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Legitimizing the Modern American Democracy through Fourth-Branch Institutions

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**LEGITIMIZING THE MODERN
AMERICAN DEMOCRACY THROUGH
“FOURTH-BRANCH” INSTITUTIONS**

ALEX SARSFIELD*

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I. INTRODUCTION

Recent scholarship has examined alternative means to the traditional three-branch model of government for modern democracies.¹ This literature has pointed out that a growing distrust of democratic institutions forces states to implement safeguards, like constitutional courts, to protect characteristic commitments of democracy, and to instill trust back into the public. However, placing the power to check democratic institutions in an unelected body creates tension within separation of powers doctrine, and causes further concern among an already distrustful populace. Moreover, courts generally lack the necessary resources to regulate the complexities within a modern democracy.

These obvious concerns lead constitutional designers to create a series of independent institutions designed to check and control the elected branches of government.² These “fourth-branch” institutions provide an effective remedy for the tension between democracy and judicial review, and, as an apolitical branch, their actions focus solely on upholding the commitments of a constitutional democracy. Additionally, these institutions specialize in certain areas of government, and they may act *ex ante* to help curb legislative policy in ways the courts cannot. Some independent institutions that can be seen across modern democracies include electoral commissions, human rights institutions, anticorruption commissions, and information commissions.³ Moreover, these independent bodies are found in countries with diverse democratic systems, such as India, South

1. For examples of the recent literature on exploring alternatives to the three-branch model of government, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (noting that modern constitutions should include a “fourth branch of government” to account for “certain fundamental bureaucratic structures,” which could not have been foreseen at the creation of the three-branch model) [hereinafter Ackerman, *Separation of Powers*]; EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005); David Landau, *A Dynamic Theory of Judicial Review*, 55 B.C. L. REV. 1501 (2014) [hereinafter Landau, *Dynamic Theory*]; CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953 (2007) [hereinafter Elmendorf, *Advisory Counterparts*].

2. See Landau, *Dynamic Theory*, *supra* note 1, at 1515 (noting that the proliferation of these independent institutions “is one of the most important—and least studied or understood—trends in constitutional design”).

3. See generally *infra* notes 46–66 and accompanying text.

Africa, Hungary, and Colombia, demonstrating their existence as a manifestation of general democratic distrust.⁴ Comparativists have examined the roles that independent institutions play in various nations,⁵ but they have yet to argue for their inclusion in the United States, where a distrust of democratic institutions pervades the minds of many.⁶

This Article aims to do just that. It argues that independent institutions would work well in upholding American democratic values, and instilling trust back into its elected branches. It provides a shared rationale for the emergence of independent institutions in modern democracies, while also addressing the uniquely American counter-majoritarian concerns. In doing so, I bring forth evidence primarily from two countries where these institutions have been utilized—India and South Africa—to show the benefits of embracing a “four branch” model of democracy.⁷ An examination of these two countries sheds light on the promises and pitfalls in establishing institutions divorced from the elected branches of government.

By no means does this Article provide an all-encompassing account of the roles independent institutions play in varying democratic frameworks. Instead, it attempts to spark a discussion on the benefits of their inclusion in the United States based on their proven effectiveness in other democracies. Although little research has been done on the proliferation of these institutions, what is clear is that they are increasingly looked to for support in democracies fraught with a distrust of democratic institutions.

The rest of this Article is organized as follows. Part II examines the emergence of independent institutions by providing a discussion of the growing distrust of the elected branches, and by surveying the types of institutions common among modern democracies.⁸ It further provides a rationale for their inclusion in bureaucratic states, due to the increased likelihood of corruption in such models of government.⁹ Part III provides a detailed account of

4. See Landau, *Dynamic Theory*, *supra* note 1, at 1516.

5. See generally Elmendorf, *Advisory Counterparts*, *supra* note 1 (noting that these types of institutions are used in many developing democracies, but they are typically merely advisory).

6. I believe this distrust has further grown over the past year, as Americans have seen members of the 2017 United States House of Representatives pass several laws benefiting the few, while harming the masses; see Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 890–91 (2014) (noting that democratic legitimacy calls for accountability and that accountability, according to Jonathan G.S. Koppell, includes having “transparency, liability, controllability, responsibility and responsiveness”).

7. See *infra* Part III.

8. See *infra* notes 15–68 and accompanying text.

9. See *infra* notes 69–78 and accompanying text.

the promises and pitfalls of employing independent institutions in existing democracies—namely India and South Africa. In examining these two countries, I focus on three primary evils they attempt to root out in order to protect the commitments of their respective democracies—election fraud, human rights violations, and government corruption.¹⁰

Part IV argues for the inclusion of independent institutions in the United States to effectively mitigate the tension between democracy and judicial review, and to instill trust back into its citizenry.¹¹ I discuss several instances where the current three-branch model has failed to uphold the foundational values of American democracy,¹² and I advocate for the inclusion of three particular institutions independent from the other branches—an electoral commission, a human rights commission, and a transparency commission.¹³ Lastly, Part V concludes by evaluating the practical concerns regarding implementation of these institutions as a fourth branch of government, with a focus on the national adoption of them.¹⁴

II. EMERGENCE OF INDEPENDENT INSTITUTIONS

This Part examines the emergence of independent institutions in modern democracies, and the role that they increasingly play in upholding the characteristic commitments of a liberal democracy. It provides a basis for why several scholars have suggested constitutional designers disregard the traditional conception of only three branches of government and, instead, embrace a more dynamic model using independent institutions as a “fourth branch” for support.¹⁵ In providing background information on these bodies, this Part provides the following: (1) a discussion of the distrust of democratic institutions,¹⁶ (2) a survey of the functions of these institutions in constitutional democracies,¹⁷ and (3) the need for

10. See *infra* notes 79–134 and accompanying text.

11. See *infra* notes 164–191 and accompanying text.

12. See *infra* notes 136–163 and accompanying text.

13. See *infra* notes 164–191 and accompanying text.

14. See *infra* notes 192–195 and accompanying text.

15. Telephone Interview with Christopher S. Elmendorf, Professor of Law, U.C. Davis Law School (Apr. 28, 2016) [hereafter Elmendorf Interview] (“Independent institutions are much better positioned to frame a response to the democratic distrust so prevalent in modern democracies.”). See generally Ackerman, *Separation of Powers*, *supra* note 1; RUBIN, *supra* note 1.

16. See *infra* notes 19–34 and accompanying text.

17. See *infra* notes 35–68 and accompanying text.

independent institutions in a bureaucratic state.¹⁸ Further, it provides a discussion of the benefits to employing such independent institutions as defenders of liberal democracy, along with the difficulties they may bring.

*A. Distrust of Democratic Institutions:
Embracing a "Four-Branch" Constitutional Model*

The Framers of the United States Constitution placed a high value on the separation of powers as a doctrine of democratic responsibility.¹⁹ Accordingly, they divorced the elected branches from the courts, attempting to protect the foundational values of liberal democracy for years to come. This three-branch model is utilized by many nations in order to improve democracy by insulating judicial action from those seeking office—or, at the very least, create the appearance of doing so.

Many scholars have examined the role that constitutional courts in modern democracies often assume—as guardians of liberality—and some have contended they are a prerequisite for a modern democracy to properly function.²⁰ However, others have critiqued the effectiveness of the judiciary in the regulation of political actors, proposing a more dynamic theory of judicial role as a possible solution to address the many defects in dysfunctional political systems.²¹ Even upon acceptance of this theory, though, we are left with the reality that judicial action alone fails to address the concerns that commonly arise in an advanced political state.²² Many of these concerns are rooted in the distrust of democratic institutions in modern governments.²³

Recent scholarship has recognized this concern, and it has surveyed a new approach that many democracies are utilizing to combat the pitfalls of the traditional three-branch model.²⁴ This

18. See *infra* notes 69–78 and accompanying text.

19. Ackerman, *Separation of Powers*, *supra* note 1, at 691.

20. See generally CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); Ackerman, *Separation of Powers*, *supra* note 1.

21. See generally Landau, *Dynamic Theory*, *supra* note 1.

22. See *id.* at 1515 (noting that “constitutional designers in newer democracies have found that judicial review alone is not enough,” which has led to the creation of independent institutions to check and control elected actors).

23. See José Álvaro Moisés, *Citizens Distrust in Democratic Institutions*, 16 INT’L REV. SOC., 594 (2006) (noting that citizens’ perception of “indifference or an institutional inefficiency before social demands, corruption, fraud or disrespect for citizenship generates mistrust, discredit and hopelessness, compromising acquiescence, obedience and submission of citizens towards the law, as well as to the structures that regulate social life”).

