

# Electoral Management Bodies as a Fourth Branch of Government

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*Electoral Management Bodies (EMBs) are tasked with administering elections in most democracies, yet have been the subject of relatively little scholarly attention until recently. This article focuses on one under-examined aspect of EMBs: the decision in some democracies to grant them constitutional status. While independent EMBs are now the norm, there are variations in how they are designed. Within the democracies that use independent EMBs, there is a division between those that enshrine the EMB in the constitution itself as a fourth branch of government with status similar or equivalent to the legislature, executive, and judiciary, and those that create and empower EMBs through statute. This article traces the phenomenon of EMBs as a fourth branch of government in contemporary constitutional design and investigates its implications.*

*Les organismes de gestion électorale (OGE) sont chargés de gérer les élections dans la plupart des démocraties et pourtant, jusqu'à récemment, ils ont fait l'objet de relativement peu d'attention érudite. Cet article traite essentiellement d'un aspect peu examiné des OGE, c.-à-d. la décision dans certaines démocraties de leur accorder une reconnaissance constitutionnelle. Bien que les OGE indépendants soient désormais la norme, il existe des variations dans la façon dont ils sont conçus. Chez les démocraties qui optent pour des OGE indépendants, il existe une division entre celles qui inscrivent l'OGE dans la constitution comme quatrième branche du gouvernement avec un statut semblable ou équivalent aux pouvoirs législatif, exécutif et judiciaire et celles qui créent et habilitent les OGE grâce à des lois. L'auteur de cet article fait l'historique du phénomène des OGE comme quatrième branche du gouvernement dans la conception constitutionnelle contemporaine et examine les implications.*

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## I. Introduction

Most democracies task specialized commissions, which are collectively known as Electoral Management Bodies (EMBs),<sup>1</sup> with responsibility for administering elections. Election administration includes interpreting and applying electoral laws, counting ballots, and running polling stations among other functions essential to democracy. The current dominant trend in democracies is to assign election administration to an independent EMB,<sup>2</sup> rather than leaving it within the hands of elected representatives or the bureaucrats ultimately accountable to them. Placing election administration within the ambit of EMBs instead of within the political branches reduces the risk of partisan interference in election administration.<sup>3</sup> Election administration through an independent and impartial EMB maximizes the probability of electoral integrity.<sup>4</sup>

Despite their importance in the democratic architecture, and their prevalence across democracies, EMBs have received relatively little scrutiny until recently. While independent EMBs are now the norm, there are variations in how they are designed. Within the democracies that use independent EMBs, there is a division between those that enshrine the institution in the constitution itself as a branch of government with status similar or equivalent to the legislature, executive, and judiciary, and those that create and empower EMBs through statute as regular administrative bodies. This article focuses on this under-examined aspect of election administration — the decision in some

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1 Rafael Lopez-Pintor, *Electoral Management Bodies as Institutions of Governance* (New York: United Nations Development Programme, 2000); Alan Wall et al, *Electoral Management Design: The International IDEA Handbook* (Stockholm: International IDEA, 2006); Louis Massicotte, Andre Blais & Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (Toronto: University of Toronto Press, 2004) at 83-97. I exclude from this definition electoral courts, which are tasked with aspects of election administration in some democracies. Electoral boundary commissions should also be considered EMBs, though with a more limited mandate confined to the realm of redistricting than the electoral commissions that are the subject of this article.

2 Lopez-Pintor, *supra* note 1 at 25-26. 53 per cent of democracies administer elections through independent EMBs. 27 per cent operate through government supervised by an independent body and 20 per cent have elections run by the executive. Canada, Australia, the United Kingdom, South Africa, Mexico, and India are notable democracies that assign election administration to an independent institution. Leading democracies where the executive still has a significant role in running elections include France, Japan, and Germany.

3 See Sarah Birch, *Electoral Malpractice* (Oxford: Oxford University Press, 2012), for the prevalence of abuses of electoral governance across multiple democracies.

4 Electoral integrity is a concept used to measure the legitimacy of democratic processes that has recently found favour among the political science community as an alternative to standards such as “free and fair” elections. See Pippa Norris, “The New Research Agenda Studying Electoral Integrity” (2013) 32:4 *Electoral Studies* 563, and Pippa Norris, *Why Electoral Integrity Matters* (New York: Cambridge University Press, 2014).

democracies to constitute EMBs as a fourth branch of government. It traces the phenomenon of EMBs as a fourth branch of government in contemporary constitutional design and investigates its implications.

How constitutional designers have envisioned EMBs varies among these democracies. In some, EMBs are the only entity to be granted elevated constitutional status and the sole institution comprising the fourth branch of government. In others, a multitude of bodies have been created and endowed with constitutional status, with the common denominator being their oversight of the actions of the other branches. This second scenario could be understood as fostering several new branches of government or instead a fourth one composed of many different institutions. For the purposes of this article, I focus exclusively on EMBs and use the term the “fourth branch of government” in relation to them, without intending to foreclose the existence of other similarly constituted branches of government dealing with matters of institutional oversight.

EMBs in established democracies tend to be statutory creatures, born of regular legislation that defines their existence, functions, authority, and appointment process. This model displays some vulnerabilities, as EMBs inevitably clash with the elected representatives whose political activities they regulate. Governments may be tempted to use their legislative authority to impede the work of independent EMBs or to stack them with partisan appointees. The risk of “partisan capture” by political majorities of EMBs designed on the statutory model is alive and ongoing.<sup>5</sup>

The danger of partisan interference has led some democracies to constitutionalize the body engaging in election administration. These democracies entrench independent EMBs in the constitution rather than enabling them through statute. This approach to constitutional design removes EMBs from direct control by transitory political majorities in the legislature, as they can no longer legislate to eliminate or neuter the election commission. Newer democracies, and those transitioning from periods of authoritarian or colonial

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5 As will be discussed in the paper, even commissions with constitutional status are vulnerable to capture. Recently, hostile political actors have captured or eliminated election commissions in the Maldives and Hungary. e.g. BBC, “Entire Maldives Election Commission Sentenced” *BBC News* (9 March 2014), online: <<http://www.bbc.com/news/world-asia-26508259>>; Kim Lane Scheppele, “Hungary, An Election in Question, Part 3”, *The New York Times* (28 February 2014) online: <[http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/?\\_php=true&\\_type=blogs&\\_r=0](http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/?_php=true&_type=blogs&_r=0)>. As Scheppele writes, “Twice since the 2010 elections, the Election Commission was reorganized and all members...were fired before they completed the ends of their terms.” In 2010 the Commission “was replaced by a new Commission elected by the Fidesz parliamentary majority which included no members from the political opposition.” In 2013, a new structure was imposed and “[n]ot surprisingly, all of the new members...appear to be allied with the governing party.”

rule, have led this trend. India, South Africa, Mexico, Kenya, and Costa Rica are at the vanguard. The constitutions in these countries elevate EMBs to a veritable fourth branch of government, alongside the legislature, executive, and judiciary. Other notable democracies adopting this form of constitutional design include South Korea, the Maldives, Nepal, Bangladesh, Afghanistan, and several countries in Latin America. As a matter of constitutional practice, democracies of otherwise varying lineages and trajectories have adopted this model in an attempt to insulate EMBs from partisan capture and enhance electoral integrity.

At the level of theory, Bruce Ackerman has called for a “serious constitutional exploration”<sup>6</sup> of how a “democracy branch”<sup>7</sup> within the state itself could be formulated to check misuses of power by elected representatives who undermine the democratic process in order to entrench themselves. This article aims to contribute to that exploration by analyzing the strengths and weaknesses of granting EMBs constitutional status. The fourth branch model represents an evolution in democratic practice, constitutional design, and election administration that has implications for electoral integrity, but also for how we understand the separation of powers.

The benefits of constitutionalizing EMBs, and therefore insulating them from the risk of direct partisan capture, are significant. This approach protects the existence and the functioning of the election commission. The democracies that take this approach provide a model for protecting the election commission as an inextricable component of electoral integrity. An assessment of the lived experience of these democracies, however, indicates that constitutional protection for EMBs has not eliminated partisan interference, but merely channeled it in different directions.<sup>8</sup> While the model is an improvement from the statutory approach, the experiences of democracies where EMBs form a fourth branch of government have exposed flaws in constitutional design and, at times, the failures of courts to fully protect EMB independence and impartiality despite their constitutional status.

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6 Bruce Ackerman, “The New Separation of Powers” (2000) 113:3 Harv L Rev 633 at 691.

7 *Ibid* at 716-722.

