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Introduction: Pluralism, Contestation, and the Rule of Law

Keith Cherry*

I. Introduction

Around the world, the current political conjuncture is one of profound challenges for constitutionalism and the rule of law. In the United States, the executive has willfully engaged in a prolonged attempt to weaponize the machinery of the state and radicalize public opinion in order to undermine a democratic election. In the European Union, the increasingly authoritarian relationship between the executive and the judiciary in Poland and Hungary is posing the most profound threat to European constitutionalism in decades. In Hong Kong, the Chinese state is actively seeking to undermine legislative and judicial independence in the face of unprecedented pro-democracy mobilizations. In India, Lebanon, Bolivia, and elsewhere mass mobilizations are challenging, and being suppressed in the name of, the rule of law. Here in Canada, the Wet'suwet'en and their supporters, as well as the Tsleil Waututh, Haudenosaunee, L'nu (Mi'kmaq), Inuit, and members of countless other Indigenous nations are contesting the very nature of the rule of law, as they assert Indigenous laws against the law enforcement of the colonial state. Around the world, the use of emergency powers in response to the COVID-19 pandemic is also raising profound constitutional concerns.

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I would also like to acknowledge the generous financial support of the Killam Foundation, the Centre for Global Studies at the University of Victoria, and the Centre for Constitutional Studies at the University of Alberta where I have worked as a postdoctoral fellow with Assistant Professor Josh Nichols and Patricia Paradis for the past year.

In this context, the Centre for Constitutional Studies invited Dr Jacob T Levy to deliver its 31st McDonald Lecture, focusing on the separation of powers, the rule of law, and the future of constitutionalism in liberal democracies. Recognizing the profound need for such discussions in the present political conjuncture, the Centre then hosted four outstanding scholars, Arjun Tremblay, Mary Liston, Hillary Nye, and Yann Allard Tremblay to further reflect on the themes Dr Levy raised. The following special issue is comprised of papers which grew from this discussion.

The full text of Dr Levy's talk is available in the *Review of Constitutional Studies* and the recorded video is available through the Centre's website.¹ Nevertheless, because each of the authors in this issue engages deeply with the themes Dr Levy raised, we have chosen to begin this collection with a brief summary of the talk so that readers can engage more directly with Dr Levy's ideas and critically compare their own readings to those presented by our authors. I will therefore begin this introduction with a very brief recap of Dr Levy's talk in Section II. Then, in Section III, I broaden the field in anticipation of the papers that follow, situating Dr Levy's theses in relation to an expansive, agonistic understanding of constitutionalism and briefly describing the four papers in this special issue. Finally, I conclude by offering a modest contribution of my own to the discussion, pointing to how popular contestation and international pressure can both help to constitute the rule of law, enacting or undermining the principles of constitutionalism in practice by imposing or failing to impose extra-legal costs on the exercise of lawless executive authority.

II. A Very Brief *Precis* of Dr Levy's McDonald Lecture: *The Separation of Powers and the Challenge to Constitutional Democracy*

Levy begins his lecture by emphasizing the importance of the separation of powers in contemporary constitutional thought and practice. Indeed, for Levy, the separation of powers is the defining feature of constitutional systems of government — it is the feature that distinguishes properly constitutional regimes from all others. At a minimum, Levy argues that constitutional governance requires an independent judiciary capable of holding legislative and particularly executive branches to constitutional principles. This separation between law-making and law-enforcing lies at the heart of the rule of law as we understand it today. Having thereby positioned the rule of law, and the separation of powers that guarantees it, at the center of constitutionalism, Levy offers a genealogy of the separation of powers as an idea and practice of government in Western law.

Beginning in ancient Greece, Levy roots the separation of powers in ongoing contests between monarchic, aristocratic, and democratic forms of rule — the rule of the one, the rule of the few, and the rule of the many. Aristotle, writing in reaction to the struggles between these forms of rule, introduced the idea of the “mixed constitution,” which mobilizes all factions of society by combining elements of the rule of the one, the few, and the many.

1 Jacob T Levy, “The Separation of Powers and the Challenge to Constitutional Democracy” (2020) 25:1 Rev Const Stud 1. A video of Dr. Levy's lecture is available online: *Centre for Constitutional Studies*, <www.constitutionalstudies.ca/2020/11/31st-annual-mcdonald-lecture-in-constitutional-studies-with-professor-jacob-t-levy/>.

The mixed constitution therefore arises as a solution to division, a way to unite various social classes and ideologies in order to pool their powers together to facilitate effective, durable, and united government. In fact, this practice arises again and again in European history. In Roman constitutionalism, the consuls, the Senate, and the tribunes worked to operationalize each part of the mixed constitution. Likewise, in European kingdoms the concept of various estates participating in government reflects a similar principle. Thus, political actors in Europe consistently turned to mixed forms of rule as a pragmatic solution to social division and contestation.

However, at this point, the mixed constitution was largely understood as a means of pooling the power of different social classes together. The idea is not for those powers to act as checks on one another, but rather for them to facilitate shared rule together. As such, the mixed constitution does not necessarily produce judicial independence and thus does not necessarily guarantee the rule of law as we understand it today.

This begins to change with Montesquieu and his widely influential interpretation of the British Constitution. Montesquieu effectively maps the participation of different social classes in government onto distinct branches of government. The legislative function rests with “the many” through the popularly elected² House of Commons; the executive function rests with “the one” embodied by the monarch; and the judicial power rests with “the few” through the aristocratic House of Lords in its capacity as the nation’s highest court of appeal. In so doing, Montesquieu helps recast the mixed constitution as not a pooling of powers, but a separation of powers — a way for each class to wield its own authority to check the absolute power of the others — and thus as a guarantor of the rule of law in the modern sense.

This interpretation of the British Constitution was a profound influence on the American founding fathers. However, the nascent American nation lacked the raw ingredients from which the mixed constitution had traditionally been constructed — it had no monarchy, and no traditional aristocracy either.³ As a result, America could not simply map existing social classes onto the different branches of government. Instead, the Americans worked to simulate the missing social classes through the use of government offices — “the one” is constituted through the presidency, “the many” through the House of Representatives, and “the few” through the senate and judiciary. While these bodies would not possess coherent class interests in the traditional sense, they would nonetheless possess a coherent institutional interest, in that each branch would be concerned with protecting and extending its own powers, status, and privileges. In this way, America forwarded a more rigorously institutional conception of the separation of powers as primarily a separation of governmental functions, rather than a separation of social classes.

With this reformulation, American practice, drawing on Montesquieu, transformed the mixed constitution into a modern separation of powers — a doctrine that is centrally concerned with divorcing the judicial power from the legislative and especially executive powers,

2 Though “popular” elections at the time included only property-holding white men, thereby excluding the vast majority of the actual population.

3 Which is not to say that the US lacked a class of elites. Wealthy landowners dominated, and continue to dominate, American politics in many ways. However, this is a bourgeois class whose power and influence flows primarily from their wealth, rather than from an inherent social status like a traditional nobility.

and that therefore guarantees the rule of law as we understand it today. Having explored the foundations of modern constitutionalism, Levy then calls our attention to two contemporary phenomena that threaten the separation of powers and, by derivation, the rule of law itself.

The first threat comes from partisan politics. In a partisan system, it is possible for both legislative and executive powers to be held by the same party. In such situations, the dominant party can often influence the composition of the judiciary as well. Thus, branches which are institutionally separate become united through the apparatus of the party. When officials are more concerned with the interests of their party than the long-term interests of the institution in which they serve, branches may stop checking each other effectively and the rule of law can be thrown into question.

Moreover, when the various branches of government are controlled by different parties, a different sort of threat can emerge. Although each branch may continue to check the others, the public at large may understand these contests in a partisan light, as one party competing with another, rather than one branch checking the other. So understood, the separation of powers and the actions needed to maintain it become delegitimized and the conceptual and normative force of the rule of law can be eroded. Regardless of which parties control which branches then, partisan politics presents a potential threat to the separation of powers.⁴

The second threat to the rule of law that Levy identifies comes from nationalist populism. Because nationalist populism presents an image of a homogeneous, united “people” in contrast to narrow, parochial interests, Levy argues that it lends itself to a particular style of partisan politics whereby a political actor, typically the executive, can present itself as *the* voice of the people. In this way, a single branch can claim to represent the entire people, rather than each branch making its own claim to represent a certain subsection of the population, as in the mixed constitution. In such a context, all constraints on the executive can be interpreted as constraints of the will of the people themselves, and can thus be presented as inherently illegitimate. This creates fertile ground to undermine the institutional autonomy of other branches, endangering the separation of powers and, in turn, the rule of law.

As a result of these two threats, Levy tells us that we are now seeing an increasingly executive-dominated style of government in both parliamentary and presidential systems around the world, that executives are increasingly seeking to consolidate their power further, that they are finding discursive and political strategies which facilitate this movement, and that this has the potential to undercut the rule of law and thus, the very constitutional character of our democracies. This is the political conjuncture with which this special issue engages.

III. Agonistic Constitutionalism, the Separation of Powers and the Rule of Law

As the summary above suggests, Levy’s lecture demonstrates the profound importance of the separation of powers as an institutional feature of contemporary constitutions and as a shifting, contested idea that structures the practice of constitutionalism over time. In so doing,

4 Levy makes clear, however, that he sees political parties as a pragmatic necessity of representative governance, despite the challenges they pose to institutional separation.

Levy provides an opening for us to engage with what Jeremy Webber has called “agonistic constitutionalism”⁵ — a broad view of constitutionalism which embraces not only formal constitutional documents and judicial decisions, but also the contested practices of political and social actors as they navigate, implement, challenge, and shape the broader principles of constitutionalism in their everyday lives. Similarly, the papers in this special issue engage with the separation of powers, the rule of law, and the future of liberal democracies in their broadest sense, as contested practices of governance situated in real and ongoing political struggles. This approach allows each paper, in its own way, to consider alternative sources of resiliency for the rule of law, thereby providing a deeper, more multi-faceted understanding of the current conjuncture, and of the steps we might take to address it.

As a window into these alternative sources of resiliency, Arjun Tremblay takes up the puzzle of why “English as a national language” bills failed to pass even in a highly favorable political climate where unified Republican control of both the executive and legislative branches of the American government made traditional checks and balances ineffective.⁶ Tremblay explores how underemphasized features like the makeup of the electorate, the role of veto players like committee chairs, interpersonal relations between legislators, changing societal norms, and other factors can constrain hyper-partisan activity even when unified government threatens the separation of powers as it has traditionally been understood.

Mary Liston expands this conceptual opening by turning her attention to the role of the administrative state in relation to the rule of law.⁷ While acknowledging that administrative bodies often blend roles associated with legislative, judicial, and executive functions, Liston argues that the diffusion of power to administrative bodies can be one way to decentralize power, creating a different sort of check and balance, not through strict separation, but by ensuring interpretative pluralism and preventing partisan domination. Grounding her analysis in a careful reading of Canadian constitutional law, Liston encourages us to think about the rule of law in ways that transcend a strict separation of powers, and that implicate a much broader array of institutions than is often presumed relevant.

In his contribution, Yann Allard Tremblay explores a complimentary vein.⁸ Whereas Liston expands traditional concepts of the institutions responsible for the rule of law, Allard Tremblay takes up the role of social groups as checks on lawless authority. Drawing on older conceptions of the mixed constitution as an amalgamation of social classes, Allard Tremblay argues that cultural groups, Indigenous peoples, minorities, and social classes could all be institutionally empowered to check government authority, permanently preventing any party from claiming to speak for “the people” as an undifferentiated whole and thereby preventing the total concentration of authority that concerns Levy.

Finally, Hillary Nye’s intervention shifts our attention away from the capacity of various actors and institutions to check one another’s power, and focuses instead on actors’ ability to

5 See e.g. Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015).

6 Arjun Tremblay, “Are there “Sources of Resilience” When the Separation of Powers Breaks Down?” (2021) 30:4 Const Forum Const 25.

7 Mary Liston, “Bringing the Mixed Constitution Back In” (2021) 30:4 Const Forum Const 9.

8 Yann Allard Tremblay, “Harnessing Distrust and the Power of Intercession for the Separation of Powers” (2021) 30:4 Const Forum Const 37.

check themselves through role-morality.⁹ Nye shows how an understanding of what is proper to each role, and a level of personal identification with that role, can meaningfully constrain exercises of power. Thus, the rule of law is buttressed not only by “external” checks but by “internal” ones as well. On this view, building robust and shared cultural understandings of each branch and its “role” constitutes an essential element of the rule of law as well.

Together, these contributions challenge us to expand our understanding of the rule of law beyond the relationship between executive, legislative, and judicial branches. They reveal how a much wider array of institutions and social relationships are implicated in the rule of law and indeed, that preventing abuses of power is as much about pluralism as it is about role-separation. In so doing, they reveal additional sources of constitutional resiliency and suggest additional sites of potential intervention and reform as we safeguard the practices of constitutionalism in these challenging times.

IV. The Separation of Powers, Popular Contestation and International Contestation

In the final section of this introduction, I would like to briefly offer my own modest contribution to the discussions that follow. As Levy has shown, the mixed constitution and the separation of powers are themselves innovative responses to social contestation and international struggle. They are born of, and constituted through, such struggle. It would seem then, that the level, character, and quality of contestation are central to the rule of law.¹⁰ In particular, I want to draw attention to two sites of contestation which are external to the constitutional system as it is normally understood, yet which are nevertheless capable of checking the power of various branches of government. I argue that both the people themselves, acting outside of the structures of formal government, and other actors in the international system, can and do act as constraints on the lawless executives that Levy warns us of. Seen in this light, the rule of law inheres not just in the contests between institutions within a constitution, but also in the contests between those constituted institutions and other centers of power with which they co-exist.

Popular Contestation and the Rule of Law

In her discussion of constitutionalism, Nootens, drawing on Loughlin, distinguishes between constituted authority — the authority of the institutions constituted by the present political order — and constituent authority — the permanent and inalienable power people hold to found new constitutional orders.¹¹ In so doing, they draw our attention to the role of people as an independent source of constitutional authority capable of acting independently of, outside of, and even against their governing institutions. Like many constitutional scholars, Nootens

9 Hillary Nye, “Checking the Other and Checking the Self: Role Morality and the Separation of Powers” (2021) 30:4 Const Forum Const 45.

10 For a convincing and in many ways analogous case that contestation is a key criteria of legitimacy in international law, see e.g. Antje Wiener, “A *Theory of Contestation* — A Concise Summary of Its Argument and Concepts” (2017) 49:1 Polity 109.

