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Reforming the Federal Election Commission: Storable Voting

Alvin Padilla-Babilonia

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REFORMING THE FEDERAL ELECTION COMMISSION: STORABLE VOTING

*Alvin Padilla-Babilonia**

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I. INTRODUCTION

The Federal Election Commission (FEC) has the important task of enforcing and regulating campaign finance law. It has failed miserably. It has been called the “Failure to Enforce Commission,”¹ a “toothless tiger,”² “FEC-less,”³ and “The

* Adjunct Professor of Law, University of Puerto Rico Law School; Fox International Fellow at Yale Graduate School. LL.M., Yale Law School, 2019; J.D., University of Puerto Rico School of Law, 2016; B.A., University of Puerto Rico, 2013. Thank you to Bruce Ackerman for his guidance and encouragement. Thank you also to the editors of the *Wyoming Law Review* for their dedication and thoroughness.

¹ 149 CONG. REC. 17, 694 (2003).

² 135 CONG. REC. 21, 329 (1989).

³ Charles R. Babcock, *FEC-less . . . ; Real Campaign Reform Will Give the Watchdog Agency New Teeth*, WASH. POST, Dec. 6, 1992, at C5.

Little Agency That Can't."⁴ One target of criticism is the structure of the FEC. According to its enabling act, the Commission consists of six members who will serve for a single term of six years. No more than three members can belong to the same political party, which in practice means that there is a three-member bloc from the Republican Party and a three-member bloc from the Democratic Party. However, a four-member majority is necessary for most significant actions, including conducting investigations, enforcement through civil action, issuing advisory opinions, and rule-making.⁵ This commitment to absolute majority rule was established so that the FEC can only act when there is bipartisan support.

This institutional design has been perverted in this era of peak polarization. A lack of four votes—because of 3-to-3 ties or when the vacancies are not filled—leads to deadlocks, a situation where there is no majority for any action.⁶ Deadlocks are so frequent that the law on the books is substantially different than the law in action.⁷ Because a tie prevents the Commission from investigating violations, deadlocks have, in practice, changed the rules governing campaign finance. Disclosure requirements are ignored, “independent” expenditures are actually coordinated with candidates, and foreign money continues to influence national elections.⁸

Surprisingly, it is not that each bloc refuses to investigate the violations of campaign finance laws incurred by members of their own political party. Instead, there is a growing tendency of commissioners following their parties’ views on campaign finance regulations: commissioners from the Republican Party vote against their enforcement, and commissioners from the Democratic Party vote

⁴ Benjamin Weiser & Bill McAllister, *The Little Agency that Can't: Election-law Enforcer is Weak by Design, Paralyzed by Division*, WASH. POST, Feb. 12, 1997, at A1.

⁵ 52 U.S.C. § 30106(c) (2018).

⁶ Editorial Board, *The Federal Election Commission Needs Commissioners*, BLOOMBERG: OPINION (Sept. 20, 2019, 4:30 AM), www.bloomberg.com/opinion/articles/2019-09-20/fec-paralyzed-by-vacancies-as-2020-presidential-election-nears [<https://perma.cc/4YUP-W5YR>].

⁷ Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15–16 (1910) (describing the difference “between the rules that purport to govern the relations of man and man and those that in fact govern them”).

⁸ Anna Massoglia, *State of Money in Politics: Billion-Dollar ‘Dark Money’ Spending is Just the Tip of the Iceberg*, OPENSECRETS (Feb. 21, 2019, 11:20 AM), www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/ [<https://perma.cc/UH9T-Z8J4>]; Adam Wollner & National Journal, *10 Ways Super PACs and Campaigns Coordinate, Even Though They're Not Allowed To*, THE ATLANTIC (Sept. 27, 2015), www.theatlantic.com/politics/archive/2015/09/10-ways-super-pacs-and-campaigns-coordinate-even-though-theyre-not-allowed-to/436866/ [<https://perma.cc/8NH2-LPRG>]; Michael Sozan, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, CENTER FOR AMERICAN PROGRESS (Nov. 21, 2019, 12:01 AM), www.americanprogress.org/issues/democracy/reports/2019/11/21/477466/ending-foreign-influenced-corporate-spending-u-s-elections/ [<https://perma.cc/YB6U-RS6N>].

in favor.⁹ Thus, the FEC has become ineffectual. It is failing to enforce and regulate campaign finance law. This should not mean, however, that Congress must eliminate the FEC.¹⁰ Instead, we must think of new institutional reforms to reduce deadlocks in the FEC and increase enforcement and compliance with campaign finance regulations.

So far, all proposed reforms preserve majority rule in the FEC—a majority of commissioners need to agree for the FEC to investigate and enforce campaign finance law. The most common proposal is to change the number of commissioners to an odd number of either three, five, or seven. These proposals tend to have an independent as the tiebreaker: someone who does not belong to either major political party.¹¹ I will call this reform the *odd-number commission*. Other reformers question how independent such an individual can be and want to keep the even number of commissioners to avoid one-party control of the FEC.¹² Moreover, they maintain that the FEC can only investigate and enforce campaign finance regulations when there is a majority. When there is no majority, however, they propose that the federal judiciary should be the tiebreaker, rather than deferring to the FEC. I will call this the *non-deference approach*. These reforms do not dispute that a majority of commissioners need to agree for the FEC to investigate and enforce campaign finance law. But while the supporters of a commission with an odd number of members seek to have a decisive tiebreaking vote, under the non-deference approach the federal courts settle the issue when there is no majority decision in the FEC. A more modest proposal is to lower the threshold number of votes in the earlier stages of investigation. For instance, the FEC could determine there is “reason to believe” that a violation occurs with three votes rather than four.¹³ Lowering this threshold would allow alleged violations to be further investigated, even without a majority of commissioners. Yet, this reform does not stop the Commission from deadlocking in a future vote because there is no majority for action or inaction. But what if decisions could be made through a voting system different from majority rule? Could a new voting system reduce deadlocks while keeping the even number of commissioners?

My proposal for breaking the FEC’s gridlock requires adopting *storable voting*. Storable voting is a multiple-issue electoral mechanism that is an alternative

⁹ ANN RAVEL, OFFICE OF COMM’R, FED. ELECTION COMM’N, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP 1, 7–8 (2017).

¹⁰ Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1436 (2018).

¹¹ See For the People Act of 2019, H.R.1, 116th Cong. § 6002 (2019).

¹² Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 172, 188 (Eugene D. Mazo & Timothy K. Kuhner eds. 2018).

¹³ Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 592 (2000).

to majority rule.¹⁴ Voters can distribute their storable votes among different proposals and across time, voting on several binary issues (Yes/No questions) according to the intensity of their preferences. Originally intended to promote minority rights,¹⁵ it can also be used in a context like the FEC to reduce deadlocks. Storable voting could increase enforcement and compliance of campaign finance regulations without disrupting the partisan balance (odd-number commission) or resorting to the federal judiciary (non-deference approach). Under my proposal, the voting threshold of the “reason to believe” determination will be lowered to three votes, rather than four, but later decisions—probable cause, settlement, and notification to authorities—will be decided through storable voting.

This Article will proceed in three parts. Part II explains the structure of the FEC, the purposes behind its structure, and how the FEC’s structure eventually led to an increasing number of deadlocks and the non-enforcement of campaign finance regulations. Part III examines the different proposals that address the problem of the ineffectiveness of the FEC due to deadlocks. Different policy goals animate these proposals, but while the odd-number commission fails to stop one party from controlling the FEC, the non-deference approach will not successfully increase enforcement and compliance with the law. Part IV discusses how the FEC could implement storable voting to decrease gridlock and increase enforcement and compliance, while maintaining the even number of commissioners. Storable voting can reduce the deadlocks of the FEC and increase enforcement and compliance with campaign finance regulations.

II. FEC: STRUCTURE AND DEADLOCKS

A. *Original Structure and Amendments After Buckley v. Valeo*

Through the amendments to the Federal Election Campaign Act (FECA) of 1971, the FEC was created in 1974 to enforce and regulate campaign finance law.¹⁶ The Commission’s structure was the subject of passionate discussion, particularly on the issue of how to make it more or less insulated from congressional influence. The Senate wanted a powerful Commission with seven members nominated by the President. The House of Representatives, however, wanted to exercise more control, despite calling it an “independent” agency.¹⁷ It proposed that the Commission be made up of only four commissioners, all nominated by congressional leadership.

¹⁴ ALESSANDRA CASELLA, *STORABLE VOTES: PROTECTING THE MINORITY VOTE* xviii–xxi (2012).

¹⁵ *Id.* at xxix.

¹⁶ See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 208(a), § 308–14, 88 Stat. 1263, 1279–85.

¹⁷ See H.R. Rep. No. 93-1438, at 309–11 (1974).

