

ARTICLE

Constitutional Design of Electoral Governance in Federal States

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Abstract

This article explores the constitutional politics of electoral governance in federations by focusing on the role of election commissions, drawing mainly on examples from Asia. All democracies face the challenge of insulating electoral governance from interference and capture. Compared to unitary states, federations confront the additional dilemma of how to disperse authority over electoral governance across multiple orders of government. Federal democracies must decide whether electoral governance should be a matter for the center or the states. I argue that the basic choice is between what I will call the ‘unitary model’ and the ‘division of powers model.’ The main institution of electoral governance is the electoral management body or ‘EMB.’ In the unitary model, a central EMB administers both national and state-level elections. In the ‘division of powers model’, both a central and state-level EMBs exist, with the state commissions administering elections in the component units of the federation. In federal democracies generally, but especially in Asia, the allure of the unitary model has been strong. The article draws on the example of the Constituent Assembly in India to illustrate what is at stake in how federal constitutions allocate authority over electoral governance.

The long, slow spectacle of the final certification of the 2020 Presidential election results in the United States shone a light on the contested link between electoral governance and federalism. The states administer nearly all aspects of elections in the United States, with the Federal Election Commission having authority only for campaign finance. The states further delegate responsibility to smaller jurisdictions such as counties. The result is a patchwork of rules, processes, and timelines that is arguably dysfunctional.¹ The decentralized organization of American electoral governance introduces sub-national² or local pressure points that can be exploited for partisan gain.³ It raised the spectre of states or local jurisdictions engaging in voter suppression against minorities or partisans. The United States is an outlier in granting the power to sub-national units to administer national-level elections according to their own unique rules distinct from those in other component parts of the federation.⁴

¹Robert Pastor, ‘The U.S. Administration of Elections: Decentralized to the Point of Being Dysfunctional’ in Alan Wall and others (eds), *Electoral Management Design* (International IDEA 2006) 273.

²I use the term ‘sub-national’ at points in this article to indicate orders of government other than the federal/union/central government. It is not meant to imply the absence or presence of a ‘national minority’ in the sub-national unit. I also use the terms ‘state’ or ‘province’ inter-changeably or generic terms such as ‘component unit.’

³Heather Gerken, *The Democracy Index: Why Our Election System is Failing and How to Fix It* (Princeton University Press 2009) 158.

⁴Sweden and Switzerland also have high levels of decentralization: Susan D Hyde and Kevin Pallister, ‘Election Administration, Election Observation, and Election Quality’ in Jennifer Gandhi and Ruben Ruiz-Rufino (eds), *The Routledge Handbook of Comparative Political Institutions* (Routledge 2015) 241, 251.

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Leaving aside the dramatic particularities of the American case, the impact of federalism or center-state relations on electoral governance remains an important question whose answer in a given constitution reflects potentially competing visions of democracy. ‘Electoral governance’ refers to the ‘wider set of activities that creates and maintains the broad institutional framework in which voting and electoral competition take place.’⁵ The main institution of electoral governance in most democracies is the electoral management body or ‘EMB.’⁶ EMBs act in conjunction with the traditional three branches of government – the legislature, executive, and courts – but generally have authority to administer elections. EMBs come in many shapes and sizes, including as independent election commissions or electoral courts with both judicial and administrative functions. How to ensure EMB capacity and freedom from interference by political actors is a pressing question given the evidence that independent and non-partisan electoral governance contributes to electoral integrity and democratic resilience.⁷

This article explores the constitutional politics of electoral governance in federations by focusing on the role of election commissions in these systems, drawing primarily on examples from Asia. All democracies face the challenge of insulating electoral governance from executive interference and partisan capture. Examples of attempts to rig the electoral ‘game,’⁸ including by capture of the institutions of electoral governance, are plentiful globally. Democracies have pursued diverse strategies to prevent capture of EMBs or interference with electoral governance.⁹ Asian democracies – through their constitutions – overwhelmingly empower an independent commission to administer elections, consistent with global trends.¹⁰ The constitutional status, legal authority, and prestige of such a body as reflected in public opinion have sometimes led them to be called a ‘fourth branch of government.’¹¹

Compared to unitary states, federations confront the additional dilemma of how to disperse authority over electoral governance in a system with multiple orders of government. The impact of federalism on electoral governance has not yet, however, been the subject of much sustained analysis by constitutional scholars, despite the fact that some of the main country case studies in the literature on EMBs are federations.¹² Federalism generally combines shared rule at the central order of government for some matters and self-rule in the component parts of the federation for others.¹³ Federal democracies must decide whether electoral governance should be a matter for the center or the states. That decision is a weighty one, especially given the sometimes inhospitable ground in which Asian democracy has been asked to grow.

⁵Shaheen Mozaffar and Andreas Schedler, ‘The Comparative Study of Electoral Governance – Introduction’ (2002) 23(1) *International Political Science Review* 5, 7.

⁶Helena Catt and others, *Electoral Management Design* (rev edn, International IDEA 2014); Rafael López-Pintor, *Electoral Management Bodies as Institutions of Governance* (UNDP 2000).

⁷Hyde and Pallister (n 4) 245–258 provides an overview of the evidence and competing claims.

⁸Andreas Schedler, ‘The Nested Game of Democratization by Elections’ (2002) 23(1) *International Political Science Review* 103; Andreas Schedler (ed), *Electoral Authoritarianism: The Dynamics of Unfree Competition* (Lynne Rienner Publishers 2006).

⁹See for example the case of Australia: Paul Kildea, ‘The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission’ (2020) 20 *Federal Law Review* 1.

¹⁰Svitlana Chernykh and others, ‘Constitutions and Election Management’ in Pippa Norris, Richard W. Frank, and Ferran Martínez i Coma (eds), *Advancing Electoral Integrity* (Oxford University Press, 2014) 94.

¹¹Michael Pal, ‘Electoral Management Bodies as a Fourth Branch of Government’ (2016) 21 *Review of Constitutional Studies* 85; Mark Tushnet, ‘Institutions Protecting Democracy: A Preliminary Inquiry’ (2018) 12(2) *Law & Ethics of Human Rights* 181; Mark Tushnet, ‘Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries’ (2019) 70 *University of Toronto Law Journal* 95, 96.

¹²The exceptions include: Indraneel Datta, ‘Are Centralized Election Management Bodies Suitable for Federal Structures?’ in John Kincaid and Rupak Chattopadhyay (eds), *Policy Issues in Federalism International Perspectives* (Forum of Federations and Viva Books 2008) 173.

¹³Harihar Bhattacharyya, *Federalism in Asia* (2nd edn, Routledge 2020) 16.

The basic choice is between what I will call the ‘unitary model’ and the ‘division of powers model.’ In the unitary model, a central EMB administers both national and state-level elections. In the ‘division of powers model’, both a central and state-level EMBs exist, with the central commission administering national elections and the state commissions doing the same in the component units of the federation. There are many possible variations if constitutional designers choose to divide power over electoral governance among EMBs attached to different orders of government. The law administered by the state commissions could emanate from the national legislature or the sub-national one. The central EMB could administer only, say, presidential elections, but not those in electoral districts even to the federal parliament. Some constitutions assign authority over local or municipal elections in addition to national and state ones.¹⁴ While these complexities have salience in some democracies, the prior and foundational choice around electoral governance in federations is whether to pursue the unitary or division of powers model and that is the focus of this article.

