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The Separation of Electoral Powers

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THE SEPARATION OF ELECTORAL POWERS

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I. INTRODUCTION

A cardinal principle of republicanism since at least Montesquieu has been the separation of powers. This principle—so second-nature to Americans by virtue of its presence in our founding constitutions, both state and federal, as well as the philosophical tracts written in support of those constitutions—calls for the placement of legislative, executive, and judicial power in three different institutions of government. One premise of this principle is that these three governmental powers are qualitatively different in nature: legislative enactment of laws is distinct from executive enforcement of them, and judicial pronouncement of how laws apply to particular circumstances should be distinct from both the initial adoption of rules as well as their prosecutorial enforcement.

This principle has served us well, but we need to supplement it. Traditional republican political theory lacks an adequate account of election laws and their relationship to the rest of the legal system. Republicanism developed prior to the formation of entrenched two-party electoral competition and thus could not anticipate the problem of one party capturing control of the legislature and being able to manipulate election rules so that the two-party competition is no longer a fair fight.[1] This problem has become familiar to us in the form of gerrymandering, but it can take other forms as well. We saw this particularly clearly in 2012, when Republican-controlled legislatures enacted various forms of restrictive voting rules—from stricter voter ID laws to reduced availability of early voting—in an apparent effort to tilt the electoral playing field in their favor.[2]

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1. For an interesting and valuable discussion of the role that election laws played in eighteenth century republican theory in America, see Kirsten Nussbaumer, *Republican Election Reform and the American Montesquieu* (draft available on SSRN). Nussbaumer argues that these Founding Era theorists believed that election laws should be imbedded in constitutional law and thereby protected from ordinary legislation. But, as I explain in this essay, it is unrealistic (at least in contemporary times) to expect that electoral rules can be confined entirely to constitutional, rather than ordinary, law—and thus some new alternative needs to be developed to implement the traditional spirit of republican theory, which attempts to protect the state from becoming hostage to partisan avarice.

2. *See e.g.* Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 Geo. Wash. L. Rev. ___ (forthcoming 2013). As Hasen observes in his *Voting Wars* book, Democrats are not immune from strategic behavior when considering which voting rules to advo-

To address this problem, I offer a new theoretical twist on the old separation-of-powers idea, which I call the separation of electoral powers. It has two dimensions. Its vertical dimension separates powers that govern the electoral process from the traditional powers that govern the rest of social life in the polity. The horizontal dimension replicates the traditional three-part division among legislative, executive, and judicial powers within the newly separate domain of electoral powers. Thus, there is a new electoral legislature, executive, and judiciary.

For this theoretical twist to be attractive, it needs to be workable in principle even if it is not likely to be implemented immediately. Therefore, after explaining the necessity for a development in republican theory along these lines, I offer an account of how the separation of electoral powers might actually operate in practice. In addition, to be persuasive in the twenty-first century, any theory concerning the separation of powers needs to take account of administrative law and the rise of administrative agencies that do not fit neatly into the eighteenth century tripartite division of legislative, executive, and judicial powers. Much of election law is necessarily a species of administrative law. Boards of election are administrative agencies, and the rules that they promulgate for the casting and counting of ballots—or the rules that are imposed on them by a Secretary of State or other statewide office—are administrative rules, presumptively subject to judicial review in accordance with general principles of administrative law unless otherwise specified in the state's constitution or statutes.

Yet in one crucial respect election law differs from every other specialty that falls under the umbrella of administrative law (such as environmental law, securities law, etc.): the rules of election law determine the identity of the elected officials responsible for adopting all those other areas of law. They are antecedent to the legislative process, whereas all other areas of administrative law are subsequent to the legislative process.[3] In any event, the separation of electoral powers as a theoretical idea designs

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cate or oppose. *See* Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Electoral Meltdown* (Yale Univ. Press 2012). Indeed, as the nation's historical experience with gerrymandering shows, including recent examples in Illinois and Maryland, state legislatures controlled by Democrats can be just as guilty of this manipulative practice as Republican-controlled legislatures. For purposes of this essay, it is not necessary to make a comparative assessment of the relative extent to which Republicans and Democrats attempt to amend voting rules in an effort to secure partisan advantage.

3. This distinction is important because the democratic legitimacy of administrative rules is predicated on the assumption that these administrative rules are subordinate to, and constrained by, legislation enacted by a legislature that itself has democratic legitimacy. Yet for administrative rules that regulate elections, this assumption does not hold. Rather, in this unique context, the administrative rules affect the identity of the legislature itself, including whether it is entitled to be respected as democratically legitimate. Simply put, electoral administrative rules cannot derive their democratic legitimacy from the legislature. The relationship runs in the opposite direction: if the administrative electoral rules are not themselves democratically legitimate, the legislature will not be so.

the institutions of the electoral legislature and the electoral executive—and structures the relationship between these two electoral powers—in a way that benefits from the wisdom of administrative law developed in more recent decades. But first, why is it necessary to introduce this new theoretical twist into traditional republican theory?

II. The Problem of Partisan Legislation

Partisan manipulation of election laws in an effort to help one's own party win is arguably on the rise since 2000. Many have accused Secretaries of State of abusing their executive power over the enforcement of voting laws in order to secure an electoral advantage for their fellow teammates.[4] Consequently, scholars (including myself) have called for the creation of new, nonpartisan institutions to replace the authority of partisan Secretaries of State to enforce election laws.[5]

Giving executive power to enforce election laws to a nonpartisan Secretary of State, however, would do nothing to constrain the *legislative* power of a legislature controlled by one party to enact election laws that bias the voting process in its favor. Yet the partisanship of state legislatures was the innovative hallmark of the 2012 election. Much more than the administrative decisions of Secretaries of State, partisan rules written by state legislatures were a serious blight on the body politic.

In an effort to prevent gerrymandering, there have been recent attempts (with mixed success) to put the power to draw district lines, which otherwise would reside in the legislature, in the hands of a nonpartisan redistricting body.[6] But thus far there have been no similar calls to remove from the legislature all power to enact any form of election law (so that the rules for voter registration, voter ID, early and absentee voting, and the like would all be promulgated by some entity other than the ordinary legislature of the

4. In Ohio alone, the last three Secretaries of State—Ken Blackwell, Jennifer Brunner, and Jon Husted—have all suffered these accusations. Similar accusations have arisen in many other states, including Colorado, Connecticut, Florida, Indiana, Kansas, and Minnesota. *See e.g.* Hasen, *The Voting Wars*, *supra* n. 2.

5. *See e.g.* Steven F. Heufner, Nathan A. Cemenska, Daniel P. Tokaji & Edward B. Foley, *From Registration to Recounts: Developments in the Election Ecosystems of Five Midwestern States* (Election Law @ Moritz, The Ohio State Univ. Moritz College of Law 2007); Hasen, *The Voting Wars*, *supra* n. 2. Dan Tokaji, my Moritz College of Law colleague, has also recently written about the largely successful implementation of a nonpartisan administrative alternative in Wisconsin. *See* Daniel P. Tokaji, *America's Top Model: Wisconsin's Government Accountability Board*, ___ U.C. Irvine L. Rev. ___ (forthcoming 2013).