24. See Ackerman, *Separation of Powers*, *supra* note 1, at 691–92 (noting that modern constitutions should include a “fourth branch of government” to account for “certain

modern approach argues for the creation of independent institutions in order to address the concerns of an advanced bureaucratic state, and instill trust back into the democratic system through the independent regulation of its political actors.

The judiciary's limited capacity to fix constitutional problems is acknowledged by the designation of certain sections in constitutions as non-justiciable,²⁵ leaving issues deemed too important for an unelected body to be handled by a legislature.²⁶ Constitutional designers have good reason to rely on legislative bodies to handle certain matters, rather than the judiciary. Judiciaries often lack the expertise to craft an effective remedy for the problem, they may be inefficient in meeting their citizenry's needs, or there may be a general counter-majoritarian concern for judicial overreach or lack of accountability.²⁷

But what is to be done when members of a legislature are subjected to the clamoring of an illiberal minority that uses money to curb the law in its favor? The result is the enactment of laws that benefit the few, but are detrimental to the masses, thus undermining the foundation of a liberal democracy and creating distrust among its very own populace. Some states provide an answer to this problem by allowing judicial action only through process-based theories of constitutional judicial review,²⁸ intending to uphold the liberal aspirations of democracy by regulating those political institutions which threaten its core values, while also preventing judicial overreach.²⁹ These theories attempt to fill the gap between how politics *should* work, and how they *actually* work.³⁰

However, scholars who have advanced such theories seemingly ignore the substantive merits of the many laws that are presented to a constitutional court after passage through an elected body. This has led some nations, like India, to expand the role of the

fundamental bureaucratic structures," which could not have been foreseen at the creation of the three-branch model); see generally Elmendorf, *Advisory Counterparts*, *supra* note 1.

25. See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898–1902 (2004) [hereinafter Tushnet, *Social Welfare Rights*].

26. See, e.g., *Baker v. Carr*, 369 U.S. 186, 209 (1962) (noting that "federal courts will not intervene in cases [which] compel legislative reapportionment," and that such cases will be deemed political questions reserved to an elected body—the legislature).

27. See generally Kim Lane Scheppele, *Parliamentary Supplements (or Why Democracies Need More Than Parliaments)*, 89 B.U. L. REV. 795 (2009).

28. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

29. See JOHAN RABE, *EQUALITY, AFFIRMATIVE ACTION AND JUSTICE*, 88 (2001).

30. See Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063 (1980).

judiciary to become a sort of "good governance court."³¹ Although empowering the judiciary with more policing authority over the elected bodies seems like a solution, it falls victim to the inherent difficulties courts face when lacking both the expertise to dictate comprehensive policies and the political accountability to rally public support. Moreover, merely using courts to remedy a dysfunctional legislature does not alleviate the distrust in the institutions themselves.³² In order to instill this trust, political actors must embody the title they assume upon election—"representatives"—and fight for the majority that elected them into office.

Herein lies the heart of the problem: the inexpert counter-majoritarian judiciary cannot heal the wounds from the popular distrust of democratic institutions. Scholars have envisioned a number of different maneuvers in attempting to achieve democratic legitimacy capable of ridding such distrust from the populace.³³ Yet, they seldom venture out of the familiar three-branch template to which so many comparativists find themselves intellectually shackled. This distrust, and discontent with the judiciary as a solution to it, has led modern constitutional designers to create a series of independent institutions designed to check and control elected actors.³⁴

31. Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 8–17 (2009) [hereinafter Robinson, *Expanding Judiciaries*].

32. See William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 403–24 (1998).

33. There are many examples throughout literature that analyze democratic legitimacy within the traditional three branches of government. For a few that I use throughout this paper, see generally Tushnet, *Social Welfare Rights*, *supra* note 25 (studying the enforcement of constitutionally created social welfare rights by the courts); see also David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L. L. J. 319 (2010) (developing a comparative theory of judicial role that focuses on broad differences in political context) [hereinafter Landau, *Political Institutions*]; Ackerman, *Separation of Powers*, *supra* note 1, at 642–88 (arguing for a balance between democratically elected bodies and constitutional courts); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 200–11 (2013) (examining how constitutional changes effect the "democratic order").

34. See Landau, *Dynamic Theory*, *supra* note 1, at 1515 (noting that such distrust leads to the creation of institutions like "anticorruption commissions, ombudsmen, electoral courts and commissions, human rights commissions, independent prosecutors, independent comptrollers, etc.").

*B. Survey of Independent Institutions
and Their Roles in Government*

Constitutional democracies increasingly utilize independent institutions as a means to address the distrust of democratic institutions.³⁵ They embrace these “fourth-branch” bodies as either statutorily created or constitutionally mandated institutions that are essential to the functioning of a liberal democracy.³⁶ Recent scholarship has explained the attractions of these independent bodies for institutionalizing a constitutional commitment to liberal democracy as twofold.³⁷ First, these institutional bodies are better positioned than courts to handle structural remedies for illiberality.³⁸ This is because these institutions possess the expertise and superior resources for identifying threats to a liberal democracy. Moreover, they are flexible in exercising remedial measures because they are free from the confines of judicial precedent, allowing them to act *ex ante* in an ever-changing world.

The second argument for independent institutions is that they have the ability to engage the masses and instill trust back into the elected bodies by way of transparency.³⁹ Ensuring transparency between elected actors and their constituents

35. See generally INDIA CONST. (establishing an independent finance commission, public service commissions, an election commission, and a commission to investigate social class status); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY (establishing an independent media commission and ombudsmen for a fundamental rights commission); David Banisar, *Freedom of Information and Access to Government Record Laws Around the World*, FREEDOMINFO.ORG GLOBAL SURVEY (2004), http://www.freedominfo.org/documents/global_survey2004.pdf (last visited May 7, 2017) (demonstrating the vast amount of countries which have adopted comprehensive laws on access in order to place an independent check on political institutions).

36. Some nations constitutionally mandate independent commissions to uphold liberal values, while others permit the legislature to enact such commissions. See generally INDIA CONST. (establishing an independent finance commission, public service commissions, an election commission, and a commission to investigate social class status); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY (establishing an independent media commission and ombudsmen for a fundamental rights commission); David Banisar, *Freedom of Information and Access to Government Record Laws Around the World*, FREEDOMINFO.ORG GLOBAL SURVEY (2004), http://www.freedominfo.org/documents/global_survey2004.pdf (last visited May 7, 2017) (demonstrating the vast amount of countries which have adopted comprehensive laws on access in order to place an independent check on political institutions).

37. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 957 (note that, although Elmendorf argues these institutions are merely advisory, there is ample evidence to the contrary, demonstrated by the examples throughout Parts II and III).

38. *Id.*; but cf. Elmendorf Interview, *supra* note 15 (Elmendorf explained, contrary to his earlier work, that these independent institutions actually wield real power and are in a much better position than other branches for remedying public concerns.).

39. Elmendorf Interview, *supra* note 15

allows for political accountability and, thus, better representation through the satisfaction, or dissatisfaction, of voters at the polls.⁴⁰

The combination of these two arguments—along with government cooperation—allows for independent institutions to effectively drive policy within the socio-cultural contexts in which they are situated, benefitting their respective populaces, and upholding the core principles of a liberal democracy.⁴¹ The result has been the establishment of many independent bodies around the world, including national human rights institutions (NHRIs),⁴² privacy commissions,⁴³ information commissions,⁴⁴ anticorruption commissions,⁴⁵ and electoral commissions.⁴⁶ These institutions—though not directly elected—perform valuable functions that increase the democratic legitimacy in governments.⁴⁷ By driving policy through *ex ante* measures rather than *ex post*—like constitutional courts—these bodies further the democratic interests of the population at large while maintaining a necessary independence from the institutions the public has grown to distrust.

1. National Human Rights Institutions

National human rights institutions are independent governmental entities with a mandate to promote and protect human rights.⁴⁸ The inability of the three-branch model to protect human rights is evidenced by the increasing demand for separate NHRIs. Between 1990 and 2003, there was a dramatic increase in the number of NHRIs across the world.⁴⁹

40. Elmendorf, *Advisory Counterparts*, *supra* note 1, at 959 (explaining that liberal societies allow citizens to “participate in the political process on equal footing,” and that political accountability of democratic institutions will ensure that all means to political equality are exhausted).

41. See RYAN GOODMAN & THOMAS PEGRAM, *HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS*, 74 (2012).

42. *Id.* at 74–90.

43. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 964–65.

44. *Id.* at 966; see generally Banisar, *supra* note 35.

45. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 967.

46. *Id.* at 968; see also Scheppele, *supra* note 27, at 810 (noting that these institutions “supplement the capacity of parliaments to respond to democratic mandates”).

47. See Scheppele, *supra* note 27, at 810.

48. See GOODMAN, *supra* note 4041, at 1 (citing the United Nations’ definition of NHRIs as bodies which are established “by a government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights”).