In federal democracies generally but especially in Asia, the allure of a central election commission also running state/provincial elections has been strong. The constitutional calculus of this choice can be put bluntly. A unitary model for electoral governance in a federal system is appealing where the likelihood of capture of a sub-national election commission or abuse of minority political rights at the sub-national level is deemed a greater threat than the risk posed by the capture of a single, national election commission. As I will elaborate in the discussion in this article of the Constituent Assembly in India, constitutional drafters in federations have understood a central EMB with authority over national and sub-national elections as a catalyst for the establishment of a national political culture that is more likely to adhere to the ‘minimum core’ of democracy.¹⁵ In empowering a national commission as a solo act, however, the consequences of any capture of the single institution tasked with administering elections across jurisdictions within the federation spike dramatically upward.

This article proceeds as follows. Part I discusses the relationship between federalism, constitutionalism, and democracy. While the link between federalism and constitutionalism is direct, federalism and democracy have a less easy history together. Part II then considers the particular function of electoral governance in federations, the available constitutional design choices, and the implications for democracy of the decisions of constitutional drafters. It outlines how federations in Asia have approached this set of options. Part III delves into the consequences of design choices around electoral governance in federal systems for the right to vote. Part IV draws on the example of India’s Constituent Assembly to illustrate the salience of electoral governance in federations. It details how the Constituent Assembly approached the necessity of developing fair procedures and institutions of election administration in a new, federal democracy and, in particular, the constitutional vision of Bhimrao Ramji Ambedkar. Ambedkar’s advocacy for unitary electoral governance won out and was eventually reflected in independent India’s Constitution. The debates within the Constituent Assembly on electoral governance were profoundly shaped by India’s federal system and, more broadly, demonstrate the stakes for democracies in the choice between the unitary or divided powers models. Part V concludes.

Federalism, constitutionalism, and democracy

Federalism

Thirty of the world’s one hundred and ninety-five or so countries are federations.¹⁶ In Asia, five of forty-eight countries have adopted federalism: India, Pakistan, Malaysia, Nepal, and

¹⁴See for example Article 219 of the Constitution of the Islamic Republic of Pakistan, which provides authority over elections to multiple jurisdictions and bodies within Pakistan to the Election Commission, including over local government.

¹⁵Rosalind Dixon and David Landau develop the concept of a ‘democratic minimum core’ in ‘Abusive Judicial Review: Courts Against Democracy’ (2020) 53(3) UC Davis Law Review 1313, 1322–1326.

¹⁶In the massive literature on federalism, influential federal cases in democracies outside of Asia include Argentina, Australia, Austria, Belgium, Brazil, Canada, Germany, Mexico, Nigeria, South Africa, Switzerland, and the United States. There are many more democracies with informal devolution or decentralization, including the UK, Spain, and Italy.

Myanmar.¹⁷ The principle of decentralization has had influence beyond these formal instances of federalism. Unitary states in Asia have experimented with decentralization in various forms, including notably Indonesia and, to a limited extent, Sri Lanka.¹⁸

Federations must decide how to divvy up electoral governance. In federal systems, the design choice facing many new democracies or constitutional drafters is whether to create a single, national election commission with authority over national and sub-national elections, or to create state/provincial commissions with authority in the component units of the federation to exist alongside a national commission.¹⁹ This consequential choice²⁰ goes to the heart of the relationship between federalism and constitutional democracy. The ways in which constitutions in federations approach the design of electoral governance echoes the underlying dilemma of where centralized or decentralized authority is preferable.²¹

As put succinctly by William Riker, 'Federalism is a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions.'²² The reasons any one jurisdiction opts for federalism are complex and may include the path dependency supplied by its colonial legacy or by imposition in the aftermath of conflict,²³ external or internal threats,²⁴ or attempts to avoid civil war or secession.²⁵ In the abstract, the defences of federalism are varied and multiple, but include: 1) decreasing the risk of tyranny or dominance by decentralizing power;²⁶ 2) facilitating self-determination, particularly for a sub-national minority concentrated in a region;²⁷ 3) ensuring territorial integrity;²⁸ 4) facilitating responsive government through the principle of subsidiarity,²⁹ or, 5) more prosaically, fostering policy innovation.³⁰

¹⁷Bhattacharyya (n 13); Niraj Kumar, 'Federalism in Asia and Africa Beyond India' (2019) 65(1) *Indian Journal of Public Administration* 259. Myanmar is no longer a democracy after the recent military coup in 2021. The electoral management body is controlled by military appointees and the regime has already attempted to shift the electoral system: 'Myanmar's NLD Rejects Military's Call for Proportional Representation Election System' *The Irrawaddy* (4 March 2021) <<https://www.irrawaddy.com/news/burma/myanmars-nld-rejects-militarys-call-proportional-representation-election-system.html>>.

¹⁸George Anderson and Sujit Choudhry (eds), *Territory and Power in Constitutional Transitions* (Oxford University Press 2019). On Asia, see specifically the chapters on Indonesia (Jacques Bertrand) and Sri Lanka (Asanga Welikala).

¹⁹It is possible of course to have only sub-national commissions, but no national one. With the exception of campaign finance reserved to the Federal Election Commission, that is effectively the US model.

²⁰Robert Pastor, 'The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research' (1999) 6(4) *Democratization* 1.

²¹This question is sometimes framed as 'accommodation' versus 'integration': See Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Accommodation or Integration* (Oxford University Press 2008).

²²William Riker, *Federalism: Origins, Operation and Significance* (Little and Brown 1996); Craig Volden, 'Origin, Operation, and Significance: The Federalism of William H. Riker' (2004) 34(4) *Publius: The Journal of Federalism* 89.

²³Kumar (n 17) 229 argues for example that India, Pakistan, Malaysia, and Myanmar were heavily influenced by the United Kingdom's export of the model found in the British North America Act 1867, now styled in Canada as the Constitution Act 1867, which establishes federalism in Canada in sections 91 and 92.

²⁴Riker (n 22) famously makes this point, but see David McKay, 'William Riker on Federalism: Sometimes Wrong but More Right Than Anyone Else?' (2004) 14(2) *Regional and Federal Studies* 167.

²⁵Sujit Choudhry, 'Classical and Post-Conflict Federalism: Implications for Asia' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2014) 163, 164, 177–178.

²⁶James Madison, 'Federalist No. 51' in Alexander Hamilton, James Madison, and John Jay, *The Federalist* (George Carey and James McClellan eds, Liberty Fund 2001) <https://oll.libertyfund.org/title/jay-the-federalist-gideon-ed#lf1631_label_191>. See Tom Ginsburg, 'Constitutional Design and Territorial Cleavages' in Anderson and Choudhry (n 18); Jacob Levy, 'Self-Determination, Non-Domination, and Federalism' (2008) 23(3) *Hypatia* 60.

²⁷Ronald Watts, *Comparing Federal Systems in the 1990's* (McGill-Queen's University Press 1996); Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987).

²⁸Choudhry (n 25) 164.

²⁹See generally James E. Fleming and Jacob T. Levy (eds) *Federalism and Subsidiarity* (Nomos Vol. 55, NYU Press 2014).

³⁰Jim Gardner, 'The "States-as-Laboratories" Metaphor in State Constitutional Law' (1996) 30(2) *Valparaiso University Law Review* 475.

Federalism and constitutions

Whatever the goal behind its implementation, federalism is intimately tied to constitutionalism.³¹ According to leading federalism scholar Ronald Watts, meaningful federalism requires a written constitution not unilaterally amendable by the center or the states, multiple orders of government with powers divided up by the constitution, and representation for the states/provinces in the central executive and legislative branches.³² Constitutional design cementing a division of powers beyond the reach of ordinary political majorities at the center is necessary to ensure that federalism is 'credible.'³³ According to a rational actor model of the kind favoured by Riker, political players must view the benefits of joining a federation as superior to the costs of remaining outside.³⁴ Federalism can be seen as a form of 'political insurance' against the loss of power, or a means of locking in some policy outcomes.³⁵ A written constitution is a minimum pre-commitment device to reassure the component groups in the federation that the bargain on the division of powers, fiscal federalism, power-sharing, appointments to central institutions, and so on, will endure.³⁶

Democracy in federations

The relationship between federalism and democracy has been more fraught.³⁷ Federalism is not necessarily linked to a democratic form of government. Many federations are not democracies.³⁸ This fact stands in contrast with some broader claims about the relationship between federalism and democracy.