6. California adopted a new nonpartisan redistricting commission, which drew the lines for the first time after the 2010 census. An attempt in Ohio that was modeled largely on California's experience failed at the ballot box in November 2012, after being subjected to a well-organized and well-funded campaign to defeat it. *See* Jim Siegel, *Redistricting revamp readily defeated*, The Columbus Dispatch 1B (Nov. 7, 2012).

state). The reason why we have not heard this call yet is that there is no more basic tenet in republican political theory than that legislative power resides with the legislature. This tenet is part of the separation-of-powers principle itself, and it is the principle that gives republican theory its democratic character—since the legislature is designed to be representative of the people. Thus, while carving out redistricting from the otherwise general legislative powers of the legislature might seem consistent with traditional republican theory, carving out all legislative power over the enactment of election laws is a much more radical idea ("radical" in its basic meaning of challenging the very "root" of republican theory).

For one thing, redistricting is meant to occur only once a decade, and it is a discrete single issue (even if a complicated one).[7] The task of updating a state's election laws is potentially a continuous one. Should new voting technologies be adopted? Should the rules for absentee voting be revised in light of changing demographics or other societal factors? Similarly, should voter registration and its procedures be modernized? These (and a host of other policy questions concerning the optimal rules for the operation of the voting process) have always been thought, since the beginning of republican political theory, to belong to the province of the legislature.[8] In what institution would this power to enact election laws reside, if not the legislature, and how would this institution be adequately representative of the people?

A. The Limits of Traditional Constitutional Law

One strategy to sidestep these difficulties is to rely on the judiciary to invoke constitutional principles like Equal Protection to constrain the power of a partisan legislature to write election rules in its favor. But there are limits to the effectiveness of this strategy. The Supreme Court, for example, has repeatedly shown its reluctance to police partisan gerrymanders.[9] Nor has the Court exhibited an eagerness to invalidate other forms of election laws, like voter ID requirements, that have a veneer of a policy justification—even when the evidence overwhelmingly indicates that the desire

7. For a discussion of the philosophical underpinnings of decennial redistricting, see Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* 38–53 (U. Chicago Press 2004).

8. For example, the U.S. Constitution gives to Congress (and if Congress does not act then the state legislatures) the authority for determining the "manner" of congressional elections. *See* U.S. Const. art. I, § 4.

9. *See e.g. Vieth v. Jubelirer*, 541 U.S. 267 (2004); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (refusing to invalidate a redistricting plan based on alleged partisan motivation alone).

to secure a partisan advantage actually motivated the enactment of these laws.[10]

To be sure, in 2012 lower courts largely blocked implementation of new laws that appeared motivated by partisanship and intended to make it more difficult for eligible voters to cast ballots than in the previous presidential election.[11] But one should not rely too heavily on these judicial victories, at least for the long run. First of all, some of these decisions were explicitly temporary, blocking implementation of the legislation for only the 2012 election, with the expectation that the new law would be permitted to take effect thereafter.[12] Second, several of these key rulings were predicated not on constitutional law but on § 5 of the Voting Rights Act, which may not survive the Supreme Court's review of its constitutionality.[13] Third, none of the 2012 rulings rested squarely on the partisanship of the statutes they invalidated but instead (like the Supreme Court in *Crawford*) judged the legislation in terms of the statute's policy justifications.[14] Thus, as long as the policy justification is adequate according to the generally deferential standard of review that courts use to evaluate regulations of the voting process (unless those regulations mandate an outright denial of the franchise), the judiciary will not stop a legislature's manipulation of voting rules to achieve a partisan advantage.

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10. In *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 203 (2008), the plurality opinion indicated a voter ID law would be invalid because of partisan motives underlying its enactment *only if* the legislature offered no other reason for the law's adoption. Therefore, as long as the legislature articulates a policy pretext for its new electoral rule—however insincere that pretext may be—the Court will not invalidate the statute for having a partisan motive but instead will assess the constitutionality of the statute as if the pretext had been the legislature's actual motive (and thus evaluate the validity of that policy justification under the Court's balancing test for electoral regulations).

11. For a survey of these judicial developments, see Hasen, *The Voting Wars*, *supra* n. 2.

12. The new voter ID laws in South Carolina and Pennsylvania were temporarily suspended in this way. *Id*.

13. On November 9, 2012, the U.S. Supreme Court granted certiorari in *Shelby Co., Ala. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012) to consider the constitutionality of § 5 of the Voting Rights Act. Many legal scholars believe the Supreme Court is likely to rule § 5 unconstitutional, as being beyond the scope of congressional power under the "congruence and proportionality" test because the burdens of § 5 apply only to some states. The Court may conclude, by a 5–4 vote, that Congress lacks an adequate justification for continuing to impose these burdens exclusively on some states when contemporary evidence indicates that other states also pose a significant risk of adopting discriminatory election laws.

14. For example, a Pennsylvania trial judge adjudicating a dispute over that state's voter ID law based a temporary injunction not on the evidence of the law's partisan motive but instead on its potentially disenfranchising effect. *Applewhite v. Pa.,* 2012 WL 4497211 at **3–5 (Pa. Cmmw. Oct. 2, 2012). Likewise, a three-judge panel recently denied preclearance under § 5 of the Voting Rights Act to Florida's rollback of early voting hours not based on the partisan motive underlying this rollback but instead on Florida's failure to provide that it would not have a discriminatory effect on African-American voters. *Fla. v. U.S.*, No. 11-1428, 2012 WL 3538298 at *2 (D.D.C. Aug. 16, 2012). Finally, although the Sixth Circuit did note the risk of partisan manipulation in its decision on Ohio's rollback of early voting, it also ultimately rested on the State's inadequate policy justifications for the rollback in light of its differential curtailment of voting opportunities. *Obama for Am. v. Husted*, 697 F.3d 423, 435–436 (6th Cir. 2012).

Moreover, the judiciary itself may be tainted by partisan favoritism. This was certainly the perception of many after *Bush v. Gore*,[15] with respect to both the Florida and U.S. Supreme Courts.[16] Although 2012 notably lacked partisan divisions among the appellate judges who decided the year's electoral cases, these divisions were quite apparent in 2008 and easily could occur again in the future.[17] Consequently, there is no guarantee that constitutional constraints designed to curb partisan favoritism in the legislature will be implemented in a nonpartisan manner by conventional courts, whether elected or appointed.[18]

Perhaps we could be more specific in the constitutional rules we wish the judiciary to uphold so that a partisan court would have diminished ability to interpret those rules in ways that favor its own party. But that wish is unrealistic. We cannot expect a constitution to specify all the details of the voting process, such that there is no room for partisan maneuvering by either the legislature or the judiciary (or both). For example, the Constitution is not the place to itemize the kinds of IDs that would satisfy an appropriate voter ID requirement; nor is it suitable to write into the Constitution all the details for the verification of provisional ballots.

B. The Need for More Than Just a Nonpartisan Court

Perhaps instead we could change the method of selecting judges so that those selected would be much more likely to act in a nonpartisan manner even in highly charged election cases. For example, we could amend the Constitution to require that Supreme Court justices be confirmed by two-thirds, or even three-quarters, of the Senate. This kind of supermajoritarian confirmation requirement would force presidents to nom-

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15. *Bush v. Gore*, 531 U.S. 98 (2000).