In the end, Congress settled on six commissioners: two appointed by the President pro tempore of the Senate with recommendations by the majority and minority leaders of the Senate, two appointed by the Speaker of the House of Representatives, upon recommendation by its respective majority and minority leaders, and the last two appointed by the President of the United States.¹⁸ They all required confirmation by both Houses of Congress, rather than only by the Senate, reflecting once again the desire for congressional control of the agency.¹⁹ The law also established that each nominator—the President pro tempore of the Senate, the House Speaker, and the President—could not propose two nominees from the same political party.²⁰ Finally, while the first commissioners would serve shorter terms, the typical term for commissioners would be a single term of six years, but they could stay past that term if their successor had not yet taken office.²¹

This appointment scheme process was invalidated in 1976.²² In *Buckley v. Valeo*, the Supreme Court concluded that the powers vested in the commissioners of the FEC could only be exerted by “Officers of the United States” within the meaning of the Appointments Clause.²³ As such, each of the commissioners must be nominated by the President and confirmed by the Senate.²⁴ Shortly thereafter, Congress amended the FECA to comply with *Buckley*.²⁵ Now, the six commissioners, of which not more than three can be affiliated with the same political party, must be nominated by the President and consented to by the Senate.²⁶ The amendments maintained that each commissioner will serve for a single term of six years or until his successor takes his place.²⁷ The law does not define who can serve as a commissioner: it only states they “shall be chosen on the basis of their experience, integrity, impartiality, and good judgment.”²⁸ The only limitation is that, at the time of the appointment, commissioners cannot be “elected or appointed officers or employees in the executive, legislative or judicial branch.”²⁹

¹⁸ Sec. 208(a), § 310(a)(1), 88 Stat. at 1280–81.

¹⁹ *See id.* at 1281.

²⁰ *Id.*

²¹ 52 U.S.C. § 30106(a)(2) (2018).

²² *Buckley v. Valeo*, 424 U.S. 1 (1976).

²³ *Id.* at 140.

²⁴ *Id.* at 143.

²⁵ Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a)(1), 90 Stat. 475, 475 (1976).

²⁶ 52 U.S.C. § 30106(a)(1).

²⁷ *See id.* § 30106(a)(2).

²⁸ *Id.* § 30106 (a)(3).

²⁹ *Id.*

The FEC has the power to elect a chairperson and vice-chairperson from among its members, but they cannot be from the same political party. These positions will only last for a nonrenewable term of one year.³⁰ The Commission must also appoint a staff director and a general counsel.³¹ The staff director can, with the approval of the Commission, appoint additional personnel.

B. Voting Thresholds and Their Purposes

The FEC's main task is to enforce the limitations and prohibitions on contributions and expenditures, and oversee the compliance with campaign finance disclosure.³² To achieve this, the enabling act recognizes multiple powers that can be classified in two camps: (1) those that do not require a majority of the commissioners, and (2) those that require the affirmative vote of four commissioners.³³ The first group includes the power to administer an oath or affirmation and to require subpoenas, among others.³⁴ Because these actions do not require an absolute majority, I will focus on the second group, where deadlocks are more common.

The second group comprises the four most significant faculties of the FEC. First, the FEC can conduct investigations and report willful violations to law enforcement authorities.³⁵ During the investigation, the Commission can pursue a settlement with the respondent, known as a conciliation agreement, but it cannot impose a direct penalty.³⁶ Second, if the FEC cannot reach an agreement, it can, through its general counsel, bring a civil action that enforces campaign finance regulations.³⁷ Third, the FEC can render advisory opinions requested by persons, candidates, or authorized committees.³⁸ Finally, the Commission can make, amend, and repeal any regulation needed to carry out campaign finance law.³⁹ At first glance, these specific authorities appear to empower the Commission to successfully regulate campaign finance. However, these four areas—enforcement, civil actions, advisory opinions, and rule-making—require

³⁰ *Id.* § 30106(a)(5).

³¹ *Id.* § 30106 (f)(1).

³² *See id.* § 30107.

³³ *Id.* § 30106(c).

³⁴ *Id.* § 30107(a)(2)–(3).

³⁵ *Id.* § 30107(a)(9).

³⁶ FED. ELECTION COMM'N, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 5 (2012).

³⁷ 52 U.S.C. § 30107(a)(6).

³⁸ *Id.* § 30107(a)(7).

³⁹ *Id.* § 30107(a)(8).

the affirmative votes of four members of the Commission.⁴⁰ Since no more than three members can belong to the same political party, this means that there must be bipartisan support for the most significant actions of the FEC.⁴¹ Thus, when there is a 3-3 tie—for example, on whether to investigate a candidate for violating campaign finance regulations—the FEC cannot carry forward and must close the investigation.⁴² In this scenario, the three commissioners who vote against enforcement become the “controlling Commissioners.”⁴³

Creating a majority-vote requirement in a Commission with an even number of members was a compromise between two policy goals. On the one hand, Congress was fearful that the FEC could be used “for partisan misuse or for administrative action which does not comport with the intent of the enabling statute.”⁴⁴ If a party controls the FEC, the party could entrench itself into permanent power by enacting campaign finance regulations to the party’s benefit or only investigating its political opponents. Accordingly, the risks of this potential abuse are particular to the FEC in contrast with other independent agencies.⁴⁵ On the other hand, Congress also recognized that the Commission needed to be independent to enforce the law.⁴⁶ The way it balanced those two interests was the four-vote requirement, which Congress believed would ensure “a mature and considered judgement.”⁴⁷ Most recently, Lee E. Goodman, former Chair and Commissioner of the FEC, called the four-vote requirement one of the agency’s “most prudential features.”⁴⁸ Requiring four votes stops the FEC from being captured by one party and guarantees that members from both major political parties agree before the FEC can proceed.

C. Structural Collapse

While the apparent purpose of the structure was bipartisan support and considered judgement for the most significant actions, critics argue that since the

⁴⁰ See *id.* § 30106(c); BROOKS JACKSON, *BROKEN PROMISES: WHY THE FEDERAL ELECTION COMMISSION FAILED* 28 (1990) (“The new law also required four of the six commissioners to vote affirmatively for any commission action to be taken . . .”).

⁴¹ See Thomas & Bowman, *supra* note 13, at 590 (arguing that the four-vote requirement was established “to ensure that the Commission would not become a vehicle for partisan purposes . . .”).

⁴² *Citizens for Responsibility and Ethics in Wash. v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018).

⁴³ *Id.*

⁴⁴ H.R. Rep. No. 94-917, at 3 (1976).

⁴⁵ Tokaji, *supra* note 12, at 188.

⁴⁶ H.R. Rep. No. 94-917, at 3.

⁴⁷ *Id.*

⁴⁸ Lee Goodman, *The FEC’s Problems Aren’t with the GOP*, POLITICO MAG. (May 10, 2015), www.politico.com/magazine/story/2015/05/the-fecs-problems-arent-with-the-gop-117798 [https://perma.cc/J98X-UEXC].

beginning, the Commission was “set up for deadlock and political shenanigans.”⁴⁹ Rather than creating an independent agency with enough tools to succeed, “[t]he design of the agency ensured it would be weak.”⁵⁰ When there is a deadlock—because of 3-3 ties or because there are not enough commissioners to constitute an absolute majority—the Commission cannot move forward to conduct investigations, enact rules, advise aspiring candidates, or pursue civil action when there is a campaign finance violation.⁵¹ As such, it is “possible for commissioners of one party to block any legal action against their own presidential, House, and Senate candidates when they violate election laws.”⁵² Ties are a clear consequence of having majority rule in a commission with six members. When ties are combined with a requirement that there cannot be more than three members from each political party, which ultimately results in a Republican and a Democratic bloc, it leads to a higher possibility of deadlocks, especially on a topic as politically ingrained as campaign finance.

But how frequent are these deadlocks? Is this “institutional bias in favor of inaction” or “recipe for gridlock” real or imagined?⁵³ Before delving into the magnitude of deadlocks, it is necessary to understand the process by which the FEC investigates campaign finance violations. Normally, the process starts when a third-party complains against a person or entity for violating campaign finance law. This complaint opens a “Matter Under Review” (MUR). After the respondent is given an opportunity to reply, the general counsel of the Commission investigates and determines whether there is “reason to believe” there was a violation.⁵⁴ Afterwards, the FEC has three options: (1) find “reason to believe,” (2) dismiss the matter pursuant to its prosecutorial discretion, or (3) find no “reason to believe.”⁵⁵ Each of these decisions requires the affirmative vote of four members.⁵⁶ Accordingly, when the matter fails to obtain four votes—for example, because

⁴⁹ ROBERT G. BOATRIGHT, *THE DEREGULATORY MOMENT?: A COMPARATIVE PERSPECTIVE ON CHANGING CAMPAIGN FINANCE LAWS* 62 (2015); *see also* Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 154 (2013) (“An equally plausible explanation can be couched as a legislative attempt to delay and ultimately prevent major electoral reforms by setting up such an agency structure.”).

⁵⁰ JACKSON, *supra* note 40, at 27.