Federalism has been seen as the form of government most consistent with political liberty. KC Wheare saw decentralization of political and legal authority as a limit on the one-party dictatorships that proliferated at the time he was writing.³⁹ Federalism in his view could only exist where liberty was valued. Dispersing power was a precursor to a free society and federalism did so by establishing multiple governments within a single territory, rather than concentrating powers in the hands of a unitary government.⁴⁰ Hannah Arendt similarly saw federalism as a potential check against totalitarianism.⁴¹ Riker claimed that liberalism was not just compatible with federalism, but perhaps even required by it in many cases. He saw federalism as foundational to liberal democracy and as necessary to democratic government as the separation of powers. Both 'intergovernmental and inter-branch deadlocks' protect rights from hostile political majorities in his account.⁴² Jacob Levy has more recently asserted that federalism prevents some forms of domination⁴³ and is an intermediate institution of 'bulwark liberalism' against abuses of centralized power.⁴⁴

³¹Kenneth Clinton Wheare, *Federal Government* (Oxford University Press 1953).

³²Watts (n 27) 7; Bhattacharya (n 13) 18.

³³Ginsburg (n 26) 354.

³⁴Volden (n 22) 92.

³⁵Rosalind Dixon and Tom Ginsburg, 'The Forms and Limits of Constitutions as Political Insurance' (2017) 15(4) *International Journal of Constitutional Law* 988. Dixon and Ginsburg develop a sophisticated typology of political insurance and identify federalism as a form of 'power-based' or policy-focused political insurance in some scenarios at 996. See also Rosalind Dixon and Tom Ginsburg, 'Constitutions as Political Insurance: Variants and Limits' in Erin F. Delaney and Rosalind Dixon (eds) *Comparative Judicial Review* (Edward Elgar 2018) 36.

³⁶Watts (n 27) 7.

³⁷See the overview in Thomas O. Hueglin, 'Federalism and Democracy' in Grace Skogstad and others (eds), *The Global Promise of Federalism* (University of Toronto Press 2013) 17.

³⁸Alfred Stepan, *Arguing Comparative Politics* (Oxford University Press 2001) ch 15.

³⁹Wheare (n 31).

⁴⁰Bhattacharya (n 13) ch 8.

⁴¹Hannah Arendt, 'Thoughts on Politics and Revolution' in her *Crises of the Republic* (Harcourt Brace 1972).

⁴²William Riker, *The Development of American Federalism* (Kluwer Publishers 1987), xiii.

⁴³Jacob Levy (n 26).

⁴⁴Jacob Levy, 'Federalism, Liberalism, and the Separation of Loyalties' (2007) 101(3) *American Political Science Review* 459.

The more pessimistic view of the relationship between federalism and democracy is that it is doomed to fail. Thomas Hueglin summarizes a long-standing strand in scholarship of federalism and democracy. While federalism is conditioned on decentralization, electoral democracy must eventually decide on a winner, particularly in majoritarian, parliamentary electoral systems. 'Democracy is by definition a unitary concept: somehow the plurality of wills must be transformed into unity of decision and action.'⁴⁵ On this view, the more diverse the society, the harder it will be for political outputs of democracy to be seen as legitimate. The social diversity that leads to federalism contains the seeds of its demise. Rather than managing and accommodating diversity, federalism is more prone to exacerbate conflict between components of the federation.⁴⁶

The federal model of multiple orders of territorially-based governments disperses power to groups that are minorities nationally, but which are political majorities in a component unit of the federation. Federalism stands accused of fostering hostility to the political and other rights of local minorities within a state/province by subjecting them to the whims and prejudices of the local majority.⁴⁷ The rights of dispersed minorities that do not command a majority in any region may be seen as a hindrance to the political aspirations of the dominant group in a component unit of the federation.⁴⁸ Political rights, such as those to vote, speak, and associate, are equally as vulnerable in this view as others tied to group identity, such as language and education. For example, the dispersal of authority over electoral governance in the United States is a facilitator of the long history of voter suppression.⁴⁹

Electoral governance and federalism

While the connection between federalism, constitutionalism, and democracy has been much interrogated, electoral governance has not classically been seen as a core focus in the vast literature on federalism⁵⁰ or constitutional design.⁵¹ The literature on consociationalism has long taken seriously the issue of representation of minorities in the electoral system, including in federations.⁵² This scholarship focuses, however, on the choice between majoritarianism and proportionality in electoral systems, or the mechanisms of group representation and power-sharing, rather than the administration of elections or federal division of powers on electoral matters. The choice of whether to centralize or devolve electoral governance is a revealing and consequential one, however, for the

⁴⁵Hueglin (n 37) 30.

⁴⁶Jan Erk and Lawrence Anderson, 'The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?' (2009) 19 *Regional & Federal Studies* 191.

⁴⁷See for example, Francesco Palermo, 'Owned or Shared? Territorial Autonomy in the Minority Discourse' in Tove Malloy and Francesco Palermo (eds), *Minority Accommodation Through Territorial and Non-Territorial Autonomy* (Oxford University Press 2015).

⁴⁸For a nuanced exploration of this issue, see G. Alan Tarr, Robert F. Williams, and Josef Marko (eds) *Federalism, Subnational Constitutions, and Minority Rights* (Praeger 2004).

⁴⁹Carol Anderson, *One Person, No Vote: How Voter Suppression is Destroying Democracy* (Bloomsbury 2019). The refrain of 'state's rights' is closely associated with discrimination and voter suppression in the United States: Anderson, 41–42, 91.

⁵⁰Alfred Stepan argues that the relationship between federalism and democracy remains under-theorized: *Arguing Comparative Politics* (Oxford University Press 2001), 14. See also the helpful overview of the central issues in constitutional federalism by Richard Simeon, 'Constitutional Design and Change in Federal Systems: Issues and Questions' (2009) 39:2 *Publius: The Journal of Federalism* 241. Simeon at 241 argues: '...the reality is that there are very few clearly established generalizations [regarding federalism]' and 'no robust empirical findings about the political consequences of decentralization, pro or con, are to be found.' See also Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007), 5.

⁵¹Notable exceptions include Chernykh (n 10); Rekha Saxena, 'The Election Commission and Indian Federalism' (2012) 15:1 *Think India Quarterly* 194.

⁵²On consociationalism, see from its leading scholar, Arend Lijphart, *Patterns of Democracy: Government Forms and Patterns in 36 Countries* (Yale University Press 1999). Federalism fits as a method of power-sharing. Belgium and Switzerland are the key cases. See Matthijs Bogaards, Ludger Helms, and Arend Lijphart, 'The Importance of Consociationalism for Twenty-First Century Politics and Political Science' (2019) 25(4) *Swiss Political Science Review* 341.

operation of democracy.⁵³ It is also a matter of constitutional design in the growing number of democracies that provide constitutional status to their election commission. This section investigates the relationship between electoral governance and constitutional design.