8 This is a variation on the “hydraulics” metaphor in election law: Samuel Issacharoff & Pamela S Karlan, “The Hydraulics of Campaign Finance Reform” (1999) 77:7 Tex L Rev 1705. Under the hydraulics theory, if a path is closed off to money in politics, for example, it will naturally flow elsewhere to seek a different outlet. There might be a similar phenomenon with respect to EMBs. Stronger EMBs with the ability to vigorously enforce electoral laws might create incentives for elected representatives to pass less robust laws, in the hope of diminishing the artillery available to the regulator. I thank Tim Kuhner for this point.

This article will proceed as follows. Section II discusses the statutory model of election administration and details the risk of partisan capture. The recent conflict in Canada between the federal government and Elections Canada will be investigated as a prominent example showcasing the vulnerability of EMBs under the statutory approach. Section III considers the fourth branch model, with a particular focus on India, South Africa, Kenya, Mexico, and Costa Rica, as leading examples of democracies that have enshrined the EMB in their constitutions. This section will focus on the variation among the approaches adopted by the constitutions in these democracies along three lines: 1) the EMB's authority; 2) its relationship to the other branches as defined in the constitution; and 3) the provisions regarding the structure of the EMB. Section IV assesses the experiences with election administration in these democracies. It suggests ways forward that build on the successes of the model at reducing partisan interference while improving on the weaknesses in constitutional design that have become evident. I conclude in Section V by considering the broader implications of the fourth branch model beyond election administration, namely for comparative constitutional design.

## II. The statutory model of election administration

The adoption of election commissions with constitutional status is a reaction to the limits of the statutory model for election administration. The statutory model prevails in many prominent established democracies, including the United Kingdom, Australia, Canada, New Zealand, and the United States. The United Kingdom's Electoral Commission,<sup>9</sup> the Australian Electoral Commission,<sup>10</sup> and Elections Canada all possess broad mandates to administer elections and oversee political activity.<sup>11</sup> All three are independent and impar-

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9 Navraj Singh Ghaleigh, "A Model for Party Finance Supervision? The First Decade of the UK's Election Commission" in Keith D Ewing, Joo-Cheong Tham & Jacob Rowbottom, eds, *The Funding of Political Parties* (Oxford: Hart Publishing, 2011), and Keith D Ewing, *The Cost of Democracy* (Oxford: Hart Publishing, 2007). Troublingly, the EMB in the United Kingdom in 2009 had its membership revised to include some partisan appointees. See Canada, *Comparative Assessment of Central Electoral Agencies*, by Paul G Thomas & Lorne R Gibson (Ottawa: Elections Canada, 2014) at 50-51. The 2009 amendments, however, made sure that the partisan appointees would be a minority.

10 Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (Canberra: Australian National University Press, 2012), and Colin Hughes, "The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality" in Graeme Orr, Bryan Mercurio & George Williams, eds, *Realising Democracy: Electoral Law in Australia* (Sydney: The Federation Press, 2003).

11 Jean-Pierre Kingsley, "The Administration of Canada's Independent, Non-Partisan Approach" (2004) 3:3 Election LJ 406 and Diane R Davidson, "Enforcing Campaign Finance Laws: What Others Can Learn from Canada" (2004) 3:3 Election LJ 537.

tial EMBs that replaced election administration dominated by government departments accountable to elected representatives. The move to administration by EMBs was an initial victory for electoral integrity as those with the most to gain from electoral rules were no longer in ultimate control of them.

The United States' Federal Election Commission (FEC) follows the statutory model, but represents a variation. It has independence, but not impartiality. It operates as a distinct entity formally independent of Congress and the executive, but is staffed by an equal number of Democrat and Republican Commissioners. While superior to an EMB composed of representatives from only one political party, the FEC has been heavily criticized for its partisan make-up, limited mandate covering only campaign finance, and impotence in the face of flagrant abuses of federal election laws.<sup>12</sup>

The statutory model uses regular legislation to create commissions, outline their mandates, and define the appointment process. Legislation may set rules for interaction with government or political parties, and may indicate general principles (such as non-partisanship) that are to guide the decision-making of the EMB. For instance, the *Canada Elections Act*<sup>13</sup> brings Elections Canada into existence with the office of the Chief Electoral Officer (CEO) at its apex and establishes removal only for cause with the agreement of both houses of Parliament as well as the Governor General.<sup>14</sup> The Act also grants the CEO the power to "exercise general direction and supervision of the conduct of elections" and ensures that Elections Canada operates with "fairness and impartiality" in carrying out its duties.<sup>15</sup>

Despite its success in taking election administration away from direct control by elected representatives, a defining weakness plagues the statutory model: it fails to stamp out the partisan interference with election administration that animated the creation of independent EMBs separate from the political

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12 Ackerman, *supra* note 6 at 713 says the FEC's structure "virtually guaranteed administrative failure." The current FEC Chair has gone so far as to say that, "The likelihood of the laws being enforced is slim [for the 2016 election]. I never want to give up, but I'm not under any illusions. People think the FEC is dysfunctional. It's worse than dysfunctional": Eric Lichtblau, "F.E.C. Can't Curb 2016 Election Abuse, Commission Chair Says," *New York Times* (2 May 2015) online: *New York Times* <[www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?\\_r=0](http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0)>. See Brooks Jackson, *Broken Promise: Why the Federal Election Commission Failed* (Ann Arbor: Priority Press Publications, 1990), and Daniel W Butrymowicz, "Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law" (2009) 109:7 Colum L Rev 1708.

13 *Canada Elections Act*, SC 2000 c 9.

14 *Ibid* at s 13.

15 *Ibid* at s 16 (a) and (b). The Act also provides a form of rule-making power to the EMB in s 17.

branches in the first place. If dissatisfied with a decision of an EMB, a political majority in the legislature may simply amend the commission's enabling statute. This furnishes partisan-minded governments dissatisfied with the impact of independent and impartial election administration with an ample set of options, from outright elimination of the EMB to manipulation of the rules that structure its functioning.

EMBs are vulnerable to two forms of partisan capture that are particularly relevant for the purposes of this article, though a more complete typology should be developed as part of the growing study of these institutions. The first is capture built into the very creation of the EMB. On the statutory model, the US FEC stands as emblematic of this approach. By placing partisans on the FEC, Congress guarantees that the interests of Democrats and Republicans will be taken into account. There is no representation for small political parties or independent voters. While partisan balance wherein no single political party has a majority may be an attractive way of generating buy-in for the creation of an arms-length regulator from both camps in a two-party system, it deliberately minimizes any chance of impartial election administration.

The second form of capture is partisan interference with an independent and impartial EMB. Elected officials can use the appointment process to ensure partisans staff the EMB, shorten tenures so commissioners are more responsive to political pressures, cut funding, or curtail the authority of the EMB. Governments can limit the independence or impartiality of a commission or decrease the EMB's capacity to effectively carry out its functions.

Canada's recent experience with the *Fair Elections Act*<sup>16</sup> (*FEA*) demonstrates the vulnerability of EMBs on the statutory model. The *FEA* dramatically altered Canadian election law on a number of fronts, particularly by imposing restrictive voter identification rules<sup>17</sup> that were heavily criticized.<sup>18</sup> Also

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16 *Fair Elections Act*, SC 2014, c 12.

17 The government used the data in a report on "vouching" by Harry Neufeld to justify the elimination of the practice, which had permitted an individual to "vouch" for the identity and residence of a voter lacking the proper documents at the polling station. See Canada, *Compliance Review: Final Report and Recommendations: A Review of Compliance with Election Day Registration and Voting Process Rules*, by Harry Neufeld (Ottawa: Elections Canada, 2013) online: Elections Canada <[www.elections.ca/res/cons/comp/crfr/pdf/crfr\\_e.pdf](http://www.elections.ca/res/cons/comp/crfr/pdf/crfr_e.pdf)>. Mr Neufeld, however, publicly disputed their interpretation of his report and their conclusion. See Joan Bryden, "Author of Report Touted by Poilievre Contradicts Minister on Voter Fraud", *The Ottawa Citizen* (7 March 2014) online: Ottawa Citizen <[www.ottawacitizen.com/news/Author+report+touted+Poilievre+contradicts+minister+voter/9590853/story.html](http://www.ottawacitizen.com/news/Author+report+touted+Poilievre+contradicts+minister+voter/9590853/story.html)>.

18 Josh Wingrove, "Scholars Denounce Conservatives' Proposed *Fair Elections Act*", *The Globe and Mail* (19 March 2014) online: The Globe and Mail <[www.theglobeandmail.com/news/politics/scholars-denounce-conservative-governments-proposed-fair-elections-act/article17561354/](http://www.theglobeandmail.com/news/politics/scholars-denounce-conservative-governments-proposed-fair-elections-act/article17561354/)>.

included in the *FEA* were several amendments to the *Canada Elections Act* that reshaped Elections Canada. The Conservative government of the day justified these changes as necessary to curb any unaccountable behaviour by the EMB and to ensure predictability for political participants.