11 Geneviève Nootens, “Constituent Power and People-as-the-Governed: About the ‘Invisible’ People of Political and Legal Theory” (2015) 4:2 Global Constitutionalism 137 at 144.

limits her analysis to those rare moments when people choose to found an entirely new constitutional order. However, others see a more expansive role for constituent power.

As Ouziel succinctly explains, “for Gandhi, ‘consent through elections’ is never enough to govern the conduct of elected representatives. In addition, people have to be ready to exercise mass nonviolent civil disobedience in order to ‘govern their governors’ whenever they abuse the power conditionally delegated to them.”¹² Thus, Gandhi presents a picture where people exercise constituent power on an ongoing basis, regularly acting outside of their constituted institutions to protect or intervene in their constitutional order through mass civil disobedience and other forms of direct action.

Seen in this way, the robustness of the rule of law depends not only on contestation between branches of government, but also upon the capacity of individuals, groups, organizations, and movements to contest these relationships effectively. In other words, the separation of powers inheres not only in the separation between governing institutions, but in the separation between those institutions and the collective political agency of ordinary people.

Picking up on Nye’s point, this suggests that how citizens and, following Allard Tremblay, social groups, understand their own role relative to the rule of law is of crucial importance. James Tully’s distinction between civil and civic citizens is useful here.¹³ Where civil citizenship is defined by engagement with formal institutions (voting, etc.), civic citizenship inheres in the bottom-up practices of self-government and political contestation that take place outside of official channels (protest, direct action, prefigurative institution building, etc.). The presence of robust concepts of civic citizenship, as well as for the capacity of individuals, groups, and civic organizations to exercise political agency in ways that transcend the bounds of existing institutions, are therefore essential components of the rule of law. Ironically, constitutionalism may be most secure when constituted institutions do not exhaust the possibilities for political agency within a society, and we might take the level and quality of social contestation as one key indicator of the health of a constitutional regime.

International Recognition and the Rule of Law

Michaels argues that the authority of a state is also constituted, both legally and practically, in part by the recognition of other states — and, we might add, other international and even subnational actors.¹⁴ By offering or withholding their cooperation, these actors enable or constrain national governments. In this sense, recognition is actually a constitutive element of constitutional authority.¹⁵ Consider, for example, how the long-standing exclusion of Indig-

12 Pablo Ouziel, *Democracy Here and Now: The Exemplary Case of Spain* (Toronto: University of Toronto Press) at 176 [forthcoming]. For a discussion more grounded in legal theory, see e.g. Luigi Corrias, “Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity” (2016) 12:1 Eur Const Law Rev 6; Andreas Kalyvas “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12:2 Constellations 223.

13 For discussion of the distinction, see James Tully, *Public Philosophy in a New Key. Volume 2: Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008), especially Chapters 4 and 9.

14 See e.g. Ralf Michaels, “Law and Recognition — Towards a Relational Concept of Law” in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 90.

15 For thoughtful discussion, see Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013).

enous peoples as voting members of international institutions has shaped their ability to exercise effective authority.¹⁶

Though the extension and denial of international recognition are often shaped by self-interest, they can be, and sometimes are, mobilized precisely to contest the authority of lawless executives or other threats to a constitutional order. For example, both Hungary and Poland are experiencing a brand of hyper-partisan nationalist populism which threatens to undermine the rule of law in precisely the ways that Levy suggests. However, the European Union, the European Court of Human Rights, and others are exerting leverage in ways that complicate the efforts of national governments to undermine their domestic political orders by imposing geopolitical costs, creating economic costs, triggering legitimacy crises for the regime, and bolstering the efforts of the domestic opposition. As Liston and Tremblay demonstrate in their consideration of administrative bodies and committee roles respectively, the range of actors relevant to contests over executive, legislative, and judicial powers is much broader than first meets the eye.

The robustness of a given constitutional order is therefore partly a function of that order's place within ongoing geopolitical and global economic contests, how the regime's survival aligns with other powerful corporate and state interests, the regime's relationship with other countries and institutions, the level of connection with international civil society, and a host of related factors normally considered as being within the realm of international relations or political economy, rather than constitutional law. While these factors are not, of themselves, properly constitutional, they can dramatically affect the durability of a constitutional order, the presence of the rule of law, and the potential for abuses of power, and are therefore germane to a holistic consideration of threats to, and defenses of, the rule of law.

V. Conclusions

The preceding section is my modest way of illustrating a larger theme that permeates this special issue — that by taking an expansive interpretation of Levy's focus on the separation of powers as a guarantor of the rule of law, we can begin to analyze the plurality of different sites of authority and contestation in our society and how they contribute to, challenge, or shape the rule of law in practice. So understood, the separation of powers becomes a useful analytical tool not only for understanding contests between branches within the state, but also as a means of focusing on the state's relationship with the various normative orders with which it co-creates the normative, political, and legal environment.

The papers that follow explore both of these uses of the separation of powers and many more, opening space to engage with an expansive, contested, and pluralistic conception of the separation of powers, the rule of law, and constitutionalism itself. In so doing, the contributions to this volume partake in the ongoing reformulation and refinement of the rule of law that Dr Levy has traced, allowing us to more deeply and creatively analyze and respond to the myriad challenges facing constitutional democracies today.

16 For discussion, see Keith Cherry, *Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationships in Europe and on Turtle Island*, (PhD Dissertation, University of Victoria, 2020) [unpublished] especially at 87-90.

Bringing the Mixed Constitution Back In

Mary Liston*

I. Introduction

No doubt exists that the separation of powers is a fundamental architectural principle in Canadian public law jurisprudence. But what about the idea of a mixed constitution? A simple CanLII search for “mixed constitution” turns up six cases. In five¹ of these cases, the search reveals the following phrases: “pre-mix constituted goods,” “the mix constituting the excavated material,” “the Owners’ mixes constitute ‘bread and rolls,’” “the improper mixing constituted a fraudulent misrepresentation,” and “quality control for the asphalt mix constituted.” Clearly baking and aggregate blends figure largely in constituted mixes, but the constitutional jurisprudential sense is largely absent. That said, concerns about pre-mixing, constituted goods, excavating, improper mixing, and quality control do have some salience for the discussion that follows.

One case, however, does refer to the mixed constitution in the sense that I wish to focus on in this reflection on Jacob Levy’s “The Separation of Powers and the Challenge to Constitutional Democracy”² and on the contributions of my fellow discussants — Professors Yann

* Associate Professor, Peter A Allard School of Law, University of British Columbia. I would like to thank Patricia Paradis, Joshua Nichols, and Keith Cherry from the Centre of Constitutional Studies for organizing the panel discussion on Professor Jacob Levy’s 31st Annual McDonald Lecture in Constitutional Studies and inviting me to contribute. I would also like to thank Hillary Nye for her constructive feedback on my paper.

1 The phrases are taken from the following cases: *Bank of Montreal v Quality Feeds Alberta Ltd*, 1995 CanLII 808 at para 7; *Great West Development Marine Corp v Canadian Surety Co*, 2000 BCSC 806 at para 26; *Stikeman Elliott LLP v Puratos NV*, 2017 TMOB 29 at para 21; *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378 at para 5; and, *TNL Paving Ltd v British Columbia (Ministry of Transportation And Highways)*, 1999 CanLII 5186 at para 297.

2 Jacob T Levy, “The Separation of Powers and the Challenge to Constitutional Democracy” (2020) 25:1 Rev Const Stud 1.

Allard-Tremblay, Hillary Nye, and Arjun Tremblay. In this reflection, I will briefly examine the separation of powers, the related idea of checks and balances, and the mixed constitution generally and as they appear in Canadian public law jurisprudence. For the discussion of the mixed constitution, I will examine this singular case — the *Patriation Reference*³ — to illustrate how the idea of a mixed constitution *is* part of our legal tradition and is therefore of potential jurisprudential use. I will then turn to discuss the two themes that the mixed constitution, when contrasted with the separation powers, raises in my mind: the import of the mixed constitution for administrative law, and the idea of public faith that an older constitutional tradition embraces, but which is not part of a modernist or positivist understanding of a constitutional order. My main point will be that the idea of bringing the mixed constitution back into our jurisprudence — if not in name, then in substance — will improve both the descriptive and normative purchase of our public law jurisprudence and improve the quality of resulting analyses.

II. Pre-mixed Constitutive Goods

In this section, I will provide a short examination of three basic concepts as they appear in Canadian jurisprudence: the separation of powers; the associated notion of checks of balances; and the concept of a mixed constitution, or mixed government.

The Separation of Powers

The Canadian constitutional model is often described as a “hybrid”⁴ of the British and American models with the “US-inspired separation of powers ... superimposed on a British, ‘Westminster’ system of government.”⁵ In this sense, our constitutional structure was already “pre-mixed” and we simply adopted the admixture through the wording of the preamble to the *British North America Act, 1867*⁶ (now the *Constitution Act, 1867*): “a Constitution similar in Principle to that of the United Kingdom.” Any excavation of the origins of our Constitution, however, discloses the basic reality that the three branches often share each other’s functions and, in doing so, check, overlap, and cooperate with each other.⁷ Examples of usually unproblematic sharing or overlaps of power include the Speaker of the House possessing a quasi-judicial function, judicial “legislative” practices of “reading in” words into statutes, and cabinet having an appeal function. Numerous other overlaps, and even fusions, exist.⁸ So, it is

3 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25 [*Patriation Reference*].

4 See Warren J Newman, “The Rule of Law, the Separation of Powers and Judicial Independence in Canada” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 1031 at 1031, 1043.

5 Peter Cane, “Understanding Administrative Adjudication” in Linda Pearson, Carol Harlow & Michael Taggart, eds, *Administrative Law in a Changing State* (Oxford: Hart Publishing, 2008) 273 at 293.

6 *The Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK) [CA, 1867].

7 Adam Tomkins offers a good analysis of the separation of power in the British tradition. See Chapter 2 in *Public Law* (Oxford: Oxford University Press, 2003). He considers the defining feature of the British order to be a separation of power (singular) between the Crown and Parliament alone. This is not the case in Canada, and is one reason why Canada finds itself *between* the British and American models of the separation of powers.

8 For an analysis of some of the more problematic overlaps and fusions, see Mary Liston, “The Most Opaque Branch? The (Un)Accountable Growth of Executive Power in Modern Canadian Government” in Richard

clear, as discussed by Professor Levy in his lecture, that the Westminster system that we have “inherited” in Canada does not possess a bright line separation of powers.

Nevertheless, our jurisprudence does invoke the principle of the separation of powers. One of the most cited “definitions” of the separation of powers starkly illustrates the “elemental” form it usually takes in the jurisprudence. Dickson CJ, for the Supreme Court, coined this definition when he wrote:

There is in Canada a separation of powers among the three branches of government — the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.⁹

Dickson CJ’s descriptive statement reflects how the *Constitution Act, 1867* laid out the three branches of government in our Westminster parliamentary system. Very little has been added to his statement since and it remains rather sleek, if not skeletal, in content. So, while accurate and uncontroversial, the principle of the separation of powers remains less than helpful in making sense of Canada’s constitutional order.

Despite the basic division or structure that Dickson CJ’s statement confirms, constitutional scholar Peter Hogg consistently argued throughout his career that the *Constitution Act, 1867* neither set out a general separation of powers nor insisted that each branch of government only exercise its own function.¹⁰ One key reason was that the executive power was vested in the Queen and the Crown appears in every branch of government.¹¹ Perhaps for this reason, the Supreme Court of Canada has described the American model as “strict”¹² in comparison to Canada’s, and has been hesitant to supply much in the way of substantive content. We therefore do not get a strong sense of the differences between the two countries in the case law. Since Confederation, then, the basic idea of the separation of powers has been simultaneously much simpler and more complicated than the American ideal type with its separate and distinct branches — though even James Madison acknowledged the necessary (and often salutary) intermixing of powers,¹³ while Alexander Hamilton endorsed the partial intermix-

Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 19.

9 *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CanLII 14 at para 39.

10 See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 7.3(a) and editions before and after.

11 *CA, 1867*, *supra* note 7, s 9. On this point, see Levy *supra* note 2 at 5. See also Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004) at 24-25.

12 See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 at para 13 [*Secession Reference*]. Here, the separation of powers is discussed in relation to the Canadian practice of the highest court giving advisory opinions in reference cases: “However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual “cases” or “controversies”. See, e.g., *Muskrat v United States*, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement.” On the Supreme Court’s reference function and the separation of powers, see Chapters 1 and 4 in Carissima Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart Publishing, 2019).

13 Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, (New York: Bantam, 1982) at Nos 38, 47.

ture for special and necessary purposes such as impeachment.¹⁴ By critiquing the paucity of content in this principle, I do not mean to undermine its importance. The replacement of a unitary monarchy with three institutions in which formerly unitary public power has been separated, redistributed, and housed remains a significant legal and political achievement. As Martin Loughlin writes: “The establishment of a legal system that operates in accordance with its own conceptual logic while remaining free from gross manipulation by power-wielders is an achievement of considerable importance.”¹⁵

Because of its thin content, the separation of powers does very little analytic work in most cases, other than act as a recurring reminder that the judiciary should not usurp the jurisdiction of the other two branches. Where nuance is provided, it involves overt acknowledgement of overlap. We can see this in the *Secession Reference*, where the Supreme Court explicitly states the true nature of the Canadian model in its discussion of, and justification for, the constitutional validity of the courts’ reference function:

Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court’s receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the *Supreme Court Act* is therefore constitutionally valid.¹⁶

I will return to the implications of this quote when I later argue why the mixed constitution may be a better descriptor for the structure and functions of modern government. A second strong acknowledgement of overlap is this well-known admonition written by Major J for the Court:

The doctrine of separation of powers is an essential feature of our constitution. It maintains a separation of powers between the judiciary and the other two branches, legislature and the executive, and to some extent between the legislature and the executive ... On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government. ... The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature.¹⁷

The tensions that such overlaps produce can create strong anxieties in public law jurisprudence. Judicial anxiety is surely one of the reasons why Dickson CJ expressed the reality of the Canadian separation of powers in this way:

It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament’s auditing function is not, with all respect to the contrary position taken by Jerome A.C.J., constitutionally cognizable by the judiciary. The *grundnorm* with which the courts must work in this context is that of the sovereignty of Parliament.¹⁸

14 *Ibid* at Nos 66.

15 Loughlin, *supra* note 11 at 42.

16 *Secession Reference*, *supra* note 12 at para 15.

17 *Wells v Newfoundland*, [1999] 3 SCR 199, 1999 CanLII 657 at paras 52-54.

18 *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, 1989 CanLII 73 at 103.

That *grundnorm*, however, no longer operates as the dominant constitutional principle. Instead, an open set of interrelated architectural principles work together and in tension with each other — principles such as constitutional supremacy, parliamentary sovereignty, the rule of law, separation of powers, democracy, and so on.