16. *See e.g.* Akhil Amar, *Bush, Gore, Florida, and the Constitution*, 61 Fla. L. Rev. 945, 946 (2009).

17. Most prominently, the en banc Sixth Circuit revealed deep partisan divisions in *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008) (en banc), *vacated,* 555 U.S. 5 (2008). The Eleventh Circuit also split 2–1 along party lines in *Fla. NAACP v. Browning*, 522 F.3d 1153 (2008), an important case involving voter registration and provisional ballots. *See generally* Hasen, *The Voting Wars*, *supra* n. 2.

18. For a nineteenth century lament on the widespread partisanship of state judges in election cases, see Frederick C. Brightly, *A Collection of Leading Cases on the Law of Elections in the United States* (Kay & Brother 1871), the preface of which states: "this work has an aim and a purpose, and that is, to call public attention to what the Author sincerely believes to be the greatest vice in our political system, the delegation of discretionary powers, in political cases, to an elective Judiciary, holding by a limited tenure." *Id.* at iv. Throughout his book, Brightly condemns examples of what he considers to be partisan rulings, describing one: "A more fallacious argument was never penned: it only shows how the judgment of an estimable, honest and learned judge can be warped by his party feelings, in a contested election case; and how unfit a depository of this delicate jurisdiction, is the judicial department, as organized in the United States." *Id.* at 511. Thus, insofar as the problem of judicial partisanship in election cases continues into the twenty-first century, it is hardly a new or transient phenomenon.

inate individuals who are acceptable to both major political parties and who are thus less likely to exhibit partisan favoritism when ruling from the bench on election cases.

Later in this essay, I will invoke the merits of this supermajoritarian confirmation requirement by applying a version of it to the creation of new specialized election courts. I shall argue that it should be adopted for the adjudication of election cases even if it is rejected for other forms of litigation (and thus even if the confirmation of regular Supreme Court justices remains a simple majority vote of the Senate[19]). The courts that adjudicate election cases should be as nonpartisan as possible, and this supermajority confirmation requirement is the best way to maximize the likelihood of nonpartisan adjudication.

Even so, the creation of nonpartisan election courts would not solve all our difficulties. Insofar as we are attempting to achieve a republican form of government, we do not want to vest *legislative* power over the enactment of election laws in the hands of a nonpartisan election *court*. To be sure, we do want to vest *judicial* power over the adjudication of election cases in the hands of a nonpartisan election *court*, but that is a distinct matter from determining where the *legislative* power to adopt election laws in the first place should reside.

Suppose we are fortunate to have in place the ideal form of a nonpartisan election court. It would be a small body, of three to nine members, all of whom are highly talented and accomplished attorneys, possessing the intellectual skills and training suitable for adjudicating legal disputes on the merits (according to the most faithfully objective understanding of the law that is possible given existing legal materials[20]). But as ideal as this body is for the task of *interpreting* the law of elections, it is not well-suited for the enterprise of enacting electoral legislation in the first place. Even at its largest, a nine-member tribunal of intellectual elites from the legal profession is not at all representative of the people as a whole. It cannot begin to qualify as a fair cross-section of the populace. Were it to have the authority for enacting all the election laws for the state, the regime would be an oli-

19. Current filibuster rules in the Senate require sixty votes to close debate, even though only a simple majority is necessary on the confirmation vote itself. After Republicans threatened to eliminate filibusters for judicial confirmations, there developed an informal understanding that Supreme Court nominations should not be filibustered except in extreme circumstances. *See* Walter J. Oleszek, *The"Memorandum of Understanding": A Senate Compromise on Judicial Filibusters* (Cong. Research Serv. Rpt. RS22208 July 26, 2005). In any event, a three-fifths requirement for closing debate on a nomination is not nearly as strong a commitment to nonpartisanship as a two-thirds or three-quarters requirement for confirmation itself.

20. The model for the ideal judge is Justice Hercules, as Ronald Dworkin has described him (or her, since he has refined his description to be gender-neutral). *See* Ronald Dworkin, *Law's Empire* (Harvard U. Press 1986).

garchy or aristocracy, at least with respect to the enactment of election laws, which are fundamental to determining the character of the regime as a whole.

Thus, if we truly want a democratic republic, we need a genuinely representative body for the enactment of election laws. A representative legislature, not a nine-member court, should decide whether to hold elections on Tuesdays or some different day of the week. The same point applies to whether there should be early voting in advance of Election Day and, if so, for how long and in what form. Likewise, a representative legislature, not a nine-member court, should decide how broadly or narrowly to make available the option of voting by mail and what specific rules and procedures should attend the practice of postal voting—ditto for the institution that decides what technologies to employ for the casting and counting of ballots and for the registering of voters, as well as related policy issues concerning voter registration, such as how and when voters are entered into the system and the means for verifying the accuracy of registration databases.

The list of policy choices regarding the operation of the electoral process could go on and on, but the basic point remains the same: these policy choices should be made by a representative legislature, not by a court of nine intellectually elite attorneys who have been selected for their special skill and expertise at interpreting the law already adopted by others (and resolving disputes based on their interpretation of the law). Thus, even if we were to have in place the best possible nonpartisan court for the adjudication of election cases, we would still need a representative legislature for the initial enactment of election laws.

Yet, if possible, we would like that representative legislature to also be nonpartisan in its enactment of election laws. As we said at the outset, we would much prefer that the legislature not be biased by partisan favoritism in its enactment of election laws. That preference is what sent us down the road thinking of the judiciary as a potential nonpartisan constraint on the machinations of a partisan legislature. We have seen that a nonpartisan court can constrain a partisan legislature somewhat but not completely. Thus, we are still left searching for a way to remove the taint of partisan bias from initial legislative enactment of election rules.

III. An Alternative Approach

We need to create a new institution: a representative but nonpartisan specialized legislature for the enactment of election laws, different from the regular legislature in the same way that a nonpartisan specialized elections court is different from the regular judiciary. Indeed, to speak more broadly,

we need to recognize the separation of *electoral* powers as a distinct principle that supplements the separation of regular powers.

The separation of electoral powers, as I noted in the introduction to this essay, has two dimensions. First, it recognizes the need to separate the distinct domain of election law into the three basic divisions of legislative, executive, and judicial power. In other words, the electoral legislative power (the power to enact election laws) is different from the electoral executive power (the power to administer elections pursuant to the enacted election laws), and both in turn are different from the electoral judicial power (the power to adjudicate disputes pursuant to the enacted election laws). Three different nonpartisan institutions should possess each of these distinct electoral powers: an Elections Assembly, Elections Director, and Elections Court.

The identification of these three specialized electoral institutions indicates the second dimension to the separation of electoral powers: the three electoral powers, in addition to being separate from each other, should be separate from the three corresponding regular powers. In other words, the electoral legislative power should be kept separate from the regular legislative power by being vested in a separate nonpartisan Elections Assembly, rather than in the regular legislature. Likewise, the electoral executive power should be kept separate from the general executive power by being vested in a separate nonpartisan Elections Director, who is not subservient to the regular chief executive of the state. Similarly, the electoral judicial power should be placed in the hands of the special Elections Court, with its supermajoritarian confirmation requirement, rather than in the hands of the regular judiciary. There is thus, if you will, both a vertical as well as horizontal dimension to the separation of electoral powers: the vertical being the separation of the three electoral powers as a group from the three regular powers, and the horizontal being the separation of the three electoral powers from each other.