Electoral governance: horizontal and vertical allocation

While some democracies persist in allowing the executive a significant role in managing elections, as in France, Germany, and Japan, most opt to empower an independent EMB to do so.⁵⁴ Independent EMBs of various forms are often given constitutional status.⁵⁵ Constitutions in democracies in Asia, Africa, and Latin America overwhelmingly favour the administration of elections by an independent EMB⁵⁶ as part of the ‘new separation of powers.’⁵⁷

In conjunction with other entities or branches, EMBs are the primary institution of electoral governance.⁵⁸ Electoral governance involves the execution of three main functions: rule-making, rule-application, and rule-adjudication in relation to electoral law and policy.⁵⁹ These functions are essential in democracies and must be allocated to one or more institutions to carry out. The separation of powers around electoral governance involves a division of labour with a key role for EMBs alongside the traditional three branches of government. The institutional separation around electoral governance often involves the legislature passing election laws, the EMB interpreting and administering the statute, and either regular or specialized electoral courts resolving disputes or handling appeals of decisions by the EMB. There are variations. Some EMBs have rule-making power in the form of the authority to issue regulations or binding orders that come close to a power to legislate in a discrete area. In Latin America, the most popular form of EMB is a hybrid electoral court or ‘*corte electoral*’ that administers elections but also acts like a court to resolve disputes and is run in part by judges from the regular courts.⁶⁰

If the separation of powers around electoral governance involves the horizontal allocation of authority, federations are obliged to vertically allocate electoral governance as well. Federations must decide whether electoral governance is a matter for the center or the states. There are stronger and weaker form versions of both possibilities. The unitary model of central rule implies a national commission with authority over all aspects of federal and state/provincial election administration. The national commission generally has authority over matters such as a national voters list or roll, enforcement, and so on. The leading comparative public administration account of EMBs finds that centralized election administration leads to greater accountability.⁶¹

⁵³Jorge Elklit and Andrew Reynolds, ‘Analysing the Impact of Election Administration on Democratic Politics’ (2001) 38 (1) Representation 3; Toby James, *Comparative Electoral Management* (Routledge 2019); Hyde and Pallister (n 4) 246–248.

⁵⁴Catt and others (n 6); Hyde and Pallister (n 4) 244.

⁵⁵Chernykh and others (n 10).

⁵⁶Catt and others (n 6). On Latin America, see Fabrice E. Lehoucq, ‘Can Parties Police Themselves? Electoral Governance and Democratization’ 23(1) International Political Science Review 29 and Jonathan Hartlyn, Jennifer McCoy, and Thomas M. Mustillo, ‘Electoral Governance Matters: Explaining the Quality of Elections in Contemporary Latin America’ (2008) 41(1) Comparative Political Studies 73. On Africa, see Shaheen Mozaffar, ‘Patterns of Electoral Governance in Africa’s Emerging Democracies’ (2002) 23(1) International Political Science Review 85; Alexander Makulilo and others, *Election Management Bodies in East Africa* (Open Society Foundations 2015); Open Society Initiative of Southern Africa, *Election Management Bodies in Southern Africa* (Open Society Initiative for Southern Africa 2016); Ismaila Madior Fall, *Election Management Bodies in West Africa* (Open Society Foundations 2012). On South Asia, see Michael Pal, ‘The South Asian Fourth Branch: Designing Election Commissions for Constitutional Resilience’ (in press).

⁵⁷Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) Harvard Law Review 633.

⁵⁸Mozzafar and Schedler (n 5).

⁵⁹ibid 7.

⁶⁰Lehoucq (n 56); Hartlyn, McCoy, and Mustillo (n 56).

⁶¹James (n 53) 271. James compares centralized versus decentralized models for election administration across federal and unitary countries. He does not separate out a comparison between federal and unitary systems or centralized and decentralized federations.

Allocating electoral governance to the states or provinces implies the existence of a commission in each jurisdiction with the full range of authority over regional elections. The most extreme version of this division of powers model would grant the regional commission jurisdiction to administer even the rules for federal elections taking place in that jurisdiction. That is the U.S. model, with the exception of campaign finance reserved for the Federal Election Commission. Most division of powers instead establish state/provincial commissions that mimic the power of the federal one, but with jurisdiction only over elections in the sub-national territory. Canada and Australia follow this weaker form version of the division of powers model.⁶² Even on a division of powers approach, the decisions of sub-national election commissions are subject to the democratic rights provisions of the national constitution.

Unitary electoral governance

The unitary model has been dominant in Asian federations, though it remains under-theorized.⁶³ The Constitutions of India, Pakistan, Nepal, and Malaysia all empower their national commission to oversee state/provincial elections.⁶⁴ The Election Commission of India (ECI) is a national commission based in the capital, but with jurisdiction set out in Art 324(1) of the Constitution over elections to Parliament as well as state legislatures, among others.⁶⁵ It is a paradigmatic case of the unitary approach.

In a large country, even unitary election administration through a national commission will have some decentralization in practice. The ECI assigns Chief Electoral Officers for each state, for example. Central control is maintained through the appointment process and financing. The regional officers are appointed by the ECI and are accountable to it. The ECI also determines the budget for state legislative elections and the state is obliged to bear the expense. Decentralization is therefore a practical element of the unitary model in some instances, but ultimate legal authority rests with the national EMB.⁶⁶

The unitary vision of a single, national commission whose authority crosses federal and state jurisdictions rejects the relevance of subsidiarity for electoral governance. According to the principle of subsidiarity, governance of any given subject-matter should rest with the government closest to the people.⁶⁷ Providing a state/province with jurisdiction over education, for example, allows for self-government on a matter that is key to cultural survival for linguistic minorities. It recognizes that there are legitimately different ways of approaching the organization of a system of education, the training and regulation of teachers, and the content in the classroom. On the unitary vision that has won out in India, Nepal, Malaysia, and Pakistan electoral governance is a different animal that requires uniformity, even for elections at sub-national levels. The most extreme version of this approach is in Nepal, where a host of central accountability institutions beyond just the election commission have authority across the national and regional jurisdictions.⁶⁸

⁶²Both have a central commission and then provincial or state commissions. Information and best practices are shared, but they are distinct entities.

⁶³Sudhir Krishnaswamy argues in the context of India that 'a tired air hangs about contemporary academic and professional debates on legal and constitutional federalism': 'Constitutional Federalism' in Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015), 356.

⁶⁴Constitution of India, art 324(1); Constitution of the Islamic Republic of Pakistan, Part VIII, arts 213–226; Constitution of Nepal, arts 245–257; Constitution of Malaysia, art 114.

⁶⁵Article 324(1) of the Constitution of India reads: "The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission."

⁶⁶Alan Wall and others, *Electoral Management Design: The International IDEA Handbook* (International IDEA 2006).

⁶⁷Fleming and Levy (n 29).

⁶⁸Constitution of Nepal, parts 21–27. See, for example, Part 22, whereby the Auditor General is granted authority over federal, state, and local government offices: s 241(1). Mara Malagodi, 'The Rejection of Constitutional Incrementalism in Nepal's Federalisation' (2018) 46(4) *Federal Law Review* 521; Mara Malagodi, 'The Locus of Sovereign Authority in

The arguments in favour of centralized electoral governance include concerns with capacity and competence. A national body may in the abstract be more likely to deliver on the massive logistical operation that is an election, especially if it is better funded than local institutions and more able to attract expert staff.⁶⁹ A national EMB may simply have more capacity. A single national commission also enhances the power of those at the center possessing the authority to make appointments to the commission,⁷⁰ even if the commissioners are required by law to behave impartially once assuming office.

Post-colonial or transitional moments may also involve over-arching emphasis on nation-building. As Rosalind Dixon and Tom Ginsburg write about Asia, ‘all of the countries in the region share, more or less, the idea that constitutional state building was part of the modernization project.’⁷¹ National election commissions with broad authority even over sub-national elections could be seen as part of the complement of central institutions that establish and shape the new country or constitutional order, along with the courts, legislatures, and other core bodies.