⁵¹ 52 U.S.C. § 30106(c) (2018) (“[A]ffirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title . . .”).

⁵² JACKSON, *supra* note 40, at 64.

⁵³ *Eliminating the FEC: The Best Hope for Campaign Finance Regulation*, *supra* note 10, at 1431; Ellen L. Weintraub & Samuel C. Brown, *Following the Money: Campaign Finance Disclosure in India and the United States*, 11 ELECTION L.J. 241, 258 (2012).

⁵⁴ FEDERAL ELECTION COMMISSION, *supra* note 36, at 12.

⁵⁵ *Id.* at 12–13.

⁵⁶ *Id.* at 5; *see* 52 U.S.C. § 30106(c).

there is a 3-3 deadlock—the case will not proceed. Four votes are also needed in other stages of enforcement like finding probable cause that a violation occurred, or settling and authorizing a civil action.⁵⁷

The frequency of deadlocks has changed over the years. Between 1996 and 2006 the Commission tied in only 2.4% of the MURs.⁵⁸ Despite the debate concerning deadlocks, there were unanimous 6-0 and 5-0 decisions in 78.6% of the cases.⁵⁹ But when they occur, deadlocks tend to follow party lines: in 59% of the 3-3 splits the Republican and the Democratic blocs voted in opposite directions.⁶⁰ The problem with deadlocks is that, although they are rare, political actors can still identify the campaign finance regulations that are less likely to be enforced.⁶¹ Yet, because deadlocks were not as predominant, reformers suggested re-tooling, rather than complete reform or elimination of the FEC.⁶²

Unfortunately, the FEC has become more and more polarized since 2006. In 2008 and 2009 deadlocks spiked to 13% on MURs⁶³ and increased to 24.4% in 2014.⁶⁴ The most complete analysis on 3-3 ties on MURs was done by Ann Ravel, a Democratic Commissioner who resigned in 2017.⁶⁵ She divided the votes on two categories. The first group is non-substantive votes, which she narrowly defines as votes to close a file.⁶⁶ Substantive votes constitute all remaining decisions.⁶⁷ She found that, in 2016, commissioners deadlocked on more than 30% of substantive votes.⁶⁸ While in 2006 no MURs closed due to deadlocks, in 2016, 12.5% of the cases closed because of a deadlock.⁶⁹ She also highlighted that case closure was not the only consequence of the deadlocks, since sometimes they were used “to dilute

⁵⁷ FEDERAL ELECTION COMMISSION, *supra* note 36, at 20–21.

⁵⁸ Michael M. Franz, *The Devil We Know? Evaluating the FEC as Enforcer*, 8 ELECTION L.J. 167, 176 (2009).

⁵⁹ *Id.*

⁶⁰ *Id.* at 177.

⁶¹ *Id.*

⁶² *Id.* at 186.

⁶³ R. SAM GARRETT, CONG. RES. SERV., NO. R 40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 5, 9–10, 12 (2009).

⁶⁴ R. SAM GARRETT, CONG. RES. SERV., NO. R 44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 10 (2015).

⁶⁵ Eric Lichtblau, *Democratic Member to Quit Election Commission, Setting Up Political Fight*, N.Y. TIMES (Feb. 19, 2017), www.nytimes.com/2017/02/19/us/politics/fec-elections-ann-ravel-campaign-finance.html [https://perma.cc/2VMR-5A8C].

⁶⁶ RAVEL, *supra* note 9, at 9.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 10.

enforcement results and avoid holding violators accountable for the full scope of their conduct.⁷⁰ Accordingly, while a case may not close because of deadlocks, the Commission often only imposes “a slap on the wrist,” since it could later deadlock on a harsher penalty.⁷¹ Consequently, as the deadlocks increase, the fines imposed by settlement are smaller and fewer. In 2006, the FEC collected \$5.5 million in civil penalties in MURs, but only \$595,424 in 2016.⁷²

The consequences of deadlocks are not only felt on enforcement matters. In *Citizens United v. FEC*, the Supreme Court decided that the Free Speech Clause bars the government from limiting corporate independent expenditures.⁷³ The Court reasoned that previous restrictions on independent expenditures were premised on the lack of effective disclosure of expenditures.⁷⁴ Yet, “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”⁷⁵ Despite the importance of disclosures for transparency and accountability, the Republican Commissioners have been unwilling to regulate and clarify campaign finance disclosures pursuant to *Citizens United*.⁷⁶ For instance, nonprofit organizations are exempted from disclosures.⁷⁷ This is known as dark money: political spending from anonymous donors. Prior to *Citizens United*, these nonprofit organizations could not be funded by corporations.⁷⁸ Yet, the combination of *Citizens United*'s recognition of unlimited independent expenditures and the FEC's unwillingness to regulate disclosure led to new records of dark money.⁷⁹ For every dollar spent as dark money the decade prior to *Citizens United*, “at least [ten dollars] were spent in the decade after.”⁸⁰ In total, nearly one billion dollars of dark money has been spent on federal elections since *Citizens United*.⁸¹ This is one example of how deadlocks, because of the institutional design and polarization, affect transparency, accountability, and democracy.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 11.

⁷³ *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

⁷⁴ *Id.* at 370.

⁷⁵ *Id.*

⁷⁶ RAVEL, *supra* note 9, at 12.

⁷⁷ 26 U.S.C. § 501(a) (2018).

⁷⁸ Anna Massoglia, ‘Dark money’ in Politics Skyrocketed in the Wake of *Citizens United*, OPEN SECRETS (Jan. 27, 2020), www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united/ [<https://perma.cc/M47D-J8LN>].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

The FEC's structure, designed to promote bipartisanship and considered judgment, has been twisted in this era of polarization to further weaken what was supposed to be one of the most important independent agencies. Because of deadlocks resulting from the Republican bloc's opposition to campaign finance regulations, "major violations are swept under the rug and the resulting dark money has left Americans uninformed about the sources of campaign spending."⁸² While Lee Goodman, a Republican Commissioner, contends that commissioners actually deadlocked in less than 10% of the cases, there can be no question that deadlocks have become substantially more prominent, especially in the context of enforcement.⁸³ Michael E. Toner, a lawyer and former Republican Commissioner, even said that he tells his clients: "Here's the situation, you have three commissioners who say this is lawful, and that is something you can rely on between now and November for your campaign strategy."⁸⁴ Another former Commissioner, Don McGahn, said in an interview that he was "not enforcing the law as Congress passed it. I plead guilty as charged."⁸⁵ These expressions by former commissioners confirm that now—because of the institutional design and the salience of campaign finance for both political parties—violations of existing law regularly go unpunished and candidates have "license to violate the law."⁸⁶

III. STRUCTURAL REDESIGN: ODD NUMBER COMMISSION AND NON-DEFERENCE APPROACH

Since its inception, critics argued that the FEC's structure made deadlocks more likely.⁸⁷ As seen in Part II, this dire forecast eventually became true. Along

⁸² RAVEL, *supra* note 9, at 1.

⁸³ Ashley Balcerzak, *Ann Ravel's Parting Shot*, OPENSECRETS (Feb. 23, 2017, 12:06 PM), www.opensecrets.org/news/2017/02/ann-ravels-parting-shot [<https://perma.cc/QL7Z-NAXX>]; RAVEL, *supra* note 9, at 1.

⁸⁴ Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html [<https://perma.cc/AQ5N-HAUS>].

⁸⁵ Michael Beckel, *Federal Election Commissioner Donald McGahn Criticizes 'Overreach' of Campaign Finance Regulations*, OPENSECRETS (Mar. 21, 2011, 12:36 PM), www.opensecrets.org/news/2011/03/federal-election-commissioner-donald-mcgahn-criticizes-overreach/ [<https://perma.cc/8XC5-WXN4>].

⁸⁶ Eliza Newlin Carney, *The FEC's Open Hostilities, Dysfunction, and Intimidation Foreshadowed the Trump Era*, AMERICAN PROSPECT (Mar. 2, 2017), <https://prospect.org/article/fec%E2%80%99s-open-hostilities-dysfunction-and-intimidation-foreshadowed-trump-era> [<https://perma.cc/Y583-GEUC>].

⁸⁷ Deadlocks, the lack of four votes for significant actions, do not result only from 3–3 ties. Deadlocks can also occur when commissioners resign and there are no immediate replacements. As of this writing, the FEC only has three commissioners and cannot constitute a quorum. Editorial Board, *supra* note 6. This problem also needs an urgent reform. However, in this Article I focus on reforms that can reduce the number of 3–3 ties, because this problem is present even when the Commission is operating without any vacancies.

the way, multiple scholars and politicians proposed to reform the FEC. As stated before, my proposal to reform the FEC consists of adopting storable voting. But before we delve into the particulars of that proposal, this Part discusses two previous proposals for structural redesign: the odd-number commission and the non-deference approach. This will provide much-needed context to understand how storable voting addresses some of their limitations, among them being the lack of bipartisan balance and the overburden of the federal judiciary. These are not the only proposals to reduce deadlocks in the FEC. Modest reforms have also been suggested, for instance, by reducing the voting threshold for the “reason to believe” determination,⁸⁸ or when the FEC needs to pursue civil action after it determines probable cause.⁸⁹ Moreover, these proposals are not mutually exclusive and could complement each other. Here, however, I will focus on how these two proposals—the odd-number commission and the non-deference approach—could independently reduce the number of deadlocks in the FEC.