49. MORTEN KJAERUM, *DANISH INST. FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS IMPLEMENTING HUMAN RIGHTS 5* (Klaus Slavensky ed. 2003), <http://www.nhri.net/pdf/NHRI-Implementing%20human%20rights.pdf>.

The proliferation of independent NHRIs owes much of its credit to the ombudsman and the commission of inquiry.⁵⁰ The classical ombudsman—a Swedish invention—is supposed to act *ex post* as prosecutor for the people in seeking relief from wrongs committed against them.⁵¹ On the other hand, commissions of inquiry act *ex ante* by studying large-scale societal problems and proposing policy reforms.⁵² Together, these non-traditional institutions paved the way for NHRIs to flourish in contexts where neither political actors nor courts adequately protect the fundamental rights of their citizenry. Although some scholars correctly highlight the fact that most NHRIs lack formal remedial power, the actual power they wield derives from the transparency argument above—they engage the masses and inculcate human rights norms, spread awareness of human rights violations, and encourage the ratification of and compliance with international human rights norms in legislatures.⁵³

2. Privacy Commissions

Privacy commissions are specialized independent bodies concerned with data protection.⁵⁴ These commissions stem from a distrust of democratic institutions to handle data protection matters in an increasingly technological and commercialized world.⁵⁵ They help to implement and revise data protection laws by working with government entities.⁵⁶ There is concern for the independence of these institutions in a constitutional democracy, particularly where there is a strong executive branch that seeks to use innovative technologies to infringe on the rights of its citizenry in the name of security.⁵⁷ However, the risk

50. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 961–62.

51. *Id.* at 962; see also U.N. CENTRE FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS 8–9 (1995); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 12 (2004).

52. Elmendorf, *Advisory Counterparts*, *supra* note 1, at 962.

53. *Id.* at 963–64.

54. *Id.* at 694.

55. See Robert Gellman, *A Better Way to Approach Privacy Policy in the United States: Establish a Non-Regulatory Privacy Protection Board*, 54 HASTINGS L.J. 1183, 1185 (2003) (noting that the popularity of independent privacy commissions is based on an “international recognition of a need to address privacy issues through a formal and dedicated organization, and on a demonstrated record of accomplishment and utility,” implying that traditional governmental entities lack such utility).

56. *Id.*

57. See Scheppele, *supra* note 27, at 818 (explaining that executive power may try to overreach, and that the “courts can help them restore constitutional commitments that protect the population in the longer view,” because they are completely insulated from executive pressure); see also Elmendorf, *Advisory Counterparts*, *supra* note 1, at 965 (noting

of privacy infringement, and thus increased distrust among the public, is discernibly greater when the duty of data protection rests upon an elected polity's shoulders.

3. Information Commissions & Anticorruption Commissions

Information commissions and anticorruption commissions both seek to provide transparency in the workings of the political elite, while also enforcing punitive measures in cases where corruption threatens democratic values.⁵⁸ These institutions have been established to monitor the legal and administrative frameworks in government, thereby providing the transparency necessary to ease the worries of a distrustful populace.⁵⁹ These bodies are assigned to the general oversight of the freedom of information system, including reviewing and proposing changes, and increasing public awareness.⁶⁰ They follow the commissions of inquiry, but also provide a further remedy by enforcing penalties if the policies set forth are ignored. These penalties include either binding orders of disclosure to the corrupt entities or officials,⁶¹ or increasing the public discourse on the matter and holding the wrongdoer[s] politically accountable.

4. Electoral Commissions

Finally, governments create electoral commissions to run and regulate elections,⁶² effectively empowering these independent bodies to guard over the most fundamental aspects of a liberal democracy: election law and governmental integrity. An increasingly prominent threat to modern democracies is the entrenchment of incumbent officials through election laws in order to stay atop a robust and competitive political climate.⁶³ Governments have sought to alleviate these concerns by establishing electoral commissions, which have the power to

the "serious questions" about whether these commissions will remain meaningfully independent when pressured by the White House).

58. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 966–67; see also Banisar, *supra* note 35, at 6 for data regarding which countries employ such commissions.

59. See Banisar, *supra* note 35, at 6 (noting that such commissions exist in Belgium, Canada, Estonia, France, Hungary, Ireland, Latvia, Mexico Portugal, Slovenia, Thailand, the United Kingdom, and on the regional level in Germany).

60. *Id.*

61. *Id.*

62. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 968.

63. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1366 (2005) [hereinafter Elmendorf, *Representation Reinforcement*].

review electoral legislation with the interest of strengthening constitutional democracy, and they may report to the legislature any laws that may be harmful to democratic values.⁶⁴

An argument can be made that these institutions are not wholly independent, as some are created through legislative action, and some lack any formal power.⁶⁵ However, in other jurisdictions—like the United Kingdom—the elected branches of government have a legal obligation to respond to the advisory body's proposal.⁶⁶ Typically, the commission's proposal is accepted as is, and no revisions are made by the legislature.⁶⁷ This may be to avoid a quasi-judicial process, or merely to save political face in the eye of the public. Further, some nations—like India—constitutionally situate those who serve on the electoral commission similarly to Supreme Court Justices,⁶⁸ entrenching their role in the very fabric of the commitments to its democracy.

C. Answering the Democratic Disconnect in the Bureaucratic State

As constitutional democracies grow, so too do their responsibilities in governing.⁶⁹ What follows is the vast manufacturing of governmental positions in order to meet the demands of a burgeoning state. However, to uphold the foundational values of a constitutional democracy, the will of the governed, as expressed by their elected representatives, must affect the actions of government.⁷⁰ The development of the

64. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 968 (noting that South Africa's Electoral Commission has "a mandate to 'conduct research on electoral matters and to continuously review electoral legislation' in the interest of 'strengthening . . . constitutional democracy'").

65. See Elmendorf, *Representation Reinforcement*, *supra* note 6263, at 1386 (noting that, in a number of jurisdictions, the commission's formal power is limited to proposing district maps).

66. Parliamentary Constituencies Act 1986, c. 56, §§ 3(3)–3(5) (Eng.).

67. See Elmendorf, *Representation Reinforcement*, *supra* note 6263, at 1388 ("Legislatures almost uniformly accede to the recommendations of nonpartisan districting commissions.").

68. INDIA CONST. art. 324 § 5 (stating that "the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner").

69. A clever quote on this topic may be attributed to Oscar Wilde: "The bureaucracy is expanding to meet the needs of the expanding bureaucracy."

70. See Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91, 91 (1994).

bureaucratic state⁷¹ has complicated the modern policymaking process and created a democratic disconnect between the government and its citizenry⁷²—leaving the underrepresented in want of a more democracy-improving model.

Due to the increasing needs of the modern democracy, many legislatures choose to delegate their authority to unelected entities, thus subverting the general will of the governed.⁷³ Some scholars even go so far as to label such delegation an unjust abdication of democratic authority,⁷⁴ leading to the hopeless conclusion that constitutional democracy is unsustainable in the modern world.⁷⁵

However, scholars of this morbid approach fall victim to the same stubbornness as those comparativists previously discussed⁷⁶—they believe that democratic legitimacy must be delivered through a traditional three-branch model. Independent institutions provide a viable “fourth-branch” solution to the troubles of the bureaucratic state. They possess the specialized expertise to manage a complex modern democracy;⁷⁷ they are apolitical and serve with the sole interest of upholding the foundational commitments of liberal democracy;⁷⁸ and they are insulated from both the pressures of private interests, and the robust political arena.

III. EXAMINING THE ROLE OF INDEPENDENT INSTITUTIONS IN EXISTING CONSTITUTIONAL DEMOCRACIES

The last Part provided an overarching rationale for independent institutions in liberal democracies—to provide a non-judicial remedy for the growing distrust of democratic

71. Bureaucratic states are states run by “a large group of people who are involved in running a government but who are not elected.” *Bureaucracy*, MERRIAM-WEBSTER'S LEARNER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/bureaucracy>.

72. See MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 232–35 (Hans H. Gerth & C. Wright Mills eds. & trans., Oxford University Press paperback 1958).

73. See Lupia, *supra* note 6970.

74. See Weber, *supra* note 7172, at 233.

75. See Lupia, *supra* note 6970.

76. See *supra* Part II.A.

77. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 957 (noting that they are better situated than courts to pursue structural remedies because “counterparts’ license to craft legislative solutions to the problems they ascertain; from the counterparts’ superior resources for identifying and understanding threats to liberality”).

78. *Id.* (noting that these institutions “could be more thoroughly insulated from the elected branches of government without incurring the countermajoritarian risks associated with constitutional judicial review”).

institutions⁷⁹—and general examples of such institutions.⁸⁰ This Part, more specifically, demonstrates the role of these “fourth-branch” institutions in existing democracies, focusing its efforts on two nations—India and South Africa. In doing so, it describes the purpose of such institutions, the manner in which they operate, and it weighs their strengths and weaknesses as applied in those states, taking into account each respective political climate.