It is necessary, of course, to describe in some detail each of the three specialized electoral institutions. We should start with the Elections Assembly because explaining its differences from the regular legislature is the most significant ingredient to the separation of electoral powers as theoretical construct. It is also the most novel and thus unfamiliar of the institutional innovations associated with this theory. (Moreover, while tailored primarily to state government, this theory is also suitable for implementation at the national level. I trust that readers will keep this point in mind as they consider the specific institutions contemplated by this theoretical innovation.)

A. An Elections Assembly: Legislative Powers[21]

Consider a body of roughly one hundred randomly selected citizens, gathered together for the sole purpose of deciding what should be the election laws for their state. This Elections Assembly would be a thoroughly representative, republican institution. Random selection ensures that the Assembly would be a fair cross-section of citizenry as a whole, like a jury or especially a grand jury. Indeed, because this Assembly would be much larger than either a jury or grand jury, it would be even more demographically representative than those longstanding and quintessentially republican ("of the people") institutions.[22]

Random selection would also ensure that this Assembly would be as nonpartisan as possible. If the partisan make-up of the state's citizenry is divided into thirds—one-third Democratic, one-third Republican, and one-third independent (or not affiliated with the two major parties)—then the Assembly will mirror this tripartite division. Because members of the Assembly do not run for office, they need not think of themselves primarily as partisans in holding the office (whereas the members of an elected legislature inevitably think of themselves primarily as partisans because party identity is the way they secured their jobs). The members of the Assembly thus will be able to deliberate more freely about the merits of alternative election rules. They will not be beholden to any party position on the issue. Further, the Assembly will not be organized into majority and minority parties, with majority and minority whips functioning to hold members of their respective party caucuses in line.

The entire operation of the Assembly will be more open and fluid in its deliberation on the merits of alternative election law proposals when com-

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21. Inspiration for the idea of the Elections Assembly comes, in part, from the growing literature on citizen assemblies. *See e.g.* Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions against Everyday Politics*, 6 Election L.J. 184 (2007) and sources cited therein. But one important feature of the Elections Assembly distinguishes it from most conceptions of citizen assemblies: the Elections Assembly would have actual legislative power with respect to the domain of elections; it would not be merely advisory, and it would not need to submit its legislation for approval in a referendum.

Thus, conceptually, it is important to distinguish citizen assemblies as either exceptions or supplements to the regular lawmaking process of a polity, for the purposes of a one-time major reform effort, from the Elections Assembly as the permanent and ongoing institution holding the polity's legislative power with respect to the governance of the electoral process. As a theory, the separation of electoral powers tells us that we do not merely need a reform commission from time to time to recalibrate the regular legislative process but instead need to recognize the electoral legislature should be constitutionally and perpetually separate from the regular legislature.

22. I leave aside whether random selection should be constrained by a guarantee of demographic representativeness. *See e.g.* Heather K. Gerken & Douglas B. Rand, *Creating Better Heuristics for the Presidential Primary: The Citizen Assembly*, 125 Pol. Sci. Q. 233, 248–249 (2010) (advocating the assurance of gender, ethnic, and geographic representativeness for a citizen assembly designed to assist the presidential primary process).

pared to the comparable proceedings of a regular legislature. There is a much greater chance that the policy choices made by the Assembly regarding the voting process—how much early voting, what method of voter registration, what form of voter identification requirement, and so forth—will more accurately reflect the views of the citizenry as a whole on these issues, as compared to a regular legislature whose choices may be driven by the partisan desire to tilt the rules in the majority party's favor.

Of course, there would need to be orderly rules of procedure by which the Assembly operates so that it can conduct deliberations and enact policy. The state constitution could establish basic rules by which the Assembly operates. For example, a majority vote of the Assembly would suffice to enact a proposed rule into law, and proceedings of the Assembly shall follow Robert's Rules of Order unless the Assembly adopts otherwise. The nonpartisan Elections Director (discussed below) could help to set the Assembly's agenda by making specific proposals to consider. The Director could also chair the Assembly's meetings, which would be preferable to having contests within the Assembly itself to determine which members should serve as chair.[23]

As a practical matter, the views of the Director are likely to have considerable influence over the Assembly, since the Director is a full-time expert on the subject and the Assembly needs to meet only for a relatively brief period (perhaps for a month or so, every couple of years in advance of the next major general election) in order to assess whether the state's existing election laws need to be revised in light of new developments. Because the members of the Assembly are ordinary citizens and not professional experts in the field of elections, they need to be educated on the issues about which they will deliberate. The Director will play a primary role in this educational process by giving background information and briefing materials to the Assembly's members. Each Assembly, like a jury or grand jury, will consist of new individuals, and thus (unlike a regular legislature) basic information concerning the voting process needs to be provided each time.[24]

Still, the Director will not have the same degree of influence over the Assembly as a prosecutor typically does over a grand jury. The Assembly should be constitutionally required to meet in public, in contrast to a grand

23. In thinking about the relationship of the Assembly and the Director, I have been influenced by the work on deliberative assemblies of Jim Fishkin and Chris Elmendorf, among others. *See e.g.* James Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford U. Press 2009); Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L.J. 425 (2006).

24. Because of the powerful informal influence that the Director inevitably will have over the Assembly, I would not give the Director formal veto authority over electoral laws enacted by the Assembly.

jury's secrecy. Consequently, voting rights groups like the League of Women Voters can present their own proposals for the Assembly's consideration if they disagree with the proposals submitted by the Director. The transparency of the Assembly's deliberations should yield a genuinely open and public debate about what changes in voting rules and procedures are most in the public interest. After receiving input from their fellow citizens, channeled through various advocacy organizations, the citizens of the Assembly will adopt election laws that they believe best reflect the interests and wishes of the citizenry as a whole.[25]

One additional way to diminish the influence of the Director is to incorporate the republican principle of bicameralism into the design of the electoral legislature. There could be an upper house of the electoral legislature—an Elections Council—to balance the more popular Assembly. For example, suppose the Council has ten members (no more than five from any single political party), all of whom have previous government service of some kind. Suppose, too, that the Council is a continuous body, with each member serving a ten-year term and with the seats staggered so that one opens up each year.[26] This body could develop considerable expertise concerning the administration of elections and thus would serve as a counterweight to the inexperience of the Assembly.

Requiring new electoral legislation to undergo deliberation in both the Assembly and the Council, in accordance with the principle of bicameralism, would ensure that election laws reflect the input of both popular sentiment and expert judgment. The expertise of this ten-member Council would prevent the individual views of the Director from becoming too dominant in the consideration of which new election laws to adopt. One need not worry, however, that the Council, with ten members (again, no more than five from any one party), will often deadlock in a five-to-five tie. As I explain later, if the Council's power is limited to vetoing legislation enacted

25. There is a risk that the Assembly would be swayed by the most persuasive of advocacy organizations, whose particular views might not accurately reflect the views of the public at large. But this risk is tempered by the fact that the members of the Assembly, being collectively a fair cross-section of the entire public, could confidently rely upon their own views, rather than those of the advocacy organizations, to the extent that these views diverged. In other words, the testimony of advocacy organizations would be useful for input but not necessarily influence: these groups could provide information and insight, but the members of the Assembly ultimately could still rely on their own independent judgment.