A. *Odd-Number Commission*

An even-number commission will tie sometimes. Thus, a logical reform is to have an odd number of commissioners, since it would mean that if all commissioners participate, there will always be a majority for action or inaction. There are many variations of this reform, which I will call the odd-number commission.⁹⁰ For instance, Congress could reduce the number of commissioners to five, which would make the FEC “more lean and economical.”⁹¹ The decisive fifth vote should be someone politically independent, who does not identify strongly with either political party. While this commissioner, called a *public commissioner*, could still be registered with one of the political parties, the ideal public commissioner would be someone who “could bring to the commission the skepticism of entrenched party interests that seems to be shared by non-aligned voters—and those who have ceased voting entirely.”⁹² The public commissioner could be, for instance, a university president, a member of the clergy, a retired judge, or the leader of a public interest group.⁹³ Congress could also eliminate the

⁸⁸ For example, reducing the votes to three, rather than four, when the FEC has to determine whether there is reason to believe that a violation occurred after the recommendation of the general counsel. See Thomas & Bowman, *supra* note 13, at 592.

⁸⁹ Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1177 (2006) (“A second situation in which a tied Commission vote should not kill a proceeding is when the Commission deadlocks on whether to pursue an action in civil court.”).

⁹⁰ Another reform is to have a single administrator. Tokaji, *supra* note 12, at 186. However, the most recent congressional bills have adopted the odd-number commission, instead of a single administrator. Thus, I only focus on the odd-number commission.

⁹¹ JACKSON, *supra* note 40, at 65.

⁹² *Id.*

⁹³ *Id.*

practice of confirming commissioners in pairs, with one of each political party. A separate confirmation and a five-year term for each commissioner would mean that there would be a vacancy every year.

Other reformers have contemplated a commission with seven members with terms that would last for one year, as was proposed in a congressional bill in 1989.⁹⁴ This would mean that partisan control of the FEC would change on a year-to-year basis, eliminating the possibility of absolute one-party control. Structural reforms should empower the FEC to act quickly, because without reform “a candidate could violate the campaign finance laws, win the election as a result, be seated, and then be assessed a penalty.”⁹⁵

Bruce Ackerman and Ian Ayres focused their work on the substantive changes that are necessary to make campaign finance more democratic. They were conscious, however, that without institutional redesign the law will only look good on paper. They also proposed a five-member commission constituted by retired judges who will place their legacy above party politics.⁹⁶ Every commissioner would serve ten years and there would be vacancies every two years.⁹⁷ These term limits would entail that “the same political coalition would need to control both the Presidency and the Senate for six years before it could pack the commission with a strongly partisan majority.”⁹⁸ As such, this reform is more feasible, since neither of the political parties will benefit; the composition would depend on the electoral results. Thus, the desire for a commission that is both nonpartisan and decisive were the chief animating concerns of Ackerman and Ayres.

In 2006, a congressional bill proposed a three-member commission with a strong chair.⁹⁹ In this commission, none of the members could be affiliated with the same political party. The President would nominate the chair who would be one of the three members of the commission and serve a term of ten years. The chair would have the power to issue subpoenas, order testimony, require assistance from other agencies, require written reports, among many other powers. Meanwhile, the other two commissioners, who would also be responsible for the administration, would serve a term of six years.

Recent bills, however, have proposed replacing the three-member commission with a five-member one, with an appointed chair and no more than two members

⁹⁴ DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM* 189 (1990).

⁹⁵ *Id.* at 191.

⁹⁶ BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 129 (2002).

⁹⁷ *Id.* at 130.

⁹⁸ *Id.*

⁹⁹ Federal Election Administration Act of 2006, H.R. 5676, 109th Cong. § 101(a) (2006).

from each political party.¹⁰⁰ Similar to the congressional bill of 2006, certain administrative functions would fall on the chair, “allowing the Commission as a body to focus on the difficult questions of campaign finance law rather than getting hung up on squabbles over staffing.”¹⁰¹ However, the most significant actions—enforcement, rulemaking, and advisory opinions—would require three out of five votes, thus avoiding “the pitfall of a split vote and deadlock.”¹⁰² Finally, a blue-ribbon panel, formed by experts insulated from political influence, would recommend candidates to the President.

A bill introduced by House Speaker Nancy Pelosi and John Sarbanes, titled *For the People Act of 2019*, follows previous bills and reduces the composition from six to five members.¹⁰³ The most fundamental break with the current law is that while there cannot be more than two members from the same political party, the fifth member must be an independent. An independent will be anyone who has not been affiliated with a political party “as a registered voter, employee, consultant, donor, officer, or attorney, with such political party or any of its candidates or elected public officials at any time during the five-year period ending on the date on which such individual is nominated to be a member of the Commission.”¹⁰⁴ The commissioners, who will serve a non-renewable six-year term, will be appointed by the President from a pool of candidates preselected by a blue-ribbon panel. The bill also replaces the four-vote majority requirement with a simple majority of the members who are serving at the time, solving the problem of what happens when the FEC has fewer members than it is supposed to. There will also be a chair, as stipulated in the congressional bill of 2006.¹⁰⁵

While these proposals have substantial disagreements, they all break the 3-3 deadlock by having an odd-number commission, which will reduce the likelihood of ties in the FEC. However, these sets of proposals would entail that there is not a partisan balance between both major political parties. While the FEC is normally comprised of three Republicans and three Democrats, under this reform it would be possible, in theory, for one party to mostly control the FEC. In an odd-number commission, the impartiality of the decisive vote would always be disputed. In some situations, the losing party could feel that the other party captured the agency. Moreover, the controlling political party could use the FEC’s

¹⁰⁰ Campaign Legal Ctr., *Fix the FEC: Background Memorandum on New Bipartisan Legislation to Address a Dysfunctional Agency*, (Sept. 17, 2015), www.campaignlegalcenter.org/news/publications-speeches/fix-fec-background-memorandum-new-bipartisan-legislation-address-0 [<https://perma.cc/5CGU-B5TQ>].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ For the People Act of 2019, H.R.1, 116th Congress § 6002 (2019).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 6003.

powers to its own advantage by persecuting the rival political party. When that party gains back control of the political branches of government it would seek to eliminate or reform the FEC. This could start a never-ending cycle of both political parties trying to control and reform the FEC to their own advantage.

For Professor Daniel P. Tokaji, this cure might be worse than the disease.¹⁰⁶ Tokaji evaluates the structure and competencies of the Commission by analyzing their substantive expertise, their coordination of enforcement, their susceptibility to agency capture, accountability to Congress and the public, and the compliance burden on those regulated by the agency.¹⁰⁷ Applying these criteria, he concludes that the Commission “still has some advantages, expertise and resources.”¹⁰⁸ Its bipartisan structure avoids the liability that has affected other independent agencies, like the Internal Revenue System.

Tokaji is also concerned about the susceptibility of agency capture if the FEC has an odd number of commissioners.¹⁰⁹ Even when the fifth member is an independent, the President can still nominate someone that tilts towards his party. Others have echoed this concern that most independents lean towards one party.¹¹⁰ If the independent identifies with one party, the odd-number structure would allow the Commission to be dominated by one political party, which could pursue actions with the intent of weakening the rival party.¹¹¹ A partisan majority could lead to “quid pro quo corruption and the appearance of corruption that the FEC was designed to prevent.”¹¹² Because the nature of what the FEC regulates—i.e., campaign finance—reformers should be wary of proposals that could facilitate one political party to entrench itself in power.¹¹³

¹⁰⁶ Tokaji, *supra* note 12, at 188.

¹⁰⁷ *Id.* at 184; *see also* Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 655 (2007).

¹⁰⁸ Tokaji, *supra* note 12, at 185.

¹⁰⁹ *Id.* at 186.

¹¹⁰ Eber, *supra* note 89, at 1173 (“Most independents tend to lean one way or another politically, so an independent member would likely function as a de facto member of one of the parties.”).

¹¹¹ Tokaji, *supra* note 12, at 173.

¹¹² Eber, *supra* note 89, at 1174 (“Having a partisan majority in control of regulating campaign violations implicates the very concerns about quid pro quo corruption and the appearance of corruption that the FEC was designed to prevent. Having a party majority on the Commission would provide the party in power an opportunity to manipulate elections and thus create a dynasty for that party. Certainly, the mere structure would lead to the appearance of corruption even if not actually used by the party in power to entrench itself.”).