The “strictest” form of separation advanced by the Supreme Court is in its interpretations of the principle of judicial independence that have had the effect of amplifying that independence from the other branches.¹⁹ Along with the preamble, section 96 of the *Constitution Act, 1867* represents the interpretive fount for the principle of judicial independence and maintains the traditional function of the superior courts in a common law system. We can trace the important development of independence for courts, especially in matters of judicial review, to the historical significance of the United Kingdom’s *Act of Settlement, 1701*.²⁰ Peter Cane underscores the importance of the judicial branch for the rule of law and the separation of powers for our constitutional model: “Independence of the judiciary is universally accepted to be a necessary condition of good government and freedom of the individual regardless of the details of other constitutional arrangements. This is particularly true in Westminster systems, where the main significance of the separation of powers lies in the independence of the judiciary.”²¹ This view is also consistent with Professor Levy’s discussion of Montesquieu’s views on the judicial power and the Constitution of England.²² The most ardent advocate and crafter of the jurisprudence on judicial independence was Lamer CJ²³ and I will return to some of the implications of his writings on judicial independence in Section III below when I reflect on the separation of powers, the mixed constitution, and administrative tribunals.

To Separate is Also Not Necessarily to Check

The related idea of “checks and balances” is even less prevalent in our constitutional jurisprudence. Generally in the case law, it is most often used in relation to non-governmental institutions, relations, and schemes rather than governmental ones. When the concept of checks and balances is used in Canadian public law jurisprudence, it often describes how a statutory scheme internally operates. It also appears in relation to the workings of the criminal justice system. Regarding constitutional jurisprudence,²⁴ checks and balances are most often asso-

19 In his overview of the principle of the separation of powers, Warren Newman insists that the associated principle of judicial independence “can stand alone as an autonomous principle of the first order.” Newman, *supra* note 4 at 1040. While principles have independent status from each other, I would argue that it is jurisprudentially undesirable to have any principles stand alone and autonomous of other principles. Regarding the four principles at stake in the *Secession Reference*, Supreme Court maintained that: “These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.” *Secession Reference*, *supra* note 12 at para 49.

20 *An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject*, (UK), 1701, 12 & 13 Will III, c 2 [*Act of Settlement, 1701*].

21 Cane, *supra* note 5 at 279-280.

22 Levy, *supra* note 2 at 6-7. See Cane, *supra* note 5 at 276-80.

23 See *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 1 SCR 3, 1998 CanLII 833.

24 On CanLII, ‘checks and balances’ appears in 23 Supreme Court cases. The search turned up 1,145 cases in total. Discussion of the internal checks and balances particular to section 1 can be found in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*]. There it was understood that the judiciary ought not to (re)interpret all statutes to make them conform to the *Charter*. Instead, section 1 provides an opportunity for a government to justify the infringement of a *Charter* right, and section 52

ciated with the section 1 *Oakes* balancing test and the section 33 legislative override in the *Charter of Rights and Freedoms*.²⁵ The concept does not overtly appear at all in relation to the separation of powers.

This last result is interesting for the reason that Brian Singer suggests: in order for checks and balances to work — that is, to set power against power — different fields of action should already overlap in some way.²⁶ When seen this way, there is no need for a separate concept of checks and balances if the function of an existing overlap serves that purpose. Where overlaps may problematically prove suboptimal as constraints on the exercise of public power, or where power is problematically fused to facilitate the arbitrary exercise of public power, the separation of powers on its own may do the work of checks and balances. In other words, there may be less need to invoke this concept in our system.

An intriguing development is that, while the concept of checks and balances appears in section 1 jurisprudence, the Supreme Court rejected a lower court's proposition to explicitly add the separation of powers to section 1's *Oakes* test. Binnie J for the court wrote:

... Marshall J.A. proposed that a court should ask itself at each stage of the s. 1 analysis whether the judicial response to the questions posed conform to the separation of powers doctrine. ...

In summary, whenever there are boundaries to the legal exercise of state power such boundaries have to be refereed. Canadian courts have undertaken this role in relation to the division of powers between Parliament and the provincial legislatures since Confederation. The boundary between an individual's protected right or freedom and state power must also be refereed. The framers of the *Charter* identified the courts as the referee. While I recognize that the separation of powers is an important constitutional principle, I believe that the s. 1 test set out in *Oakes* and the rest of our voluminous s. 1 jurisprudence already provides the proper framework in which to consider what the doctrine of separation of powers requires in particular situations, as indeed was the case here. To the extent Marshall J.A. invites a greater level of deference to the will of the legislature, I believe acceptance of such an invitation would simply be inconsistent with the clear words of s. 1 and undermine the delicate balance the *Charter* was intended to achieve. I would therefore not do as he suggests.²⁷

The end result of this particular case, then, was to return the separation of powers to its prior status as a kind of ghost principle in the legal machine — doing very little work and saying very little despite re-acknowledgement of its fundamental status.

authorizes a reviewing court to declare an offending statute invalid if it the government fails to meet the requirements of sections 1's *Oakes* test. Checks and balances in relation to section 33 is mentioned in *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81, where Lamer CJ pointed out that the American constitution does not have the internal checking and balancing mechanisms of sections 1 and 33 and also rejected the American approach to due process protection. See also *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 where Rothstein J in dissent accused the majority of violating the checks and balances internal to the *Charter* by sourcing the right of access to justice in section 96 of the *CA, 1867*, thereby providing it with stronger protection than what is given to *Charter* rights and also putting the principle of access to justice out of the ambit of section 33 and therefore beyond legislative response.

25 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

26 Brian CJ Singer, "Montesquieu on Power: Beyond Checks and Balances" in Rebecca E Kingston, ed, *Montesquieu and His Legacy* (Albany: SUNY Press, 2009) 97.

27 *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 at paras 100, 116.

Excavating the Mixed Constitution: “To mix is not to separate.”²⁸

Professor Levy succinctly lays out Aristotle’s idea of a mixed constitution or mixed government.²⁹ He then demonstrates how Montesquieu, by “re-describing” the English Constitution, “joined the existing institutions of mixed government with a quite different principle: the rule of law,” which resulted in the idea of a separation of powers that, in turn, provided a strong institutional basis for judicial independence.³⁰ Following Aristotle, Montesquieu associated each branch with one of the three traditional classes or social orders, thereby maintaining their separate bases of power.³¹ By way of contrast, in the United Kingdom Victorian constitutionalist AV Dicey looked to the *Act of Settlement 1701* as the British jurisgenerative moment when the central courts gained independence from royal control and transferred their loyalty from the monarch to the rule of law.³² For Dicey, this institutional change galvanized the rule of law because the government became accountable not just to a sovereign parliament, but also to an independent judiciary.

It is not in the context of judicial independence, however, where mixed government comes into our jurisprudence. Rather, it is in the *Patriation Reference*’s analysis of conventions, constitutional morality, and federalism as a form of local democratic and representative government. The mixed constitution appears in the part of the judgment where Martland, Ritchie, Dickson, Beetz, Chouinard, and Lamer JJ all agree about the essential nature of constitutional conventions:

Dicey first gave the impression that constitutional conventions are a peculiarly British and modern phenomenon. But he recognized in later editions that different conventions are found in other constitutions. As Sir William Holdsworth wrote ... :

In fact conventions must grow up at all times and in all places where the powers of government are vested in different persons or bodies — where in other words there is a mixed constitution. “The constituent parts of a state,” said Burke ... “are obliged to hold their public faith with each other, and with all those who derive any serious interest under their engagements, as much as the whole state is bound to keep its faith with separate communities.” Necessarily conventional rules spring up to regulate the working of the various parts of the constitution, their relations to one another, and to the subject.

Within the British Empire, powers of government were vested in different bodies which provided a fertile ground for the growth of new constitutional conventions unknown to Dicey and from which self-governing colonies acquired equal and independent status within the Commonwealth. Many of these culminated in the *Statute of Westminster, 1931, 1931* (U.K.), c. 4.³³

In the *Patriation Reference*, the Supreme Court cites the concept of a mixed constitution, but usefully detaches it from its ancient connection with social classes (as seen in Aristotle and Montesquieu’s conceptions). Instead, the Court defines it as a plurality of persons, institutions, and offices that exercise government power for the public good. Again, this comports with the American trajectory of the separations of powers laid out by Professor Levy. It is

28 Levy, *supra* note 2 at 5.

29 *Ibid* at 3-5.

30 *Ibid* at 5-6.

31 *Ibid* at 8.

32 Cane, *supra* note 5 at 276-77.

33 *Patriation Reference*, *supra* note 3 at 880.

also clear in the *Patriation Reference* that the “orientation towards harmonious cooperation”³⁴ from the mixed government tradition informs the judicial conception of the convention of seeking provincial consent before requesting the amendment of the Canadian Constitution by the Parliament at Westminster. The ethos behind the convention is described as a kind of constitutive “public faith.”

In public law for example, many of the canons of statutory interpretation and their associated practices incentivize harmonious cooperation and reinvigorate public faith between the judiciary and the legislature. In a key case involving the modern approach to statutory interpretation, which was already discussed above, the Supreme Court draws upon the idea of “institutional dialogue” as embodying this kind of ethos. Iacobucci J, discussing institutional dialogue explicitly and invoking the separate of powers implicitly, writes in *Bell ExpressVu*:

This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta* ... the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. “The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)” (*Vriend* ... at para. 139).³⁵

On my reading, the mixed constitution links together several fundamental principles that undergird a kind public faith. Part of this public faith is the role morality that legal actors hold while in office that Professor Nye’s contribution to this issue explores.³⁶ This public faith or public ethos is a blend of harmonious cooperation (i.e. mixing and balancing) and effective oversight (i.e. reviewing, separating, and checking). It remains aspirational. And, as Professor Levy’s lecture and the accompanying commentary from all four discussants raises, public faith has come under severe stress in our times.

Professors Levy and Allard-Tremblay provide incisive analysis of how political parties and factions have undermined the institutional incentives created by the separation of powers for actors to be loyal to the office rather than to their party or faction, how this has contributed to a set of difficult governance challenges, and how these challenges present an opportunity to reflect on whether the current state of distrust — a loss of public faith in government — can be productively harnessed. It seems clear that the development of modern political parties in Canada, as in the United States and the United Kingdom, has undone much of the work done in the earlier history when the executive and legislature were more separate.³⁷ The problem of partisan loyalty and the spectre of executive impunity, as a result of the dominance of the political executive, has significant implications for the separations of powers, the mixed constitution, and the administrative state. The Canadian case remains different from the Ameri-

34 Levy, *supra* note 2 at 9-10.

35 *Bell ExpressVu*, *supra* note 24 at para 65.

36 Hillary Nye, “Checking the Other and Checking the Self: Role Morality and the Separation of Powers” (2021) 30:4 Const Forum Const 45.

37 See Cane, *supra* note 5, at 277-78 on this point, referring to the United Kingdom. See also Liston, *supra* note 8.

can, but it is vulnerable to these trends. With this in mind, I next turn to the two themes that Professor Levy's lecture has raised for me, and I will be drawing on these ideas of "harnessing distrust"³⁸ and "sources of resilience"³⁹ — but first I will recap Part II.

The Aggregate Mix: A Recap

The key points to take forward from Part II's discussion of fundamentals consists of the following. First, the principle of the separation of powers is a fundamental, but rather skeletal, constitutional principle in Canadian jurisprudence which shapes and supports the actual architecture of our government. This underscores Peter Hogg's claim that we do not yet have a general separation of powers doctrine: right now, it remains bare bones. The separation of powers should be understood functionally — three institutions with core competencies which each house different powers and purposes. It is not strict or "watertight" and beneficial overlaps are legitimate and welcome. The separation of powers most usefully buttresses the independent judicial function and it is crucially related to the complementary principles of the rule of law, deference to and respect for each branch's jurisdiction, and legality. It is also related to the political constitution, which I also call constitutional morality and public faith. The separation of powers is related to the concept of checks and balances (but not strongly in our jurisprudence, which I have argued is appropriate given existing permissible overlaps). Lastly, the separation of powers could be innovatively linked to the concept of the mixed constitution/mixed government should that opening be taken up in the future. Such an uptake, with novel content, could further "Canadianize" the doctrine perhaps by resuscitating the dormant idea of institutional dialogue, understood as a relational theory about "how the branches of government operate and interact within a working constitutional system."⁴⁰

III. The Mixed Constitution and Administrative Law: Pluralism and Public Faith

In this brief set of reflections, I argue that US debates about the legitimacy of the administrative state are not relevant for the Canadian model of the separation of powers and judicial review. Indeed, both the Canadian separation of powers and the idea of mixed government illustrate how the administrative state, including administrative tribunals, serves to disperse power and provide another institutional avenue for legal subjects to demand accountability, fairness, and legality from executive actors whose decisions affect their rights, interests, and privileges.

(Im)proper Mixing?

Unsurprisingly, given the distance in time between the development of the original idea and its modern variant, the separation of powers has almost nothing to say about the administra-

38 Yann Allard Tremblay, "Harnessing Distrust and the Power of Intercession for the Separation of Powers" (2021) 30:4 Const Forum Const 37.

39 Levy, *supra* note 2 at 17. Arjun Tremblay, "Are there 'Sources of Resilience' When the Separation of Powers Breaks Down?" (2021) 30:4 Const Forum Const 25.

40 Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30:1 Kings LJ 43 at 46.

tive state. Because administrative bodies possess differing combinations of the three functions — adjudicative, legislative, and executive — they present descriptive and normative challenges under a strict understanding of the separation of powers, although the Canadian model is less burdened by these challenges. This critique of the administrative state, grounded in a model of a strict separation of powers, currently holds a great deal of sway in the United States. There, debates about the separation of powers and the executive branch, including both presidential and administrative powers, rage.⁴¹ Two examples are debates about whether the Constitution requires that the President control a hierarchically organized executive branch, or whether the Constitution requires that each branch exercise *only* the power assigned to it. If strictly enforced, this second argument would result in the dismantling of many administrative agencies. In the United States, then, models of the constitutional state have become distorted, partial, and even overtly partisan.⁴²

These sorts of debates occasionally surface in Canada, but really ought not to, given the differences between the US and Canadian public law orders, models of the separation of powers, and political cultures. Questions may arise about the constitutional nature of a particular administrative body,⁴³ for example, but not the wholesale repudiation of the administrative state. In a Westminster system operating under the rule of law, with a functioning constitution, and with institutions that maintain “public faith,” the constitutional status of administrative actors should not be a matter of widespread dispute. Canadian public law has tended to analogize the hybrid architecture of many administrative bodies as a kind of “government in miniature,” to use the phrase originally coined by John Willis.⁴⁴ To take another analogy, this time a more organic concept from nature, many administrative bodies might be seen as “fractal” — little governments replicating big government in different ways and across different scales. This complex institutional pluralism can be a desirable feature in a constitutional order.⁴⁵ Understood this way, the administrative state facilitates the *dispersion* of government power, rather than its improper concentration. After the recent experience with the Trump presidency, we can see that the administrative state and its actors can function as sites where distrust can be fruitfully harnessed, especially when confronting outright presidential mendacity. A better understanding of the separation of powers is therefore one that recommends

41 For an overview of these debates, see M Elizabeth Magill, “Beyond Powers and Branches in Separation of Powers Law” (2001) 150:2 U Pa L Rev 603. Even a trenchant critic like Richard Epstein does not advocate for the abolition of the administrative state whole-hog but, following libertarian ideology, recommends a minimal administrative state. See Richard A Epstein, *The Dubious Morality of Modern Administrative Law* (London, UK: Rowman & Littlefield, 2020).