Looked at as a whole, however, the *FEA* amendments appear to have weakened the EMB through changes to rules on tenure, public communication, and internal administration. The *FEA* eroded the protections provided by the CEO's lifetime appointment by replacing it with a 10 year term.<sup>19</sup> The CEO was banned from communicating with the public regarding anything other than technical information about where and how to vote, excepting programs for school children.<sup>20</sup> The CEO and Elections Canada were therefore prevented from conducting voter engagement campaigns among low turnout groups, such as youth of voting age. Despite these concerns, turnout was up by 7% overall in the 2015 federal election and even increased among youth, whom Elections Canada had targeted with a pilot project for easier access to voting on campuses.<sup>21</sup> The *FEA* expanded the role for political parties in election administration by formalizing a broader role for an Advisory Committee of Political Parties to the EMB.<sup>22</sup>

The *FEA* also notably ended the CEO's authority to appoint the Commissioner of Elections Canada. The Commissioner, who is in charge of investigating if candidates and parties have violated the *Elections Act*, will now be appointed by and report to the Director of Public Prosecutions (DPP). The DPP is formally independent from government, but reports directly to a cabinet Minister and is selected by the executive, rather than by the House of Commons as is the CEO.<sup>23</sup> The rationale underlying this move appears to have been to ensure that the investigative arm of the regulator remains distinct from

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19 This change is applicable to future appointees, not the current office holder, Marc Mayrand, see *Canada Elections Act*, *supra* note 13 at s 13. The previous CEO, Jean-Pierre Kingsley, had been in office from 1990-2006.

20 *Ibid* at s 18 and s 17.1. The CEO took the view in the 2015 election that his powers were not curtailed by the amendments.

21 See Kathleen Harris, "Voter Turnout Spikes After Long, Unpredictable Campaign", *CBC News* (20 October 2015) online: CBC News <[www.cbc.ca/news/politics/canada-election-2015-voting-polls-turnout-1.3278838](http://www.cbc.ca/news/politics/canada-election-2015-voting-polls-turnout-1.3278838)>. See also Allison Jane Smith, "Youth Aren't Apathetic, and StatsCan Has the Proof", *The Ottawa Citizen* (28 February 2016) online: Ottawa Citizen <[http://ottawacitizen.com/opinion/columnists/smith-youth-arent-apatetic-and-statscan-has-the-proof?utm\\_content=buffer25264&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://ottawacitizen.com/opinion/columnists/smith-youth-arent-apatetic-and-statscan-has-the-proof?utm_content=buffer25264&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)>.

22 *Canada Elections Act*, *supra* note 13 at s 16.2(2), 21.1(1). The stated goal of this body was to ensure parties had a venue to express their concerns to Elections Canada and to receive opinions from the regulator that they could use to plan their operations.

23 *Director of Public Prosecutions Act*, SC 2006, c 9, s 121; *Canada Elections Act*, *supra* note 13 at s 13(1).



those who administer elections. There is merit in the abstract to this view. The concrete impact, however, is a risk of greater political interference in investigations of violations of election laws. In addition to these changes to the structure of Elections Canada, for the first time, an aspect of election administration was carved out from Elections Canada's mandate. Elections Canada's powers to monitor and regulate automated phone calls (termed "robocalls"), which are increasingly being used by political parties in Canada, was granted to another agency.<sup>24</sup>

Whatever the motivations behind the changes or the policy rationales on offer, their cumulative effect was to weaken the office of the CEO and the capacity of Elections Canada to effectively oversee compliance with election laws. The plenary power of Parliament to amend legislation gives any government all the authority it needs to alter election administration. Legislative majorities of all political stripes will have incentives to create more favourable rules of the electoral game that give them a leg up on their competitors. That partisan interference with elections plagues even established democracies such as Canada, let alone transitional democracies, is an underlying flaw of the statutory model. Partisan excesses may be tempered within parliamentary systems by minority or coalition governments, or in congressional systems by divided government. Absent these specific conditions, partisan capture of EMBs designed on the statutory by political majorities is a live risk. By contrast, other democracies have recognized this vulnerability and moved certain decisions about election administration out of the scope of legislative discretion by establishing EMBs in their constitutions. I turn now to consider this alternative to the statutory model.<sup>25</sup>

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24 There were vote-suppressing robocalls in the 2011 election. See *McEwing v Canada (Attorney General)*, 2013 FC 535 (where the results were upheld in several ridings despite the robocalls because the outcome was not affected). A Conservative Party operative, Michael Sona, was sentenced to jail for electoral fraud in the riding of Guelph for misleading robocalls: Michael Oliveira, "Tory Staffer Sentenced to Nine Months in Robocall Scandal", *The Globe and Mail* (19 November 2014) online: *The Globe and Mail* <[www.theglobeandmail.com/news/politics/michael-sona-convicted-in-robocalls-voter-fraud-scandal-faces-sentencing-today/article21646553/](http://www.theglobeandmail.com/news/politics/michael-sona-convicted-in-robocalls-voter-fraud-scandal-faces-sentencing-today/article21646553/)>. As of the date of writing, there were no claims of voter suppression in the 2015 federal election.

25 I leave for other work consideration of whether courts in countries with the statutory model could read constitutional protection for an election commission into guarantees of democratic rights. The right to vote or to representative government, or perhaps even the freedom of political expression, could all arguably be textual anchors. The basic argument would be that without independent and impartial election administration carried out by an EMB, democratic rights established in constitutional texts are illusory, and so constitutional protection should be on offer. If recognized, such a right could potentially have prevented the *FEA*'s interference with Elections Canada, for example.

### III. The fourth branch model

Fourth branch democracies respond to the weaknesses of the statutory model by protecting EMBs in their constitutions. They aim to provide a constitutional status for the institutions conducting election administration in order to insulate them from interference by political majorities. In doing so, they move beyond the traditional understanding of three branches in the separation of powers through the creation of an additional foundational institution of government. It is true that the *functions* of the EMB may not be fully distinct from those exercised by the other branches.<sup>26</sup> EMBs may serve a quasi-judicial function by settling disputed elections, a quasi-executive role in rule-making and applying statutes, and possess quasi-legislative powers to set rules around administration. Despite some overlap in functions among the EMB, legislature, executive, and judiciary, in the fourth branch model the EMB is conceived of as *institutionally* distinct. The *subject-matter* of its authority is also separate. The model carves out the election administration functions previously carried out by other actors within the state and assigns them to an autonomous body not directly accountable to any of the other branches.

The creation of additional branches of government can be justified by the failures of the traditional tripartite separation of powers. Bruce Ackerman argues that, given the reach of the modern administrative state, constitutional design needs to break free of envisioning government as composed of only three branches.<sup>27</sup> He asserts that the classic separation of powers is incapable of checking the daily exercise of political power by elected representatives and bureaucracies.<sup>28</sup> This failure, Ackerman claims, means that additional branches are necessary, and must be imbued with constitutional status and protection, so as to effectively check misuses of political power.<sup>29</sup> As a result, “a modern con-

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26 I thank Mark Walters for this point.

27 Ackerman, *supra* note 6 makes this argument in the context of comparison between the American Presidential model and the constrained Parliamentarianism he finds in descendants of Westminster democracies. I take no position in the debate about Presidentialism versus Parliamentarianism, constrained or otherwise. For that debate, see Cindy Skach, “The ‘Newest’ Separation of Power: Semi-Presidentialism” (2007) 5:1 Intl J Constitutional L 93.

28 A related argument for the “self-restraining” state has positioned EMBs alongside courts, central banks, and anti-corruption agencies as elements necessary to check political power. See Andreas Schedler, Larry J Diamond, & Marc F Plattner, eds, *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner Publishers, 1999) at 75-145, including specifically on EMBs, Robert A Pastor, “A Brief History of Electoral Administration” at 75-83.