¹¹³ R. SAM GARRETT, CONG. RES. SERV., NO. R 44318, THE FEDERAL ELECTION COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 22 (2015) (“If Congress chose instead an odd number of commissioners, how, if at all, might that affect perceptions of the agency’s legitimacy or partisanship?”).

Even if these dire outcomes do not materialize, an odd-number commission still might not be a good idea. While the FEC will be a vigorous enforcer if the majority of the commissioners align with the Democrats, the same cannot be said if the majority align with the Republicans.¹¹⁴ If that happens, the Commission might be even less effective than the current FEC.¹¹⁵ This might end gridlock, but it will not be efficient. In other words, “the devil we know”—the current FEC—might be better than “the devil we don’t”—an odd-number commission.¹¹⁶ After all, discussions about the FEC’s structure should not ignore the value of “sincere political differences over the scope of campaign finance laws.”¹¹⁷

B. *Non-Deference Approach*

Any doubt about whether the FEC’s structure affects its enforcement of campaign finance law “has evaporated over the past decade as the commission has increasingly stalemated on significant issues.”¹¹⁸ Since Tokaji believes that the FEC should reduce deadlocks, he proposed giving the tie-breaking authority to the federal courts while maintaining the FEC’s current structure. This reform would not entail amending the FECA. Instead, the D.C. Circuit only needs to overturn its previous decisions and stop deferring to the FEC when there is a deadlock because of the lack of four affirmative votes.¹¹⁹ According to Tokaji, the federal judiciary is a better tiebreaker than any independent because it is the federal institution most insulated from party politics.¹²⁰ Thus, the federal judiciary should not defer to the FEC when there are fewer than four votes and it should, instead, be the final decider. I will call this proposal the non-deference approach.

Several decisions by the Supreme Court regarding the judicial review of administrative decisions are relevant to understand how this non-deference approach would work. Under *Skidmore v. Swift & Co.*, federal courts determine whether the rulings of an administrative agency deserve deference on a case-by-case basis.¹²¹ Among many factors, the courts should consider the agency’s thoroughness, reasoning, the consistency of its interpretation, and persuasiveness. However, in *Chevron v. National Resources Defense Council*, the Court refined its approach to deference.¹²² According to *Chevron*, there are two steps courts need to consider: (1) whether Congress spoke directly on the question, and (2) whether the

¹¹⁴ Tokaji, *supra* note 12, at 188.

¹¹⁵ *Id.*

¹¹⁶ Franz, *supra* note 58, at 187.

¹¹⁷ *Id.* at 185.

¹¹⁸ Tokaji, *supra* note 12, at 185.

¹¹⁹ *Id.* at 189.

¹²⁰ *Id.* at 198.

¹²¹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹²² *Chevron v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984).

interpretation of the agency is permissible.¹²³ When these two conditions are met, courts cannot substitute that permissible interpretation with their own reading.¹²⁴ The Supreme Court later clarified in *United States v. Mead* that, before applying *Chevron's* two-steps test, federal courts need to make a previous determination, known as "Step Zero."¹²⁵ According to *Mead*, *Chevron* deference only applies when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."¹²⁶ However, even when *Chevron* deference does not apply, the administrative decision could be subject to deference under *Skidmore's* case-by-case approach.¹²⁷

In the context of the FEC, the most significant decision, *FEC v. Democratic Senatorial Campaign Committee*, precedes *Chevron*.¹²⁸ The Supreme Court decided that the FEC's unanimous dismissal of a complaint was entitled to deference under *Skidmore*.¹²⁹ Accordingly, *Democratic Senatorial Campaign Committee* clarifies that courts should generally defer to the Commission, at least when there is a four-member majority decision. The remaining question is what the level of deference is when the FEC deadlocks and the matter was closed because there was not an affirmative vote by four commissioners. This question has not been answered by the Supreme Court. However, in *Democratic Congressional Campaign Committee v. FEC*, the D.C. Circuit, through an opinion by then-Judge Ginsburg, expressed in a footnote that there should be "judicial deference to the agency's initial decision or indecision."¹³⁰ Given that the issue was not central to the resolution of the case, this footnote should be considered dictum.¹³¹ Yet, multiple decisions by the D.C. Circuit have followed the footnote and extended its application.¹³² Recently, in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, the D.C. Circuit decided that the dismissal of a complaint after a 3-3 tie was not reviewable because the FEC has prosecutorial discretion to dismiss.¹³³ According

¹²³ *Id.* at 844.

¹²⁴ *Id.*

¹²⁵ *United States v. Mead*, 533 U.S. 218, 229 (2001); see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836-37 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

¹²⁶ *Mead*, 533 U.S. at 226-27.

¹²⁷ *Id.* at 237.

¹²⁸ *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

¹²⁹ *Id.* at 37.

¹³⁰ *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987).

¹³¹ Tokaji, *supra* note 12, at 189.

¹³² *FEC v. Nat. Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992); *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000).

¹³³ *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, 892 F.3d 434, 441 (D.C. Cir. 2018).

to these D.C. Circuit precedents, federal courts must defer to the Commission, or decline to review, even when the decision was the result of deadlocks because of a lack of four affirmative votes. While *Democratic Senatorial Campaign Committee* applied *Skidmore* deference to an enforcement decision that satisfied the four-member threshold, D.C. Circuit case law extends deference even when there is no four-member majority.

Tokaji argues that in cases where fewer than four commissioners agree—including, but not limited to 3-3 deadlocks along party lines—courts should not defer to the FEC’s indecision.¹³⁴ Following *Chevron* and *Mead*, he claims that courts should not defer to the FEC when there is no majority position.¹³⁵ Deferring fails the “Step Zero” analysis since a decision with less than a majority does not carry the force of law. Accordingly, “[a] dismissal in these circumstances does not meet *Mead*’s second prong: the agency has not exercised congressional delegated authority to make rules carrying the force of law.”¹³⁶ Since the law requires four votes for any significant action, without that majority FEC decisions should not be binding on federal courts. But while *Chevron* should not apply, it is less clear whether courts should defer to the FEC under *Skidmore*.¹³⁷ Tokaji reasons that *Skidmore* should not apply when the FEC deadlocks, since there is no agency interpretation. Meanwhile, even if it were to apply, “it is hard to see why the views of three commissioners voting ‘no’ should receive greater deference than the three voting ‘yes.’”¹³⁸ Under this scenario, since federal courts do not need to defer to the FEC when there is no majority position, the federal judiciary can serve as tiebreakers.¹³⁹ Therefore, if federal courts abandon deadlock deference, they can provide the definitive answer while preserving the partisan balance of the Commission.¹⁴⁰ Along similar lines, Judge Pillard, in her dissenting opinion in *Citizens for Responsibility and Ethics in Washington*, concluded that judicial review of the FEC exists because Congress knew that the partisan balance could lead to deadlocks.¹⁴¹ Thus, judicial review of deadlocks can stop campaign finance violations from going unpunished.¹⁴²

While I share Tokaji’s fears of one-party control over the FEC, it is not hard to see why federal courts are ill-equipped to handle campaign finance regulations

¹³⁴ Tokaji, *supra* note 12, at 196.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 197.

¹³⁸ *Id.* at 198.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 200.

¹⁴¹ *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm’n*, 892 F.3d 434, 444 (D.C. Cir. 2018) (Pillard, J., dissenting).

¹⁴² *Id.*

on a day-to-day basis. If the FEC deadlocks on every step—the initial “reason to believe” determination, the finding of probable cause, settlement, or bringing civil action—federal courts must then review each determination, which would prolong the process. Federal courts should be the measure of last resort, not the default way of breaking gridlock in the FEC. Moreover, the increased polarization and partisanship has also extended to judicial selection and the federal judiciary more broadly.¹⁴³ This puts into question how insulated the federal judiciary is from political influence. Because of how impractical it would be for the judiciary to review deadlocks, plus the increased partisanship of federal courts, reformers should look at other paths towards reforming the FEC.

IV. STORABLE VOTING: A PATH TOWARDS REFORM?

The best-case reform must: (1) avoid the risk of one-party control; and (2) increase enforcement and compliance with campaign finance law. Ideally, the FEC would be insulated from political influence. If the commissioners were truly independent, an odd-number commission could satisfy both requirements. Unfortunately, because of party polarization it has become harder to separate independent agencies from political pressure.¹⁴⁴ Thus, to avoid one-party control and the appearance and likelihood of corruption, the FEC should retain the six-member commission, with no more than three members from a political party.

The current structure is not without criticism. Under current law, nothing stops the FEC from being made up of three Republicans, two Democrats, and one independent or member of the Libertarian Party who shares the Republicans’ deregulation policy. The emphasis on bipartisanship leads to political entrenchment at the expense of independents or third parties.¹⁴⁵ Finally, since most independent agencies have an odd number of members, the odd-number commission would only align the FEC with the political convention. Despite recognizing these points, it would be best to retain, at least for now, the institutional political balance within the FEC. For many years, the FEC operated mostly through unanimous consensus.¹⁴⁶ A radical institutional reform that is associated with political party takeover could lead to corruption and the loss of

¹⁴³ Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262, 266 (2019); Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J. L. & PUB. POL’Y 521, 530 (2018).