42 Kavanagh, *supra* note 40 at 63.

43 But see *Reference re Code of Civil Procedure (Que)*, art 35, 2021 SCC 27 for a recent example of the judicial branch protecting and preserving the historical jurisdiction and status of section 96 courts. See also the recent constitutional challenge to the jurisdiction of British Columbia’s Civil Resolution Tribunal on the basis that the legislative scheme violates section 96 by creating a section 96 court within the provincial executive: *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2021 BCSC 348.

44 See John Willis, “Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional” (1935) 1:1 UTLJ 53 at 78. See also Mary Liston, “Administering the Canadian Rule of Law” in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) 139-182.

45 See Paul Daly, “Section 96: Striking a Balance between Legal Centralism and Legal Pluralism” in Richard Albert, Paul Daly & Vanessa A MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 84.

a general division of labour among the branches, while also acknowledging shared functions between institutions, and supplementing institutional design with appropriate counterbalances (both positive in encouraging action and negative in constraining action). This understanding also comports with the idea of a mixed constitution presented above. Both provide a better descriptive and normative understanding of institutional relations in complex governance.

This paper follows many other scholars in proposing that the separation of powers needs to be updated in Canadian jurisprudence. It is beyond the scope of this paper to lay out this more complex understanding of the separation of powers in relation to the modern state, but many scholars are at work on this shared project.⁴⁶ And, as I have said above, it is my view that the literature on “institutional dialogue” also supports this conception of a functional division where institutions both counter and cooperate and where overlapping functions are presumed legitimate until shown otherwise.⁴⁷

I am not, however, totally sanguine. Complex governance poses challenges for democratic and rule of law accountability as well as for institutional coherence and coordination, particularly when we create more strongly independent public actors (e.g. auditors, ombuds, watchdogs) and bodies (e.g. central banks, electoral commissions, agencies like Statistics Canada) than the more garden variety administrative agencies, boards, commissions, and tribunals. Distrust of the administrative state is part of the loss of public faith in government. Powerful executives may upset the dispersion of power that the administrative state contributes to by putting partisan loyalists in charge of administrative bodies. When in charge, partisan loyalists will shape the policy-making and discretionary powers exercised by those bodies in favour of the political executive’s agenda. As Bruce Ackerman writes of presidential systems, although this can apply to parliamentary systems as well: “Presidential systems encourage the politicization of the bureaucracy, leading to the demotion of career civil servants to second-tier positions as presidents keep pushing political loyalists into key administrative positions in their on-going struggle with Congress.”⁴⁸ Ackerman suggests, however, that such a strategy is short-term in a parliamentary system where the incentives and sources of resilience differ. Once a strong civil services tradition has been established, he argues that the “political logic

46 In addition to Magill, *supra* note 41, see also Bruce Ackerman, “The New Separation of Powers” (2000) 113:3 Harv L Rev 633; Richard Albert, “The Fusion of Presidentialism and Parliamentarism” (2009) 57:3 Am J Comp L 531; NW Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018); Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford: Oxford University Press, 2009); Mogens Herman Hansen, “The Mixed Constitution Versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy” (2010) 31:3 History of Political Thought 509; Aileen Kavanagh, “The Constitutional Separation of Powers” in David Dyzenhaus & Malcom Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 221; and Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford: Oxford University Press, 2017).

47 See e.g. Dennis Baker, “A Feature, Not a Bug: A Coordinate Moment in Canadian Constitutionalism” and Jacob T Levy, “Departmentalism and Dialogue” in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 397, 68.

48 Bruce Ackerman, “Good-bye, Montesquieu,” in Susan Rose-Ackerman & Peter L Lindseth, eds, *Comparative Administrative Law* (Cheltenham, UK: Edward Elgar, 2010) at 131.

of parliamentarianism is likely to sustain the professional tradition.”⁴⁹ Over the last twenty years, Canada federally, and in some provinces, has seen significant challenges to this tradition of a strong civil service, and there have been significant incursions on the independence of administrative bodies.⁵⁰ One potential remedy — a remedy that recognizes the constitutional dimension of both the administrative state and administrative law — would be to better guarantee indicia of independence for certain types of administrative bodies that perform functions that have significant public law or constitutional import, such as adjudication.

Quality control

But, there is a rub with this remedy. One of the trickiest features of the administrative state has been the development of administrative tribunals (in the true sense of the word “tribunal”) and their constitutional relationship with superior courts in our legal system.⁵¹ Our jurisprudence certainly discloses a somewhat fraught relationship between administrative tribunals and some judges at the Supreme Court. The creation of non-court adjudicative bodies, housed in the executive branch and without the constitutional guarantees of independence (such as the *Valente*⁵² requirements of security of tenure, financial security, and institutional independence over administrative matters), continues to produce strong tensions. This is primarily due to the ongoing efforts of the judicial branch to protect and preserve the jurisdiction and status of section 96 courts — courts which constitutionally represent the separation of powers. The “rule” that has developed over time is that administrative bodies can exercise delegated adjudicative powers (if properly authorized by the enabling legislation) so long as the government that creates that body (federal or provincial) does not completely re-create a section 96 court.⁵³ The intent behind this rule is to ensure that provinces do not create a parallel system of administrative justice that would replace the superior courts whose judges are federally appointed. With some exceptions, this has generally not posed a problem constitutionally.⁵⁴ Nevertheless, if one wanted to enhance the independence of administrative tribunals by extending some of the constitutional guarantees of independence, as was done in the United Kingdom in 2007,⁵⁵ our jurisprudence sets up a roadblock. One very bright separation of powers line that McLachlin CJ (for the Court) entrenched regarding the administrative state is this:

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of

49 *Ibid* at 132.

50 See Liston, *supra* note 8.

51 See Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge: Cambridge University Press, 2006).

52 *Valente v The Queen*, [1985] 2 SCR 673, 985 CanLII 25.

53 *Re Residential Tenancies Act*, 1979, [1981] 1 SCR 714, 1981 CanLII 24.

54 *Supra* note 43.

55 See Cane’s discussion of these reforms and the resulting *Tribunals, Courts and Enforcement Act 2007*, *supra* note 5 at 286-287.

independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.⁵⁶

Here, our separation of powers puts us between a rock and a hard place: if we give administrative tribunals more independence, we may violate the Constitution; but, if we do not provide them with more protection from the executive, then their power-dispersing function fails and we may end up with a partisan body that risks using its powers arbitrarily in order to toe the party line.

Of equal interest are battles over jurisdiction and interpretation. Some judges have maintained a hierarchical approach whereby courts need not defer to an administrative actor's interpretations of statutory provisions or other questions of law concerning civil or human rights.⁵⁷ This debate is ongoing. In *Cooper v Canada (Human Rights Commission)*, Lamer CJ (concurring) maintained that while the judiciary does not have an interpretive monopoly over questions of law as an interpretative matter (and also if the legislature intends that the administrative body be the main interpreter), he insisted that courts must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution, including the *Charter*.⁵⁸ Administrative bodies therefore cannot access the section 52 remedy of "striking down" legislation that offends the Constitution; only courts can exercise this power. The dissent in *Cooper*, penned by McLachlin J with L'Heureux-Dubé J, vociferously disagreed and held that if a tribunal's jurisdiction includes questions of law, then that includes the power to determine whether or not its enabling legislation is unconstitutional. They rejected Lamer CJ's "holy grail" conception of the Constitution (specifically the *Charter*) and underscored how important adjudicative bodies are for access to justice in the modern state and for providing alternative routes to accountability than judicial review in the superior courts:

The *Charter* is not some holy grail which only judicial initiatives of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.⁵⁹

The *Cooper* dissent eventually won out. But for those who have anxieties about arbitrary administrative interpretations that implicate constitutional matters, a jurisprudential balance and check has been struck. Regarding general interpretation, a presumption of reasonableness exists when administrative actors interpret their enabling legislation, rather than the more

56 *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 at para 24.

57 See David Dyzenhaus on the consequences of Lamer CJ's formalist understanding of the separation of powers in relation to administrative bodies and especially those adjudicative bodies which interpret rights (e.g., human rights tribunals). He argues that Lamer CJ sought to preserve a "judicial monopoly" on the interpretation of law. David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27:2 *Queen's LJ* 445 at 488.

58 *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 13.

59 *Ibid* at para 70. The remedy that administrative bodies use is to decline to apply the offending statutory provision in the case or dispute at bar. This remedy returns to issue back to the other branches which can then decide whether or how to amend the statute.

stringent standard of correctness.⁶⁰ Where a legislature has created an administrative decisionmaker to implement a statutory scheme, this presumption instructs courts to be cognizant that in order to fulfill its mandate, that body has the jurisdiction to interpret the law applicable to all issues that come before it, including constitutional matters if it can consider questions of law.⁶¹ It will be up to a particular complainant to displace that presumption and demonstrate that the administrative interpretation or decision is unreasonable. Key to this exercise, and to the culture of justification⁶² that exists in Canadian public law, are the reasons given by the particular administrative actor seeking to justify the decision and its outcome. Reasons also serve to “check” the judiciary because they need to be mindful of legislative intent to delegate authority to that administrative actor (including the power to interpret the enabling legislation), the jurisdiction of that administrative actor, and the limits on their own exercise of powers. In this way, our constitutional and administrative legal order not only sanctions overlap, but also interpretive pluralism and the dispersion of public power. But, these overlaps are also accompanied by a variety of internal and external checks on power — both administrative and judicial.⁶³ Quality control is ensured through judicial review with courts properly deferring to justified interpretations and retaining the last adjudicative word on constitutional matters.

Scaling Up Constraints on Executive Power from Administrative Law

Many Canadians harbour deep anxieties about the concentration of power in the executive branch, and in particular unaccountable bodies like the Prime Minister’s Office. Administrative law might provide useful resources to maintain the separation of powers but also provide accountability. But, these resources can only reach their potential with a rethinking of the separation of powers along the lines discussed above. Both constitutional and administrative law in common law systems locate a separate source of power as well as an overarching reason for understanding the judiciary as providing a necessary oversight function to review exercises of executive power. This oversight function theoretically encompasses *all* forms of executive power, including the once solely monarchical prerogative powers. However, judicial review of prerogative powers is highly deferential and sometimes not even justiciable.⁶⁴ If we were to better see the constitutional dimension of administrative law — that is, as a form of common law constitutionalism — it might serve as an institutional site for further constraints on the potentially unlawful use of executive discretion and prerogative power. What if, for example, we “scaled up” the foundational insight from the *Roncarelli*⁶⁵ case that “there is no such thing as absolute and untrammelled discretion” in public law and hold that such a bottom line should apply to prerogative power in order to further “tame” it. The end result would be that most, if not all, exercises of public power should be subject to judicial review in administrative law on the grounds of fairness, legality, proportionality, rationality, and reasonableness. In my view, exercises of public power should always be subject to a justification requirement at

60 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

61 The legislature is always free to take away this function from an administrative body.

62 See the Honourable Madam Justice Beverley McLachlin on this “ethos of justification” in Canadian public law. “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 Can J Admin Law & Practice 171 at 174.

63 See Nye on how internal checks work, *supra* note 36 at 52.

64 *Black v Canada (Prime Minister)*, 54 OR (3d) 215, 199 DLR (4th) 228, 2001 CanLII 8537.

65 *Roncarelli v Duplessis*, [1959] SCR 121, 1959 CanLII 50.

judicial review. Courts would then engage in different intensities of judicial review dependent on the context, thereby preserving the separation of powers by respecting different functions, expertise, and the deference principle. Professor Nye advances a similar view when she suggests Canadian public law should move towards a “stronger default of reviewability of exercises of public power” as one important direction for reform.⁶⁶ One recent example of such a development would be the game-changing decision by the UK Supreme Court in *Miller II* where Prime Minister Boris Johnston’s advice to the Queen regarding prorogation was found to be unlawful.⁶⁷

Public faith

In the short space left for this set of reflections, I want to highlight one other potential benefit of seeing Canadian public law through the lens of a mixed constitution rather than the separations of powers. This brings us back to Aristotle’s idea of regime and the now unconventional view that in a constitutional polity, law itself must be moderated in order to prevent the domination of law or the domination of purely legal modes of structuring institutional and personal relationships. As Jill Frank argues: “Aristotle ... holds both that the rule of law, and ... the constitution, moderates the rule of men, and also that the rule of men moderates the rule of law, including the constitution.”⁶⁸ Key to this idea of moderation — which is different than the language of balance that is linked to the separation of powers — are a set of aspirations informed by good judgment, practical wisdom, and responsiveness to context that can inform human relations and institutional design. In this sense, moderation is not just an individual virtue, it is also a constitutive feature and purpose of the constitution and its associated branches, offices, and subordinate bodies.⁶⁹ Aileen Kavanagh evokes this idea of moderation in her discussion of “inter-institutional comity” as a constitutive practice requiring that “the relationships between the branches of government ... be based on a ‘mutuality of respect’ between them.”⁷⁰ And, as Professor Nye further argues: “It has always been the case that good governance required good faith actors with a particular conception of their role to occupy that role and carry out their vision of what it requires”⁷¹ — although, importantly, not as “entirely separate entities pursuing their own goals, but as interconnected ‘partners in authority’ engaged in the ‘joint-enterprise of government’ for the betterment of society.”⁷²

A commitment to moderation in law and politics is not what immediately springs to mind when we think about the separation of powers. And yet, this commitment to moderation informed the judicial approach to understanding conventions in the *Patriation Reference* as well as their understanding of the political constitution and the larger constitutional morality. What prevents a prime minister or president from going too far in the extension of their prerogative power? What prevents judges from being activist? What stops an administrative official from imposing their own policy preferences in their decision-making rather than what is intended by the legislature? Isn’t one reason some kind of public faith? Professor Tremblay

66 Nye, *supra* note 36 at 52.

67 *R (Miller) v The Prime Minister and Cherry and others v Advocate General for Scotland*, [2019] UKSC 41.