Beyond a descriptive account of these bodies in both India and South Africa, this Part aims to demonstrate the versatility of independent institutions in effectively safeguarding democratic values in bureaucratic states. In accomplishing this, I highlight those institutions that protect the fundamental commitments of a liberal democracy—namely, electoral commissions, human rights institutions, and information (“transparency”) commissions.

A. Democratic Distrust in India and the Rise of Independent Institutions

Legal scholars have seldom acknowledged the actual power held by independent institutions in liberal democracies.⁸¹ However, those who do recognize the untapped potential of these institutions have examined their use in India as a possible solution to democratic distrust in modern governments around the world.⁸² As the world’s largest democracy, India is referenced as an example of a global trend—the strengthening of the unelected branches.⁸³ This trend takes decision-making power away from representative

79. See *supra* notes 25–34 and accompanying text.

80. See *supra* notes 35–68 and accompanying text.

81. The little research completed on this topic describes these fourth-branch institutions as merely advisory, lacking any formal power to effectuate change in modern democracies. Though these scholars brilliantly describe the purpose of these institutions and their potential purposes, they fail to recognize the actual power they currently wield in existing democracies. See generally Elmendorf, *Advisory Counterparts*, *supra* note 1 (arguing that these independent institutions are merely advisory—branding them “advisory counterparts”); cf. Landau, *Dynamic Theory*, *supra* note 1, at 1516 (arguing that “in many cases, these non-judicial independent agencies have as sweeping a set of powers . . . as constitutional courts” and that “they should instead be viewed as an additional manifestation of democratic distrust”).

82. I owe much of my research to Nick Robinson, whose writing on India’s government and its fight to protect democracy has greatly enhanced my perspective of the role independent institutions may play in “good governance.” See Robinson, *Expanding Judiciaries*, *supra* note 3031, at 69 (noting that “other unelected bodies will likely play an important future governance role in India”); Landau, *Dynamic Theory*, *supra* note 1, at 1516 (noting that these institutions can be seen in India, Hungary, and Colombia and are “often designed in addition to—rather than as a replacement for—an activist constitutional court” to uphold and police the elected branches of government).

83. Robinson, *Expanding Judiciaries*, *supra* note 3031, at 3 (noting that “[t]here are few issues of political life in India with which the higher judiciary is not in some way involved, often critically”).

institutions and transfers it to the judiciary and independent bodies, attempting to satisfy the fear of corruption within the elected branches.⁸⁴ Recent scholars have even described the Indian Supreme Court as a "court of good governance" over the rest of government—potentially threatening the separation of powers requirement within modern constitutional frameworks.⁸⁵

From the beginning, India's founders were concerned that corruption within the elected branches would encumber the young nation's democratic intent.⁸⁶ A strong judiciary was cemented by failing to explicitly recognize a rigid separation of powers in the new constitution,⁸⁷ thus allowing for judicial overreach when the High Court believes Parliament acts inappropriately. To further combat this fear, the founders established a series of constitutionally-mandated unelected bodies designed to shift power away from Parliament and institutionalize apolitical groups tasked with safeguarding the foundational commitments of the young democracy.⁸⁸ India's founders foresaw the problem many nations are faced with today—that both representative bodies and courts lack the expertise and legitimacy necessary for good governance in a modern liberal democracy.

The proliferation of these bodies in India supports the inference that there are areas in government which are better off being governed by specialized bodies rather than by the general public's input.⁸⁹ I further highlight how the implementation of such institutions demonstrates that the elected branches alone cannot carry the weight of political responsiveness or of democratic legitimacy. To fill these cracks in its government, India created (1) an Election Commission,⁹⁰ (2) a National Human Rights Commission,⁹¹ and (3) a Central Vigilance Commission.⁹²

84. *Id.* at 17.

85. *Id.* at 3; *but see* *Rai Sahib Ram Jawaya Kapur v. Punjab*, (1955) 2 SCR 225, 235 (India) ("The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity . . .").

86. Robinson, *Expanding Judiciaries*, *supra* note 3031, at 17 (noting that India's founders worried over "politics, conflicts of interest, and corruption of the country's representative institutions").

87. *Rai Sahib Ram Jawaya Kapur*, 2 SCR at 235 ("The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity . . .").

88. *See* Robinson, *Expanding Judiciaries*, *supra* note 3031, at 17, 69 (noting that the founders of India set up a series of independent unelected bodies, including a national human rights commission, child rights commission, election commission, comptroller, finance commission, auditor general, and public service commissions).

89. *Id.* at 19.

90. INDIA CONST. art. 324.

91. The Protection of Human Rights Act, No. 43 of 2006, INDIA CODE (1993), http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf.

1. Election Commission of India

Article 324 of the Indian Constitution vests in the Election Commission the “superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President”⁹³ The Supreme Court of India has interpreted the phrase “conduct of elections” to confer upon the Election Commission the “power to make all necessary provisions for conducting free and fair elections.”⁹⁴ It may facially seem counterintuitive to vest the power to control the very nature of a democracy in an unelected body. But a deeper understanding reveals the profound distrust India’s founders had for political actors in a traditional three-branch model of government. The Court echoed this distrust through its interpretation of Article 324, permitting the Commission to address the “infinite variety of situations [not yet addressed by statute] that may emerge from time to time in such a large democracy.”⁹⁵

The Election Commission may be composed of several commissioners, but a Chief Election Commissioner must always be present, and he will head the committee when in session.⁹⁶ The Indian Constitution politically insulates the Chief Commissioner by situating his appointment and removal akin to that of a Judge on the Supreme Court.⁹⁷ This structure has permitted the Commission to wield actual power in the administration of free and fair elections while also maintaining legitimacy through its frequent cooperation with Parliament.

92. The Central Vigilance Commission Act, No. 45 of 2003, INDIA CODE (2003), <http://cvc.nic.in/cvcact.pdf>.

93. *See supra* note 89, INDIA CONST. art. 324.

94. *Union of India v. Ass'n for Democratic Reforms*, (2002) 2 LRI 305. *See also Mohinder Singh Gill v. Chief Election Commissioner*, New Delhi, 1 SCC 405 (1978).

95. *Ass'n for Democratic Reforms*, 2 LRI.

96. INDIA CONST. art. 324.

97. *Id.*; *cf. id.* art. 124 (A Judge may “hold office until he attains the age of sixty-five” or when there has been an order of removal “of the President passed after an address by each House of Parliament supported by a majority of the house membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.”).

2. National Human Rights Commission (NHRC) of India

It is well established that the legitimacy and credibility of a National Human Rights Institution rests upon its independence from government.⁹⁸ This—along with insufficient actions by courts—has necessitated the creation of an independent institution to safeguard human rights in India. The NHRC of India was a statutorily created response to the failure of the Court to check abusive government policies through public interest or ordinary litigation.⁹⁹ Its function is to protect and promote human rights “relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants.”¹⁰⁰ Although not enshrined in the nation’s constitution, the NHRC maintains independence through its appointment and removal processes. Appointment power does rest in the President’s hands, but it is checked by the processes to which he is bound.¹⁰¹ What results is a Commission, balanced by judicial and executive members, prohibiting the removal of any such persons without permission from the Supreme Court.¹⁰²

The socio-economic gap between the rich and poor in India is massive, and much of India’s population consists of the economically disadvantaged¹⁰³ who lack the means to protect themselves from the inequalities promulgated by their “representative” government. Accordingly, the NHRC has sweeping authority—as an independent institution—to act *suo motu* against any public servant when a complaint has been registered for violation of human rights.¹⁰⁴ This has proved quite

98. See GOODMAN, *supra* note 4041, at 170 (“An NHRI that is not independent of government (and thus not engaged in scrutiny of state action and robust critique of government action, policy, and legislation) will not be a credible human rights actor.”).

99. See Robinson, *Expanding Judiciaries*, *supra* note 3031, at 69.

100. See *supra* note 90, INDIA CONST. art. 324.

101. *Id.* (requiring the Commission consists of “a chairperson who has been a chief Justice of the Supreme Court; one member who is, or has been, a Judge of the Supreme Court; one member who is, or has been, the Chief Justice of a High Court; and two members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights”).

102. *Id.* (“The Chairperson or any Member shall only be removed from his office by order of the President of India on the ground of proved misbehavior or incapacity, after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or the Member, as the case may be, ought on any such ground to be removed.”).

103. In 2010, 29.8% of India’s population lived below the national poverty line, http://www.indexmundi.com/india/population_below_poverty_line.html.