¹⁴⁴ Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 461 (2008).

¹⁴⁵ ACKERMAN & AYRES, *supra* note 96, at 130–31; see also Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 688 (1998) (“The existing public financing system for presidential campaigns illustrates the potential for bipartisan entrenchment.”).

¹⁴⁶ Franz, *supra* note 58, at 176.

legitimacy.¹⁴⁷ Reformers seem to operate under the wishful thinking that three out of the five commissioners will believe in regulation. But if the opposite is true, the cure will be worse than the disease.¹⁴⁸ Thus, to avert the risk of one-party control, Congress should keep the FEC as an even-number commission.¹⁴⁹

The even-number commission avoids one-party control, but it can still lead to deadlocks. Therefore, Congress must find a way to reduce these deadlocks while maintaining six members. Deadlocks lead to severe non-enforcement of the law. They are so common that political candidates sometimes do not even bother to comply with campaign finance law. The lawlessness is two-fold. On the one hand, deadlocks often cause the Commission to not enforce campaign finance laws.¹⁵⁰ On the other hand, politicians and political committees trust that the law will not be applied to them because of the high likelihood of deadlocks and inaction.¹⁵¹ As cautioned recently by one former Commissioner, “[t]he deadlock in recent years not only means that those who have already violated the law are not penalized, but sends a signal that others can push the legal envelope with little fear of recourse.”¹⁵² Therefore, because of deadlocks, there is less enforcement and compliance of campaign finance regulations.

But how can Congress reduce deadlocks while maintaining the current structure? My proposal requires lowering the voting threshold from four votes to three for the initial “reason to believe” determination to allow more investigations to go forward, and adopting storable voting to reduce deadlocks in later stages. This third and final Part illustrates how storable voting can avoid one-party control of the FEC, while increasing enforcement and compliance with campaign finance regulations. First, I will explain the idea of storable voting. Second, I will discuss how the FEC can implement storable voting in the enforcement process. While the initial “reason to believe” determination will require only three votes, storable

¹⁴⁷ Tokaji, *supra* note 12, at 173; *see* Eber, *supra* note 89, at 1774; GARRETT, *supra* note 113, at 22.

¹⁴⁸ Tokaji, *supra* note 12, at 188.

¹⁴⁹ An even-number commission is not irreconcilable with other reforms that make the FEC more independent. For example, a blue-ribbon panel could assist in advising the President or commissioners could be selected from retired justices. Congress could prolong the commissioners’ term limits to give them more independence. A stronger chairperson, appointed by the President and with a longer term, might also be desirable. These changes should be adopted to make the Commission more independent. But these alternations, by themselves, will not entirely end the likelihood of deadlocks.

¹⁵⁰ *See* RAVEL, *supra* note 9, at 3.

¹⁵¹ Confessore, *supra* note 84; Anthony Herman, *The FEC: Where a “Tie” Can Be (Almost) a “Win”*, COVINGTON (Mar. 20, 2014), www.insidepoliticallaw.com/2014/03/20/the-fec-where-a-tie-can-be-almost-a-win/[<https://perma.cc/ATZ3-VAHJ>].

¹⁵² Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission’s Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 450 (2017).

voting will apply in later decisions, such as the determination of probable cause. Third, I will pay special attention to the problems of agenda control. Finally, I will evaluate how this proposal enhances certain policy goals, such as facilitating enforcement and increasing compliance with the law.

A. *Storable Voting: The Idea*

Storable voting, designed by Alessandra Casella, is an alternative to majority rule for binary issues.¹⁵³ The idea is that, in addition to regular votes, voters have supplemental or bonus votes that they can use as they wish during multiple decisions. Votes can be stored for future elections, hence the name storable voting. If the voter does not use the bonus vote in this election because they did not feel passionate about any issue, they can use it in the next one. As such, storable voting builds on the “temporal dimension of voting rights.”¹⁵⁴

To understand storable voting, consider the following hypothetical scenario. A committee with four members meets weekly to decide different proposals that can either pass or fail. The chairperson of the committee is the agenda setter, and he decides how many proposals are on a particular weekly meeting and the order of the voting. Each member has a storage of votes that they can use every month. In this particular committee, every member has thirty regular and twenty bonus votes to be distributed among thirty proposals every month. During the first week, six proposals are on the table. Commissioner A and Commissioner B feel passionate about the first proposal, so each give it three votes (one normal vote + two bonus votes). Meanwhile, Commissioner C feels neutral (one normal vote) and Commissioner D is against it (one normal vote + one bonus vote). They do not know how the other commissioners are voting. According to the voting, the proposal wins by a 7-2 margin, but with the consequence that the first two commissioners lost two bonus votes, while Commissioner C, who was more indifferent, stored votes for a future issue he cares more strongly about, either that same week or in the future.

Storable voting can apply in many voting contexts: commissions, shareholder meetings, legislatures, and even referendums. For example, imagine a situation in which a commission of four members will consider twenty matters over a period of four weeks. Each commissioner is given an initial stock of twenty bonus votes, in addition to their twenty regular votes, for a total of forty votes. In this voting situation, each commissioner must determine two fundamental things before voting. First, the *direction* of their preference: whether they are for or against the proposal. Then, the *intensity* of their preference: whether they will use their

¹⁵³ CASELLA, *supra* note 14, at xxi.

¹⁵⁴ *Id.* at xxxii (quoting Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. ONLINE 41 (2007)).

extra votes and how many of them they will use. To determine their intensity, the commissioner will also have to enter a murky territory: guessing how the others will use their bonus votes. This is the element of *voting strategy*, which will depend on “the number of proposals that remain to be voted upon, and the number of votes still held by each of the other members.”¹⁵⁵ Each commissioner votes without knowing how the other commissioner will vote. While commissioners are not forbidden from collaborating with one another, the utility of storable voting rests on the uncertainty regarding how the other commissioners will use their bonus votes. For every Yes/No decision, the outcome that gets the most votes will triumph, regardless of how many commissioners voted in that direction. Thus, any decision can have different patterns of votes.

Studies have shown that commissioners can increase the utility of storable voting if they vote according to their preferences.¹⁵⁶ Monotonicity, which Casella describes as the voting strategy of “casting more votes when the decision on the table is more important,”¹⁵⁷ is a central aspect of storable voting. If every commissioner votes according to their preferences, each commissioner will win more often than under majority rule on the issues they care about the most.¹⁵⁸

Storable voting accomplishes several objectives. First, voters will have a greater chance of winning in topics that matter more to them, while having a lower probability in those that matter less. Second, there is a higher probability of minority victories, even though every individual is treated identically and has the same number of votes. Finally, storable voting addresses the problem of minority disenfranchisement, because the minority can never win under a majority system.

B. *Storable Voting in the FEC*

While storable voting was designed to protect minority rights, Congress should apply it in the FEC to reduce deadlocks. As we have seen, deadlocks are more common in the enforcement context.¹⁵⁹ Many MURs end with a deadlock, even when the general counsel advises the Commission that there is “reason to believe” that a violation occurred. Accordingly, deadlocks during enforcement decisions are more pervasive and lead to significant non-enforcement of the law. By contrast, rulemaking and advisory opinions are areas in which the FEC deadlocks less frequently, and there is a smaller, though significant, problem with polarization.¹⁶⁰ As such, I recommend applying storable voting only in the

¹⁵⁵ *Id.* at 36.

¹⁵⁶ *Id.* at 37.

¹⁵⁷ *Id.* at 60.

¹⁵⁸ *Id.* at 95.

¹⁵⁹ RAVEL, *supra* note 9, at 9–10.

¹⁶⁰ See GARRETT, *supra* note 63, at 13–14.

context of enforcement: the application of campaign finance regulations to individual violators.

Currently, the enforcement process starts when a third-party complains that a federal candidate or a political committee violated a campaign finance regulation. This MUR is assigned to the general counsel, who advises the FEC on whether there is “reason to believe” there was a violation. To proceed, the law states that four members need to agree to: (1) find “reason to believe” and initiate the investigation; (2) dismiss the matter pursuant to its prosecutorial discretion; or (3) find no “reason to believe.”¹⁶¹ What tends to happen is that the Commission reaches a tie on whether there is “reason to believe” and, consequently, the matter is closed.¹⁶²

To address this, one alternative is for “reason to believe” determinations to require only three votes, rather than four, to allow the matter to proceed.¹⁶³ The United States International Trade Commission—another independent, bipartisan, even-number commission—has a similar rule in place.¹⁶⁴ This change, by itself, would not stop the Commission from deadlocking on future proceedings since four members of the FEC are also required for finding probable cause that a violation occurred, conciliation, notifying authorities, and pursuing civil action.¹⁶⁵ However, if this lower voting threshold is combined with storable voting, the risk of future stalemate at a later stage is diminished. Therefore, I would divide the enforcement proceeding into two stages: pre-“reason to believe” and post-“reason to believe.” In the first stage, the Commission must determine whether there is “reason to believe” and whether to exercise prosecutorial discretion to dismiss. In this stage, storable voting will not apply. Instead, if the FEC has a 3-3 tie, the proceeding goes forward. Thus, the Commission cannot submit someone to an investigation without at least three commissioners agreeing there is “reason to believe” that a violation occurred. Meanwhile, to dismiss because of its prosecutorial discretion, at this first stage or a later moment, four commissioners must consent.