The division of powers model

Decentralization overlaps with the foundational objects of federalism, including self-determination and accommodation of pluralism. In federations, there is one national political community and multiple regional political communities. The division of powers in a federation apportions authority to legislate on a topic or subject-matter to the larger national political community, or to the regional ones, or shares it among them. Even recognizing the legal reality of overlapping jurisdiction on many policy matters, the assumption in federal systems is that each political community is supreme in the matters over which it has jurisdiction. This assumption is particularly strong in those systems understood as ‘confederations’ or ‘compacts’ of distinct political communities mutually accepting limited shared rule by the center.⁷²

That a central institution on the unitary model of electoral governance would manage provincial elections goes against this general feature of federalism. In the controversial decision of *Shelby County v. Holder*, Chief Justice John Roberts of the United States Supreme Court emphasized the equal sovereignty of the states and, by extension, the value of sub-national control over elections.⁷³ *Shelby County* struck down the ‘coverage’ formula in section 4 of the *Voting Rights Act* (VRA).⁷⁴ The logic behind the VRA in the United States is that democracy does not function at the state level due to racial discrimination and that federal oversight is therefore needed. There is ample evidence to support the need for a robust VRA in the United States due to facially neutral laws that have a disproportionate and negative impact on minority voters.⁷⁵ Section 4 determined which jurisdictions were subject to federal oversight over changes to election laws and their administration and which were free to amend their laws without seeking approval from federal authorities.

Chief Justice Roberts opined that asymmetric federal involvement, where some states were subject to pre-clearance requirements as a result of the ‘coverage’ formula but others were not,

Nepal’ in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 45.

⁶⁹James (n 53) ch 10.

⁷⁰For a discussion of appointments to election commissions and the broader constitutional politics, see Mark Tushnet, ‘Institutions Protecting Democracy’ (n 11) 191–193.

⁷¹Rosalind Dixon and Tom Ginsburg, ‘Introduction’ in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2014), 2.

⁷²Stepan (n 38); Sébastien Grammond, ‘Compact is Back: The Supreme Court of Canada’s Revival of the Compact Theory of Confederation’ (2016) 53(3) *Osgoode Hall LJ* 799. Where there are political or legal consequences that flow from the distinction, the categorization of a given country as ‘federal’ or ‘confederal’ or a ‘compact’ tends to be much disputed.

⁷³*Shelby County v Holder*, 570 US 529 (2013).

⁷⁴Voting Rights Act 1965, 42 USC 1973 (a).

⁷⁵Richard Hasen, *The Voting Wars* (Yale University Press 2013); Carol Anderson, *One Person, No Vote* (Bloomsbury 2019).

was contrary to the spirit of federalism. He framed federal oversight of elections in the states as ‘a dramatic departure from the principle that all States enjoy equal sovereignty.’⁷⁶ The Chief Justice’s reasoning found an unconstitutional harm in differential treatment by Congress of some states in comparison to others. Hence his use of the word ‘equal’ in ‘equal sovereignty.’ Congress does retain often unused constitutional authority to regulate federal elections beyond the specific terms of the VRA.⁷⁷ *Shelby County* did not upset that position. The emphasis on ‘sovereignty’ in this context, however, rather than simply ‘equality’ among the states, would seem to imply some form of constitutional recognition of the value of subsidiarity in electoral governance in the federation.

Outside of the United States, there may be other considerations that would suggest departing from the principle of subsidiarity in electoral governance in a particular federation. The component units of a federation may prefer self-government in administering elections so they can adopt measures that fit with local political traditions or respond to social or demographic realities on the ground that would be ignored by a remote bureaucracy stationed in the national capital.⁷⁸ If state/provincial legislatures set electoral law for elections in their regions, there is a symmetry in having those laws be administered by a state/provincial election commission rather than a national one. All of these concerns go to jurisdiction and reflect the usual push and pull of debates about the proper allocation of powers and responsibilities in federal systems.

Decentralized election administration in a federation may also be a tactic to minimize the risk of capture. If the national election commission has partisan representation in its membership by design or is seen as captured by national political parties, states or provinces may view local administration as a way to ward off interference on partisan grounds. Dispersed authority may act as a check on abuses emanating from the center. Such a risk may be heightened where there are different political parties governing at the center and in the states/provinces, which has been a factor in the abuse of some other centrally assigned powers in India, for example.⁷⁹

Asian federations and electoral governance

The unitary model of electoral governance has been the dominant choice in Asia. This preference fits with the general tendency for Asian federations to be highly centralized.⁸⁰ Pakistan, Malaysia, India, and Nepal are formally federations, with varying degrees of decentralization in Myanmar and some other countries.⁸¹ British colonial influence in early constitutional design partly accounts for the presence of federalism in Asia.⁸² Despite different democratic trajectories, all four have adopted unitary governance by a single, national election commission enshrined in the constitution. India has done so since its Constitution was implemented in 1950, while Nepal is the latecomer with its momentous 2015 constitutional reform. The overall trend of unitary electoral governance in Asian federations is therefore quite consistent, but obscures some important variations among the countries.

Pakistan adopted its first constitution in 1956, a second one in 1962, and a third in 1973. The 1973 Constitution established Pakistan as a federation, a legal reality which has persisted despite periods of military rule.⁸³ There are four provinces, a national capital region, and federally-run

⁷⁶*Shelby County* (n 74) 530, per Roberts CJ.

⁷⁷For a recent analysis of federal authority over elections, and the possibility of more robust interpretation of its own powers by Congress, see Nicholas Stephanopoulos, ‘The Sweep of the Electoral Power’ (2021) 36(1) *Constitutional Commentary* 1.

⁷⁸George Guess, *Dysfunctional Decentralization: Electoral System Performance in Theory and Practice* (Center for Democracy and Election Management 2009); James (n 53) ch 10.

⁷⁹K Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance* (2nd rev edn, Synergy Books 2012).

⁸⁰See generally Bhattacharaya (n 13).

⁸¹Kumar (n 17). Unlike Kumar, I exclude here Iraq, which is sometimes included in analysis of Asian democracy and other times included with countries of the Middle East.

⁸²*ibid* 230.

⁸³*ibid*.

“Tribal Areas” near the border with Afghanistan. The Constitution has been amended multiple times since 1973, including many changes that address aspects of electoral governance,⁸⁴ particularly after the end of the Musharaff regime in 2008.

Part VIII of the Constitution creates the Election Commission, the office of the Chief Commissioner, and roles for four regular Commissioners. Article 219 assigns to the Election Commission of Pakistan authority over federal, provincial, and local government elections. The desire to formally centralize electoral governance therefore extends not just to provincial elections, but all the way down to those at the local level. The formal centralization of electoral governance is balanced out in practice by some recognition through the appointments process of the federal nature of the Pakistani state. Alongside the Chief Commissioner, one Commissioner is named from each of the four Provinces according to Article 218 (2)(b).

In Malaysia, Article 1 of the Constitution establishes the country as a federation with states, the Federal Territory of Kuala Lumpur and other Territories. Article 114 of the Constitution instructs the Election Commission to ‘conduct elections to the House of Representatives and the Legislative Assemblies of the States.’ The Commission has power over federal and state redistricting, voting rolls, and so on. Article 113(4) permits the legislatures to delegate authority over other elections to the Commission. There is therefore a form of opt-in mechanism for electoral governance that can shift greater responsibility to the center.