26. I would have the regular governor of the state appoint the members of the Council, one per year, subject to confirmation by three-fourths of the regular Senate. If a seat remains unfilled because of a failure of the governor to nominate a candidate capable of receiving the necessary confirmation, there could be a special alternative selection process whereby the majority and minority of the leadership in the regular Senate propose candidates and a coin toss determines which candidate prevails (subject to the constitutional requirement that no more than five of the seats are held by individuals from the same political party). Mid-term vacancies could be filled by the same method as regular appointments: gubernatorial nomination, Senate supermajority confirmation, and a gridlock-breaking coin toss when necessary.

by the Assembly, or vetoing orders issued by the Director, then a five-to-five tie by the Council cannot block legislative or executive action from occurring when the Assembly or Director think necessary. In other words, the Council—when it musters enough votes of its members—can serve as a brake on the other bodies. But inertia by the Council cannot, in itself, bring the entire electoral system of the state to a halt.

It might seem ironic that the legislature empowered to enact the laws for operating elections should itself not be an elected body. Upon reflection, however, this apparent anomaly should be understood as appropriate. To ensure that the elections themselves are fair, it is important that the laws themselves not be tainted by being the product of a biased process. Therefore, there needs to be a kind of "original position" (to use Rawls's term loosely) that is antecedent to the operation of the elections to make sure that they are free from partisan taint.[27] The way to achieve this is to have the body that writes election rules be selected by some fair and representative means apart from the electoral process that this body itself adopts. Random selection serves this purpose.

Random selection is not the same as an election, but it is no less democratic and representative. As far back as the ancient Greeks, it has been recognized that selection by lot is a fully democratic alternative to selection by vote.[28] The Assembly, when selected randomly from the entire adult citizenry of the state (with the obligation to serve if called), is fully democratic and representative, though not directly elected.[29]

This is not to say that regular legislatures should be chosen by lot instead of being elected. There are advantages to elections; they permit the electorate to send representatives to the legislature whom the voters think will do a better job than the average person chosen at random. It is solely for the purpose of making the election laws themselves that a separate legislative assembly should be chosen at random so as to counteract the favoritism that can occur when the regular legislature is permitted to choose the election rules.

The Assembly is not exactly a constitutional convention, but it shares some features of a constitutional convention, especially when considering

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27. *See* John Rawls, *A Theory of Justice* (Harvard U. Press 1971).

28. *See e.g.* Christopher Eisgruber, *Constitutional Self-Government* 51 (Harvard U. Press 2009); Robert Dahl, *Democracy and Its Critics* 304 (Yale U. Press 1989).

29. The Council would not be selected randomly; only the more popular Assembly would be so selected. To avoid the concern that the Council is insufficiently democratic to share equal legislative power with the Assembly, the constitution should structure their legislative relationship asymmetrically. As I elaborate elsewhere in this essay, the constitution should specify that it requires a majority, or even supermajority, vote of the Council to veto a law enacted by the Assembly.

its relationship to the regular legislature.[30] A constitutional convention writes the rules organizing the legislature and constraining its operation, including the fundamental rules for election of the legislature's members.[31] As we have seen, a constitution cannot specify all the detailed rules governing the electoral process, but a permanent constitutional convention could do so on an ongoing basis. The Assembly is not a permanent constitutional convention; like the regular legislature, it too is organized and constrained by the constitution. But it occupies something of a middle position between a constitutional convention and the regular legislature.

With respect to election rules unspecified in the constitution itself, the Assembly has the authority to specify those rules, and the regular legislature is elected on that basis and must abide by those rules. In this respect, enactments of the Assembly occupy a position superior to the regular legislature and inferior to the constitution. To the extent that the regular legislature attempts to enact laws that conflict with the authority of the Assembly, it would be preempted.[32]

The Assembly would also need legislative authority to appropriate enough funds to pay for operation of the electoral process, including the administrative expenses associated with each of the electoral bodies: Assembly, Council, Director, and Court. The Assembly need not have the power to tax so long as it has the power to spend; the regular legislature could still be charged with the responsibility of determining how best to raise funds for the Assembly. If there is a concern that the Assembly might be too extravagant in determining the appropriate amount of electoral ex-

30. Hereafter, unless otherwise specified, all references to the Assembly refer to its power of electoral legislation, whether held by itself in a unicameral legislature or jointly with the Council in a bicameral legislature. As previously indicated, the relationship between the two bodies could be specified by giving the Council the power to veto legislation enacted by the Assembly, and this arrangement could be characterized as either bicameral (if the Council is considered primarily a legislative body) or unicameral (if the Council is considered primarily as executive, but with the power to veto legislation as a president or governor may have).

31. This point is a further basis for distinguishing the Assembly from one-time citizen assemblies that are convened to recommend fundamental constitutional reforms concerning the governance of the electoral process. *Compare with* Gerken, *supra* n. 21. It is a momentous decision whether the regular legislature of a polity should be chosen by proportional representation rather than a first-past-the-post system, and thus one would expect to see a decision of this nature to be imbedded in the polity's constitution, rather than adopted by a legislative choice. The need for the citizenry to ratify any such constitutional reform would require that a citizen assembly convened for this purpose would need its proposal to secure such ratification, and that is why Professor Gerken has devoted attention to the important question of how to enable a citizen assembly of this type to be appropriately sensitive to political considerations that inevitably would arise during a ratification debate. *Id.* This concern, however, is inapplicable to the Assembly insofar as its role is not constitutional reform but rather implementing legislation constrained by electoral choices already imbedded in the polity's constitution.

32. Preemption by the Assembly would operate in much the same way as the preemption of state law by Acts of Congress. So long as the Assembly is acting within the scope of its lawmaking authority, any conflicting law by the regular legislature would be preempted.

penditures, the constitution could provide that the regular legislature, by a two-thirds vote of each chamber, can suspend the Assembly's appropriation, sending it back to the Assembly for reconsideration.

The question may arise as to whether it is necessary to create the separate Assembly to achieve nonpartisan electoral legislation. Might it be possible instead to create special rules for the enactment of election laws by the regular legislature? For example, the constitution might provide that election laws must be passed by two-thirds of each house in the state's legislature, rather than by a simple majority. This supermajority requirement might guarantee nonpartisan, or at least bipartisan, election laws in the same way that a supermajority requirement for the confirmation of judges maximizes the likelihood of nonpartisan adjudication.

