any constitutional provision for the popular recall of elected officials, the Speech or Debate Clause, and the Compact Clause, but these elements can also be used to argue the opposite case.\footnote{Consider also the history of the Electoral College. States can allow political parties to require presidential electors to pledge to vote for their political party's nominated candidate. See Ray v. Blair, 343 U.S. 214, 227-31 (1952) (holding that Alabama could exclude a Democratic Party elector who refused to pledge support for the Democratic Party's candidate). Nevertheless, an elector cannot legally be prevented from casting her vote for whomever she pleases, thus betraying the voters' trust and her own pledge. See Congressional Quarterly, Guide to U.S. Elections 207 (1975). But when all is said and done the evolution of the Electoral College has plainly been toward the mandate model. See McPherson v. Blacker, 146 U.S. 1, 36 (1892) (noting that the original expectation of independent electors has been frustrated). A Burkean institution has become mandate-driven—with hardly any objection from courts.

Moreover, within the procedural context of the Electoral College, it is noteworthy that although there had been a choice among three methods of choosing electors, "voting within the state legislature, statewide unit voting, or district voting," Michael J. O'Sullivan, Note, Artificial Unit Voting and the Electoral College, 65 S. Cal. L. Rev. 2421, 2425 (1992), states quickly competed with one another until all came to use the unit (or winner-take-all) method of voting. Id. at 2427. The Founders recognized this contest for what it was—a precommitment strategy designed to maximize the electoral votes of each individual state. For example, Thomas Jefferson wrote to James Monroe on the Electoral College vote:

On the subject of an election by a general ticket, or by districts, most persons here seem to have made up their minds. All agree that an election by districts would be best, if it could be general; but while ten States choose either by their legislatures or by a general ticket [precommitting to vote as a unit], it is folly and worse than folly for the other six not to do it. In these ten States the minority is certainly unrepresented; and their majorities not only have the weight of their whole State in their scale, but have the benefit of so much of our minorities as can succeed at a district election.

Letter from Thomas Jefferson to Colonel James Monroe (Jan. 12, 1800), \textit{in} 10 The Writings of Thomas Jefferson 134 (1907). In similar fashion, James Madison wrote to George Hay:

I agree entirely with you in thinking that the election of presidential electors by districts is an amendment very proper to be brought forward . . . . The district.
If there is room to view the Constitution (or other blueprints for democracy) as something less than inalterably opposed to precommitment politics of all kinds, then there are both normative and positive cases to be made about precommitments. The central normative claim builds on the idea that since contractual precommitments by informed and well-endowed parties are generally thought to be fair and efficient, it is likely that there are similar gains from trade in the political arena. The argument is strengthened by the perception that organized interest groups have substantial power in our political system, that this power may sometimes reflect market and political failures, and that legal constraints on (majoritarian) campaign finance reform—combined with the financial investments necessary for many political election campaigns—further empower organized interests. It is plausible that dispersed interests would benefit in relative terms from the introduction of enforceable political precommitments. The logic of collective action may also suggest the wisdom of a generous interpretation of legal doctrines in favor of precommitment strategies that bond otherwise unorganized but like-minded voters. Of course, if political precommitments will either be generally enforced or not enforced, then the normative argument for enforcement must rest on the perception that organized interest groups are already powerful and often undesirable, so that there is more to gain than to lose from additional political contracts. In any event, there is an especially strong argument for permitting representatives to bind themselves to their constituents in a flexible manner.\footnote{mode was mostly, if not exclusively, in view when the Constitution was framed and adopted; and was exchanged for the general ticket and the legislative election [in which the whole state precommits to vote as a unit] as the only expedient for baffling the policy of the particular States which had set the example. Letter from James Madison to George Hay (Aug. 23, 1823), \textit{in} 3 Letters and Other Writings of James Madison 332, 333-34 (1867). Thus, states perceived that their like-minded citizens would gain power compared with citizens of other states if their delegations were selected through a winner-takes-all procedure. Put differently, precommitment politics flourished in at least one setting.\footnote{Again, the binding material would consist of financial incentives, much as contracting parties are encouraged to "bind" themselves to one another by the remedies available in contract law.}}
The positive perspective on precommitment politics centers on its puzzling absence in most settings. There are precommitment arrangements in some deliberative bodies, but no real examples of aspiring representatives testing the legal limits of precommitment to the voters they court. The absence of precommitments by representatives to their constituents may be best explained by a circular problem involving credibility. Voters would not believe precommitments of the kind advanced in Part I of this Article because courts have never enforced such