Nepal’s 2015 Constitution defines the country as a federal one in Article 4(1), in contrast to the centralized monarchy that had been in place before. The Constitution is notable for creating a number of independent institutions with authority across the federal and provincial governments. The Election Commission, set out mainly in Articles 245 and 246, is one of them. It has the power to administer Presidential, Vice-Presidential, Parliamentary, provincial legislative, and local elections. Like Pakistan, the reach of the central commission goes to the local level. It also administers federal referendums (see Article 241(2)).

While we are at an early juncture in the life of the 2015 Constitution, the system has to date functioned in a centralized manner with regards to electoral governance. Elections in 2017 were the first under the new, democratic, federal arrangements, with further indirect ones for the Presidency, Vice-Presidency, and other offices in 2018. While the Constitution devolves authority to sub-national governments in a manner that did not exist prior to 2015, electoral governance remains centralized. There are provincial and district offices of the Commission, but they remain directly under the auspices of the center. Unlike in Pakistan, there is no formal mechanism in Nepal to represent the country’s regions in the Election Commission.

Article 324(1) of the Constitution of India grants the Election Commission of India (ECI) the exclusive authority to administer federal and state elections. The ECI began with a single Chief Commissioner but evolved after some political and legal struggle into a multi-member body with several Commissioners alongside the Chief.⁸⁵ The ECI has some administrative decentralization, with provincial offices, though always under the ultimate control of the center.⁸⁶ The Chief Electoral Officer for each state is appointed directly by the central, Chief Commissioner of the ECI. These state officers have no distinct constitutional status and are subject to budgetary and administrative control by the central commission.

All of the federations in Asia have therefore chosen a unitary approach to electoral governance. They have mostly, however, made some notable concessions owing to the federal fact and, perhaps, political pressure for decentralization, either through the appointments process as in Pakistan, an

⁸⁴The 19th, 20th, 22nd, and 24th Amendments to the Constitution were either partly or entirely preoccupied with electoral matters and were made between 2010 and 2017.

⁸⁵Pal (n 11) 105–106.

⁸⁶Election Commission of India, ‘The Setup’ (26 October 2018) <<https://eci.gov.in/about/about-eci/the-setup-r1/>> accessed 22 July 2021.

opt-in mechanism as in Malaysia, or informal decentralization as in India. It remains to be seen how electoral governance will evolve in Nepal. Concerns over lack of capacity at the provincial and local level likely play a role in the choice of the unitary approach. Given the credible possibility of secession in the Asian federations and the challenges in building post-colonial institutions, a desire to engage in a project of central-led state-building is a plausible explanation as well.

As I will discuss in the next two sections, concerns around the right to vote and electoral integrity may also be reflected in the adoption of the unitary model. In India, such concerns were in fact paramount in the Constituent Assembly's debates and drafting of the Constitution of 1950. Section III outlines the impact of electoral governance on the right to vote as a general matter, which lays the groundwork for the detailed discussion in Section IV of the deliberations by India's Constituent Assembly around federalism and democracy.

The right to vote and electoral governance

The relationship between election commissions and democratic rights must also be taken into account in assessing the horizontal and vertical allocation of authority over electoral governance. Democratic rights concerns are often at the heart of disputes about the vertical allocation of electoral governance. Election administration is the primary vehicle for the practical realization of the abstract commitment to the right to vote in constitutions.

Assigning power over electoral governance to one order of government over another might have an impact on fulfillment of the right to vote or other democratic rights. The logic behind the *VRA* in the United States, for example, is that democratic rights are more likely to be upheld if authority is in federal hands, rather than with the states. The harm addressed by the *VRA* is discrimination carried out by local majorities against local minorities, remedied by temporarily re-assigning the authority from the sub-national majority to the national one. While the dynamics play out differently in other democracies, concerns about democratic rights are frequently intertwined with the vertical allocation of electoral governance in a federation.

The right to vote is often characterized as 'fundamental',⁸⁷ 'foundational',⁸⁸ 'preservative of other rights',⁸⁹ and 'universal'.⁹⁰ The right to vote is closely tied to political equality of a certain type. It is held by those whom their fellow citizens respect as equals in the political community.⁹¹ The right to vote does not guarantee that each citizen has equal influence, but only that each has an equal opportunity. Political equality, however, extends not just to the 'boundary problem'⁹² of who is entitled to vote as a full member of the polity, but also to the administrative procedures that implement the right. We intuit a harm when there is differential access to the ballot box, whether through informal measures such as longer waiting times to cast ballots in some areas than others,⁹³ or more formal ones such as strict voter identification measures that disproportionately make it more difficult for some citizens to vote.⁹⁴ The right to vote enshrined in constitutional text means little if polling stations are inaccessible or there is no option for postal or remote voting in a pandemic, for example.

⁸⁷ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, para 9; *Frank v Canada (Attorney General)*, 2019 SCC 1, para 1.

⁸⁸ Joshua A. Douglas, 'The Foundational Importance of Voting: A Response to Professor Flanders' (2013) 66(1) *Oklahoma Law Review* 81; Joshua A. Douglas, 'Is the Right to Vote Really Fundamental?' (2008) 18(1) *Cornell Journal of Law and Public Policy* 143.

⁸⁹ Joseph Fishkin, 'Equal Citizenship and the Individual Right to Vote' (2011) 86 *Indiana Law Journal* 1289; *Yick Wo v Hopkins*, 118 US 356, 370 (1886).

⁹⁰ Fishkin (n 89) 1345. See the UN Declaration of Human Rights, art 21(3), referring to 'universal and equal suffrage.'

⁹¹ Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999), ch 11, 'Participation: The Right of Rights.'

⁹² Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should be Bounded by the State' (2012) 4 (1) *International Theory* 39; Eva Erman, 'The Boundary Problem and the Ideal of Democracy' (2014) 21(4) *Constellations* 535.

⁹³ Elizabeth Cohen, *The Political Value of Time* (Cambridge University Press 2018).

⁹⁴ Anderson (n 75).

Unitary election administration implies that laws will be interpreted and applied consistently throughout the country, which resonates with the notion of political equality underlying the right to vote. Consistency in administration trumps innovation and variety of policy responses if universality is emphasized. The costs are that there is likely to be less local knowledge and less room for distinct political and legal cultures around election administration to emerge. The constitutional designers of Asia have been willing to bear these costs given the success of the unitary model in carrying the day with constitutional drafters.

A unitary rather than decentralized approach to electoral governance carries with it the presumption that discriminatory tactics that harm political rights are more likely to occur at the sub-national, regional, or local jurisdictions, rather than the national one, all else being equal. Such an evaluation is obviously a contextual one depending on a host of country-specific factors. Given inevitable pluralism in a federation, the risk of the division of powers model for electoral governance is that local elites or sub-national political majorities will oppress minorities within those jurisdictions and the state election commission will either fail to prevent or, worse, willingly facilitate it. The strongest form of the claim is that generally not only discrimination, but even violence, is more prevalent in sub-national jurisdictions⁹⁵ and that this insight can be extended to violations of the right to vote and electoral violence. The fear of discriminatory local political majorities runs counter to the arguments posited by early scholars, notably K.C. Wheare, who associated federalism closely with multiple democratic spheres,⁹⁶ and James Madison, who thought an 'extended republic' was better placed to respect rights.⁹⁷ Even if there is the same risk of abusive exercise of authority in the national and sub-national spheres, there might be less scrutiny from the media, academia, or civil society at jurisdictions removed from the center.

I turn next to setting out how these issues played out in the vertical allocation of authority over electoral governance in the Indian context.