The problem with this alternative, however, is the high probability of legislative stalemate that would result from a supermajority requirement for the enactment of election laws. The legislature simply would not pass any significant election reforms because each side would veto any reforms that might cause a disadvantage to its side's chances of winning future elections. The probability of stalemate over the content of election laws is higher than over a judicial appointment, which can be resolved simply by finding a fair-minded individual agreeable to both sides. But to break legislative gridlock over the content of election law amendments, each side must agree that the substance of the proposed change would not pose a risk to its electoral prospects. With respect to any proposal coming from the other side, each side will think it is simpler and easier just to preserve the status quo. Consequently, imposition of a supermajority requirement for the adoption of new election rules would likely result in the existing rules remaining frozen in place, no matter how obsolete or outdated they may become.[33]

This likelihood of legislative deadlock is a result of the inherent partisan nature of regular legislatures. Just as it is pernicious (because of the bias that will ensue) to give one party unilateral power to write election laws over the objection of the other, so too is it problematic to give both major parties veto power over election laws proposed by each other. Instead, it is necessary to break out of the partisan mold and design a special nonpartisan legislature for the enactment of election laws. The proposed Assembly serves this purpose by avoiding gridlock through simple majority

33. An example of legislative gridlock occurred after 2008 with respect to Ohio's provisional voting rules. Both political parties recognized the inadequacy of existing rules and thus both proposed reforms. But each party proposed separate reforms and could not agree on a compromise. One party controlled the State's senate while the other party controlled the State's house of representatives. Therefore, no reform was enacted despite the recognized necessity for new legislation on both sides. It is only rarely, as with the bipartisan consensus to improve the process for military voters in the MOVE Act, that electoral reform legislation can be accomplished when the legislative process requires both parties to sign on.

rule, allowing it to adopt whatever reforms its members think is most in the public interest. But giving it the power to enact election laws by simple majority vote does not risk domination of one party over another because the selection of its members by random lottery prevents the Assembly from becoming organized along majority-versus-minority lines.

B. An Elections Director and Elections Council: Executive and Administrative Powers

Should the electoral executive power be placed in the hands of a single individual or, rather, a multimember body? The advantage of a single individual is that it enables everyone to know easily who is responsible if the voting process does not go smoothly—thereby giving this individual the incentive to make sure that the voting process does work well. A single individual is also able to make decisions more quickly than a multimember body, and it is often the case that decisions about the voting process need to be made extremely quickly. For example, what should be done if polling locations run out of emergency backup ballots or if—as Superstorm Sandy demonstrated in 2012—emergency conditions require a last-minute adjustment to the voting process? Conversely, a multimember body poses less risk of idiosyncratically authoritarian rule. In eighteenth century republican theory, executive powers were given to a single individual (governor or president), and lawmaking power to a multimember body. That combination was designed to achieve the advantages of executive accountability and efficiency while preventing the lawmaking power from falling into the hands of a dictatorial autocrat.

1. The Relationship of the Council to the Director and Assembly

The rise of administrative agencies in the twentieth century suggests that the division of legislative and executive powers is not so simple. Consequently, it makes sense to consider the possibility of a multimember Elections Council with responsibilities for the administration of the electoral process, together with a single individual serving as Elections Director, who is primarily accountable for the day-to-day and hour-by-hour operation of the electoral process. The idea of the ten-member Council, serving alongside the single Director, enables us to have both the accountability of an individual electoral executive and the supervisory role of a multimember electoral administrative agency.

What should be the relationship between the Director and the Council, and what in turn should be the relationship of both to the authority of the Assembly? Is the Council part of the electoral executive or part of the electoral legislature—or both, as something of an administrative hybrid that

cannot be easily categorized in eighteenth century terms? Moreover, if both the Director and Council exist, is there really a need for the Assembly? All of these questions deserve attention.

My preference is to consider the Council as legislative, not executive. It is the upper house of the bicameral electoral legislature, as described above, with the Assembly as the lower, or more popular, house. But I would give the Council, as an ongoing body (in contrast with the Assembly, which meets only temporarily), the authority to engage in a one-house "legislative veto" of administrative orders issued by the Director. This legislative veto would give the Council the character of an administrative agency, as its rulings (in the absence of new electoral legislation adopted by an Assembly) would stand as the operative law that the Director must enforce.

Indeed, I would also explicitly permit the Council to promulgate interstitial administrative regulations when the Assembly is not in session. These regulations would be subordinate to the laws enacted by the Assembly and deemed necessary for the implementation of those laws. One would hope that the need for such interstitial quasi-legislative administrative rulemaking would be infrequent and that the laws enacted by the Assembly would be adequately specific for the Director to administer in an executive capacity without the requirement of additional lawmaking.

It is not realistic, however, to expect that there never would be a need for such interstitial rulemaking. Consider the topic of provisional ballots, for example. The Assembly might enact a thoroughly detailed code for the casting and counting of provisional ballots, and still an ambiguity in the code might arise after the Assembly has disbanded but while the Director is undertaking preparations for the upcoming election. In this situation, the Director would have the authority to make an executive decision on how to handle the particular problem. But the point of giving the Council the power to issue a one-house legislative veto over the Director's decision is that the Council, as one house of the bicameral legislature, is likely to have a better sense of what interstitial provision is more in keeping with the spirit of the original legislation. For the same reason, rather than having to wait to veto an executive decision issued by the Director, the Council ought to have the explicit authority to take the initiative of providing interstitial administrative regulations it deems necessary.

Thus, there should be a hierarchical relationship between the Director, the Council, and the Assembly. The executive decisions of the Director should be subordinate to and controlled by the administrative regulations and legislative vetoes of the Council. The administrative regulations and legislative vetoes of the Council should be subordinate to and controlled by the legislation enacted by the Assembly.

This hierarchy requires further consideration of exactly what role the Council should play in the enactment of legislation as the bicameral partner of the Assembly. If the Council can effectively veto legislation passed by the Assembly by refusing to give its bicameral assent, then the Council could insulate its administrative regulations from legislative supervision, thereby making its administrative regulations essentially superior rather than subordinate to the legislation enacted by the Assembly. The way to fix this problem is to adjust the power that the Council has as one chamber of the bicameral legislature. Rather than making it a requirement that a bill passed by the Assembly receive majority support of the Council before it can become law, there can be a requirement that it takes a supermajority vote of the Council to defeat legislation enacted by the Assembly.

For example, suppose it takes a vote of seven members of the Council to block legislation enacted by the Assembly. We can imagine the Assembly has repudiated an administrative regulation promulgated by the Council. (Perhaps the Council overturned, by legislative veto, an executive decision of the Director, and now the Director has secured the assistance of the Assembly to negate the interference of the Council.) In this situation, the Council cannot simply reinstate its administrative regulation by a six-member majority vote that vetoes the Assembly's enactment. Instead, it takes a seventh member of the Council to supersede the will of the Assembly. In this way, the supermajority requirement for the Council's veto of the Assembly's legislation maintains the hierarchical superiority of the Assembly's legislation to the Council's administrative regulations.

In addition, I would give the Elections Court (discussed later) jurisdiction to invalidate regulations adopted by the Council as inconsistent with the legislation enacted by the Assembly. The Court would also have the jurisdiction to block any orders of the Director that are inconsistent with the administrative determinations of the Council. The Court, therefore, contributes to maintaining the hierarchical relationship between the Director, Council, and Assembly.

But why bother having the Assembly at all? If the Council has the authority to engage in quasi-legislative administrative rulemaking, and if the Council can block legislation enacted by the Assembly (either in the form of a supermajority veto or, under the alternative approach, simply by failing to give its assent as one house of a bicameral electoral legislature), then why not just dispense with the Assembly? Why not, in other words, simply lodge the electoral legislative power in the hands of the ten-member Council, with the electoral executive power in the hands of the single Director, and be done with it—without any additional confusion from adding the Assembly into the mix?