68 Jill Frank, “Aristotle on Constitutionalism and the Rule of Law” (2007) 8:1 *Theor Inq L* 37 at 40.

69 *Ibid* at 47.

70 Kavanagh, *supra* note 40 at 66.

71 Nye, *supra* note 36 at 54.

72 Kavanagh, *supra* note 40 at 66 [footnotes omitted].

points to this kind of answer when he talks about formal institutional constraints and public norms as ongoing sources of resilience even as the separation of powers may be breaking down. Professor Nye emphasizes the importance of internal checks provided by a role morality which limits the discretionary power of all public actors, right up to the political executive.⁷³ The idea of a mixed constitution, and its association with public faith, provides a potential source of resilience for Canadian public law.

IV. Separating, Mixing, Checking, Balancing, Reviewing, Moderating, and Dialoguing

Public power required separation and redistribution. But that was not the only *telos* of the historical process. Once separated, we need to create a variety of institutional interrelations to achieve other goals such as institutional accountability and integrity, opportunities for participation, and the development of expertise and efficiencies. As Hugh Breakey phrases it, “we separate only to reconnect.”⁷⁴ One route to reconnection is by looking back to the idea of a mixed constitution, since, as Professor Levy writes, “[t]he continuities between ancient and modern constitutionalism run both backward and forward.”⁷⁵

I have argued that the institutional pluralism that the administrative state represents is desirable because it has the potential to counteract pooling of power. Our constitutional model does not prohibit shared or overlapping functions so long as powers exercised are within jurisdiction and actors stay within the bounds of their authority.⁷⁶ Institutional design considerations guide us in our choice about whether to divide, to fuse, to coordinate, to compete, to separate, to balance, to check and so on. Jurisprudence can make these choices evident and disclose the purposes, strengths, and failings of various institutional relations, particularly where overlaps and fusions occur. In this way, judicial decisions themselves function as a feedback loop leading to potential opportunities for reform.

This reflection has argued that we might better see these considerations if we moved beyond the current conception of the separation of powers to a more nuanced understanding. We might, for example, revive the older model of a mixed constitution but update its content. As Jacob Levy writes, this revival has the potential “to simulate the desirable effects of ancient constitutionalism even after its traditional forms became anachronistic.”⁷⁷ If that seems too far-fetched, we can further develop the seemingly dormant idea of institutional dialogue in Canadian public law. We even have a toehold in the *Patriation Reference* as a launching pad for either possibility.

73 Nye, *supra* note 36 at 51.

74 Hugh E Breakey, “Dividing to Conquer: Using the Separation of Powers to Structure Inter-Relations between Institutions” (2014) 12 *Research in Ethical Issues in Organizations* 29.

75 Jacob T Levy, “Montesquieu’s Constitutional Legacies” in Rebecca E Kingston, ed, *Montesquieu and his Legacy* (Albany: SUNY Press, 2009) 115 at 117 [Levy, “Montesquieu”].

76 See Iain Stewart, “Men of Class: Aristotle, Montesquieu and Dicey on the ‘Separation of Powers’ and ‘The Rule of Law’” (2004) 4 *Macquarie LJ* 187.

77 Levy, “Montesquieu”, *supra* note 75 at 125.

Are There “Sources of Resilience” When the Separation of Powers Breaks Down?

Arjun Tremblay*

I. Introduction: Challenges to the Separation of Powers

Jacob Levy describes three variants of the separation of powers in the 31st Annual McDonald Lecture in Constitutional Studies, only one of which is germane to this reflection. The first variant he describes is based solely on the independence of the judiciary from both the executive and legislative branches of governments; consequently, this variant encompasses both presidential and parliamentary systems under its conceptual ambit. Another variant, which Levy attributes to Montesquieu, envisages the separation of powers between executive, judicial, and legislative branches as a way of allowing for the “pooled”¹ rule of “the one” (i.e. monarch), “the few” (i.e. aristocrats), and “the many” (i.e. the people). Levy also describes a distinctly American variant of the separation of powers undergirded by a system of checks and balances. This variant was designed to ensure “mutual monitoring between executive and legislative”² and it vests the legislative branch with the power to impeach the executive in order to “maintain effective limits on the political power and the political ambition of the president.”³

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2 *Ibid* at 10.

3 *Ibid*.

In narrowing his focus to this distinctly American variant, Levy identifies political parties and partisanship as two main threats to the separation of powers and, by extension, to the survival of constitutional democracy. More specifically, he argues that: “[the] imagined rivalry between legislative and executive, simply as offices or institutions, gets replaced quite rapidly by the emergence of loyalty to a partisan side.”⁴ In a unified government — where the same political party controls both the executive branch as well as majority control of both upper and lower chambers of the legislature — partisan loyalty supplants loyalty to a particular branch of government, thus creating the conditions for “a relatively unconstrained executive, effectively not subject to the rule of law.”⁵ The executive is further constitutionally unfettered and “lawless”⁶ when, according to Levy, it exploits nationalism and populist ideology and presents itself as “the voice of the undifferentiated, unified, *true* people.”⁷ According to Levy, “unconstrained executives” can deploy the instruments of government both to persecute their opponents and to protect themselves from “any such indignity as being held to legal account for their action.”⁸ Levy nonetheless concludes his lecture on a mildly optimistic note. He acknowledges that, while the challenges to the separation of powers and constitutional democracy are real, “perhaps there are other sources of resilience in constitutional democratic systems I have not identified that will meet these challenges.”⁹

Are there “sources of resilience” when the separation of powers breaks down? The following reflection explores a puzzle in contemporary American politics and, in so doing, brings to light potential “sources of resilience” that may help address the four key challenges to constitutional democracy — political parties, partisan loyalty, unified governments, and “unconstrained executives” — that Levy identifies. To be clear: although Levy focuses mainly on the executive’s legal accountability, it is important to note that a unified government is also a “minimum winning coalition”¹⁰ that can bypass the institutional barriers in the lawmaking process that result from the separation of powers. A “minimum winning coalition” in a presidential democracy can act much like a majority government in a parliamentary democracy and pass laws along strictly partisan lines and without the consent of opposition parties. Therefore, when electoral outcomes lead to the formation of unified governments, partisan loyalty can both free executives from legal responsibility and, in essence, veto-proof the lawmaking process. The focus of this reflection is on identifying potential “sources of resilience” against the deployment of a deeply partisan policy agenda by a minimum winning coalition and an “unconstrained executive.”

The puzzle under examination in this reflection concerns the persistence of multilingual accommodation in the United States during the 115th Congress, which lasted from January 3, 2017 to January 3, 2019. For this period of time, the Republican Party held majority control of both chambers of the legislature, and when Donald Trump was inaugurated on January 20, 2017, the legislative and executive branches then formed a “unified” Republican government. As this reflection will show, these conditions were more than ideal for the deeply par-

4 *Ibid* at 12.

5 *Ibid*.

6 *Ibid* at 15.

7 *Ibid* [emphasis in original].

8 *Ibid* at 16.

9 *Ibid* at 17.

10 William H Riker, *The Theory of Political Coalitions* (New Haven, CT: Yale University Press, 1962).

tisan “Official English” movement to finally succeed in making English the official language of the United States and in putting an end to nearly six decades of language accommodation for American immigrants of limited English proficiency. Contrary to what one might have expected, this did not happen. Not only did Republican-sponsored “Official English” bills fail to pass out of a majority Republican Congress, but the only presidential candidate in the last three decades overtly sympathetic to the enshrinement of “Official English” chose not to rescind Executive Order 13166, a Clinton-era executive order mandating language accommodation by federal agencies and departments.

The “Official English” movement’s failure to entrench monolingualism at the federal level is directly attributable to the decisions of chairs of two congressional committees not to hold hearings on “Official English” bills and to President Trump’s decision not to rescind Executive Order 13166. There is further evidence that this failure was the result of internecine conflict within the Republican Party, the toxic and racist politics of the key congressional sponsor of “Official English” legislation, the size of the American “minority electorate,” and the absence of national level citizens’ initiative. Based on this evidence, this reflection concludes that there may be several “sources of resilience” even where the separation of powers seems to have failed.

II. The Puzzle: Persistence of Multilingual Accommodation in an Inhospitable Environment

Since the late 1960s, the United States federal government has developed and implemented three major language accommodation policies for immigrants with limited English proficiency. First, in 1968 the federal government incorporated the *Bilingual Education Act* of 1968 (*BEA* 1968) under Title VII of the *Elementary and Secondary Education Act* of 1965. The *BEA* 1968 encouraged local educational agencies to develop bilingual education programs for children with limited English proficiency as well as “programs designed to impart to students a knowledge of the history and culture associated with their language.”¹¹ From 1968 to 1994, the federal government set aside hundreds of millions of dollars for the *BEA*’s implementation; following the adoption of the *No Child Left Behind Act* of 2002, minority language accommodation in education was reimagined as education in English language acquisition and the *BEA* was effectively replaced by the *English Language Acquisition, Language Enhancement, and Academic Achievement Act*. Second, in 1975 the federal government amended the *Voting Rights Act* of 1965 to include minority language assistance provisions in section 203, which outlines “minority language assistance provisions” that require *inter alia* that covered jurisdictions¹² provide registration and voting materials in languages other than English.¹³ Third, in the waning months

11 *Bilingual Education Act* of 1968, Pub L No 90-247, § 704(c)(2) at 817.

12 The United States Department of Justice defines a covered jurisdiction as follows: “A jurisdiction is covered under Section 203 where the number of United States citizens of voting age is a single language group within the jurisdiction: Is more than 10,000, or...Is more than five percent of all voting age citizens, or...On an Indian reservation, exceeds five percent of all reservation residents; and...The illiteracy rate of the group is higher than the national illiteracy rate.” “About Language Minority Voting Rights” (2020), online: *The United States Department of Justice* <www.justice.gov/crt/about-language-minority-voting-rights> [perma.cc/ESV5-D3SR].

13 Some scholars have questioned the effectiveness of minority language assistance provisions given that these provisions of the VRA “do not include an automatic trigger that necessitates local voting

of his second term in office, President Bill Clinton issued Executive Order 13166 which re-interpreted the anti-discrimination provisions of Title VI of the *Civil Rights Act* of 1964 to also include a duty “to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency.”¹⁴ As a result of Executive Order 13166, each federal agency and department is required to design and to implement a Language Access Plan (LAP) detailing the steps they are taking to deliver their services in languages other than English.

By contrast to these policy developments, there is also a movement in the United States to make English the country’s official language and, in so doing, to assert English monolingualism in the American public sphere. This so-called “Official English” movement has been around for more than a century. Its two main representative organizations are: 1) US English, an organization founded by Senator S I Hayakawa in 1983 and whose current advisory board includes Arnold Schwarzenegger and Francis Fukuyama among others¹⁵ and 2) ProEnglish, an organization that was founded in 1994 by John Tanton — a progenitor of modern “white identity politics”¹⁶ — and that the Anti-Defamation League has identified as an “anti-immigration umbrella organization.”¹⁷ Both organizations advocate the enshrinement of “Official English” at the state and federal level, but they differ somewhat in their other objectives. US English’s main objective is to ensure that the business of government at the state and federal level is conducted solely in English, but the organization also advocates “common-sense exceptions permitting the use of languages other than English for such things as public health and safety services, judicial proceedings, foreign language instruction and the promotion of tourism.”¹⁸ By contrast, ProEnglish seeks not only to make English the official language of governments at both the state and federal levels, but also aims at putting an end to bilingual education and at “repealing federal mandates for the translation of government documents and voting ballots into languages other than English.”¹⁹ It should also be noted that understandings of the sources of popular support for “Official English” differ as well: for Raymond Tatalovich,²⁰

procedures and processes to be scrutinized by the federal government. Instead, the implementation of Sections 203 and 4(f)(4) depends on the cooperation of local election authorities.” Melissa J Marschall and Amanda Rutherford “Voting Rights for Whom? Examining the Effects of the Voting Rights Act on Latino Political Incorporation” (2016) *American Journal of Political Science* 60:3 at 590.

14 Exec. Order No. 13166, Fed. Reg. 65159 (Aug. 16, 2000), www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf.

15 “U.S. English Advisory Board” (2020), online: *U.S. English* <www.usenglish.org/advisory-board/> [perma.cc/QNC5-8VB8].

16 Nicholas Kulish, “Dr. John Tanton, Quiet Catalyst in Anti-Immigration Drive, Dies at 85”, *The New York Times* (18 July 2019) online: <www.nytimes.com/2019/07/18/us/john-tanton-dead.html> [perma.cc/V3WQ-QF57].

17 “Anti-Immigrant Umbrella Group U.S., Inc.’s New Website Reveals Organization’s Influence” (21 February 2013), online (blog): *Anti-Defamation League* <www.adl.org/blog/anti-immigrant-umbrella-group-us-incs-new-website-reveals-organizations-influence> [perma.cc/4CWC-FSGG].

18 “Official English” (2020), online: *U.S. English* <www.usenglish.org/official-english/about-the-issue/> [perma.cc/J8FP-Q3KQ].

19 “Our Mission” (2021), online: *ProEnglish* <proenglish.org/our-mission/> [perma.cc/JQ6Q-ZJ5X].

20 See Raymond Tatalovich, *Nativism Reborn? The Official English Language Movement and the American States* (Lexington, KY: University Press of Kentucky, 1995).

“Official English” is evidence of “nativism reborn,” whereas Deborah J Schildkraut²¹ points to support for “Official English” from civic republicans, liberals, and soft-multiculturalists as well as from nativists and anti-immigrant xenophobes.

The “Official English” movement has had considerable success at the subnational level. Between 1919 and 1921, Nebraska state legislators passed the first three “Official English” laws in the United States. The laws targeted the state’s German-speaking minority; they enshrined the “American language” (i.e. English) as the state’s official language and they also made it illegal for public assemblies to be conducted in languages other than English.²² In 1923, Illinois became the second state to enshrine the “American language” as the state’s official language. As opposed to the Nebraska laws, the Illinois’ “Official English” law was articulated as a way of clearly differentiating the American republic from its British colonial roots.²³ While no other state passed an “Official English” law for nearly six decades thereafter, 30 states passed “Official English” laws between 1980 and 2016. In total, at the time of writing, 32 states have made English their official language.