Constitutional design of electoral governance: the case of india

The various considerations behind adopting a unitary or division of powers model for electoral governance in a federation have weighed heavily on the minds of constitutional drafters. This section examines the deliberations of the Constituent Assembly in framing the Indian Constitution and, particularly, the views of BR Ambedkar. The culmination of the Assembly's deliberations on election administration resulted in the creation of a national commission, the ECI. Article 324(1) of the Constitution vests power over the management of federal *and* state elections in the ECI. In debating the specific wording of what would become Article 324, the Constituent Assembly dealt head on with the relationship between federalism, democracy, and free and fair elections. Earlier versions had envisioned a division of powers approach of state commissions alongside the national one.⁹⁸ Ambedkar pressed and eventually won the argument in favour of a national commission with authority to administer state elections.⁹⁹

⁹⁵Take for example the view of David Stuligross and Ashutosh Varshney, 'Ethnic Diversities, Constitutional Designs, and Public Policies in India' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press 2002), 455: '...communal or ethnic violence tends to be locally concentrated.'

⁹⁶Wheare (n 31) 48: 'Dictatorship, with its one-party government and its denial of free election, is incompatible with the working of the federal principle. Federalism demands forms of government which have the characteristics usually associated with democracy or free government.'

⁹⁷James Madison, 'Federalist No. 10' in Alexander Hamilton, James Madison, and John Jay, *The Federalist* (George Carey and James McClellan eds, Liberty Fund 2001) <https://oll.libertyfund.org/title/jay-the-federalist-gideon-ed#lf1631_label_191>. See also Peter S. Onuf, 'James Madison's Extended Republic' (1990) 21 Texas Tech Law Review 2375; James S. Liebman and Brandon L. Garrett, 'Madisonian Equal Protection' (2004) 104(4) Columbia Law Review 837.

⁹⁸*Constituent Assembly Debates*, 15 June 1949.

⁹⁹*ibid*; Ornit Shani, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (Cambridge University Press 2018) 185–191.

Article 324 has been an influential constitutional provision in shaping the global evolution of election commissions as comprising or, as part of, a fourth branch of government.¹⁰⁰ The South African Chapter 9 institutions from 1996 (as a group) was a later model¹⁰¹ that has been widely emulated, especially in Africa.¹⁰² The model of a hybrid election commission-electoral dispute resolution court has been the preference of designers in South America, Central America, and Mexico.¹⁰³ India adopted a unitary model in 1950 and its template has circulated in South Asia in particular,¹⁰⁴ which fits within broader trends of constitutional migration in the region.¹⁰⁵

The reasons behind India's design choice are instructive. Article 324 emerged from the attempt to reconcile often-competing goals. The deliberations of the Constituent Assembly engaged directly with whether it was possible to build a democracy with competitive elections while respecting the legitimate authority of multiple orders of government within a large and diverse country. The text reflects the insight that the animating federal principles of decentralization and subsidiarity harm constitutional democracy if applied to electoral governance.

Ornit Shani argues that the creation of the ECI was directly tied to the goal of a universal franchise, whereby all citizens were included on a single, national electoral roll.¹⁰⁶ According to Shani, the prevailing view that found its way into the final version of Article 324 was that a national commission administering the franchise and the rolls 'would foster not only the welding of the federation, but also its democratisation.'¹⁰⁷ Both the independence of the institution and the centralization of electoral governance were seen as key features of the commission by the drafters.

In searching for models of independence, the Constituent Assembly looked abroad. The deliberations were a comparative exercise with an eye to the independence of EMBs in North America, Europe, South America, and Africa.¹⁰⁸ The US model of partisan and decentralized election administration was dismissed for permitting 'political gangsterism.'¹⁰⁹ The UK's centralized but not fully independent approach at that time was deemed unworthy of emulation for still being subject to 'election brawls.'¹¹⁰

¹⁰⁰Tushnet, 'Institutions Protecting Constitutional Democracy' (n 11); Ackerman (n 57); Pal (n 11).

¹⁰¹Tushnet, 'Institutions Protecting Constitutional Democracy' (n 11) 96; Tushnet, 'Institutions Protecting Democracy' (n 11) 185. See also Christina Murray, 'The Human Rights Commission et al: What Is the Role of South Africa's Chapter 9 Institutions?' (2006) 9 Potchefstroom Electronic Law Journal 122; Heinz Klug, 'Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions' (2015–16) 60 New York Law School Law Review 153; Heinz Klug, 'Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa' (2019) 67(3) Buffalo Law Review 701.

¹⁰²Charles Fombad, 'The Diffusion of South African-Style Institutions? A Study in Comparative Constitutionalism' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018) 370; Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press 2000), ch 6, 'Global Impact: International Imperatives and their Hybridization.'

¹⁰³Lehoucq (n 56).

¹⁰⁴Bhattacharyya (n 13).

¹⁰⁵Jamal Greene and Madhav Khosla, 'Constitutional Rights in South Asia' (2018) 16(2) International Journal of Constitutional Law 470, 476. See generally, Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015).

¹⁰⁶Shani (n 99) 185: 'The revised constitutional election provisions aimed to ensure and fortify the autonomy and integrity of the election machinery, and to safeguard and give an explicitly expression to the notion of universal franchise on the basis of a single joint electoral roll.'

¹⁰⁷ibid 191. Madhav Khosla's own account resonates with that of Shani: *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020), 129–133.

¹⁰⁸ibid 188. The research office of the Constituent Assembly Service looked to the UK, US, South Africa, Australia, Canada, Brazil, Chile, Cuba, the Dominican Republic, Ecuador, Nicaragua, Panama, and Uruguay.

¹⁰⁹ibid; Brij Bushan, Constituent Assembly Service, Internal Note of 5 March 1949.

¹¹⁰Shani (n 99) 188. The U.K. adopted an independent election commission only as late as 2000. Its independence has been watered down to some extent through a revised appointment process. See Toby James, 'Electoral Modernisation or Elite Statecraft? Electoral Administration in the U.K. 1997–2007' (2010) 5(2) British Politics 179.

Ambedkar certainly viewed the ECI as central to the realization of the right to vote in India. Ambedkar lost the argument that voting should be listed as a ‘fundamental right,’ but his view of its importance informed the deliberations on election administration.¹¹¹ A centralized commission structure was more conducive to the realization of the right to vote in the Indian circumstance of deep pluralism in his view. Ambedkar’s aspiration for the Constitution was that it would be a means to generate politics that would ‘bottle the prejudices and nullify the injustice which social forces were likely to cause...’¹¹² This broader view of the role of the Constitution directly shaped his vision of the ECI as a central institution whose reach extended into state politics. Ambedkar argued that,

*The House will realise that franchise is a most fundamental things in a democracy. No person who is entitled to be brought into the electoral rolls on the grounds which we have already mentioned in our Constitution, namely, an adult of 21 years of age, should be excluded merely as a result of the prejudice of a local Government, or the whim of an officer. That would cut at the every root of democratic Government. In order, therefore, to prevent injustice being done by provincial Governments to people other than those who belong to the province racially, linguistically and culturally, it is felt desirable to depart from the original proposal of having a separate Election Commission for each province under the guidance of the Governor and the local Government. Therefore, this new change has been brought about, namely, that the whole of the election machinery should be in the hands of a Central Election Commission... so that no injustice may be done to any citizen in India, who under this Constitution is entitled to be brought on the electoral rolls.*¹¹³

Ambedkar did not aim for the Constitution to bluntly disperse power in line with a Riker-ian emphasis on liberty writ large.¹¹⁴ He sought instead to take into account India’s social realities, including caste and religious cleavages, and to identify where the Constitution should facilitate public authority and where it should blunt it. Fitting with his vision for the Indian state and the Constitution as a whole, Ambedkar sought not simply to create a system whereby misuse of power by majorities would be invalidated after the fact by courts, but to ‘implement a governmental structure that was itself counter-majoritarian.’¹¹⁵ The ECI was a core component of this institutional counter-majoritarianism, as an independent body operating outside of executive control,¹¹⁶ but also as the best alternative to local election administration, which he resisted for being unlikely to uphold constitutional values. Put into contemporary constitutional vernacular, Ambedkar feared ‘abusive’ constitutionalism¹¹⁷ at the state level in the form of capture of independent institutions and partial election administration operating at the expense of minorities.