29 There has been a larger debate about whether the administrative state as a whole should be understood as a fourth branch. In Canada, see Lorne Sossin, “The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?” (2009) 46 SCLR 51 and “The Puzzle of

stitution . . . should be designed to insulate certain fundamental bureaucratic structures from *ad hoc* intervention by politicians.”<sup>30</sup> As part of this transformation, Ackerman advocates for a “democracy branch” to conduct oversight of the rules structuring politics and electoral competition, because, “[h]aving won an election, the lawmaking majority might notoriously seek to insulate itself from further electoral tests — by suspending elections, restricting free speech, or fiddling with electoral laws.”<sup>31</sup>

Ackerman reframes the failures of the democratic process identified by J.H. Ely.<sup>32</sup> Ely posited the need for courts to act to ensure democratic accountability, given the risk of attempts by political majorities to entrench themselves beyond the reach of the electorate.<sup>33</sup> Ackerman goes further than Ely in terms of institutional response, as he identifies the need for bodies beyond courts to remedy the predictable failings of the political branches.<sup>34</sup> Ackerman points to the “common use of independent, but non-judicial, agencies throughout the world to supervise crucial elements of the electoral process” as a welcome development in responding to the problem of entrenchment identified by Ely.<sup>35</sup> Ackerman conceives of EMBs as an integral part of the democracy branch and calls for the FEC to be constitutionalized in the United States,<sup>36</sup> on the model of the Indian Constitution’s entrenchment of the Election Commission of India.<sup>37</sup> In this formulation, EMBs would be elevated above mere statutorily-created administrative bodies, to reside in similar status to the legislature, executive, and judiciary as fundamental institutions protected by the constitution.

Many constitutions take up Ackerman’s call to action. Constitutional designers have explicitly created new institutions, including some that amount to a democracy branch to oversee elected representatives. These constitutions emphasize that independent election administration is fundamental to democracy as a guarantee that elected representatives will actually be accountable to the people. This reduces the “democratic risk” of democratic transitions, to use

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Independence for Administrative Bodies” (2009-10) 26 NJCL 1 at 8; and Katrina Miriam Wyman, “The Independence of Tribunals in an Era of Ever Expanding Judicial Independence” (2001) 14 Can J Admin L & Prac 61 at 100.

30 Ackerman, *supra* note 6 at 689 (emphasis omitted).

31 *Ibid* at 712.

32 *Ibid* at 716.

33 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980).

34 Ackerman, *supra* note 6 at 716-722.

35 *Ibid* at 713.

36 *Ibid* at 714.

37 *Ibid* at 715-716.

Samuel Issacharoff's evocative phrasing — that elected governments will end or curtail the democratic experiment by entrenching themselves beyond the reach of the people.<sup>38</sup> Placing EMBs in the constitution ensures they cannot easily be tampered with, as constitutional amendment rules generally require significant agreement beyond a simple majority in the legislature. While formal amendment may be easier in some democracies than others,<sup>39</sup> and constitutions may even be mere “parchment barriers”<sup>40</sup> to the raw exercise of self-interested political power, constitutional status can provide significant protection. Insulation from regular political majorities means that the bar is raised much higher for elected representatives to eliminate the election commission or to alter the portions of its mandate or structure outlined in the constitution.

The fourth branch model notably recognizes that institutions are required to breathe life into rights, including democratic ones.<sup>41</sup> It moves beyond protecting certain electoral practices to guaranteeing a particular institutional set-up for election administration. Rights to democratic participation guaranteed in bills of rights — such as the rights to vote, stand as a candidate, or engage in political speech — are insufficient on their own in this model. These constitutions elevate election administration and the particular institution tasked with it up the constitutional hierarchy, on the understanding that EMBs are necessary to achieve electoral integrity in contemporary democracies. They reflect broader trends in constitutional design to emphasize not only rights, but also institutions. Recent constitution making has prioritized the institutional features of the democratic architecture, rather than bills of rights alone.<sup>42</sup>

Although the timeline is far from a clean one, the move to a fourth branch model can be seen as part of the historical evolution of constitutions to protect

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38 Samuel Issacharoff, “The Democratic Risk to Democratic Transitions” (2014) 5 Constitutional Court Rev 1; see also “Fragile Democracies” (2007) 120:6 Harv L Rev 1407, and *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015) for further elaboration of his argument. Issacharoff points to the Mexican EMB’s famous role in deciding the disputed election of 2007 as an exemplar of the power of independent election administration to fuel democratic entrenchment: *ibid* at 208.

39 Tom Ginsburg and James Melton, “Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty” (2014) University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 682, online: <<http://ssrn.com/abstract=2432520>>.

40 For a recent take on the meaning of “parchment barriers”, see Darryl Levinson, “Parchment and Politics: The Positive Puzzle of Constitutional Commitment” (2011) 124:3 Harv L Rev 657.

41 See Robert A Pastor, “The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research” (1999) 6:4 Democratization 1.

42 Sujit Choudhry, “After the Rights Revolution: Bills of Rights in the Postconflict State” (2010) 6 Annual Rev L & Social Science 301.

democracy in ever greater detail. Early democratic constitutions, such as that of the United States, had no explicit protection for right to vote but did view political expression as worthy of protection. Later versions such as Canada's 1982 amendments embraced the right to vote, which is now a generally accepted component of bills of rights. Newer constitutions tend to protect not just political expression and voting, but also the rules surrounding elections and the election commission tasked with enforcing or applying them. South Africa (1996) is a main example here. Early adopters, such as India (1950) and some Latin American democracies, prevent any linear trajectory of the evolving notion of how democracy should be constitutionally protected. Yet it is clear that there is an evolving "best practice" for constitutional design and election administration reflecting in broad strokes Ackerman's call for a "democracy branch" in addition to the usual tripartite separation of powers.

I turn now to analyzing the content of the constitutions adopting the fourth branch model. The main relevant criteria for evaluating the effectiveness of EMBs and degree of insulation from partisan interference are the authority granted to the EMB, the relationship established between the branches, and the rules structuring the EMB such as those around appointment and tenure.

### **i) Authority**

There is a spectrum of ways in which different constitutions characterize the authority of the EMB.<sup>43</sup> Some constitutions grant general responsibility over elections to the EMB and leave the specific content of that authority undefined in the constitution; the blanks are left to be filled in by the practice of the commission and by legislation. Other constitutions provide more detail on the particular activities the EMB must engage in to fulfill its mandate. This second approach has the consequence of also clarifying which aspects of election administration are beyond the reach of regular legislation.

One of the templates here has been the 1950 Constitution of India. Article 324(1) assigns the Electoral Commission of India (ECI) the "superintendence, direction and control" of elections. This language is echoed in other

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43 They also vary with regard to the jurisdictions and types of elections they oversee. India for example grants its commission authority over parliamentary, presidential, and municipal elections (India, Const, ch II, Part XV, art 324 (1949) [*Constitution of India*]). South Africa's EMB has responsibility for national, provincial, and municipal elections (Republic of South Africa, Const, ch IX, art 190(1)(a) (1997) [*Constitution of South Africa*]). Contrast this approach with that in Canada, and Australia, where the federal EMB has responsibility only for federal elections, with state/provincial or municipal authorities in charge of sub-national elections.

constitutions, including for example in Costa Rica<sup>44</sup> and Afghanistan.<sup>45</sup> South Africa adopts different but similarly broad language; it directs its Electoral Commission to “manage” elections and to ensure they are “free and fair.”<sup>46</sup> Political actors in these democracies cannot eliminate the EMB without passing a constitutional amendment. There remains significant scope for legislative action on election law and administration, however, as elected representatives can still dictate the rules that the EMB must apply, within the limits set by the guarantee of democratic rights in their constitutions. Under the Indian and South African approaches, the legal specifics of the general language stand to be determined, particularly by courts, in disputes about the boundary line between authority reserved for the EMB and that remaining with the legislature.

On the other end of the spectrum is Kenya. Kenya’s 2010 Constitution was drafted after disputes involving the partisan capture of its election commission. It establishes an Independent Electoral and Boundaries Commission<sup>47</sup> and then delineates specific sets of responsibilities, including over voter registration, electoral boundary delimitation, candidate nomination and registration, money in politics, legislative compliance, voter education, election monitoring, and dispute resolution.<sup>48</sup> Kenya exemplifies an approach wherein legislative authority over election administration is curtailed as explicitly and directly as possible.

Mexico’s Constitution represents a hybrid between generality and specificity on the authority of the EMB. Its Constitution sets out broad authority for its election commission, but leaves the content of that power largely unspecified, to be filled in by the EMB’s practice and by legislation. The Constitution, however, dictates that the Federal Electoral Institute (FEI) has the power to

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44 Republic of Costa Rica, Const, art 99 (1949) [*Constitution of Costa Rica*] exclusively grants the “organization, direction and supervision” of elections to the Supreme Electoral Tribunal. Republic of Korea, Const, ch VII, art 114 (1987) establishes the National Election Commission “for the purpose of fair management of elections and national referenda, and dealing with administrative affairs concerning political parties.”