¹⁶¹ FEDERAL ELECTION COMMISSION, *supra* note 36, at 12–13.

¹⁶² RAVEL, *supra* note 9, at 8–9.

¹⁶³ Thomas and Bowman would apply this lower threshold only if the general counsel believes there was a violation of campaign finance law. Thomas & Bowman, *supra* note 13, at 592. Instead, I believe that under any 3-3 tie the investigation should carry forward, regardless of the general counsel’s recommendation.

¹⁶⁴ 19 U.S.C. § 1330(d)(5) (2018) (“Whenever, in any case in which the Commission is authorized to make an investigation upon its own motion, upon complaint, or upon application of any interested party, one-half of the number of commissioners voting agree that the investigation should be made, such investigation shall thereupon be carried out in accordance with the statutory authority covering the matter in question.”).

¹⁶⁵ Tokaji, *supra* note 12, at 186.

Afterwards, the FEC notifies the respondent of the “reason to believe” determination and the general counsel investigates.¹⁶⁶ This is when the second stage begins, which includes settlement before probable cause, finding probable cause, notifying the Department of Justice, and settlement after probable cause. Storable voting will apply in each of these votes that now require four votes. Before the determination of probable cause, the Commission has regulated that there can be a voluntary conciliation between the respondent and the Commission to allow for early disposition of the MUR.¹⁶⁷ Since this determination is dispositive, this will be the first step where storable voting comes into play. Here, the commissioners will get to vote on whether they want to settle the issue with the respondent.

Under my proposal, each commissioner will have one regular vote and they can only use a maximum of three bonus votes in each decision. Commissioners can use the remaining bonus votes in the other MURs that are discussed during this or later meetings. For example, Commissioners A and B do not want to settle, but believe the issue is not as important as others. They both give the matter only their regular votes. Commissioner C, however, strongly opposes settling. As such, he uses three of his bonus votes and his regular vote against settling. Commissioners D and E really want to settle, and each of them uses one of their bonus votes, in addition to their regular votes. Commissioner F only uses her regular vote against conciliation. Final tally: six against settling, five in favor. The MUR continues.¹⁶⁸

The next voting step is the determination of probable cause. At this moment, the commissioners have the Probable Cause Brief, where the general counsel recommends to the Commission whether to find probable cause to believe a violation has occurred or is about to occur.¹⁶⁹ The respondent can request a Probable Cause Hearing and two commissioners need to agree for the hearing to be held.¹⁷⁰ Afterwards, and with the briefs of the general counsel and the respondent in hand, the Commission will vote on whether there is “probable cause to believe” that a violation has occurred or is about to occur. Storable voting will also apply in this determination. If there is a determination of probable cause, the Commission then needs to: (1) determine whether to notify the Department of Justice if they believe the respondent acted willfully; and (2) approve or disapprove the conciliation agreement between the general counsel and the respondent. Storable voting will also apply to both of these decisions. Meanwhile, if there is no determination of probable cause, the MUR is dismissed.

¹⁶⁶ FEDERAL ELECTION COMMISSION, *supra* note 36, at 12–13.

¹⁶⁷ *Id.* at 16–17.

¹⁶⁸ If the Commission and the respondent want to settle, the general counsel proposes the conciliation agreement and the Commission only votes upon it.

¹⁶⁹ *Id.* at 18.

¹⁷⁰ *Id.* at 18–19.

Thus, it is likely that the commissioners will place more importance on the probable cause determination and, accordingly, use more of their bonus votes.

Finally, if the FEC determines there is reasonable cause that a violation occurred, but could not settle the dispute, it can bring forward a civil action. This currently requires a four-member majority. However, if there is already a determination of probable cause, it makes less sense to require an absolute majority.¹⁷¹ Likewise, if the Commission already determined through storable voting that there is probable cause that a violation occurred, the respondent should not be spared by a subsequent inconsistent vote. Accordingly, storable voting will not apply at this stage, and the vote of three commissioners is enough to bring a civil action.

Some of these decisions—settlement after probable cause, notification to the authorities, and civil action—could be left to the chairperson or require a different voting threshold. This proposal does not seek to provide all the answers. However, storable voting can be used to provide a definitive answer in the most crucial decisions of the FEC, such as the determination of probable cause. The problem of deadlocks will be solved through two changes. First, by requiring only three votes for the FEC to determine there is “reason to believe.” Second, by applying storable voting in the later stages. Thus, even if the “reason to believe” decision is tied 3-3, the Commissioners can use their bonus votes in later stages—settlement, probable cause, and notification to authorities—to avoid deadlocking on later stages. More importantly, once the process starts and the public record is compiled, it would be harder for the Commission to dismiss the matter if there was a violation of the law. It will also be easier for the third party, the one who brought the complaint, to seek review if it believes the Commission’s decision does not deserve deference.

C. Agenda Setting, Design, and Calendar

The agenda setter plays a crucial role in storable voting. Every voter in this voting system faces degrees of uncertainty. First, voters might not know on which future proposals they are going to vote. Second, if the proposals are known, they might not know the preferences of the other members, which could change over time. While this may complicate how they vote, “[a]s long as voters can predict their preferences on average, they can still use their expectations to decide their strategy and evaluate the welfare potential of the voting scheme, in the knowledge that sometimes they will overestimate the importance of future decisions and sometimes underestimate it.”¹⁷² But “what happens if one or more committee

¹⁷¹ See Eber, *supra* note 89, at 1177.

¹⁷² CASELLA, *supra* note 14, at 97.

members control the agenda.”¹⁷³ There is a risk that the agenda setter could use his powers to drain the bonus votes of the other commissioners and win an unpopular decision on that basis.

There are two possible ways the agenda setter can control the agenda. In the first, the chair can only choose the “order in which the proposals are brought to the vote.”¹⁷⁴ The full agenda will be fixed at the beginning of the game; the chair only decides, previous to the start of voting, the order in which the proposals will be considered. Here, controlling the order of the agenda serves, if only, as a communication device—a way for the chair to communicate his priorities. When the chair controls the order of the agenda, “the bonus vote does matter; the chair’s control of the agenda does not.”¹⁷⁵ Therefore, the distributional effect is minor, and “[t]he chair can do no better than setting the order randomly.”¹⁷⁶

In the second form of agenda control, the chair not only controls the order but also the content of the agenda.¹⁷⁷ The other commissioners do not know if a certain proposal will be on the agenda, and this uncertainty affects their voting choices. While in the first situation the agenda is fixed, here the agenda is fluid. The chair can add issues to the agenda as he goes along. In this situation, “the chair’s advantage is larger.”¹⁷⁸ But as long as the voters employ bonus votes based on their preferences, the voting system is still preferable to majority voting, where the agenda setter also has advantages.¹⁷⁹ This will be contingent, however, on all members sharing, more or less, the same knowledge about how the other voters will vote. But if the chair has superior information about the others’ preferences, the chair will have an even larger advantage.

Of these two forms of agenda control, the chair of the FEC should, if anything, only be empowered with the first one: deciding the order of the matters under consideration. The agenda should be fixed, with every commissioner knowing which proposals are going to be considered later on. The order of the agenda could also be arranged randomly, without the chair setting the order. However, the most important aspect is that the chair does not add matters to the agenda to drain the bonus votes of the other commissioners.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 98.

¹⁷⁵ *Id.* at 116.

¹⁷⁶ *Id.* at 103.

¹⁷⁷ *Id.* at 116.

¹⁷⁸ *Id.* at 98.

¹⁷⁹ *Id.*

How might this fixed agenda look? In 2018, there were a total of 186 MURs, with an average of sixteen every month.¹⁸⁰ This number will serve as the starting point. The Commission will meet two times every month and it will consider, on average, seven to eight cases every meeting. The chair will set and order the agenda, deliberately or randomly, at least one month in advance. As such, all the commissioners will know the ten to fifteen Matters Under Review that they will evaluate during the two meetings every month. As mentioned previously, when the Commission must determine whether there is “reason to believe” that a violation occurred, three votes will be enough to open the investigation. Storable voting will not apply in this decision, but it will apply in others where the law currently requires four votes. Under this example, however, imagine that the FEC will not consider any “reason to believe” determination, but only matters where storable voting applies. If there are twelve such matters, each commissioner will have twelve regular votes and twelve bonus votes to distribute accordingly, but never more than three in one decision. These bonus votes will expire each month. The next month they will be granted a new stock of votes, depending on the amount of matters to be considered. This fixed agenda limits the power of the chair, which guarantees that every commissioner will gain more if they use their votes according to the intensity of their preferences. Each commissioner will win more than with majority voting in matters that they prefer, and lose more frequently than with majority voting in those they consider less important.