¹¹¹Jon Soske, ‘The Other Prince, Ambedkar, Constitutional Democracy, and the Agency of the Law’ in Cosimo Zene (ed) *The Political Philosophies of Antonio Gramsci and B.R. Ambedkar* (Routledge 2013) 59.

¹¹²ibid 64. One could also see Ambedkar’s contributions here in light of his overall advocacy for a form of ‘constitutional morality.’ See *Constituent Assembly Debates*, 4 November 1948 and 25 November 1949; Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, ‘Locating Indian Constitutionalism’ in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016), 2–4.

¹¹³*Constituent Assembly Debates*, 15 June 1949.

¹¹⁴K.H. Cheluva Raju, ‘Dr. B.R. Ambedkar and Making of the Constitution: A Case Study of Indian Federalism’ (1991) 52 (2) *Indian Journal of Political Science* 153, 158 covers the emphasis by Ambedkar and others on ‘a strong Center...’.

¹¹⁵Soske (n 111) 64. Ambedkar cannot be accused of being hostile to the recognition of difference in constitutional design. He supported separate constituencies for Muslims in India in the Constituent Assembly, though ultimately lost the argument. See Raja Sekhar Vundru, *Ambedkar, Gandhi, and Patel: The Making of India’s Electoral System* (Bloomsbury 2018) and Khosla (n 107) 129–133.

¹¹⁶Khosla (n 107) 36. A weakness in Article 324 evident to some participants in the *Constituent Assembly Debates* was the appointment process. Prof. Shiban Lal Saxena worried about capture of the ECI through appointments made formally by the President but informally by the Prime Minister. He therefore advocated a requirement of 2/3 support in both houses of Parliament so as to avoid appointment of any ‘party man’ who would act counter to ‘independence and impartiality of the Election Commission.’ *Constituent Assembly Debates*, 15 June 1949.

¹¹⁷Rosalind Dixon and David Landau develop the concept of constitutional ‘abuse’ in a series of works. Constitutional abuse can stem from judicial review: ‘Abusive Judicial Review: Courts Against Democracy’ (2020) 53(3) *UC Davis Law*

Ambedkar was not alone in his fears of tyranny by local majorities facilitated by a pliant state electoral commission. Members of the Assembly were keenly aware of the risks of local discrimination in general and also with regard to the specifics of election administration. Some warned, for example, that selective voter registration for the supporters of various local political leaders and organizations was already a reality as the Assembly deliberated.¹¹⁸ These warnings were accurate. In the lead-up to the first elections in independent India, who would be included on the electoral rolls was a point of great contestation in the fights to define citizenship and democracy and their relationship.¹¹⁹ Registration for inclusion on the rolls was already the subject of 'exclusionary practices' of various kinds.¹²⁰ '[S]ome state governments...did not register some of its population because they did not consider them to be citizens.'¹²¹ Disenfranchisement was common and local officials flagrantly disregarded instructions on voter registration from the Constituent Assembly Secretariat, the body provisionally tasked with constructing the first rolls.¹²² One member of the Constituent Assembly went so far as to say that with regard to the administration of the right to vote, 'provincial governments cannot be trusted.'¹²³ A national commission was seen as a way to head off partisan manipulation of voter registration at the local level.

These debates within the Constituent Assembly highlight the various trade-offs and pressing concerns involved in the federal question's application to electoral governance. With the benefit of hindsight, one could conclude that the drafters of the Indian Constitution properly identified the risk of local discrimination, but perhaps under-estimated the chance of capture of the national commission. The current moment of democratic decline across the globe also shapes the assessment of how constitutions perform. All independent checks on executive authority or the interests of the governing party are potential threats to be neutralized or institutions to be dominated by would-be authoritarians. In an India where democracy is suffering death by 'a thousand cuts'¹²⁴ the vulnerable points of its Constitution are in the spotlight.¹²⁵

The prospect of independent institutions including the ECI being so averse to offending a political majority that they fail to carry out their constitutional responsibilities has unfortunately proven to be a reality in Prime Minister Modi's India. The ECI appears to have exercised its authority in some instances so as not to hinder Prime Minister Modi and the governing BJP's re-election prospects.¹²⁶ As Sumit Ganguly writes, the ECI 'now stands compromised in the eyes of voters. Given how long this crucial watchdog institution was revered for neutrality and independence, this represents a fall from grace that is real and serious.'¹²⁷ The appointment process to the ECI as set out in the constitutional text is seriously deficient as I have argued elsewhere.¹²⁸

The risk posed by dominant parties is not new. Earlier versions of the ECI have credibly been viewed as if not in the pocket of the previously dominant Congress Party then at least unwilling

Review 1313. It can also be carried out by the executive or legislature, especially through constitutional borrowing: '1989–2019: From Democratic to Abusive Constitutional Borrowing' (2019) 17(2) *International Journal of Constitutional Law*.

¹¹⁸'The first reason is that this is a matter which requires careful consideration and that it has been hinted in a section of the press that in some provinces the Governments are helping the registration of their own supporters.' Shri Pataskar, *Constituent Assembly Debates*, 15 June 1949.

¹¹⁹Shani (n 99) 18.

¹²⁰*ibid.*

¹²¹*ibid.*

¹²²*ibid* 185.

¹²³K.M. Munshi, *Constituent Assembly Debates*, 16 June 1949. See Shani (n 99) 192 for a discussion of the context.

¹²⁴Tarun Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14(1) *Law and Ethics of Human Rights* 49.

¹²⁵Nazifa Alizada and others, *Autocratization Turns Viral: Democracy Report 2021* (Gothenburg, V-Dem Institute 2021) 13. India is now classified by V-Dem as an 'electoral autocracy.'

¹²⁶Khaitan (n 124).

¹²⁷Sumit Ganguly, 'An Illiberal India?' (2020) 31(1) *Journal of Democracy* 193.

¹²⁸Pal (n 11).

to confront it. Ultimately, the fourth branch is a tool of liberal legalism,¹²⁹ as is federalism. Whether they will be able to restrain hostile political majorities, check power, and sustain democracy remains to be seen.¹³⁰

Conclusion

The constitutional design of electoral governance is inevitably geared toward diminishing the risk of partisan capture by a political majority. Federalism is a complicating factor. The particular dilemma of constitutional design over electoral governance in federations stems from uncertainty about which political majority is the greater friend or foe to free and fair elections. The unitary model of election administration empowers a national, independent institution as a check on abuses by local political majorities. If we accept the intuition of Ambedkar and other drafters that local discrimination is the defining problem, a single, national commission is the logical conclusion. By pooling authority over federal and state/provincial elections into the hands of a single central institution, however, the possible harm caused by capture of the election commission are exacerbated. Capture of a state commission can do harm, but nowhere near the level of partisan interference with the national one. Division of powers and decentralization of electoral governance generates multiple, vulnerable commissions at risk of capture by local majorities. Centralization creates fewer pressure points in the system, but increases the possible harm caused by capture of the institution of election administration.

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¹²⁹Tushnet, 'Institutions Protecting Constitutional Democracy' (n 11) 105–106.

¹³⁰See Mohsin Alam Bhat, 'Governing Democracy Outside the Law: India's Election Commission and the Challenge of Accountability' in this special issue for an in-depth analysis of the role of the ECI.