45 Afghanistan, Const, ch XI, art 156 (2004) creates an Independent Elections Commission to “administer and supervise every kind of elections.” Article 156, however, is listed under “Miscellaneous Provisions,” which is very different for example than the central status of EMBs in the constitutional text of many other democracies. Article 156 says nothing else about the Commission.

46 *Constitution of South Africa*, *supra* note 43, art 190(1)(b). Republic of Fiji, Const, ch III, part C, art 75 (2013) also applies the “free and fair” language with regard to the Fiji Elections Office.

47 Kenya, Const, ch VII, part II, art 88(1) (2010) [*Constitution of Kenya*].

48 *Ibid*, art 88(4). This approach follows that in Articles 42 and 42A of the previous version of the *Constitution of Kenya* that had been in place from Independence in 1963 until the promulgation of the current *Constitution* in 2010. These predecessor sections required the Election Commission to engage in redistricting every 8-10 years, register voters and maintain a registry, administer presidential, parliamentary, and local elections, promote free and fair elections as well as voter education, and to fulfill other duties as prescribed by Parliament.

oversee in particular campaign finance, including the spending of political parties, and the allocation of broadcasting time to parties. This constitutional language reflects particularly sensitive areas of electoral regulation within Mexican politics.<sup>49</sup>

Placing the EMB in the constitution should be seen as a first step toward reducing partisan interference with election administration. The fourth branch model prevents a hostile government from eliminating the EMB. However, much still turns on how courts interpret the separation of powers between the EMB and the elected branches and the relationship between the EMB and those it regulates. To the extent that the details of the EMB's role are left to the elected branches by the constitution, there is still ample room for partisan interference. The Indian model of assigning general responsibility, but providing no detail, does not necessarily prevent a government cutting away aspects of an EMB's jurisdiction. A government could choose to take away the EMBs authority to oversee campaign finance through regular legislation, for example, if constitutional designers have not explicitly carved that area out of the legislature's purview.

The more detailed approach characterizing Kenya's constitutional provisions is also not without its risks. Where a constitution establishes the specific responsibility of the EMB, its drafters are unlikely to have anticipated all areas of election administration that deserve protection, given the evolution of political practices and citizens' expectations. Take rules on voter identification, for example. Voter identification laws have recently proven controversial and the site of robust partisan contestation in many democracies, as with the *Fair Elections Act* in Canada, but also in the United States, India, and South Africa. Allegations have been made that these rules have been deliberately put in place to disenfranchise specific groups of voters.<sup>50</sup> Standards on voter identification are a natural candidate for inclusion in a list of responsibilities specifically given to an EMB by a constitution. As recently as a decade ago, however, such rules were unlikely to have been considered by drafters in new democracies as being of sufficient importance to include them in the constitution itself.

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49 The Maldives also reflects a hybrid approach. Republic of Maldives, Const, ch VII, art 170 (a) (2008) [*Constitution of Maldives*] states that the Elections Commissions must "conduct, manage, supervise, and facilitate all elections" and to ensure elections are conducted "freely and fairly." Sub-sections (b)-(h), however, then extensively outline specific tasks such as maintenance of electoral rolls and educational initiatives.

50 In the United States, see the decision in Wisconsin of *Frank v Walker*, 769 F 3d 494 (7th Cir 2014).

## ii) Relationship to the other branches

In democracies that elevate EMBs to a higher status, an important issue to be resolved is the relationship between a constitutionally entrenched election commission and the legislature, executive, and judiciary. Constitutional designers have chosen to address this question by introducing rules to establish either the hierarchy, or lack thereof, in the relations between the branches. One constant is that fourth branch constitutions typically enshrine the principle of independence for election commissions.<sup>51</sup> The concept of independence implies that an institution has both freedom from interference and freedom to act within its sphere of authority.<sup>52</sup> Independence can also be assessed from a “reasonable person” standard, by asking “whether a reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy-protecting features.”<sup>53</sup> The EMB is frequently positioned as independent from the political branches and, sometimes, even the judiciary. Some of the rules structuring the relationships between the four branches specifically bar political interference in the workings of the EMB and may go so far as to impose positive obligations on the legislature and executive to assist the fourth branch in its duties. Normal functions of the judiciary, such as resolving electorally related disputes, are at times also carved out and placed within the purview of the EMBs.

Costa Rica’s Constitution is notable for not just explicitly creating a fourth branch, but deliberately establishing its EMB as on par with the other branches.<sup>54</sup> Article 9 of the Constitution creates the Cost Rican Republic as “popu-

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51 *Constitution of Costa Rica*, *supra* note 44, art 99; *Constitution of South Africa*, *supra* note 43, art 181(2); People’s Republic of Bangladesh, Const, part VII, art 118(4) (2011)[*Constitution of Bangladesh*]; *Constitution of Maldives*, *supra* note 49, art 167; United Mexican States, Const, ch II, art 41(V) (1917) [*Constitution of Mexico*]. The Mexican constitutional provision for example states that the FEI must carry out its work according to the principles of “certainty, legality, independence, impartiality and objectivity.”

52 For an operationalization of independence, see Wall, *supra* note 1 at 9 and Norm Kelly, *supra* note 10 at 32. The Venice Commission (European Commission for Democracy Through Law) of the Council of Europe also helpfully details factors that contribute to independence: Council of Europe, Venice Commission, 87th Plenary Session, *Compilation on the Ombudsman Institution*, Documents, CDL 079 (2011), online: Council of Europe <<http://www.venice.coe.int/webforms/documents/CDL%282011%29079-e.aspx>>. There is an analogy to be made between the independence of EMBs and that of the judiciary that I do not have space to elaborate upon, but which is likely to be a fruitful area for further investigation.

53 *Helen Suzman Foundation v President of the Republic of South Africa*; *Glenister v President of the Republic of South Africa*, 2015 (2) SA 1 (CC) (2014) at para 31, [2014] ZACC 32 [*Helen Suzman Foundation*]. The case involved allegations of interference by the South African government with the supposedly independent prosecutorial services. The Constitutional Court outlined a variety of indicia of independence for arms-length institutions, including: finances, oversight by the political branches, coordination with the executive, appointment, tenure, removal, and jurisdiction.

54 *Constitution of Costa Rica*, *supra* note 44, arts 9, 99-104.



lar, representative, participatory, alternative and responsible,” with sovereignty embodied in the people and institutionalized through the three main branches of government.<sup>55</sup> Article 9(3) creates the Supreme Electoral Tribunal “with the rank and independence of the Government Branches.” Article 101 gives members of the Supreme Electoral Tribunal the same “immunities and privileges” as the other branches. Notably, the election administrator is given powers upon which the political branches cannot intrude. The political branches must consult with the EMB in order to amend electoral laws and, where the Tribunal has objected, can only pass bills with a 2/3 legislative super-majority. Within 6 months of an election, if the EMB disagrees with a proposed amendment, the Constitution bars its enactment even if there is a legislative super-majority. The Costa Rican body conducting election administration rests on equal footing with the other branches.

Chapter 9 of the South African Constitution creates a group of institutions to serve functions including but not limited to election administration that together constitute a fourth branch of government. These institutions are designed to protect constitutional democracy.<sup>56</sup> Included are the Electoral Commission, the Public Prosecutor, Human Rights Commission, Commission for Gender Equality, the Auditor-General, and the Broadcasting Authority.<sup>57</sup> Chapter 9 is premised on a view of the EMB as one of among several institutions necessary to achieve Ackerman’s goal of checking abuses of power by the state within the state itself.<sup>58</sup>

These institutions buttress the rights guaranteed by the South African Bill of Rights.<sup>59</sup> The Electoral Commission in particular operates in conjunction with the suite of entrenched democratic rights, including the right to partici-

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55 *Ibid*, art 9(1).

56 *Constitution of South Africa*, *supra* note 43, art 181.

57 The status of the Commission is elaborated upon in *ibid*, arts 190-191. On the independence of Chapter 9 institutions generally, see Pierre Vos, “Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa’s Constitutional Democracy” in Danwood Chirwa & Lia Nijzink, eds, *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (Tokyo: United Nations University Press, 2011) 160, and K Govender, “The Reappraisal and Restructuring of Chapter 9 Institutions” (2007) 22:1 South African Public L 190.

58 Independent officers of Parliament have also been the subject of analysis as a fourth branch in the Canadian context: Jeffrey Graham Bell, “Agents of Parliament: A New Branch of Government?” (2006) 29:1 Can Parliamentary Rev 13 at 14. There is a credible argument that these are integral parts of what Ackerman terms the “integrity branch” at 694. Though not concerned with election administration, at a high level of abstraction all officers of Parliament serve the same role as EMBs: checking political actors who have gained power over the state.