The reason lies in the complete displacement of the regular partisan legislature over the power to enact electoral laws for the polity. If the regular legislature were not displaced, the Council might well suffice without the need for the additional Assembly. After all, many advanced democracies around the world—including Canada, Australia, and Britain—make good use of multimember commissions to administer their election laws. The ten-member nonpartisan Council described could be seen as analogous to the nonpartisan electoral commissions in these other nations.[34]

These electoral commissions in other countries, however, generally do not displace the authority of the regular legislature to enact the electoral laws for the polity. These commissions, in other words, are purely administrative in nature and are subordinate to the will of the regular legislature.[35] Any election laws adopted by the regular legislature trump the rules promulgated by the commission and may be thoroughly partisan in motive and effect. Thus, the existence of an independent electoral commission as an administrative agency does nothing to solve the problem of partisan election laws.

Once it is viewed as desirable to displace the authority of the regular partisan legislature to enact election laws, it becomes necessary to think of an electoral legislature, like the proposed Assembly, that is much more representative of the entire populace than an expert ten-member commission. For the same reasons that it would be wrong to give the legislative power to determine the polity's election laws to a nine-member elite court, so too would it be insufficiently democratic to give the entire electoral lawmaking power to a ten-member expert commission. The legislative decisions concerning the nature of the voting process should reflect the input and wishes of the populace itself. The Assembly, as a broadly representative institution, is designed to serve that function and thus justify displacement of the regular legislature in a way that the Council cannot.

This fundamental point does not diminish the significant role of the Council in the scheme described. On the contrary, the Council is likely to exert considerable practical power, given its superior authority over the Di-

34. For a comparative discussion of nonpartisan commissions in other advanced democracies around the world, see Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 120–121 (2010).

35. The generally well-regarded elections commissions in Canada and Australia operate this way. India's Election Commission is an exception, but it arguably has not been successful in being immune from the influence of partisanship. *See* Alistair McMillan, *The Election Commission of India and the Regulation and Administration of Electoral Politics*, 11 Election L.J. 187, 189 (2012) ("The issue of partisan influence over appointments emerged in a blaze of controversy in January 2009."). The problem lies in the method by which members of the Commission are appointed. India's president has authority to appoint Commissioners, with the consequence that there is "the potential for partisan appointments by a government." *Id.*

rector as well as its ability to veto laws enacted by the Assembly (even if only pursuant to a seven-member supermajority vote). But the ten-member Council should not have too much power, either formally or informally. It should not function as a dictatorial electoral politburo.

Instead, it should be situated in a system of checks and balances, as envisioned by longstanding republican constitutional theory. In the system described, the Council is checked and balanced by the Director and Assembly, and it in turn checks and balances these two other institutions. Thus, the Council plays an appropriately constrained, yet major, role in the separation of electoral powers, as envisioned for the administration of the electoral process in a twenty-first century democracy.

2. The Appointment of the Elections Director

We have yet to consider how the Director should be appointed, to increase the likelihood that this official will be immune from partisan influence. Because the Director will be responsible for the day-to-day operation of the electoral process, and thus will wield considerable power even if subordinate to the Council, it is especially important to take care that the method of appointing the Director insulates the office from the taint of partisanship.

One possibility is to have the regular chief executive of the polity (governor or president) nominate the Director, subject to confirmation by a seven-member supermajority vote of the Council. Since the Council is itself a nonpartisan body, this supermajority confirmation requirement should ensure that the Director is also sufficiently nonpartisan. An alternative would be to confine the appointment authority solely with the Council, leaving the regular chief executive out of it. But this alternative has the disadvantage of making the Director insufficiently independent of the Council and is therefore not enough of a check and balance. Requiring the assent of both the regular chief executive and seven members of the Council achieves both the requisite nonpartisanship and sufficient independence from the will of the Council.

One might consider having the Assembly play a role in the appointment of the Director. The problem with this idea, however, is that each Assembly sits infrequently and only for a relatively short period of time (as membership in the Assembly is akin to jury duty). An unexpected vacancy in the essential position of Director might occur after the Assembly has completed its biennial review of the state's election laws but before the next biennial election occurs, and it would be imperative to fill the position immediately. Therefore, it is better to leave the Assembly out of the process of appointing the Director.

Indeed, there needs to be a gridlock-breaking mechanism in the event that the chief executive and a supermajority of the Council cannot agree on an individual to appoint to this office within a specified period of time. For example, if there is no appointment of a new Director within a month after the vacancy occurs (or perhaps within a week if the vacancy occurs during the last three months before a major election), then a special procedure should kick in. Pursuant to this special procedure, each member of Council would nominate three candidates for the position; each member of the Council would be entitled to strike one name from the list of nominees (proceeding in a randomly selected order); and, of the remaining names, one would be randomly selected as the newly designated Director. The regular chief executive would play no role in this special gridlock-breaking procedure, giving the chief executive an incentive to nominate a candidate capable of achieving the support of seven members of the Council—in order to avoid the gridlock-breaking mechanism.

It might make sense to give the Assembly, while it is sitting, the power to remove and replace the Director. This would enable the Assembly to ensure that the Director is genuinely nonpartisan and not merely bipartisan or, in the event of random selection following gridlock, the accidental preference of one particular political party. Presumably, this removal and replacement authority would be used sparingly, only when the sitting Director has lost the confidence of the nonpartisan Assembly. Thus, it is not the same as giving appointment power to the Assembly in the first instance. It represents a reasonable balance between: (a) the need to have a Director in place on an ongoing basis, without waiting for the next Assembly to convene; and (b) giving the nonpartisan Assembly a check on the appointment process to ensure compliance with the overarching value of nonpartisanship in administration of the electoral process. Alternatively, authority to remove a sitting Director could be placed in a seven-member supermajority of the Council. Doing so would give the Council more control over the identity of the Director. For that reason alone, it might be preferable to lodge removal power in the Assembly, rather than the Council.

How long should the term of a Director be? One possibility is ten years, the same as the term of each Elections Councilor. Another possibility is four years, the same as a governor or president. I would opt for the longer term, in an effort to insulate the office from political pressures. While a ten-year term carries greater risk of mid-term vacancies, it seems more important to maximize the likelihood of nonpolitical professionalism.

C. An Elections Court: Judicial Powers

As already indicated, it is essential to have a nonpartisan Elections Court to adjudicate disputes over the application of a state's election laws, particularly ballot-counting disputes between two candidates. The method of appointing judges to this nonpartisan Court can differ from the method for appointing the nonpartisan Director, because vacancies on the Court do not raise the same urgent concern as a vacancy in the office of Director. Consequently, the Assembly can play a role in the appointment of the Court, whereas it is impractical for the Assembly to be involved in the initial appointment of the Director.