104. See Manoj Kumar Sinha, *The Role of the National Human Rights Commission of India in the Implementation of Human Rights*, 16 NETH. Q. HUM. RTS. 101, 102 n. 11 (1998)

effective, as the NHRC utilized its power to direct compensation be paid in 559 cases and has recommended prosecution of public servants in other cases wherein human rights violations occurred.¹⁰⁵ However, though the NHRC is fully equipped to effectively handle a multitude of human rights violations, the means by which it maintains its legitimacy is also its downfall—it is powerless when the government refuses to comply with its recommendations.¹⁰⁶ When this occurs, the NHRC is left with no actual power, but it still maintains remarkable influence in the arena of public opinion, thereby holding representative government accountable if it chooses to ignore the human rights of its citizenry.¹⁰⁷

3. Central Vigilance Commission (CVC) of India

Corruption flourishes in India because it is perceived to be a low risk, high profit business whereby the representative government may be bought at the expense of its constituency.¹⁰⁸ To remedy this obvious problem, India created the Central Vigilance Commission by statute in 2003 in order to provide transparency and instill trust into an otherwise corrupt government.¹⁰⁹

The actual power the CVC wields is minimal, the majority of which stems from public awareness. The CVC website has published the names of alleged corrupt officials, and it allows for citizens to report any persons they have reason to believe are polluting the democratic process.¹¹⁰ However, the CVC has proved so far to be an unsuccessful attempt at infusing trust into a skeptical democracy.¹¹¹

(“The Commission took *suo moto* action on basis of a press report on 12 January 1994 concerning the alleged tattooing the words ‘jeb katri’ on the forehead of an alleged pick pocket by the Amritsar Police Personnel, the National Human Rights Commission, *First Annual Report, 1993–94*, New Delhi, 1994, p. 22.”).

105. *Id.* at 102.

106. *Id.* at 106.

107. *Id.* at 104 (“A considerable increase in public awareness of the work of the commission has been observed”); *cf. id.* at 106 (“the commission is able to convey the message [to the public] that it can work independently and impartially”).

108. See Subhash Bhatnagar, *Central Vigilance Commission Website: A Bold Anticorruption Experiment*, THE WORLD BANK, (Sept. 14, 2001), https://casesimportal.newark.rutgers.edu/storage/documents/leadership/public/case/Central_Vigilance_Commission_Website_A_Bold_Anticorruption_Experiment.pdf.

109. The Central Vigilance Commission was established as a government agency in 1964, but it was converted into a statutory body upon the urging of the Supreme Court.

110. See Subhash Bhatnagar, *supra* note 107.

111. *Id.* (noting that placing the names of allegedly corrupt public official has caused more stirring of conscience than justice).

India's independent institutions have shed significant light on the potential that constitutional governments have in their quest to preserve democratic legitimacy. Some scholars refute the notion that independent institutions may exist at all in a democracy where they are constantly pressured to act in order to maintain legitimacy with the public.¹¹² These scholars cynically conclude that "fourth-branch" bodies lack true independence and that their power is curtailed by Parliament's ability to alter or disband their actions.¹¹³ But—as India's Election Commission has proven—these institutions may just be the balanced approach needed to effectively pursue national policy initiatives in a liberal democracy fraught with distrust.

*B. South Africa's Push to
Legitimize Democracy*

In contrast to India's National Human Rights Commission and Central Vigilance Commission in the previous section, South Africa sought to alleviate concerns over distrustful democratic institutions by constitutionally entrenching six independent bodies to protect the fundamental commitments of its new democracy.¹¹⁴ The new government established these institutions "subject only to the Constitution and the law, and they must be impartial and exercise their powers and perform their functions without fear, favour, or prejudice," and no person or organ of the state may interfere with their functions.¹¹⁵ South Africa "recognize[d] the injustices of [its] past,"¹¹⁶ and sought to build upon the hope of a legitimate democracy in its future. Thus, the creation of independent institutions resulted from the doubtfulness of a traditional three-branch model in a modern liberal democracy.

This section will focus primarily on the Electoral Commission (EC) and the South African Human Rights Commission (SAHRC), following the theme of those institutions as discussed in the previous section.¹¹⁷ First, I discuss South Africa's unique political climate and the strengths and weaknesses of the Electoral

112. *Id.*

113. See Robinson, *Expanding Judiciaries*, *supra* note 3031, at 18.

114. These independent institutions included: The Public Protector; The South African Human Rights Commission; The Commission for the Promotion and Protection of the Rights of Cultural, and Religious and Linguistic Communities; The Commission for Gender Equality; The Auditor-General; and The Electoral Commission. See S. AFR. CONST., 1996 ch. 9, § 181(1).

115. *Id.* at § 181(2), (4).

116. *Supra* note 112. *Id.* pmb1.

117. See *supra* Parts III.A.I, II notes 114–116 and accompanying text.

Commission to ensure free and fair elections are held. Then, I explain the makeup and power of the SAHRC in protecting and promoting human rights in the Republic.

1. The Electoral Commission of South Africa

South Africa is a nation historically littered with racial inequality; apartheid South Africa held many elections based on a racially restricted franchise.¹¹⁸ The state's "democratic" façade crumbled as it entered the 1990's due to an underrepresented majority's hunger for democratic legitimacy and equal representation. With its fall came political uncertainty with the white minority National Party (NP) and the liberation African National Congress (ANC) favoring a more governmentally independent electoral process.¹¹⁹ Further, once the post-apartheid South Africa emerged in 1994, it faced a populace whose vocal discontent with the former regime demanded legitimacy through impartial elections. The impetus for the EC's establishment can be traced to the lack of public confidence in South Africa's elected government, leaving its people in search of an alternative to traditional democratic instruments.

The EC is composed of at least three members who are appointed and removed by the majority party.¹²⁰ This naturally raises concerns regarding the actual independence of the institution from the political motives of the governing party. The 1996 Electoral Commission Act¹²¹ addressed this concern by creating safeguards to protect the commission from political encroachment.¹²² The Act created a panel of independent experts who nominate a list of potential commissioners for consideration by the legislature.¹²³ Additionally, the Act created fiscal autonomy

118. See S. AFR. CONST., Constitution Act 110 of 1983 § 32 (giving President's Council, which was composed of majority white delegates pursuant to section 70 of that Act, power to pass legislation where houses could not agree). Blacks continued to be denied the franchise. See *id.* § 52 (granting right to vote to "white," "coloured," and "Indian" voters, but not to blacks).

119. See Vijay Padmanabhan, *Democracy's Baby Blocks: South Africa's Electoral Commissions*, 77 N.Y.U. L. REV. 1157, 1164 (2002) (noting that "[t]he NP, as the governing party, favored a larger role for the DHA, but it was strongly opposed to international administration of the transitional election because it believed this would undermine national sovereignty. While the ANC was willing to agree to a South African administrator, it would not allow that administrator to be the apartheid government's DHA, making an electoral commission the only politically acceptable alternative.").

120. *Id.*

121. Electoral Commission Act 51 of 1996 JRSA.

122. See Padmanabhan, *supra* note 119, at 1178.

123. See Electoral Commission Act 51 of 1996 JRSA § 6(3)-(4) (placing on panel President of Constitutional Court, representative of Human Rights Commission,

within the EC by making the EC-appointed chief electoral officer the institution's "accounting officer," responsible for all money received or spent by the body.¹²⁴

The effectiveness the EC has had in gaining trust from its citizenry has varied. Exit polls from the 1999 election (the first election after the transition period) showed that 84% of voters thought the elections were better run, and would create a more just outcome, than those previously held.¹²⁵ However, these results seem premature, as the eventual outcomes of the election left many opposition parties claiming bias on the part of the dominant party at that time (ANC).¹²⁶ This may merely be the result of the disgruntled following a tough loss at the polls, but its claim surely carries weight when the dominant party is in charge of the appointment of the EC's officers. Moreover, the EC experienced problems executing its management plan in local elections due to its inflexibility and lack of resources to reach local officials.¹²⁷ Collectively, the EC has demonstrated a strong commitment by South Africa to regulate free and fair elections, but there is a failure to practically do so.

2. The South African Human Rights Commission

The Human Rights Commission is the national institution established to entrench constitutional democracy.¹²⁸ The origins of the SAHRC stem from a strong desire for security of human rights for a long-brutalized citizenry.¹²⁹ The SAHRC was cemented in the South African Constitution with the intent to promote and protect the human rights of South Africans in the Republic, and has since established itself as one of the most respected human rights institutions in the world.¹³⁰ Moreover, the Commission's successes have afforded it the leeway to influence other specialized areas of

representative of Commission on Gender Equality, and Public Protector). The panel was mandated to act with "transparency and openness" in its candidate selection. *Id.* at § 6(5). The panel's nominees could not include anyone with "a high party-political profile" because such people were barred from serving on the commission. *Id.* at § 6(2)(b).