The “Official English” movement has not fared nearly as well at the national level; members of Congress have thus far introduced 90 “Official English” bills to no avail. While “Official English” bills have as a primary objective the declaration of English as the United States’ official language, some bills have also aimed at repealing bilingual education policies and language assistance in voting and, in some cases, at having Executive Order 13166 declared unconstitutional. To this day, none of these bills has been signed into law and the United States still does not have an official national language. The closest the “Official English” movement came to succeeding was in 1996, when the *Bill Emerson English Language Empowerment Act* of 1996 passed out of the House of Representatives and was read twice in the Senate before being referred to the Senate Judiciary Committee for final consideration. The Senate Judiciary Committee did not hold hearings on the bill prior to the end of the 104th congressional session, effectively killing the *Bill Emerson English Language Empowerment Act*.

The conditions seemed most propitious for the “Official English” movement to finally succeed during the 115th Congress, which lasted from January 3, 2017 to January 3, 2019. During the 115th Congress, the Republican Party held majority control of both the upper and lower chambers of the legislative branch. This is significant because, as **Table 1** below shows, support for “Official English” is deeply partisan and comes overwhelmingly from the Republican Party. As one can see, Congressional sponsors and co-sponsors of the 39 “Official English” bills introduced in Congress between 2001 and 2021 were almost all Republicans. Consequently, there should have been little opposition to an “Official English” bill passing out of a Congress controlled by Republicans.

21 See Deborah J Schildkraut, *Press ‘One’ for English: Language Policy, Public Opinion, and American Identity* (Princeton, NJ: Princeton University Press, 2007).

22 Tatalovich, *supra* note 20 at 35.

23 Dennis Barron, “Federal English” in James Crawford, ed, *Language Loyalties: A Source Book on the Official English Controversy* (Chicago: The University of Chicago Press, 1992) at 39.

Table 1. Partisan Support for “Official English” Bills (2001-2021)

Number of Bills	Sponsors	Party Affiliation: Percentage Republican	Co-Sponsors	Party Affiliation: Percentage Republican
39	12*	100	348**	95.11***

* Six members of Congress sponsored multiple bills: Rep. Dan Burton x 2; Rep. John T Doolittle x 2; Rep. Peter T King x 7; Rep. Steve King x 11; Rep. Thomas G Tancredo x 2; Sen. James M Inhofe x 9. Each of these sponsors was only counted once in column 2.

** Members of Congress who co-sponsored multiple bills were only counted once.

*** The breakdown by party affiliation is: 331 Republicans, 16 Democrats, 1 Independent.

Furthermore, with Donald Trump’s inauguration on January 20, 2017, both the executive and legislative branches of government were under “unified” Republican control, meaning that legislation could pass out of Congress and be signed into law without the requirement of bipartisan support. To be clear, the 115th Congress was the most recent of three unified Republican governments since the first “Official English” bill was introduced in Congress in the early 1980s. However, this unified government differed from its two predecessors. While both legislative branches of government were also under “unified” Republican control during the 108th and 109th Congresses, then President George W Bush could hardly have been considered a committed advocate of “Official English.” Paradoxically, while he signed the *No Child Left Behind Act* into law, he was also the first President of the United States to deliver an official address in a language other than English²⁴ and he had previously opposed the enshrinement of English as the language of government when he was Governor of Texas.²⁵ Donald Trump, by contrast, was far more receptive to “Official English.” During a 2015 Republican presidential debate he stated that “we have a country where, to assimilate, you have to speak English ... we have to have assimilation ... this is a country where we speak English.”²⁶ Once he became the Republican nominee for President, Trump ran an “English-only” presidential campaign²⁷ and ProEnglish claims to have met with White House staff five times in 2018 to discuss the English Language Unity Act.²⁸ In addition, Vice President Mike Pence co-sponsored five “Official English” bills when he was a Senator, which suggests that the drive for monolingualism had another important ally in the White House.

24 Maria Elena Fernandez, “Bush Tries His Hand at Spanish in Radio Talk”, *Los Angeles Times* (6 May 2001) online: <www.latimes.com/archives/la-xpm-2001-may-06-mn-60019-story.html> [perma.cc/HRP9-UZH3].

25 James Thomas Tucker, “The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006” (2006) 33:2 J Legis 205 at 210-211.

26 CNN, “Trump: We speak English here, not Spanish” (16 September 2015) at 00h:00m:17s, online (video): *YouTube* <www.youtube.com/watch?v=eNjcAgNu1Ac> [perma.cc/HK6K-TRRG].

27 Shane Goldmacher, “Trump’s English-only campaign”, *Politico* (23 September 2016) online: <www.politico.com/story/2016/09/donald-trumps-english-only-campaign-228559> [perma.cc/4YHY-F8AY].

28 Stephen Guschov, “ProEnglish Launches Fall Campaign In Advance Of November Elections” (4 September 2018), online: <proenglish.org/2018/09/04/proenglish-launches-fall-campaign-in-advance-of-november-elections/> [perma.cc/64UW-4BCP].

Despite these propitious circumstances, the “Official English” movement failed again at the federal level. **Table 2**, below, shows that there were two attempts to pass “Official English” legislation during the 115th Congress, one in the House and one in the Senate. Both bills (i.e. bills H.R.997 and S.678) were given the same short title: the *English Language Unity Act* of 2017. Their nearly identical texts acknowledged that the United States’ “benefits from... diversity”²⁹ but also that “the common thread binding individuals of differing backgrounds has been the English language.”³⁰ The bills sought to amend Title IV of the US Code to include a declaration that “the official language of the United States is English”³¹ and to affirm that “[representatives] of the Federal Government shall have an affirmative obligation to preserve and enhance the role of English as the official language of the Federal Government.”³² The House bill was first referred to the Committee on Education and the Workforce and to the Committee on the Judiciary on February 9, 2017, before then being referred to the Subcommittee on Immigration and Border Security where it languished for close to two years until it was effectively killed when the 115th Congress ended. The Senate bill was read twice on March 21, 2017, before being referred to the Committee on Homeland Security and Governmental Affairs where it too was killed when the 115th Congress came to a close.

Table 2. “Official English” Bills introduced during the 115th Congress (2017-2019)

Bill	Introduced (Senate or House, Date)	Sponsor	Number of Co-sponsors	Final Action
<i>English Language Unity Act</i> of 2017 (H.R.997)	Introduced in House on 02/09/2017	Representative Steve King (Republican, Indiana)	72	Referred to the Subcommittee on Immigration and Border Security
<i>English Language Unity Act</i> of 2017 (S.678)	Introduced in Senate on 03/21/2017	Senator Jim Inhofe (Republican, Oklahoma)	6	Referred to the Committee on Homeland Security and Governmental Affairs

There was some scuttlebutt that the Trump administration might take matters into its own hands and make English the official language of government, but this too did not come to pass. On January 20, 2017, the day Donald Trump assumed office, the LA Times ran a story³³ drawing attention to White House’s official website — WhiteHouse.gov — which no longer included its Spanish translation function. The blogosphere picked up this story and very quickly began

29 US, Bill HR 997, *English Language Unity Act*, 115th Cong, 2017, § 2(1) [Bill 997]; US Bill S 678, *English Language Unity Act*, 115th Cong, 2017, § 2(1) [Bill 678].

30 Bill 997, *supra* note 29 at § 2(2); Bill 678, *supra* note 29 at § 2(2).

31 Bill 997, *supra* note 29 at § 161; Bill 678, *supra* note 29 at §161.

32 Bill 997, *supra* note 29 at § 162; Bill 678, *supra* note 29 at § 162.

33 Joshua Gillin, “Donald Trump did not make English the Official Language of the United States”, *Politifact* (9 February 2017) online: <www.politifact.com/factchecks/2017/feb/09/blog-posting/donald-trump-did-not-make-english-official-langug/> [perma.cc/f6Y3].

circulating a rumour that the Trump administration had made English the country's official language.³⁴ A few days later, a Trump aide dismissed the rumour and stated that the Spanish option would be quickly restored and that its removal had been an accident.³⁵ On March 12, 2019, Newsmax and ProEnglish.org published then Press Secretary Sarah Huckabee Sanders' statement that making English the official language of the United States is "the position of the White House."³⁶ Both Newsmax and ProEnglish.org also intimated that the Trump administration could make English the official language of government by rescinding Executive Order 13166 and issuing an "Official English" Executive Order.³⁷ Nevertheless, the Trump administration took no action against Executive Order 13166. In fact, during the Trump administration, federal agencies such as the Federal Election Commission, the Department of Education, the Public Benefit Guaranty Corporation, and the Environmental Protection Agency each issued updated Language Assistance Plans demonstrating their compliance with Executive Order 13166. In brief, the federal government continues to this day to conduct its business in English as well as in other languages.

III. Why Did the "Official English" Movement Fail at the Federal Level Despite Conditions That Should Have Facilitated its Success?

By not holding hearings on both versions of the *English Language Unity Act* of 2017 prior to the conclusion of the 115th Congress, two congressional committees — the Committee on Homeland Security and Governmental Affairs and the Subcommittee on Immigration and Border Security — played a pivotal role in stopping the legislative drive to make English the official language of the United States. More specifically, Senator Ron Johnson and Representative Jim Sensenbrenner, chairs of the Committee on Homeland Security and Governmental Affairs and the Subcommittee on Immigration and Border Security, respectively, were the key gatekeepers against "Official English." As committee chairs, it was up to them to decide whether or not to hold hearings to consider the "Official English" bills with which their committees were presented. Since neither chair opted to hold hearings, Senator Johnson and Representative Sensenbrenner effectively vetoed the bills.

Why weren't hearings held? **Table 3**, below, shows that only two of the eight Republicans sitting on the Committee on Homeland Security and Governmental Affairs during the 115th Congress had ever co-sponsored an "Official English" bill. Senator Rob Portman co-sponsored the *English Language Unity Act* of 2005 during the first session of the 109th Congress³⁸ while Senator Mike Enzi co-sponsored the *English Language Unity Act* of 2006 during the

34 *Ibid.*

35 Noah Bierman, "White House promises website will restore Spanish content: 'We're just building up'", *Los Angeles Times* (24 January 2017) online: <www.latimes.com/politics/washington/la-na-trailguide-updates-201701-htmlstory.html#white-house-promises-website-will-restore-spanish-content-were-just-building-up> [perma.cc/4TZ4-G7RF].

36 John Gizzi, "White House Backs English As Official US Language", *NewsMax* (12 March 2019) online: <www.newsmax.com/john-gizzi/white-house-donald-trump-english-us-language/2019/03/12/id/906613/>; Stephen Guschov, "White House Backs English As Official US Language", *ProEnglish* (12 March 2019) online: <proenglish.org/2019/03/12/white-house-backs-english-as-official-us-language/> [perma.cc/RUH5-CX3W].

37 *Ibid.*

38 When Portman was Representative of Ohio's 2nd district.

second session of the 109th Congress and the *S I Hayakawa Official English Language Act* of 2007 during the 110th Congress. In brief, most Republicans on the Committee on Homeland Security and Governmental Affairs, including the committee's chair, had never sponsored or co-sponsored an "Official English" bill. Moreover, it had been a decade since Senators Portman and Enzi had themselves co-sponsored an "Official English" bill. Despite the deeply partisan nature of "Official English" initiatives, the Republicans sitting on the Committee on Homeland Security and Governmental Affairs during the 115th Congress were not, by all appearances, enthusiastic about making English the official language of the United States.

Table 3. Which Republican members of the Committee on Homeland Security and Governmental Affairs (115th Congress) previously sponsored/co-sponsored "Official English" bills

Members	"Official English"
Ron Johnson, chairman	No
John McCain	No
Rob Portman	Yes (x1)
Rand Paul	No
James Lankford	No
John Hoeven	No
Steve Daines	No
Mike Enzi	Yes (x2)

Table 4, below, shows that the same cannot be said about two of the Republicans sitting on the Subcommittee on Immigration and Border Security. Between 2007 and 2013, Representative Jim Jordan (Ohio) co-sponsored four "Official English" bills while Representative Steve King (Iowa) sponsored eleven "Official English" bills, including the *English Language Unity Act* of 2017, and co-sponsored six other "Official English" bills. Although Representative Jim Sensenbrenner — the chair of the Subcommittee on Immigration and Border Security — co-sponsored four "Official English" bills between 1980 and 2000, he has neither sponsored nor co-sponsored an "Official English" bill since then. In addition, Sensenbrenner was a key participant in the re-authorization of the *Voting Rights Act* in 2006, and with it the provisions for minority language assistance in voting. Sensenbrenner has since led the legislative charge to restore preclearance criteria in the application of the *Voting Rights Act* after they were rendered unenforceable following the Supreme Court's ruling in *Shelby County v Holder*³⁹, on the application of the *Voting Rights Act's* coverage formula. By contrast, Steve King is not only an outspoken critic of the minority language assistance provi-

39 133 S. Ct. 2612 (2013).

sions⁴⁰ in the *Voting Rights Act*, he also voted against the re-authorization of the *Voting Rights Act* in 2006.⁴¹ Furthermore, during the 115th Congress, Representative King was chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties and he chose not to hold hearings on the *Voting Rights Amendment Act* of 2017, a bill that Representative Sensenbrenner had sponsored. In other words, there is a distinct possibility that the House version of the *English Language Unity Act* of 2017 was killed in a tit-for-tat conflict between Republicans with fundamentally different perspectives on voting rights.

Table 4. Which Republican members of the Subcommittee on Immigration and Border Security (115th Congress) previously sponsored/co-sponsored “Official English” bills

Members	“Official English”
Jim Sensenbrenner, Chairman	No
Raul Labrador, Vice Chair	Yes (x1)
Lamar S. Smith	Yes (x1)
Steve King	Yes (x17)
Jim Jordan	Yes (x4)
Ken Buck	No
Mike Johnson	No
Andy Biggs	No

Although committee chairs have power to “enforce the status quo against the parent body’s wishes,”⁴² they are only partial veto players. A bill can be discharged from a committee and brought to the floor for consideration if an absolute majority in the House of Representatives signs a discharge petition. This means that the House version of the *English Language Unity Act* of 2017 could have been discharged from the Subcommittee on Immigration and Border Security with or without Representative Sensenbrenner’s consent. However, successful discharge petitions are a rarity: between 1931 and 2002, 563 discharge petitions were filed, yet only 47 obtained an absolute majority of signatories, and only 2 of the discharged bills became law.⁴³ Given that only 73 of 236 House Republicans had initially backed (as either sponsor or co-sponsor) the *English Language Unity Act* of 2017, it was improbable that the *English Lan-*

40 Dean Norland, “House Votes to Extend Voting Rights Act”, *ABC News* (13 July 2006) online: <abcnews.go.com/Politics/story?id=2190191&page=1> [perma.cc/W5UY-Y8SU].