59 The Venice Commission, *supra* note 52, recommends constitutional status for Ombudspersons and Human Rights Defenders, which can be understood as offices that monitor the integrity and responsiveness of the state.

pate in a political party,<sup>60</sup> to free, fair, and regular elections,<sup>61</sup> to vote and to stand for public office,<sup>62</sup> freedom of expression,<sup>63</sup> and equality.<sup>64</sup> South Africa's constitutional designers explicitly sought to create new institutions, in recognition that rights alone were insufficient without the institutional apparatus to give them meaning in the face of intransigence by elected representatives.

The South African Constitution also reflects the assumption that constitutional protection for these new bodies is required on terms similar to those of the political branches themselves. Section 181 therefore sets out guiding principles for these institutions that prevent capture by elected representatives or the misuse of their authority. The fourth branch is "independent", "must be impartial", and its institutions are to exercise their authority "without fear, favour or prejudice."<sup>65</sup>

The Constitution remarkably invokes a positive obligation on elected representatives to aid the fourth branch in its mission: "Other organs of states, through legislative and other measures, must assist and protect [the fourth branch bodies] to ensure the independence, impartiality, dignity and effectiveness of these institutions."<sup>66</sup> Bangladesh follows the South African model, as its Constitution places a "duty [on] all executive authorities to assist the Election Commission in the discharge of its functions."<sup>67</sup> South Africa's Constitution goes further by also imposing a principle of non-interference, stating that "[n]o person or organ of state may interfere with the functioning of these institutions."<sup>68</sup> Anticipating conflict between the EMB and the political branches, the South African Constitution therefore places an onus on elected representatives to uphold the values of independent and impartial election administration, even if this may be against their own partisan interests. Section 181 curtails legislative and executive discretion by rendering any attempt to change the fundamental values of the Electoral Commission unconstitutional.

Some constitutions address the relationship of the EMB to the judiciary. Constitutional designers diverge here on whether courts should be treated as potential partisans, and therefore threats, or as non-partisan institutions whose

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60 *Constitution of South Africa*, *supra* note 43, art 19(1).

61 *Ibid*, art 19(2).

62 *Ibid*, art 19(3).

63 *Ibid*, art 16.

64 *Ibid*, art 9.

65 *Ibid*, art 181(2).

66 *Ibid*, art 181(3).

67 *Constitution of Bangladesh*, *supra* note 51, art 126.

68 *Constitution of South Africa*, *supra* note 43, art 181(4).

privileged constitutional status can be helpful to EMBs. An independent, impartial, and un-elected judiciary does not have the same direct incentives to capture election commissions as the political branches do. Judges do not have to face election on the rules administered by the EMB.

Where courts might reasonably be anticipated to behave as partisan actors, however, the EMB requires protection from interference from the courts as well as the political branches. Some constitutions insulate the EMB from the judiciary just as they have from the legislature and executive. In Costa Rica, Article 9 bars the judiciary from overturning the results of the Supreme Electoral Tribunal. Claims of partisanship in election administration among lower bodies in the states are investigated and assessed by the Tribunal, thereby bypassing the courts.<sup>69</sup> Mexico's Constitution similarly dictates that appeals from decisions of the FEI do not go through the courts. These are reasonable options if a constitutional designer fears that the courts will behave in partisan ways when electoral results, for example, are disputed.<sup>70</sup>

Where courts are assumed to operate impartially and independent of the government of the day, constitutions define the relationship of the EMB to the judiciary with a different tenor. In these scenarios designers have sometimes anchored newly created fourth branch institutions to the courts with the intention that they will operate with equivalent constitutional status.<sup>71</sup> The EMB piggybacks on the legitimacy of the courts in this approach. The Mexican Constitution specifies that FEI Commissioners be given status on par with Supreme Court Justices, with equivalent salaries, for example. The Chief Electoral Commissioner in India can only be removed according to the same stringent conditions as a Justice of the Supreme Court of India.<sup>72</sup> Costa Rican constitutional designers were of two minds with regard to the courts. They granted the EMB and not the judiciary the exclusive authority to resolve electoral disputes, yet they also tied the selection process for commissioners to

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69 *Constitution of Costa Rica*, *supra* note 44, art 102(5).

70 The need for speedy resolution of electoral disputes may also weigh as a factor in removing power from the judiciary, if the courts move slowly.

71 Stephen Gardbaum argues that the institutional failings of legislatures, including party discipline and executive dominance of the legislature, have raised doubts about the effectiveness of political accountability among the elected branches within parliamentary democracies and therefore contributed to the expansion of judicial review: Stephen Gardbaum, "Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)" (2014) 62:3 Am J Comp L 613. This argument is very persuasive with regard to election administration, which is particularly subject to partisan considerations.

72 *Constitution of India*, *supra* note 43, art 324(5).

the courts, with a vote of 2/3 of the Supreme Court required for appointment to the EMB.

### **iii) EMB structure**

Democracies that constitutionalize the EMB generally build the structure of the institution into the text. Constitutions adopting the fourth branch model have often taken great pains to detail rules around appointments to the EMB, its composition, the salary and tenure of commissioners, and even internal decision-making. This focus makes sense given the risk of partisan capture. These features of an EMB are potential levers where politicians can apply pressure to push commissioners in a partisan direction. In doing so, these democracies attempt to come up with institutional designs that will curtail the ways in which political majorities could attack the independence or impartiality of the EMB. The inner workings of an EMB may seem too trivial to place in a democracy's founding document, but it may be necessary. As will be discussed in Section IV, where an EMB's structure has not been elaborated upon, elected representatives have often exploited the gaps.

The Mexican Constitution likely sets the high watermark for specificity regarding the structure of the EMB. Article 41<sup>73</sup> stipulates that the FEI's staff must be "independent" and "professional." The EMB is composed of a Chairman on a six year term, eight Councilors with nine year terms, plus members from among the elected representatives in the legislature, and an Executive Secretary. The provision shows a somewhat mixed approach regarding partisanship. The commissioners drawn from the legislature are partisan elected officials, and it is left to legislation to define the qualifications of the other non-partisan members of the EMB, which could be subject to manipulation. Article 41 also works to enhance independence, however, within this partisan structure. The Constitution necessitates a 2/3 vote by the Chamber of Deputies to remove a commissioner, implying the need for cross-partisan support. A "no revolving door" provision prevents commissioners from holding political appointments or offices for two years after any election that they have supervised. This presumably weakens incentives to toe the partisan line in the hope of a quick post-election reward. The political appointees are permitted by the Constitution to attend FEI meetings, but are expressly barred from voting at them. The supervision of political party finances is a perennially sensitive matter of electoral regulation, particularly in Mexico. A 2/3 vote of the commission

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73 *Constitution of Mexico*, *supra* note 51, art 41.

is therefore required in order to appoint the sub-body tasked with overseeing party finances.

Scholarly literature on the FEI has examined whether it has functioned well despite its partially partisan structure.<sup>74</sup> While largely ignoring the constitutional side of the story, the literature has generally concluded that the degree of specificity in the Mexican Constitution has deterred partisan outcomes that its membership might have otherwise suggested. The internal decision-making rules in particular reduce opportunities for partisan appointees to skew election administration. The political branches still have some say on how the FEI functions, but their room for discretionary decision-making, and therefore potentially for partisan interference, is relatively limited.

The Indian Constitution is also instructive.<sup>75</sup> Article 324 establishes the ECI as a permanent body headed by a Chief Election Commissioner appointed by the President. The President exercises the appointment power on the advice of the Council of Ministers, which in practice amounts to the Prime Minister.<sup>76</sup> The Chief Commissioner is given protections in Article 324 (5), as he serves until age 65 and his conditions of service cannot be varied to his disadvantage. The President may appoint an unspecified additional number of Election Commissioners if deemed necessary.<sup>77</sup> The drafters envisioned more commissioners being appointed when the ECI's workload was high, especially

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74 Jonathan Hartlyn, Jennifer McCoy & Thomas M Mustillo, "Explaining the Quality of Elections in Contemporary Latin America" (2008) 4:1 Comparative Political Studies 73; Guillermo Rosas, "Trust in Elections and the Institutional Design of Electoral Authorities: Evidence from Latin America" (2010) 29:1 Electoral Studies 74; Federico Estévez, Eric Magar Guillermo Rosas, "Partisanship in Non-Partisan Electoral Agencies and Democratic Compliance: Evidence from Mexico's Federal Electoral Institute" (2008) 27:2 Electoral Studies 257; and Fabrice E Lehoucq, "Can Parties Police Themselves? Electoral Governance and Democratization" (2002) 23:1 Intl Political Science Rev 29.