Thus, I would have the judges of the Court nominated by a seven-member supermajority vote of the Council, from a list of names submitted by the Director and subject to confirmation by three-fourths of the Assembly. This procedure has all three non-judicial electoral institutions—the Director, the Council, and the Assembly—participating in the selection of the judges on the Court, thereby increasing the likelihood that the judges selected will be nonpartisan consensus choices. If a vacancy occurs on the Court while the Assembly is not in session, I would permit other members of the Court to fill the vacancy temporarily until the next Assembly meets. If it ever occurs that an Assembly disbands without completing the confirmation of a judge to an open seat on the Court, either because the Assembly has not received a nomination from the Council or because the Assembly cannot garner the three-fourths supermajority necessary for confirmation, I would treat this open seat as a vacancy permitting the Court itself to select a temporary member until the next Assembly convenes.

How many members should the Court have? Three, five, seven, or nine? It should be an odd number, so there are no tie votes. It should be more than a single judge because, in contrast to the single Director, the judicial function should be exercised by a multimember body. Like any appellate or supreme court, the Court (pursuant to its jurisdiction) has power to declare what the law is. Embodying the rule of law, a court exercising this law-declaration power should be seen as acting objectively, not based on the subjective preference of an individual judge. Having several members on the Court captures the idea that the law itself is larger than any individual voice. Ideally, the several members of the Court will agree, without dissent, on what the law means and requires in each particular case.

We know, however, that this ideal cannot be achieved in all cases. Nonetheless, having several members on the Court, rather than just one, tempers the extent to which the law as defined by the Court is idiosyncratic. As a general proposition, even when a court is divided into a majority and dissent, members of the majority strive to form a single judicial opinion that

speaks for all of them, embodying the objective truth of the law as they collectively see it. Moreover, it is to be hoped and expected that, as long as the members of the Court are selected in the nonpartisan manner just described, the occasions for dissent will be kept to a minimum—and much fewer than on a court whose members are appointed by a partisan method.

I would suggest five judges on the Court, each with a ten-year term. Life tenure for the judges is not ideal, since experience has shown that it is preferable to have a defined end of the judicial term.[36] The five terms could be staggered so that one ends in each even-numbered year, with the Chief Judge's term ending in years divisible by ten (2020, 2030, etc.). Judges should be permitted to be reappointed for a second or even third term. Moreover, judges should be removed from office solely on grounds of serious criminality or gross malfeasance in the exercise of their official duties—and solely by the same seven-member supermajority of the Council, followed by a three-quarters vote of the Assembly.[37]

The jurisdiction of the Court should be defined as all disputes involving the interpretation, application, or validity of laws as enacted by the Assembly or enforced by the Director (including administrative regulations promulgated by the Council). Obviously, the classic case of a "contest" over the outcome of an election would fall within the Court's jurisdiction. So too, would a pre-election lawsuit claiming that the Director's implementation of state electoral laws was wrongful under those laws (a type of lawsuit familiar in the field of administrative law); for example, a claim that the Director's plans for allocating voting machines among precincts violates specific requirements of laws enacted by the Assembly.

Perhaps most controversially, I believe also that within the Court's jurisdiction should be any challenge to the constitutionality of legislation enacted by the Assembly, at least insofar as the state's constitution is concerned. (In a federal system, the jurisdiction of the federal courts to adjudi-

36. Linda Greenhouse, among others, has proposed limiting the terms of justices on the U.S. Supreme Court to a fixed eighteen years. *See* Linda Greenhouse, *The Eighteen Year Bench*, Slate, http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-18-year-bench (June 7, 2012). After being initially hostile to the idea, Greenhouse explains that the unpredictability of Supreme Court vacancies, with the frequent strategically partisan decisions by retiring justices on when to step down, has contributed to the poisoning of the judicial confirmation process. The reliable expectation of a new nomination every two years, by contrast, would ensure that two appointments occur in each presidential term.

37. Membership on the Court is unlikely to be a full-time job. Consequently, judges should be permitted to hold other positions and engage in other activities that are not inconsistent with the nonpartisan role they must perform on the Court. If the Director, Council, and Assembly all believe a member of the state's regular judiciary would be an appropriate member of the nonpartisan Court, existing service on the one should not preclude supplementary service on the other. In this situation, a judge on the Court would not hold that position by virtue of already being a member of the state's regular judiciary but instead as a result of the independent appointment method specifically for Court judges. Other members of the Court might not also serve on the state's regular judiciary but instead come from different backgrounds within the state's legal profession.

cate the constitutionality of a state's election laws under the paramount federal Constitution cannot be superseded by jurisdictional rules set forth in the state's constitution.) Some might think that the authority to interpret the state's constitution belongs ultimately in the state's regular supreme court, and therefore, if there is a claim that a law enacted by the Assembly contravenes the state's constitution, that claim should be resolved ultimately by the state's regular supreme court rather than the Elections Court. I take the opposite position on this issue, however. Precisely because a question concerning the constitutionality of an election law implicates what rules will govern the operation of the electoral process, it is of paramount importance that this constitutional question be resolved by a court that is designed to be as nonpartisan as possible. The special Elections Court has this maximally nonpartisan character, whereas the state's regular supreme court does not. This point is true whether the members of the state's regular supreme court are elected or appointed by conventional means. Consequently, the Elections Court and not the regular supreme court should have the last word on a question of state constitutional law concerning legislation enacted by the Assembly.

Occasions might arise, hopefully few and far between, where it is debatable whether a particular constitutional question properly lies in the exclusive jurisdiction of the Elections Court or instead in the general jurisdiction of the regular supreme court. One or the other of these institutions must have the final say on this jurisdiction-policing matter. I propose a straightforward rule: if the Elections Court says that an issue is within its jurisdiction, that determination cannot be second-guessed elsewhere, even by the regular supreme court. A required deference on the part of the regular supreme court is consistent with the vertical dimension to the separation of electoral powers: the Elections Court occupies a place in the overall system that is antecedent or superior to the regular supreme court, given the primacy of elections to the entire republican system of government that the constitution establishes.

IV. Conclusion

The separation of electoral powers, as outlined in this essay, is a progression in the evolution of republican political theory. Just as Madison improved upon Montesquieu, so too is it necessary for our generation to improve upon Madison in light of our experience with the Madisonian system since the founding of our federal republic. I harbor no illusions that the system described will be adopted anytime soon.[38] Yet aspects of this sys-

38. In this respect, this essay does not address the "from here to there problem." *See* Gerken, *supra* n. 21, at 199–201. For the separation of electoral powers to become a reality, there would need to be

tem are already being put into place, as increasing numbers of democratic republics—both American states and others abroad—adopt nonpartisan institutions for different aspects of the electoral process (whether redistricting, election administration, or the resolution of ballot-counting disputes).

Meanwhile, there is the pressing recognition that even more needs to be done in the way of building nonpartisan electoral institutions. Thus, the separation of electoral powers in both its horizontal and vertical dimensions, as well as the system of government this principle generates, can stand as a principle by which to judge the progress of democratic republics towards this evolved—and still evolving—ideal. Whether a particular state lives up to this ideal, and how soon, remains to be seen. But what is certain is that the ideal of republican government will continue to progress, as it has over the centuries. I offer the separation of electoral powers as a useful addition to that progress.

attention to what would be the method of constitutional reform most likely to be successful in adopting this idea. Right now, however, I am proposing the separation of electoral powers as a theory worthy of consideration.