124. See Public Finance Management Act 1 of 1999, ch. 5 §§ 38–40, GN 405 of GG 19814 (2 Mar. 1999) (describing responsibilities of "accounting officers"). By shifting this power to an official within the EC, the 1996 Electoral Commission Act (EC Act) assures that no government minister is financially responsible for the EC.)

125. See Padmanabhan, *supra* note 119, at 1185.

126. *Id.*

127. *Id.* at 1188.

128. South African Human Rights Commission, <http://www.sahrc.org.za>.

129. See GOODMAN, *supra* note 4041, at 127.

130. *Id.* at 127–28 (noting that the "SAHRC currently enjoys "Grade A" status at the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.").

government that may inadvertently impact human rights. In particular, the SAHRC has taken up privacy, freedom of information, and even electoral concerns in an effort to promote transparency of government and promote human rights as a whole.¹³¹

Although the appointment process is the same as the Electoral Commission, the SAHRC maintains its independence through its public education and its investigatory powers into human rights violations. In doing so, the Commission employs a Secretariat to implement its desired policies and notify the public.¹³² Public education has likely been the most significant contribution of the SAHRC.¹³³ It has called attention the concerns of the voiceless, and it has forced elected officials to listen to their constituents, or else face political backlash at the polls. Accordingly, the South African Constitution mandates that “relevant organs of state” issue an annual report indicating actions taken toward realizing their commitment to promote and protect human rights.¹³⁴ The SAHRC has proven to be very effective in upholding the commitments of the young democracy, and it should be looked to as a model for other democracies to embrace.

IV. INDEPENDENT INSTITUTIONS IN THE MODERN AMERICAN DEMOCRACY

Can the independent institutions previously discussed¹³⁵ contribute to advancing democratic legitimacy in a well-established democracy fraught with its own trust issues? This Part attempts to answer that question by arguing for the inclusion of independent institutions in the United States to effectively mitigate the tension between democracy and judicial review, and to instill trust back into its citizenry.

Though the United States differs from both India and South Africa in many respects, this Part argues that an alternative to the three-branch model has value in protecting the democratic

131. See Elmendorf, *Advisory Counterparts*, *supra* note 1, at 970.

132. See South African Human Rights Commission Act 40 of 2013 § 5 GN 583 of GG 37253 (22 Jan. 2014) (providing for Committees of at least one Commissioner sitting together with other persons).

133. See JONATHAN KLAAREN, *The Powers and Functions of the SAHRC*, in SOUTH AFRICAN HUMAN RIGHTS COMMISSION, 24C.3 (2d ed. 2005).

134. See S. AFR. CONST., 1996, ch.9 § 184(3) (“Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”).

135. See *supra* Part III.

interests they all share. It critically examines America's development as a powerful bureaucracy, along with its efforts to regulate that transformation through the establishment of agencies within the executive branch.¹³⁶ Such actions have contributed to democratic distrust, and I highlight several instances over the past decade where the public has expressed doubt of its elected officials' ability to govern democratically.

Accordingly, this Part suggests that the inclusion of independent institutions—namely an electoral commission,¹³⁷ human rights commission,¹³⁸ and transparency commission¹³⁹—will better uphold the foundational commitments of American democracy as it continues to expand.¹⁴⁰ Naturally, the practical pathways for establishing such institutions must be considered within the current political climate in Washington D.C. In doing so, I later acknowledge the likely barriers throughout their adoption process, and I propose a solution—a blend of constitutional status and majoritarian power through statutes.¹⁴¹ This blend presents a realistic approach to an ambitious goal: instilling trust back into American democratic institutions.

A. The United States of Bureaucracy

The rise of the administrative/bureaucratic state, and thus the growth of the executive branch, was certainly not foreseeable at the time the Founders created the three-branch system of government.¹⁴² The sheer size of the American populace today requires the use of many specialized polities—in addition to the directly elected bodies—to effectively govern.¹⁴³ This transformation of American government from a representative to a more bureaucratic form has profoundly influenced politics and policymaking at the national level,¹⁴⁴ raising legitimate democratic

136. *See infra* notes 142–151 and accompanying text.

137. *See infra* notes 165–181 and corresponding text.

138. *See infra* notes 182–189 and corresponding text.

139. *See infra* notes 190–191 and corresponding text.

140. *See* Scheppele, *supra* note 27, at 797 (supporting my claim by noting that the “U.S. lives with an eighteenth-century model of government that has not been able to take full advantage of what history knows about modern institutions that function more effectively than their older counterparts”).

141. *See infra* notes 192–195 and accompanying text.

142. *See* JOSEPH POSTELL, THE HERITAGE FOUNDATION, FROM ADMINISTRATIVE STATE TO CONSTITUTIONAL GOVERNMENT (2012) (noting the limited power entrusted to the federal government in the Constitution, and “the need for a new kind of government—one focused on regulating the numerous activities of citizens rather than on protecting their [democratic] rights”).

143. *But see generally id.*

144. *Id.*

concerns among the governed.¹⁴⁵ Legal scholars have acknowledged the impact that bureaucratic agencies have had on the public—namely the tension they create between the private interests of unelected officials and the social welfare of the liberal democracy, whereby economic objectives often trump democratic ones.¹⁴⁶

This tension has led to a growing distrust of the elected branches of government in the United States. In 2015, merely 19% of Americans said they could trust the government always or most of the time, which is among the lowest levels in the past fifty years.¹⁴⁷ Further, only 20% of Americans described government programs as being well-run, and 55% believed that “ordinary Americans would do a better job of solving national problems,” particularly those regarding issues of poverty and immigration.¹⁴⁸

However, there is an argument of necessity to be made for the existence of executive agencies within an ever-expanding state like the United States. They may pose a threat to the democratic values of American government, but without them, many government functions would cease to exist. This leads scholars to abandon any notion of dissolving such agencies and, instead, theorize methods by which the judiciary within the existing three-branch model may act as the effective guardian over foundational democratic commitments.¹⁴⁹ Some propose that a strengthening of the judiciary, or the use of constitutional courts, may remedy the pervasive distrust of democratic institutions.¹⁵⁰ Others have recognized that a judicial remedy may alleviate some concerns, but

145. See O’Connell, *supra* note 6, at 890–91.

146. *Id.* at 892.

147. See *Beyond Distrust: How Americans View Their Government*, PEW RESEARCH CENTER, U.S. POLITICS & POLICY (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/> (last visited May 7, 2017).

148. *Id.*

149. See generally Ackerman, *Separation of Powers*, *supra* note 1 (arguing for a balance between democratically elected bodies and constitutional courts); Landau, *Dynamic Theory*, *supra* note 1 (critically examining the “democracy-improving model of judicial review,” and analyzing the “effects of different strategies of judicial activism on the evolution of different kinds of dysfunctional political institutions”); Landau, *Political Institutions*, *supra* note 33 (developing a comparative theory of judicial role that focuses on broad differences in political context); Tushnet, *Social Welfare Rights*, *supra* note 25, at 1896 (claiming that “constitutional rights cannot be taken seriously by a nation’s population unless they are judicially enforceable”); see also Scheppele, *supra* note 27, at 804 (noting that “constitutional courts can be structured so that they have better access than the more conventionally elected branches, to what democratic publics want from democratic politics”).

150. See Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 965 (2011) (suggesting that “constitutional courts may be called upon to play a limiting role to protect the vitality of democratic competition for office and the ability of the political process to dislodge incumbents”) [hereinafter Issacharoff, *Constitutional Courts*].

with it comes another problem—tension between democracy and judicial review (i.e. the counter-majoritarian dilemma).¹⁵¹

*B. Mitigating the Tension Between
Democracy and Judicial Review*

The political branches are unlikely to respond to a court absent high levels of pressure,¹⁵² and the counter-majoritarian difficulty precludes such pressure from occurring. Judicial review has been a source of great concern among American legal scholars due to its obvious anti-democratic underpinnings. It is important to note that the weight of this concern is uniquely American. When comparing this worry with other liberal democracies around the world, one scholar describes the United States as being encumbered by the "American fixation with the source of the authority for judicial review and the accompanying hand wringing over counter-majoritarianism."¹⁵³

The Constitution of the United States bars the Supreme Court from engaging in government actions *ex ante*,¹⁵⁴ and the Court has traditionally sidestepped policymaking in order to preserve its own legitimacy as the "reviewer" and not the "actor" in government. The Court's historical emphasis on *stare decisis* demonstrates its avoidance of policy-making regarding pressing matters that it has not previously handled. This is where the United States differs greatly from other nations, and why those counter-majoritarian fears may be well founded. The Constitution is unique when compared to others around the world—it is shorter than most, allowing for more judicial discretion;¹⁵⁵ it affords Supreme Court Justices life tenure, prohibiting removal as long as they are in "good behavior";¹⁵⁶ and it is considered sacred, as evidenced by its

151. See Landau, *Dynamic Theory*, *supra* note 1, at 1524 (noting that the Colombian Constitutional Court "at times has sought to prop up other control institutions" in order to "give institutions (other than the Court itself) leverage over the bureaucracy, arguably increasing accountability" by avoiding the counter-majoritarian difficulty)

152. See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 246 (2012) (noting that this absence of pressure "suggests that states should give institutions like ombudsmen and human rights commissions power to issue binding orders on other institutions of state in at least some circumstances").