75 On the ECI, see Susanne Hoeber Rudolph & Lloyd I Rudolph, "New Dimensions of Indian Democracy" (2002) 13:1 J of Democracy 52 at 59, and "Redoing the Constitutional Design: From an Interventionist to a Regulatory State" in Atul Kohli, ed, *The Success of India's Democracy* (Cambridge: Cambridge University Press, 2001); Alistair McMillan, "The Election Commission" in Niraja Gopal Jayal & Pratap Bhanu Mehta, eds, *The Oxford Companion to Politics in India* (Oxford: Oxford University Press, 2010) and "The Election Commission of India and the Regulation and Administration of Electoral Politics" (2012) 11:2 Election LJ 187.

76 The assumption that the President would behave impartially has turned out to be flawed, given the requirement that he adhere to the wishes of the Prime Minister, who is an elected member of a political party. India, *Constituent Assembly Debates*, Vol VIII (16 May-16 June, 1949) at 905-930 [*Constituent Assembly Debates*]. See *Dhanoo v Union of India*, [1991] 3 SCR 159 at 170-74 (India) [*Dhanoo*]; *Seshan v Union of India*, [1995] 4 SCR 611 (India) [*Seshan*]; and Rekha Saxena, "The Election Commission and Indian Federalism" (2012) 15(1) Think India Quarterly 194 at 201-02.

77 *Constitution of India*, *supra* note 43, art 324 (2). The President appoints the Chief Election Commissioner and "such number of other Election Commissioners, if any, as the President may from time to time fix."

in the lead-up to an election.<sup>78</sup> These Election Commissioners were given fewer protections than the Chief, as they could be removed on the advice of the Chief and could have their terms of service varied by statute against their interests. At times the ECI has operated with a solitary Chief Election Commissioner and at others as a multi-member body. The Constitution left open the possibility the ECI could function with multiple members, and if multiple members are appointed, whether the Chief Commissioner is superior in rank to the other Commissioners.<sup>79</sup> The gaps in the Indian regime have led to attempts at partisan capture of the ECI through the appointment process and the rules on internal decision-making, as discussed below.

#### **IV. Building on the fourth branch model**

The fourth branch model improves upon the statutory one by providing enhanced protection from partisan interference. This model as adopted in the countries discussed in this article, however, has not been without failings. If the constitutional approach to election administration is to be emulated, whether by new or established democracies, there are some broad lessons to be drawn from these experiences. These lessons apply to both constitutional design and to the need for courts to recognize the importance of protecting independent and impartial election administration.

First, partisan manipulation of electoral rules does not end simply because of the entrenchment of the EMB in a constitution. The EMB gains power to administer elections, but the legislature retains significant authority in the area. All of the fourth branch democracies provide scope for the legislature to write election laws. Their constitutions remove significant chunks of legislative discretion, by mandating an EMB with a certain format and powers. They bar governments from moving election administration under the auspices of a cabinet minister or the bureaucracy. The independent and impartial EMB, however, can only apply the election laws on the books. This leaves ample opportunity for elected representatives to engage in partisan law-making.

An independent and impartial EMB, for example, can only interpret and apply the voter identification legislation as passed by the legislature, even if

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78 This was a compromise between a permanent multi-member commission and an *ad hoc* commission convened only at election time. They split the difference and got a permanent commission that was by default a single-member body but could be expanded. See *Constituent Assembly Debates*, *supra* note 76, and McMillan, "The Election Commission," *supra* note 75 at 99-101.

79 The Chief was to serve as Chairman, but this fact only raised the question of whether the Chairman was superior in power to the other Commissioners or simply facilitated their meetings.

these rules are likely to have a partisan or discriminatory impact. An EMB has no discretion to decline to apply the legislation, even if the partisan impact favouring the governing party is at odds with the EMB's non-partisan mandate. South Africa's Electoral Commission was obliged to follow rules discriminating against prisoners exercising their right to vote until the Constitutional Court eventually struck them down.<sup>80</sup> Fourth branch constitutional design does not solve the riddle of how to prevent partisan self-dealing when elected representatives control the rules of the electoral game. The Costa Rican requirement of a super-majority in order for the legislature to ignore the opinion of its EMB shows one way in which the authority of elected representatives over elections can be circumscribed. A super-majority decision procedure increases the likelihood that there will be cross-party support for an amendment to an election law. This decreases the risk of partisan dealing by one party, although it cannot prevent different parties joining together as a cartel or oligopoly.<sup>81</sup>

Second, constitutionally protected EMBs are also still vulnerable to the same two forms of partisan capture that statutory bodies are. These EMBs can be captured in their initial design within the constitution itself. An EMB may be protected by the constitution, but partisan membership and control could also be entrenched, as in the Mexican Constitution. Partisan capture can also occur after the creation of the commission. Loopholes within the constitutional text itself are at risk of being exploited. If details regarding appointment to the EMB, the tenure of commissioners, funding for the body or some other relevant factor are omitted from the constitution, then the gaps may be filled by partisan rules.

The gaps in the Indian Constitution are instructive here. The appointment power to the ECI rests with the President, who acts on the advice of the Prime Minister and Cabinet. The Prime Minister is therefore, in effect, able to make appointments directly to the institution in charge of overseeing elections. This creates the possibility of capture through the appointment process. This flaw was compounded by the Presidential authority to appoint additional members. The ECI can be stacked with pliant Commissioners if the government of the day dislikes the approach of the Chief Commissioner.

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80 *August v Electoral Commission*, [1999] 3 SA 1 (South Africa), and *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)*. [2005] 3 SA 280 (South Africa).

81 For parties as cartels, see the classic article by Samuel Issacharoff and Richard H Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643.

The issue of partisan appointments first came to a head in *Dhanoa v Union of India*.<sup>82</sup> The governing Congress Party feared losing the imminent 1990 Parliamentary elections to the *Janata Dal* Party. The President, under the advice of Congress Prime Minister Rajiv Gandhi, appointed two new Election Commissioners to sit alongside the Chief Commissioner in 1989. This was the first time the government had used the power to appoint additional Commissioners, as the ECI had functioned as a single-member body from 1950. These appointments brought the total membership in the ECI to three and allowed Gandhi's two selections to form a voting majority over the Chief Commissioner, who had been appointed by a different government and was seen as hostile to the Congress Party.

Partisan chicanery surrounded the appointments. The ECI has discretion to set federal election dates. The Principal Secretary to the Prime Minister called one of the new Commissioners just over 24 hours after the appointments and it was "conveyed to him the desire of the P.M. that the . . . elections to the *Lok Sabha* should be held on a particular date and that the announcement . . . should be made by the Commission forthwith and before 2 p.m. on that day, in any case."<sup>83</sup> The two new Commissioners overcame the objections of the Chief Commissioner, clearly indicating partisan capture of the commission by a government facing a difficult re-election campaign. Upon gaining office in 1990, the newly elected *Janata Dal* promptly removed these two Commissioners and abolished the posts, leaving the Chief again as the sole Commissioner.

After the ex-Commissioners challenged their removal, the Supreme Court held that the *Janata Dal* government had the power to remove the Commissioners, mainly on the logic that their appointment and subsequent behavior hindered the ECI's independence.<sup>84</sup> The Court found that the "manner of appointment [of the new commissioners] and the attitude adopted by them in the discharge of their functions was hardly calculated to ensure free and independent functioning of the Commission."<sup>85</sup> It held that the "appointments were an oddity, the abolition of the posts far from striking at the independence of the Commission paved the way for its smooth and effective functioning."<sup>86</sup> With this ruling, the Supreme Court acted to preserve the independence of the EMB.

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82 *Dhanoa*, *supra* note 76. See also Saxena, *supra* note 76 at 202-04.

83 *Dhanoa*, *supra* note 76 at para 18.

84 *Ibid* at para 20.

85 *Ibid*.

86 *Ibid* at para 23.