41 Tom Curry, “Conservatives not keen on effort to revise key section of Voting Rights Act”, *NBC News* (18 July 2013) online: <www.nbcnews.com/politics/politics-news/conservatives-not-keen-effort-revise-key-section-voting-rights-act-flna6c10672368> [perma.cc/T6GM-NCC2].

42 David Epstein, “An informational rationale for committee gatekeeping power” (1997) 91:3/4 *Public Choice* 271 at 271.

43 Richard S Beth, “The Discharge Rule in the House: Recent Use in Historical Context” (17 April 2003), online (pdf): *Report for Congress* <www.everycrsreport.com/files/20030417_97-856GOV_3885a71978a83cada649980d602827d2c0d4a326.pdf> [perma.cc/Z9JV-3Y7A].

guage Unity Act of 2017 was going to secure enough signatures to discharge it had the bill's sponsors opted to file a petition. It is also likely that this option was avoided because of the bill's sponsor, Representative Steve King. Over the years, King has made a number of discriminatory and racist statements which include comparing undocumented migrants to livestock,⁴⁴ describing undocumented migrants as having “calves the size of cantaloupes,”⁴⁵ and claiming that “nonwhite groups” have contributed little to civilization.⁴⁶ King is also notorious for his friendly associations with the who's who of right-wing anti-immigrant populists such as Geert Wilders, Marine LePen, Frauke Petry, and Heinz-Christian Strache.⁴⁷ And, in January 2019, shortly after he asked, “White nationalist, white supremacist, Western civilization — how did that language become offensive?” in an interview with the *New York Times*,⁴⁸ he was stripped of his committee assignments and formally rebuked in the House of Representatives by a vote of 416-1.⁴⁹ In light of King's track record, it is unsurprising then that Republicans, particularly those trying to soft pedal nativist and anti-immigrant policies, would be unwilling to put their full weight behind a bill that he had sponsored.

To be sure, the legislative process of passing an “Official English” law could have been avoided altogether; President Trump could have simply followed ProEnglish's advice and signed an executive order both rescinding Executive Order 13166 and declaring English the official language of government. There are possible electoral and institutional explanations for why this did not happen. Koopmans et al's 2012 study⁵⁰ of liberal and restrictive citizenship rights (including minority language rights) for immigrants in Western Europe shows that a sizeable “minority electorate” disincentivizes political parties from restricting immigrant rights. Foreign-born naturalized American citizens account for 10% of the total national electorate⁵¹ which means that the American “minority electorate” is close to the size of the minority electorate in the UK,⁵² which has one of the most “inclusive” immigrant citizenship regimes in Western Europe. By contrast, Deborah J Schildkraut's explanation of the rapid spread of “Official English” laws at the subnational level points to the presence of institutions of direct democracy (i.e. citizens' initiatives) as a determining factor for whether or not a state is likely to make English its official language. She therefore concludes that the prospect of seeing a national level “Official English” law are limited not only due to the size of the foreign-born

44 Trip Gabriel “A Timeline of Steve King's Racist Remarks and Divisive Actions”, *New York Times* (15 January 2019), online: <www.nytimes.com/2019/01/15/us/politics/steve-king-offensive-quotes.html> [perma.cc/D8UC-PAX9].

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 Associated Press, “House votes 416-1 to rebuke Steve King's comments on white supremacy; Illinois' Bobby Rush lone no vote”, *Chicago Tribune* (15 January 2019) online: <www.chicagotribune.com/nation-world/ct-steve-king-white-nationalism-resolution-20190115-story.html> [perma.cc/4BNQ-NV86].

50 Ruud Koopmans, Ines Michalowski & Stine Waibel, “Citizenship Rights for Immigrants: National Political Processes and Cross-National Convergence in Western Europe, 1980-2008” (2012) 117:4 *American Journal of Sociology* 1202.

51 Abby Budiman, Luis Noe-Bustamante & Mark Hugo Lopez, “Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020,” online: *Pew Research Center* <www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/> [perma.cc/2NTE-XNC5].

52 Koopmans, *supra* note 49 at 1225.

American electorate, but also due to the absence of a “national direct initiative ... [which] could mean that the chances of passage in any given year are near zero.”⁵³

IV. Conclusion: Sources of Resilience

The foregoing discussion suggests that there are several potential “sources of resilience” that could help address the challenges to the separation of powers that Jacob Levy identifies in the 31st Annual McDonald Lecture in Constitutional Studies. Overall, the failure of the “Official English” movement under conditions that should have facilitated its success brings to light the importance of formal institutional constraints even where the separation of powers seems to have failed.

More specifically, the evidence presented above shows that congressional committees represent critical veto-points in the lawmaking process and that veto players (i.e. committee chairs) can use their agenda-setting powers to act against partisan interests. Following from the previous point, Representative Sensenbrenner’s decision not to hold hearings on a Steve King-sponsored “Official English” bill also suggests that partisan loyalty in a unified government may sometimes be eclipsed by the personal politics and policy ambitions of individual lawmakers. Additionally, President Trump’s decision not to rescind Executive Order 13166 points to the possible importance of the size of the American minority electorate as key “source of resilience” against the implementation of a populist and nationalist policy agenda. However, it has also been argued that “Mr. Trump could have won in 2020 if only he had done as well among white voters as he did in 2016.”⁵⁴ If this assessment is accurate, then a majority electorate may be just as important a constraint on a populist minimum winning coalition as the “minority electorate.” Finally, a potential “source of resilience” is evidenced by the repudiation of Steve King’s racism and nativism, albeit 18 years after he first assumed office. It may be our changing societal norms that prove to be the most effective buttresses against both a unified government deploying a populist and nationalist agenda and a populist and nativist leader vindictively deploying executive power. For this possible source of resilience to be effective, our societies will have to put our full weight behind the ongoing movement for racial justice and equality and the deployment of a new politics of diversity.

53 Deborah J Schildkraut, “Official-English and the States: Influences on Declaring English the Official Language in the United States” (2001) 54:2 Political Research Quarterly 445 at 455.

54 Nate Cohn, “Why Rising Diversity Might Not Help Democrats as Much as They Hope; News Analysis”, *The New York Times* (4 May 2021), online <www.nytimes.com/2021/05/04/us/census-news-republicans-democrats.html?smtyp=cur&smid=fb-nytimes&fbclid=IwAR3dzTRUHX89lMQ9NBR1TuQYGIjAsfuTRyCB4t2pmkMrXHUhace0WHiEc> [perma.cc/AUK8-AJXN].

Harnessing Distrust and the Power of Intercession for the Separation of Powers

Yann Allard-Tremblay*

I. Introduction

In what follows, I reflect on themes arising from my reading of Jacob Levy's *The Separation of Powers and the Challenge to Constitutional Democracy*. According to Levy, the separation of powers in contemporary constitutional democracies is failing, thus endangering the rule of law. Briefly, this is because political parties have bridged the gap between the legislature and the executive: by giving rise to partisan politics that cross the institutional divide, political parties have dampened, if not disabled, the institutional incentive and motivation of the legislature to keep the executive in check. Furthermore, when this is combined with the myth of the united and undifferentiated people, which the executive, populistically, can easily claim to embody, the simple act of opposing the executive may be framed as seditious. In the end, the power of the executive is set free by the partisan loyalty of fellow party members and by the framing of opposition as disloyal and deleterious to the polity.

I find Levy's account persuasive and my intervention is not meant as an oppositional response; it is rather a reflection on considerations relevant to addressing and expanding on the challenges to constitutional democracy identified by Levy. Specifically, I am interested in thinking about the need to harness distrust to empower political actors to intercede — that is, to keep power in check — and thus to more broadly contribute to the rule of law. This emphasizes the role that factions may play in addressing the challenges to constitutional democracy, and it makes clear that these challenges should not be limited to the debilitation of institutional checks on the executive. Indeed, I contend that for government to count as constitutional, and to offer the protection against arbitrary executive power with which Levy is concerned, groups

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like cultural and racialized minorities, Indigenous peoples, and social classes, for instance, would need to be institutionally empowered to intercede in their own favour.

II. Brief Summary of Levy's Conceptualization of Constitutionalism

Levy offers an account of constitutionalism that connects it with the rule of law and the separation of powers. As he explains, constitutionalism is a feature of diverse political orders, which can be minimally understood as the independent application of the law, especially in criminal cases, by institutions protected from the mingling of — and insulated from the “direct influence” of — the legislative and executive powers.¹ Furthermore, as Levy explains by appealing to the idea of the rule of law, the powers-that-be must themselves be subjected to the independent and impartial application of the law. For Levy, in order to consolidate this type of constitutionalism as a feature of political orders, the separation of powers is essential; this refers to the “institutional separation of rulemaking from rule-enforcement, and the attendant system of accountability that prevents any political agent from being able to circumvent the regular separated system.”² It is only when power is institutionally divided in this way that “a subject can know, and be assured of knowing, what the law is, and that they will be safe in their liberty and person if they comply with it.”³

III. Harnessing Distrust

Levy explains, following Montesquieu's theorization, that the separation of powers can be understood as requiring the different branches of government to be under the control of distinct groups with the motivation to protect their own institutional position. Indeed, Montesquieu saw the separation of powers as fuelled by the privileges, rights, and interests of the members of distinct groups associated with a specific branch of government. For instance, the nobles would have the motivation — grounded in their “honour” — to “refuse orders from the king” and to “insist on their rights and privileges.”⁴ This class-based logic was transposed into the birthing American democratic republic — in which there was no nobility or royalty on which to rest the separation of powers — by imagining that the institutions created would attract the loyalty of their members and that the pride of their office would motivate them to keep the other branches in check. This may have worked, as Levy explains, had it not been for the birth of political parties, with their propensity to attract almost fanatical overriding loyalty and their crossing of institutional boundaries. All this conspires, for Levy, to dissolve the separation of powers.

Of interest to my reflections here is the central idea that the separation of powers needs to be fuelled by some underlying motivation. This means that institutions with the power to hold other branches of government in check are by themselves insufficient. Indeed, as Levy explains about Montesquieu: “he looked to the pre-political, extra-political, or not-merely-political social cleavages and orders in a society to provide motivational force that was impor-

1 Jacob T Levy, “The Separation of Powers and the Challenge to Constitutional Democracy” (2020) 25:1 Rev Const Stud 1 at 2 [Levy, “*Separation of Powers*”].

2 *Ibid.*

3 *Ibid* at 7.

4 *Ibid* at 8.

tant to constitutional balance and moderation.”⁵ In other words, the separation of powers can be viewed as an institutional arrangement that harnesses underlying motivations. But not only does it harness such motivations, it also recursively⁶ reinforces them by focalizing them in specific institutions. Beyond the motivation to protect one’s own rights, privileges, and interests, I contend that we can refer to the key underlying motivation of the separation of powers as distrust. As I argued elsewhere, distrust is “the reluctance or refusal to rely on someone [or an institution] when I expect [them] to either lack the ability or the will to fulfil [their] commitments.”⁷ Such a guarded disposition, if properly harnessed, can fuel an institutional separation of powers. In the end, part of the issue with the institutions of our contemporary democracies regarding the separation of powers is that they seek to create institutional incentives to distrust but fail to do so. This leads me to ask whether, rather than seeking to create distrust and institutional loyalty, we should instead embrace the need to harness and recursively reinforce actors’ existing propensity to distrust.

In the genealogy of the mixed constitution and the separation of powers presented by Levy, an important example of this harnessing and recursive reinforcement of distrust is conspicuously missing: the Tribune of the plebs. Levy writes about Rome and the creation of the Republic, mentioning that the plebeians fought for “institutional inclusion.”⁸ He highlights how, for all the cases he discusses, including Rome, “what was understood to be happening was a kind of pooling of powers,” and he suggests that “institutions that were created under mixed government were ways to ensure the joint activity of different actors in political societies.”⁹ Though the Roman Republic can be seen, as Levy suggests, as pooling power rather than separating it, it would be wrong to see the Tribune of the plebs as fully consistent with this logic. As Fustel de Coulanges explains, quoting the Roman historian Livy, the Tribune was the Tribune of the plebs, not of the people¹⁰ or of the whole city. As an institution, it retained and asserted a division between the patricians and the plebeians. Interestingly, one of the core powers of the Tribune was that of intercession: to physically intercede on behalf of plebeians and to stop the power and abuses of consuls and patricians.¹¹ Arguably, the Tribune embodied and consolidated the distrust of the plebs towards the patricians and thus enabled the checking of the patricians’ power. As Fustel de Coulanges further explains, in creating the Tribunes, the patricians “only granted that some of the plebeians would be inviolable. Yet, it was enough to provide safety for all.”¹² Is this not related to the logic associated with the separation of powers; that for liberty to be served, “power should be a check to power,” as Montesquieu puts it?¹³ My point here is that aspects of the mixed constitution might be more closely related to the separation of powers than Levy’s genealogy suggests; it would be worth inserting the Tribune

5 *Ibid.*

6 On recursion as combining “self-reference with positive feedback effects,” see: Robert Nichols, *Theft is property!: Dispossession and Critical Theory* (Durham: Duke University Press, 2020) at 9.

7 Yann Allard-Tremblay, “Trust and Distrust in the Achievement of Popular Control” (2015) 98:4 *The Monist* 375 at 377 [Allard-Tremblay].

8 Levy, “*Separation of Powers*,” *supra* note 1 at 4.

9 *Ibid* at 5.

10 Numa Denis Fustel de Coulanges, *La cité antique* (Paris: Flammarion, 1984) at 351 [Fustel de Coulanges].

11 *Ibid* at 350.

12 *Ibid* at 351 [translated by author].

13 Charles Louis de Secondat Baron de Montesquieu, *The Complete Works of M. de Montesquieu* (London, UK: T. Evans, 1777) at c IV [Montesquieu].

of the plebs in this genealogy, in part because this institution can help us see the importance of harnessing distrust from existing social divisions to empower intercessions.¹⁴

Following this digression to Ancient Rome, we can see that political parties and the myth of the uniform people are challenges that may be addressed by imagining contemporary political institutions that can harness distrust from existing divisions. There are various groups in our contemporary societies who are reluctant or refuse to trust those who exercise power or whose distinct interests dispose them to attach loyalty to group-specific institutions. However, the formal political agency of these groups remains channeled in a broadly uniform and general manner through our existing democratic institutions. Current political divisions such as ridings, provinces, or states for instance, with few exceptions,¹⁵ are not so oppositionally situated that their jealous dispositions could suitably fuel the type of distrust required for the separation of powers to function effectively. For instance, the various states of the US republic, as Adam Dahl and Lorenzo Veracini separately suggest, reproduce “a single political community across separate jurisdictions” rather than embody distinct polities that could vigilantly hold each other to account.¹⁶ Even if we acknowledge that federalism is to some extent efficient in curtailing unchecked power, it remains the case that it has neither managed to prevent the crisis of constitutional democracy discussed by Levy, nor, like other current political divisions, to track existing lines of distrust.