How should the FEC deal with urgent matters that arise at the last minute? If it is possible, they should be added to next month’s agenda, either in the first or the second meeting. A different alternative is to include it in the agenda that has already been fixed, since it is not likely that this, by itself, will outweigh the benefits of storable voting. As explained above, even when the chair controls the content of the agenda, storable voting is still favorable to majority voting. More importantly, these extraordinary situations are not enough to disregard the proposal. The exception should not make the rule. In 2017, the average number of days of a Matter Under Review, from the moment it was opened to the day it was closed, was 470 days. The process of enforcement is long, with opportunities for presenting evidence, filing briefs, public hearings, and different stages of conciliation. Nothing stops the FEC from setting up an agenda that is relatively fixed, with limited exceptions for urgent matters. It would also be wise that the chair position rotates among Commission members every two years to avoid any possible advantage the position may have in this or any other situation.

¹⁸⁰ FEC ENFORCEMENT STATISTICS 1977–2019, FEDERAL ELECTION COMMISSION, www.fec.gov/press/bkgnd/EnforcementStatistics.shtml (last updated Oct. 17, 2019) [<https://perma.cc/3CBE-KY9A>].

D. Policy Goals

While the objectives of storable voting are more salient in the context of majority and minority voters, they are also present, though in different ways, in the context of the FEC. First, the commissioners will feel more enthusiastic about this voting system since the commissioners will be able to succeed more often than with majority voting. This will be especially true in situations where they care more intensely about the outcome than the opposing commissioners. For example, imagine Commissioners A and B care deeply about campaign finance disclosure requirements, while the other commissioners are more concerned with coordination between candidates and political action committees. If A and B are the only two commissioners who are passionate about this, they will not be able to win under majority voting. Under storable voting, however, they could use their bonus votes to move this matter forward if the other commissioners are more indifferent. It is not that some commissioners will be more important than others, but that each commissioner will have a better chance of succeeding in those issues that they consider more important.

Second, the institutional balance is maintained, while simultaneously breaking through the 3-3 gridlocks and giving everyone the same voting power. Since the structure is preserved, there is a lesser chance that the FEC will be perceived as illegitimate or captured by one political party. The Democratic and Republican blocs have equal chance to apply their reasonable interpretations of campaign finance law. At the same time, the voting system might change the culture of the FEC. Currently, the commissioners think of themselves as a bloc. This bloc mentality is a clear consequence of the FEC's structure and majority rule. However, with storable voting, the intensity of their preferences over a range of matters will take precedence over their party affiliation. Because each commissioner has multiple bonus votes, it would be next to impossible for them to guess how each commissioner is going to distribute their bonus votes. Commissioners will make the most out of their bonus votes only if they vote according to their preferences. Whereas under the current system the commissioners can reach a deadlock if both blocs vote in opposite directions, under storable voting this will only happen in the unlikely event that both blocs used exactly the same number of bonus votes. While in the tier of the most controversial decisions we can expect each commissioner to use all their bonus votes, in the other tiers, the commissioners must consider many factors, unless they want to waste their bonus votes.

Third, no group of commissioners will be disenfranchised as they sometimes are under the current system and could be under an odd-number commission. This enhances the legitimacy of the Commission, while at the same time avoiding deadlocks and non-enforcement. Currently, the Democratic bloc is powerless in many cases, since the Republican bloc can paralyze any case if all of its commissioners stick together. This will not happen under storable voting. First,

three votes will be enough to determine there is “reason to believe” a violation occurred and initiate the investigation. Second, once the process starts and storable voting applies, each bloc will be expected to win at a frequency consistent with its relative size. Storable voting was created to help systematic minorities win more frequently than with majority rule. This consequence will be reproduced, at an even larger scale, in the context of two groups that share the same size. Moreover, even if an odd-number commission is established, storable voting can still be adopted so the minority wins more often than under majority rule.

Finally, the implementation of this system will lead to fewer ties and, consequently, more enforcement and compliance with the law than the current system. Now, the impasse of the 3-3 tie means that the law is not enforced. But with storable votes, the commissioners will be able to use their votes strategically and win some of the time, especially when they care more about a particular outcome than the other commissioners. More importantly, because storable voting adds an element of unpredictability, it will increase compliance. Currently, the political candidates and their committees can rely on the near-certainty that the Commission will deadlock. One negative consequence of the current structure is that deadlocks “signal to political actors the campaign finance behavior that is most susceptible to regulatory and enforcement delay or confusion.”¹⁸¹ However, under storable voting, they will not be able to accurately predict how each commissioner will use their bonus votes. This should lead to compliance with campaign finance regulations because of the fear, now more substantial, of being investigated and punished by the FEC.¹⁸² Candidates and political committees will not know what other issues the FEC will be considering each month or how each commissioner will distribute their bonus votes.

As with any voting mechanism, there are some drawbacks. One is that there will likely be inconsistent decisions over similar issues. However, this also happens with the current voting system. More importantly, federal courts would be justified to settle the matter, and not defer to the agency when the issue has been decided inconsistently.¹⁸³ Moreover, if the voting threshold for “reason to believe” determinations is reduced to three, federal courts will have a more complete record if they decide to review an inconsistent decision.

¹⁸¹ Franz, *supra* note 58, at 177.

¹⁸² See generally Fangfang Tan & Andrew Yim, *Can Strategic Uncertainty Help Deter Tax Evasion? An Experiment on Auditing Rules*, 40 J. ECON. PSYCHOL. 161 (2013) (arguing that uncertainty can contribute to tax compliance).

¹⁸³ Under *Skidmore*, an inconsistent decision is one of the factors courts should weigh when deciding whether to review the administrative decision. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

The second issue is the fear that influential politicians or lobby groups could pressure a commissioner or a set of commissioners to use all their bonus votes on a particular issue. The worst scenario would be, for example, one decision in which four commissioners use their regular votes to find probable cause, one commissioner uses only his regular vote against the finding of probable cause, and the final commissioner uses her regular vote and all three of her bonus votes to vote against a finding of probable cause to save a friend or political ally. The final tally will be 5-4 against the finding of probable cause, despite the fact that four voted in favor of the proposal and only two voted against. In a way, this is an intrinsic element of storable voting: the minority will win if it cares more about the outcome than the majority. However, there are ways to reduce the abuse of this voting system. The President should nominate, and the Senate approve, commissioners that are recommended by a blue-ribbon committee so they are more insulated from political pressure. The Office of Government Ethics can pay particular attention to extreme voting patterns and investigate accordingly. Finally, Congress can reduce the amount of bonus votes that could be used on each decision. Thus, once the method is implemented, different changes might be necessary to keep the FEC from being perverted as it has been under the current system. That is the only way storable voting will accomplish its policy goals.

V. CONCLUSION

The FEC has been delegated the fundamental task of enacting and enforcing campaign finance regulations. Without them, “[e]ven when our votes count equally, inequality of private wealth may distort public deliberation in ways that are inconsistent with our mutual recognition as equal citizens.”¹⁸⁴ But the structure of the FEC, with its persistent lapses into deadlock, has been criticized for most of its history. This perversion is growing at unprecedented levels. In this era of peak polarization, its structure has led to significant non-enforcement of campaign finance regulations. This crisis calls for an institutional reform. For many years, the emphasis has been having an odd-number of commissioners, and, most recently, allowing the federal courts to be the decider by not deferring to the FEC when it deadlocks. But while an odd-number commission could lead to one-party control, the non-deference approach would require the federal judiciary to intervene any time there is a deadlock. Through storable voting, however, Congress can reduce deadlocks in the FEC while maintaining an even-number commission. The lower threshold of the “reason to believe” will be followed by storable voting in later stages. This will lead to more investigations, while also providing a voting mechanism to reduce the occasions the FEC will deadlock at a later stage. In this way, storable voting contributes to the enforcement of campaign finance regulations. Storable voting will allow commissioners to prevail more often than under majority rule, especially on the issues they care about the

¹⁸⁴ ACKERMAN & AYRES, *supra* note 96, at 13.

most. This will stop commissioners from being effectively disenfranchised, as they are under the current system. Storable voting could lead to a change of culture in the FEC, since membership in a bloc will not be the most important factor. Instead, to make the most out of their bonus votes they will have to use them on their preferred issues. Finally, because of the uncertainty of storable voting, it could lead to voluntary compliance with campaign finance law. While this might not be enough to save the FEC, storable voting and other voting systems should be considered when redesigning this important institution.