Kenya provides another example of a fourth branch democracy where a sitting government exploited constitutional gaps with dramatic consequences. Kenya's 2007 election was marred by credible claims of electoral fraud against the Election Commission of Kenya (ECK) itself. The ECK declared sitting President Kibaki the winner, but there were immediate allegations that the challenger had in actuality won by a relatively clear margin. The crisis culminated in hundreds of deaths, extensive ethnic conflict, and drama surrounding whether there would be charges before the International Criminal Court.<sup>87</sup> After peace-brokering on behalf of the African Union by ex-United Nations Secretary General Kofi Annan, the report by the Independent Review Commission (IREC) found the ECK had cheated on behalf of the President.<sup>88</sup> The report concluded that there was profound corruption in voter registration, redistricting, at the ballot box, and in election result transmission and tallying.<sup>89</sup> IREC recommended that the ECK could only be fixed by "radical[] reform" or creating an entirely new national electoral commission.<sup>90</sup> The IREC called the appointment process, as well as the operations of the ECK, "materially defective," claiming that they caused a "serious loss of independence."<sup>91</sup>

President Kibaki gamed the election by capturing the ECK. Beginning in 2005, the President expanded the membership of the ECK to the maximum permitted and proceeded to appoint partisan allies to 17 out of the 22 posts.<sup>92</sup> The IREC report found that the ECK had significant institutional independence, but that it suffered from a lack of financial independence and was hindered by the "general political behaviour of the various actors in Kenyan elections."<sup>93</sup> President Kibaki exposed the frailties in the design of the Kenyan EMB.<sup>94</sup> The controversial 2007 election and the failure of the EMB were moti-

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87 President Uhuru Kenyatta was the first sitting head of state to appear before the International Criminal Court, for his role as a partisan on behalf of previous President Kibaki: Faith Karimi, "Kenyan President Uhuru Kenyatta at ICC Over Charges Linked to 2007 Violence," *CNN* (8 October 2014), online: <<http://www.cnn.com/2014/10/08/world/africa/kenya-icc-status-hearing/>>. The charges were subsequently dropped.

88 African Union, *Independent Review Commission Report on the General Elections of 27 December 2007* (Nairobi: African Union, 2008) [IREC].

89 *Ibid* at x.

90 *Ibid*.

91 *Ibid* at 10.

92 Partisanship in the appointment process was a long-standing political issue, with a Parliamentary report in 1997 raising particular flags about this unchecked Presidential power. The timing of commission appointments in election years as 5 year terms expired was deemed particularly unhelpful by the IREC as it opened the door to partisan interference: *ibid* at 49.

93 *Ibid* at 29.

94 These have been lessened by the 2010 constitutional amendments.

vating forces in the country adopting a new Constitution in 2010 that reduced the risk of partisan capture of election administration.

South Africa provides a cautionary tale as well. In *New National Party of South Africa v the Government of South Africa*,<sup>95</sup> a dispute about voter identification requirements led to a challenge to the government's attempts to breach the Commission's independence. The African National Congress government implemented rules that required identification documents containing bar codes in order to vote in elections. The Electoral Commission objected, on the basis that 5 million people would be disenfranchised for lack of the proper documents. It noted that the government proposed to introduce the restrictive rules without taking steps to provide the necessary identification documents to those who lacked them.

The majority of the Constitutional Court held that the voter identification requirements were consistent with the democratic rights guaranteed by the new South African Constitution. In so ruling, however, it also opined on the government's political interference with the Commission, counter to the clear design of the EMB as independent and impartial. The Court held that various ministries were treating the Electoral Commission as a line department accountable to bureaucratic higher-ups and elected representatives, rather than as an independent body. Government departments sidelined the Electoral Commission in their interactions with Parliament, attempted to control the spending of the EMB, and purported to direct its staffing. All of these were discomfiting facts in light of the South African government's pattern of capture of independent institutions to serve the interests of the dominant African National Congress.<sup>96</sup> The Constitutional Court has further elaborated that the Electoral Commission must be seen as distinct and independent from government.<sup>97</sup>

Third, an overall lesson to be gleaned from the experiences of India, South Africa and Kenya is that EMBs should be defined as specifically as possible in the constitution. Gaps around the appointment process, the number of appointees, funding, interactions with the legislature, and other specifics can all be exploited by those antagonistic to the independent workings of the EMB.

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95 *New National Party of South Africa v the Government of South Africa*, [1999] 3 SA 191 (South Africa).

96 Sujit Choudhry, "He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2010) 2 Constitutional Court Rev 1. See also the discussion of interference with the prosecutorial services in *Helen Suzman Foundation*, *supra* note 53.

97 *Independent Electoral Commission v Langeberg Municipality*, [2001] 3 SA 925 (South Africa).

The argument for detail in the constitutional design of election administration should be a familiar one in most democracies. The inner complexities of the other branches are often covered with specificity in constitutions, such as how membership in a legislature is to be distributed among component parts of a federation, or the relationship between the lower and upper legislative houses, or the number of Supreme Court justices and their rules of selection, and so on. The experiences in the fourth branch democracies suggest that the structure of EMBs should also be scrupulously detailed in the constitution.

Fourth, constitutional protection for the existence and functioning of an EMB has potential disadvantages with respect to accountability. Creating an EMB with constitutional status involves a tradeoff between independence and accountability. The more independent the EMB, the harder its own misbehaviour will be to check. Insulating the EMB from the influence of elected representatives by entrenching it in the constitution reduces opportunities for interference, but also for legitimate oversight.

The reign of T.N. Seshan as Chief Commissioner in India at the top of the ECI illustrates the risk of empire building by constitutionally entrenched EMBs. Seshan was notoriously outspoken, particularly with regard to the corruption he saw in Indian politics and the need for the ECI to play a role in curtailing it. However laudable his goals, Seshan's activism at times veered into an outsized assessment of the Chief Commissioner's role or, worse, a search for personal aggrandizement. A former head of the influential civil service, he mused about forming his own political party to fight corruption while in office.<sup>98</sup>

The Supreme Court of India felt obliged to chastise Seshan on several occasions. The unanimous Court in *Seshan v Union of India*<sup>99</sup> appears not to have taken kindly to Seshan's comparison of his role to that of the justices of the country's highest court. The case involved a dispute regarding whether Seshan as Chief Commissioner was superior in rank to the other Election Commissioners. The Court held that, "[n]obody can be above the institution which he is supposed to serve" and viewed Seshan as illegitimately attempting to elevate himself as superior to the other Commissioners and organs of the Indian state.<sup>100</sup> Seshan did in fact use the ECI as a platform for his political career, as he eventually ran unsuccessfully for the Presidency in 1997. As the attacks on election commission independence detailed in this article demon-

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98 *Seshan*, *supra* note 76.

99 *Ibid.*

100 *Ibid* at para 18.

strate, some decreased accountability is worth the enhanced independence for the EMB. The implication is that courts must be attuned to the need to check improper behaviour by the EMB itself, however, if it strays beyond its legitimate role.

## **V. Conclusion**

The move to create a fourth branch of government in India, South Africa, Mexico, and other democracies represents an institutional response to the problem of partisan capture of election commissions and administration. It reflects a move in constitutional design away from emphasizing rights to ensuring institutions capable of protecting those rights. Despite ongoing challenges with protecting impartial and independent election administration, the model stands as an attractive alternative for both new and established democracies searching to enhance electoral integrity.

The statutory model is no longer the gold standard. Constituting EMBs as part of a fourth branch of government is a preferable model. The Canadian experience with the *Fair Elections Act* and the decade of conflict between the former Conservative federal government and Elections Canada suggests that even in long established democracies election administration is not immune from partisan interference. The same can be said for other successful democracies, such as the United Kingdom and Australia, which also adopt the statutory model of election administration. Fair elections are essential to democracy, and the ground rules for political competition should not be subject to partisan games. Theories of the separation of powers that advocate additional branches beyond the traditional three, such as that offered by Ackerman, and the constitutional practice in countries such as India, South Africa, Mexico, and Kenya, have passed the statutory model by.

This new model for constitutionalizing election administration, however, raises a number of questions deserving further inquiry. One question that the shift to a fourth branch of government raises that deserves study is how courts have adapted and should adapt to this evolution, as it raises a number of challenges for them. Courts have been granted, through provisions entrenching the EMB, direction to limit executive and legislative authority. This requires displacing traditional understandings of the primacy of the executive and legislature over administrative institutions that may be difficult to dislodge. The boundary line between the discretion remaining within the political branches over electoral law and that within the EMB over election administration is inevitably the subject of contestation. Different approaches

by courts to preserving the independence and impartiality of EMBs should be further investigated.

The appeal of constitutional entrenchment of EMBs also poses a challenge for established democracies. It reverses the long-standing assumption in much comparative scholarship that the flow of constitutional ideas moves from older to newer democracies. It is an open question whether long established democracies will be willing to look to newer ones as sources of inspiration.

Another significant question will be how enduring the model will prove to be among its main adopters. The Election Commission of India has tremendous popular support and has now been entrenched for more than 65 years, despite frequent amendments to other parts of the Constitution of India. It is a success story, but an anomaly because of its longstanding presence. The South African constitutional provisions on its EMB have now lasted since 1996. Whether the constitutionally entrenched EMBs in newer constitutions will have the same staying power remains to be seen. Their longevity will go a significant way to determining whether the appeal of EMBs as a fourth branch of government endures.