153. Issacharoff, *Constitutional Courts*, *supra* note 150, at 964.

154. U.S. CONST. arts. III, VI.

155. See Tom Ginsburg, Zachary Elkins, & James Melton, *The Lifespan of Written Constitutions*, AMERICAN L. & ECON. ASS'N ANN. MEETINGS, 1, at 44 (2007) (noting that "the U.S. Constitution, at a mere 10,165 words, is seen as providing a framework for politics rather than a repository of policies").

156. Greece and Guinea-Bissau are the only other nations that appoint judges for life without a mandatory retirement age. See *The World Factbook*, CENTRAL INTELLIGENCE

228-year existence in an ever-changing democracy.¹⁵⁷ Thus, the role of the U.S. Supreme Court is difficult to judge in comparison to more activist courts in nations like India, Hungary, and Colombia, where judicial meddling in politics is commonplace.¹⁵⁸

However, the Court's reputation as interpreter, merely defending democratic values already entrenched in the Constitution, is quickly fading in the public eye. A good example of this is the public reaction to the majority opinion in *Citizens United*, where the Court allowed unlimited private funds to be spent on independent expenditures and electioneering communications.¹⁵⁹ Justice Breyer, in his dissenting opinion, voiced the eventual concerns of the public, stating that "[the majority] disregards our constitutional history and the fundamental demands of a democratic society," and that, "[i]n a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules."¹⁶⁰ This decision brought with it protests, press conferences, and talk of a new effort to expose those corporations that took advantage of the ruling to spend millions of dollars on political ads.¹⁶¹ This opposition demonstrates the anger felt by a public who believed that a counter-majoritarian body had diminished its right to participate in democracy.

Another example is the recent decision of *Obergefell v. Hodges*, whereby the Court ruled that same-sex couples have a fundamental right to marry.¹⁶² This resulted in much of the public, and several elected officials, denouncing the Court's legitimacy for ruling on an issue that many felt should be inherently left to the people.¹⁶³ Regardless of the outcomes in *Citizens United* and

AGENCY LIBRARY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html> (last visited May 7, 2017).

157. The average lifespan of a constitution is seventeen years. *See id.*

158. *See* Scheppele, *supra* note 27 (discussing the role of the Hungarian Constitutional Court as a checking institution as a response to democratic distrust); *see also* Landau, *Political Institutions*, *supra* note 33, at 339 (noting that the Colombian Constitutional Court is constitutionally permitted to enlist independent institutions—like those argued for here—to carry out its rulings and “the Court has the power to hear abstract review petitions initiated at any time by any single citizen”).

159. *See generally* *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310 (2010).

160. *Id.* at 979.

161. Kenneth P. Vogel, *One Year Later: Citizens United*, POLITICO, (Jan. 21, 2011, 1:21 PM), <http://www.politico.com/story/2011/01/one-year-later-citizens-united-047955>.

162. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

163. *See* Case Hoogendoorn, *Letter to the Editor: After Obergefell*, 11 CHRISTIAN LAW 32 (2015) (implying some took the Court's action as illegitimate, noting that “many conservative Christians, including Republican Presidential Candidates Mike Huckabee and Ted Cruz” celebrated Kim Davis, who was a county clerk who went to jail for refusing to issue marriage licenses to same-sex couples).

Obergefell, the Court arguably involved itself in policymaking, flirting with the separation of powers doctrine, and enraging much of the public in the process. There is little debate regarding the growing distrust of democratic institutions among the American people, and the Court has proven to lack the necessary tools to remedy it.

C. A Solution: Independent Institutions

Numerous independent institutions already established around the world are charged with protecting the characteristic commitments of a liberal democracy.¹⁶⁴ For the purposes of this section, though, I focus on the following three institutions of particular use in upholding American democratic values, and instilling trust back into its citizenry: (1) an electoral commission, (2) a human rights commission, and (3) a transparency commission.

1. Independent Electoral Commission¹⁶⁵

The widespread perception that party-affiliated election administrators indulge in partisan favoritism during elections has provoked calls for reform to ensure that all Americans are given their right to exercise the franchise.¹⁶⁶ This perception has spread even to the candidates themselves, as 2016 Republican presidential candidate Donald Trump¹⁶⁷ called into question the election results of a Colorado primary, claiming, "[t]he people of Colorado had their vote taken away from them by the phony politicians."¹⁶⁸ Mr. Trump also claimed that, if his political

164. See generally Elmendorf, *Advisory Counterparts*, *supra* note 1 (noting several types of independent institutions, including National Human Rights Institutions, Privacy Commissions, Information Commissions, Anticorruption Commissions, and Electoral Commissions).

165. I would like to thank Professor Franita Tolson for her teachings throughout her election law course at the Florida State University College of Law, and for her invaluable input as to how the independent institutions this Article advocates for may be beneficial in the United States.

166. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 425 (2006) (noting that the "nail-bitingly close presidential elections of 2000 and 2004" caused particular outcry among the public) [hereinafter *Election Commissions*].

167. It pains me to give a man of such weak moral fiber this title. It should be noted that Politifact.com provided analysis on Mr. Trump's comments during his campaign, finding that 70% of his comments were "false," indicating that he himself likely does not believe that elections are rigged.

168. See John Frank, *Angry Donald Trump blasts Colorado GOP results as "totally unfair."* THE DENVER POST (Apr. 10, 2016, 2:48 PM), <http://www.denverpost.com/2016/04/10/angry-donald-trump-blasts-colorado-gop-results-as-totally-unfair/>.

opponent were to win, it would only be because of cheating.¹⁶⁹ Recent scholarship has acknowledged that the challenges facing voters in America today have evolved.¹⁷⁰ Instead of an overt exclusion from the franchise, the government is now impacting voter participation through unfair registration procedures, voting methods, and vote-counting.¹⁷¹ This scholarship has also supported the notion of an independent commission to watch over elections, attempting to rid—or at least minimize—manipulation of the democratic process.¹⁷²

In answering the call to legitimizing the electoral process, some courts have handed down important decisions over the past decade, upholding constitutional challenges over voter ID requirements,¹⁷³ voter registration drives,¹⁷⁴ and inferior vote-counting technologies.¹⁷⁵ But other courts have not been so stern in safeguarding the electoral process,¹⁷⁶ creating uncertainty as to whether courts may be a reliable remedy for the unfair voting practices bureaucratic interests levy against the people. It seems to be a lose-lose situation for courts when meddling in the electoral process—they either reject constitutional challenges to election laws for fear of losing legitimacy¹⁷⁷ or they uphold certain

169. *Id.*

170. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 315 (2008) [hereinafter Elmendorf, *Electoral Mechanics*] (noting that “[i]nstead of challenging the de jure exclusion from the franchise of certain classes of voters, or the malapportionment of legislative districts, litigators are pressing claims that state-mandated procedures for registration, voting, and vote-counting—the nuts and bolts of elections—operate to burden voter participation excessively or unfairly”).

171. *Id.*

172. See Elmendorf, *Election Commissions*, *supra* note 166, at 426; see also Ackerman, *Separation of Powers*, *supra* note 1, at 716–18 (arguing that a democratic constitution ought to establish a politically insulated electoral commission with regulatory powers sufficient to effect whatever “conception of democracy” the constitution embraces).

173. See, e.g., *Weinschenk v. State*, 203 S.W.3d 201, 217–19 (Mo. 2006) (en banc). This case was nominally decided on state constitutional grounds, but the opinion largely follows the doctrinal framework employed in the Supreme Court’s electoral mechanics jurisprudence, under which “severe restrictions” on voting rights trigger strict scrutiny.

174. See, e.g., *Ass’n of Cmty. Orgs. for Reform Now v. Cox*, No. 06-1891, slip op. at 16–17 (N.D. Ga. Sept. 28, 2006) (order granting preliminary injunction) (invalidating a regulation that required persons registering to vote to seal their completed application prior to submitting it to any person other than the state registrar or deputy registrar, and that prohibited the copying of completed voter registration applications).

175. See, e.g., *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), vacated en banc as moot, 473 F.3d 692 (6th Cir. 2007).

176. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007) (the court upheld a voter ID law under the guise of protecting the integrity and reliability of the electoral process).