117 On precommitments among members of the United Nations, see supra note 104. In American politics, the most interesting examples involve party discipline. During the Progressive Era, the Democratic Caucus controlled the voting behavior of representatives in rather notorious fashion. See H.R. Doc. No. 324, supra note 106, at 122-23. In 1915, Rule 7 of the Democratic Caucus stated as follows:

In deciding upon action in the house involving party policy or principle, a two-thirds vote of those present and voting at a caucus meeting shall bind all members of the caucus; provided, the said two-thirds vote is a majority of the full Democratic membership of the house, and provided further, that no

The passage of the Seventeenth Amendment, which provided for the popular
election of senators, was a successful example of utilizing precommitment politics to overcome entrenched institutional opposition to direct democracy. The “Oregon System”—the populist-inspired reform of Oregon state government which became the symbol of direct democracy during the Progressive Era leading to the adoption of the Seventeenth Amendment—required candidates for the state legislature to sign one of two statements: in the first the candidate pledged to vote for the popularly nominated United States Senate candidate, and in the second the candidate pledged to use his own judgment in choosing senators. See Kobach, supra note 54, at 1978. It is not surprising that most candidates for popular election endorsed the former pledge, and voted accordingly in elections for United States senators. Id. Although these pledges were probably unenforceable as contracts, they successfully transformed the elections of Oregon’s United States senators in the state legislative assembly from a trustee to a mandate model. See generally Schuman, supra note 9 (recounting the history and origins of the “Oregon System”). A similar phenomenon occurred with electors to the presidential college. See supra note 115; see also supra notes 22-28 and accompanying text (proposing congressional precommitments regarding recommendations from commissions).

118 Put differently, there is no shortage of explanations for courts’ refusing to make political promises enforceable, but courts have not been put to the test by aspiring political candidates. I have of course tried to suggest that most of the objections to judicial enforcement, including administrative problems and various constitutional hints, are in fact surmountable.
contracts. If so, the system awaits some enterprising politician who precommits as described, has some luck with the electorate, and then perhaps regrets his promises (and tests the enforceability of the earlier precommitment in the courts). Judicial sympathy for the disappointed voters (and for other aspiring politicians)—or, as I have suggested, perhaps hostility to interest groups—might then create a precedent which facilitates precommitment politics. The attention paid to the Contract with America, and to specific precommitment attempts regarding terms of office and balanced budgets, may induce enterprising politicians down this path. The positive, normative, and doctrinal questions raised here may then be upon us.

Another solution to the positive puzzle of the absence of innovative precommitments is that aspiring politicians may understand that voters are not really as disgusted with broken promises, interest groups, and professional representatives as it sometimes appears.\(^{119}\) If—contrary to my own intuitions—few voters (and readers) would wish for their representatives to precommit to a mandate model, and if voters value political flexibility enough to tolerate broken (specific, substantive) promises, and if most voters would not wish to be able to precommit along with selected other voters to bloc voting, then perhaps it is time we realize that the literature on rent seeking, agency costs, interest groups, and campaign finance is at odds with what most voters (and even most academic readers) really think about the health of our system of political representation. If, on the other hand, serious citizens regard the political system as in need of repair, then it is time to tolerate and even encourage experiments of the kind explored in this Article.

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\(^{119}\) Alternatively, perhaps no aspiring politician has yet thought of the contract analogy and of the idea of an enforceable precommitment to reflect voter preferences as revealed, for example, by a carefully chosen and insulated survey group.