177. This is a classic example of the counter-majoritarian difficulty. The Court must proceed with caution so as to not disturb the elected branches too much for fear of losing legitimacy in the eye of the public.

challenges without explicitly championing the voting rights of concerned citizens.¹⁷⁸ Neither outcome cures the distrust of the elected branches nor further upholds the fundamental commitment of a liberal democracy—providing free and fair elections.

An independent electoral commission—like those constitutionally entrenched in India and South Africa—provides a potential solution for balancing the distrust of the democratic institutions with the counter-majoritarian difficulty in America. Although the United States has an Elections Assistance Commission (EAC) already in place, Congress established it merely as an advisory body, and it is designed to have as little regulatory power as possible.¹⁷⁹ The deals made by politicians in establishing the EAC and the recent burdens placed on voters further contribute to the distrust of democratic institutions among the public.¹⁸⁰ A truly independent body, given actual authority to regulate the electoral process, is necessary to check the elected branches' tactics to control the ballot box. Moreover, as one scholar noted, the commission's research into public opinion could help the Court foretell the consequences of its own actions should it deem certain kinds of regulation unconstitutional.¹⁸¹

2. Independent Human Rights Commission

There has been increasing doubt over the American political branches' willingness to support the impoverished in the face of private interest dollars.¹⁸² Although the United States has made valiant efforts to promote human rights in developing democracies

178. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992) (the Court employed a balancing test to determine if the burden on the right to vote was great enough to uphold the challenge); *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004) ("[T]he Supreme Court has suggested something of a sliding scale approach and has noted that there is no "bright line" to separate unconstitutional state election laws from constitutional ones.").

179. See Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004).

180. See Elmendorf Interview, *supra* note 15 (noting that the independence model is good, but it often fails to escape the political pressures of elected officials. For example, the EAC recently appointed an official who increased voter registration forms—making it harder for minorities to vote in Kansas, Georgia, and Alabama—due to the efforts of Kris Kobach, the Kansas Secretary of State. This type of politicking proves that the "independence" of the EAC is not an effective remedy for the partisan politics that electoral process currently faces).

181. See Elmendorf, *Electoral Mechanics*, *supra* note 170, at 438.

182. See *Americans' Views on Money in Politics*, NEW YORK TIMES (June 2, 2015), https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=0.

around the world,¹⁸³ it has often ignored its democratic responsibilities at home.¹⁸⁴ Much of this is due to a Congress that finds itself in the pocket of private companies, who have a larger interest in profit-increasing legislation than the general welfare of the country.

The U.S. Department of State contends that “democracy is the one national interest that helps to secure all the others.”¹⁸⁵ But American democracy has consistently failed its citizenry by allowing—and sometimes even promoting—human rights violations through its policies. These violations stem from laws which either target certain areas of the populace, or fail to protect others.

Criminal justice statutes in the United States are a prime example of a democratic system failing its citizenry. Elected officials enact legislation that places the impoverished at a disadvantage in the criminal justice system.¹⁸⁶ Because of the legislature’s lack of funding for “cash-strapped counties and municipalities,” court fees are often increased, adversely impacting poor people.¹⁸⁷ Moreover, the privatization of misdemeanor probation services has resulted in fee structures that penalize the poor due to a general lack of proper government oversight or accountability.¹⁸⁸

In order to provide an adequate remedy to this public concern—without the fear of special interests—an independent institution should be established to protect the fundamental human rights of Americans. This independent commission should have the authority to act *ex ante* and curb policy to ensure the disadvantaged are protected from democratic institutions the public has grown to distrust. Moreover, this independent body would assist in holding the elected branches accountable by

183. The United States has established seven bureaus reporting to “advance the security of the American people by assisting countries around the world to build more democratic, secure, stable, and just societies”). See UNDER SECRETARY FOR CIVILIAN SECURITY, DEMOCRACY, AND HUMAN RIGHTS, U.S. DEPARTMENT OF STATE, <http://www.state.gov/j/index.htm> (last visited May 7, 2017).

184. See *World Report 2015: United States*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2015/country-chapters/united-states> (last visited May 7, 2017) (noting that “particularly in the areas of criminal justice, immigration, and national security, US laws and practices routinely violate rights. Often, those least able to defend their rights in court or through the political process—racial and ethnic minorities, immigrants, children, the poor, and prisoners—are the people most likely to suffer abuses”).

185. *Bureaucracy*, U.S. DEP’T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <http://www.state.gov/j/drl/democr/> (last visited May 7, 2017).

186. See HUMAN RIGHTS WATCH, *supra* note 184.

187. *Id.*

188. *Id.*

educating the public—much like the South Africa Human Rights Commission¹⁸⁹—on the practices of its government in regards to human rights.

3. Independent Transparency Commission

A lack of transparency is probably the largest contributing factor to the distrust of democratic institutions. This concern has become so widespread that it has even gained recognition from the White House.¹⁹⁰ The very existence of democracy is grounded in the expectation of representative government, and when a citizenry feels it is not adequately represented, it wants to know why. To answer this concern, the U.S. government has established many agencies that oversee government action, supposedly ensuring that elected actors are doing their best to uphold democratic commitments to their respective constituencies. But there is a lack of legitimacy in a system in which the regulators work for the branches they oversee.¹⁹¹

An independent transparency commission would have authority to investigate elected officials and educate the public on its findings. This would grant more legitimacy to Supreme Court rulings like *Citizens United* because the public would know where large donations were coming from, and what representatives they were going to. This increased information to the public will not only expose individuals who aim to limit democracy, but it will also assist in raising the level of public discourse regarding the foundational democratic values that make up the American experiment.

189. See *supra* notes 125–131 and accompanying text.

190. See Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies*, TRANSPARENCY AND OPEN GOVERNMENT, THE WHITE HOUSE, https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (noting that his administration “will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government”) (the 45th administration removed the page from the Whitehouse website upon taking office).

191. An example of this is President Donald Trump firing the Director of the Federal Bureau of Investigation, James Comey, in 2017 while Comey was undertaking an investigation into the connection between Donald Trump and Russian influence during the 2016 presidential election. See ELIZABETH SLATTERY, THE HERITAGE FOUNDATION, *Who Will Regulate the Regulators? Administrative Agencies, The Separation of Powers, and Chevron Deference*, in 153 LEGAL MEMORANDUM (2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM153.pdf pdf

V. CONCLUSION:
THE PRACTICAL CONCERNS FOR IMPLEMENTATION

Having already discussed the theoretical implications of independent institutions in the United States, this Part briefly turns to the practical concerns of their establishment through either statute or constitutional amendment. The most obvious blockade to establishing independent institutions is the petty partisanship in modern America.¹⁹² The establishment of independent institutions would require a non-partisan agreement by the elected branches in the hopes of protecting and promoting democratic values for the country as a whole. Because neither the Democratic nor Republican Parties have shown a willingness to cooperate with each other as of late, it would seem unlikely for these independent bodies to pass a three-fourths approval by the states for constitutional amendment.¹⁹³ However bleak this reality may be, I suggest that a blend of constitutional status and majoritarian power through statute may provide the necessary balance to entice lawmakers to adopt such institutions.

To safeguard these independent bodies from political pressures, they should first gain constitutional status, which would delineate not only their existence, but also their basic duties and appointment/removal procedures—much like the South African Constitution has established with its respective commissions.¹⁹⁴ Next, in order to calm anti-democratic concerns, the legislature should be granted the means to contribute to the effectiveness of the new institutions through statute. This follows the South African model, whereby independent institutions are constitutionally mandated, but also command assistance from “other organs of state, through legislative and other measures” to protect them and “ensure the[ir] independence, impartiality, dignity and effectiveness.”¹⁹⁵ Constitutionally entrenching these independent bodies, and granting the Congress power to assist through statutory means, would afford the necessary protections

192. See Susan Milligan, *The Do-Nothing Congress: Neither the Public Nor Lawmakers Believe Anything Will Be Done to Address Pressing Crises*, U.S. NEWS & WORLD REPORT (Sept. 8, 2014), <http://www.usnews.com/news/articles/2014/09/08/the-do-nothing-congress>.

193. Amendment to state constitutions would be a more plausible approach, but they are not discussed here as this Article attempts to focus on the national level of democratic distrust. There is plenty of research to be done for the inclusion of these independent bodies at the state level, though, and their practical adoption in a state constitution would be much easier than that of the Federal Constitution.

194. See *supra* Section II.B.

195. See S. AFR. CONST., 1996, ch. 9, § 181.

for these institutions to be independent, while satisfying the counter-majoritarian concerns that keep so many American legal scholars up at night.

Some will critique this approach for its bold idealism in a modern American democracy where diplomacy is seldom seen, as the gap between the left and right widens each day. But this approach offers results that both sides of the aisle can appreciate and rally behind—it removes the pressure on elected polities to constantly govern one another, and it instills a long-lost trust back into a citizenry that craves true representation.