I do not seek to discuss in detail how harnessing distrust may be achieved, but I can gesture to some possibilities. Existing lines of distrust include, among others: urban and rural areas; racial and cultural minorities; gender and sexual orientations; Indigenous peoples; and social and economic classes. Accordingly, we can imagine political institutions that, even as they are embedded in wider institutions, would empower such groups, like the Tribune of the plebs, to intercede — that is, to check power. We can consider, for instance, how in Aotearoa New Zealand, seats are reserved for Māori in the House of Representatives and local governments can create Māori wards and constituencies.¹⁷ Such group-specific institutions may serve as nodes of mobilization from which the power of the majority and the loyalty demanded by statewide political parties may be challenged. Similarly, the United Nations Declaration on the Rights of Indigenous Peoples repeatedly refers to the free, prior, and informed consent of Indigenous peoples,¹⁸ which, if enacted in settler law, may empower Indigenous peoples to intercede on their own behalf from within the institutions of the settler state. We can also consider class-specific institutions. As I argued elsewhere,¹⁹ following John McCormick and his discussion

14 This speaks to other parts of Levy’s research, see: Jacob T Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000).

15 Jacob T Levy, “Federalism, Liberalism, and the Separation of Loyalties” (2007) 101:3 *The American Political Science Review* 459.

16 Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010) at 70; Adam Dahl, *Empire of the People: Settler Colonialism and the Foundations of Modern Democratic Thought* (Lawrence: University Press of Kansas, 2018) at 67.

17 Janine Hayward, “Mandatory Maori Wards in Local Government: Active Crown Protection of Maori Treaty Rights” (2011) 63:2 *Political Science* 186; Maria Bargh, “The Maori Seats” in Janine Hayward, ed, *New Zealand Government and Politics*, 6th ed (South Melbourne: Oxford University Press, 2015) 300.

18 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295 (I), 61st Sess, Supp No 295, UN Doc A/RES/61/295 (13 September 2007), online (pdf): *United Nations* <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

19 Allard-Tremblay, *supra* note 7.

of a contemporary people's Tribune,²⁰ class-specific institutions for the poor may be useful in harnessing distrust, and recursively reinforcing it, against the rich. This would reduce or at least challenge the control that the rich wield over the political process, and the same could be said about group-specific institutions for racial and cultural minority groups. In sum, such institutional arrangements, because they are grounded in underlying motivations to distrust, though they deny formal political equality and impede social unity, nevertheless empower members of these distinct groups to intercede and oppose power.²¹ If we truly face a crisis of constitutional democracy, it would be worth finding avenues to harness existing political divisions in such productive ways.

IV. Between Factions and the United Polity

Invitations to harness distrust and to build on existing political divisions may seem politically hazardous. There is an apparent risk that this would be taking us from Scylla towards Charybdis: from the unchecked power of the executive towards what the Greeks called stasis, a political crisis that leads to civic dissolution. Indeed, Levy explicitly notes that:

The American constitutional founders, as heirs to the republican tradition, were deeply suspicious of faction. Faction, after all, was what had divided both the old Greek city-states and the Italian city-states of the Middle Ages and early modernity. Political struggles between rich and poor or between supporters of rival demagogues put republican government in jeopardy.²²

As such, my invitation to think about ways to harness distrust — especially my explicit mention of the rich and the poor — may appear somewhat counter to the tradition of thought Levy is considering.

It is true that distrust is not an unalloyed good and that all political societies require a certain level of unity and trust.²³ Yet, disabling factions is not without issues. In practice, the “cures” to factional divides, as suggested by the *Federalist* No 10,²⁴ are either to dissolve factions into a uniform people or to multiply them. Disabling factions may indeed contribute to social stability, but the cost to freedom is high: unification requires “removing the cause of factions”²⁵ by either preventing existing social, political, and economic divisions from consolidating into factions or by removing such divisions. The issue here is that divisions already exist, and seeking to enforce uniformity and equality to give “every citizen the same opinions, the same passions, and the same interests”²⁶ cannot be done without extreme coercive force. In other words, unless liberty is destroyed,²⁷ factions will continue to exist, whether they are politically empowered or not. Similarly, multiplying factions drowns them in a cacophony of conflicting voices; but in doing so the power of factions to intercede on their own behalf

20 John P McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011) at c 7.

21 Cf. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2011); Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002).

22 Levy, “*Separation of Powers*”, *supra* note 1 at 10.

23 Allard-Tremblay, *supra* note 7 at 387.

24 Alexander Hamilton, James Madison & John Jay, *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed by Ian Shapiro (New Haven: Yale University Press, 2009).

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

is also dampened. Rather than disabling and disempowering factions through unification or multiplication, I suggest that it is appropriate to seek to fruitfully exploit them to keep power in check, though obviously the risk of stasis must be kept in mind. This problem — that of enabling political contention while avoiding stasis — is as old as politics and I do not pretend to be able to resolve it.

It is also important to see that harnessing distrust is not inimical to political unity. We only need to return to the example of the Tribune of the plebs, and more broadly to the genealogy of the mixed constitution offered by Levy, to see this. As an institution, the Tribune indeed served to consolidate political divisions and to protect the plebeians against the abuses of the consuls and the patricians. However, although Fustel de Coulanges emphasizes how patricians and plebeians formed two distinct societies, he also notes that the Tribunes of the plebs were created as part of the agreement that was made for the return of the plebs to Rome after it seceded to the Sacred Mountain;²⁸ the Tribune is thus enabling these two groups to live side by side. In the end, it is through the empowerment of social divisions that political continuity was secured.

V. Constitutionalism and the Intercession of the Few

One must recognize that Levy's concern in *The Separation of Powers and the Challenge to Constitutional Democracy* is distinct from what I have been discussing. As Levy explains, in his view, the "crisis of constitutional democracy" refers to: "Executives, seeking to free themselves from legal and constitutional restraints as well as partisan opposition, [and who] purport to be the voice of the undifferentiated, unified, true people."²⁹ Put differently, the issue I have been raising about groups being able to intercede in their own favour may be relevant on its own, but what the separation of powers is actually and specifically about is ensuring that the executive does not free itself from its restraints. I do not deny that this — keeping the executive in check — is a relevant consideration. Nevertheless, I contend that we can hardly think about the separation of powers and constitutionalism without also thinking about the need for groups, like Indigenous peoples, cultural and racial minorities, and others, to have the power of intercession.

To make this clear, let me return to Levy's definition of constitutionalism. As he explains, a constitutional government is at least one where citizens know that the law will be applied to them in a manner that is independent from both the executive and the legislative powers. Beyond this minimal independence of the judiciary, Levy also indicates, in discussing Montesquieu's views, that the separation of powers is essential to make sure that "a subject can know, and be assured of knowing, what the law is, and that they will be safe in their liberty and person if they comply with it."³⁰ Indeed, for Montesquieu, the separation of powers ensures that liberty is secured: that "no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits."³¹ Yet, I doubt that the independence of the judiciary — though highly relevant — is the minimal requirement to

28 Fustel de Coulanges, *supra* note 10 at 346-351.

29 Levy, "Separation of Powers", *supra* note 1 at 15.

30 *Ibid* at 7.

31 Montesquieu, *supra* note 13.

feel secure in knowing the law and safe in our liberty and person. These objectives cannot be achieved when those who exercise judicial power over us are recognizably and almost exclusively part of another group.

Let us consider the importance attached to the representativeness of juries and the requirement that one be judged by one's peers. This is a concern already present in the *Magna Carta* and rehearsed notably during the English Revolution. Richard Overton, for instance, refers to "the exorbitances of the Lords" in *An Arrow against all Tyrants*: "contrary to all precedents, the free commoners of England are imprisoned, fined and condemned by them [the Lords] (their incompetent, illegal, unequal, improper judges) against the express letter of Magna Carta ... : that no free man of England 'shall be passed upon, tried, or condemned, but by the lawful judgement of his equals, or by the law of the land.'"³² In this instance, the institutional independence of the Lords is orthogonal to the concern that one's equals be involved so as to ensure the independent application of the law and the safety of one's liberty and person. Today, similar concerns are raised for racial minorities and Indigenous peoples who are underrepresented on juries and yet overrepresented in the penal system. The trial of the man accused of murdering Colten Boushie, for instance, attracted significant attention for this reason.³³ In sum, then, it is easily recognized that considerations we associate with constitutionalism and the rule of law — the fair and independent application of the law in an equitable and non-arbitrary manner — are put in jeopardy when one group appears to be under the unchecked, though independent, judicial power of another.

By extension, the same applies to the separation of powers. Indeed, the separation of powers will be of limited value for racial minorities, Indigenous peoples, and marginalized social classes if the executive is kept in check by a legislature controlled by members of the same dominating and oppressive group. In denying the power of intercession to groups and factions, they are disempowered and prevented from acting in ways that protect their group-specific interests, rights, or concerns. Furthermore, in allowing them to exercise power only through inclusive groupings and supposedly universal and equal institutions, the powerful and the many are favoured, as this arrangement tends to silence and overwhelm minorities and those with less power. Without political empowerment and without anyone to intercede in their favour, groups and factions remain potential prey of those with power. In other words, constitutional government is incompatible with the exclusive power of some groups over others — even if it respects institutional boundaries.

In the end, the concern for institutional boundaries between the executive, the legislature, and the judiciary cannot neatly be separated from the concern that groups like racial and cultural minorities, Indigenous peoples, and marginalized social and economic classes, have at least the meaningful power to intercede in their own favour. Both concerns are basic considerations of constitutionalism: that the law will be applied independently from the power of the other branches but also of those who would lord it over the few, the others, the outsiders, and the meek.

32 Richard Overton, "An Arrow against all Tyrants (1646)", (Date last visited: 14 July 2021), online: *Online Library of Liberty* <oll.libertyfund.org/page/overton-an-arrow-against-all-tyrants-1646>.

33 Chenoa Sly, "A Jury of Whose Peers?", (14 June 2018), online: *Centre for Constitutional Studies* <www.constitutionalstudies.ca/2018/06/a-jury-of-whose-peers/>.

Checking the Other and Checking the Self: Role Morality and the Separation of Powers

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I. Introduction

The concepts of the rule of law, the separation of powers, and checks and balances are related in complicated ways. Jacob T Levy brings this to light in his thought-provoking McDonald Lecture, “The Separation of Powers and the Challenge to Constitutional Democracy.”¹ In this response to Levy’s paper I want to further explore the relationship between these three ideas. I will argue that, when thinking about the rule of law, we must consider the idea of “role morality” and its place in constraining power. We should think of the constraints on power that stem from role morality as “internal” as opposed to “external” checks on power. I also suggest that we would do well to broaden our understanding of what the rule of law requires, and to think of it not just as a matter of ensuring impartiality and formal legal equality in the sense that the law applies to all actors within the system. We might benefit from thinking of the rule of law as a weightier moral concept that demands that decision-makers comply with moral ideals, and not just with the rules as laid out.

* Assistant Professor, Faculty of Law, University of Alberta. This paper developed out of a panel discussion on Professor Jacob Levy’s 31st Annual McDonald Lecture in Constitutional Studies, given on November 4th, 2020. The panel discussion took place on November 27th, and in addition to Jacob Levy, included Yann Allard-Tremblay, Mary Liston, and Arjun Tremblay. I wish to thank all of them for their thoughtful comments which influenced my own thinking in developing this paper. I also thank Patricia Paradis and Keith Cherry for organizing the panel and inviting me to participate, and the editors at the *Constitutional Forum* for excellent editing assistance.

1 Jacob T Levy, “The Separation of Powers and the Challenge to Constitutional Democracy” (2020) 25:1 Rev Const Stud 1.

II. Checks and Balances and the Separation of Powers

In his McDonald Lecture, Levy argues that “[t]he separation of powers might well be the crucial concept in what we have come to think of as constitutionalism or constitutional government.”² Powers must be separated so that, for example, the same person is not making and enforcing the rules. Those in power must also be subject to the rules.³

Levy notes that, at least in the American context, there is a tendency to associate the separation of powers with the notion of checks and balances, but he argues that “the separation of powers is not merely checks and balances.”⁴ It is also a vision of keeping lawmaking and law enforcement distinct so as to protect the rule of law.⁵ I will discuss this connection between the separation of powers and the rule of law in more depth below. Levy argues that this American vision of the separation of powers was that the different branches would check and limit one another because those who held power would have a commitment, a sense of partisanship, towards their office or role. This sense of protectiveness of one’s office was supposed to result in people within Congress “resist[ing] incursion on the legislative power by the executive.”⁶

Levy raises the worry that in modern democracies with partisan political parties, when the legislature and executive are drawn from the same party, they will not adequately check one another. Rather than the legislature and executive protecting their own institutional territory, the territory of the party becomes what is important.⁷ We are left with a choice between an executive that is unconstrained, or one that is constrained only by political will.⁸ “Neither side, the governing party nor the opposition, has a credible claim and consistent incentive to do what the American founders thought legislatures would be able to do with executives: uphold the rule of law in an impartial way by seeking to defend their institutional prerogatives.”⁹ This brings us to another concept that needs introduction and elaboration: the rule of law.

III. The Rule of Law

The related idea of the rule of law is defined by Levy as follows: “The rule of law is a matter of ensuring that judicial practices happen in an impartial way, that those who are brought before legal institutions will have full access to appropriate — that is to say, due — process, and that legal institutions and legal processes cannot be circumvented by powerful political actors, engaging, for example, in extrajudicial punishment or imprisonment.”¹⁰

Levy argues that the separation of powers has a role in protecting the rule of law. “The separation of powers,” Levy says, “is the version of institutional separation and competition

² *Ibid* at 2.

³ *Ibid*.

⁴ *Ibid* at 10.

⁵ *Ibid*.

⁶ *Ibid* at 9.

⁷ *Ibid* at 12.

⁸ *Ibid*.

⁹ *Ibid* at 13.

¹⁰ *Ibid* at 6.

that promotes the rule of law by separating the particular processes of lawmaking and law enforcement.”¹¹ Because the different powers are separated, the idea is that those who have the power to make decisions are not the same people who are creating the law. This is supposed to ensure impartiality; no one will be a judge in their own case, and judges will have independence from the other branches.

This vision of the rule of law focuses on procedural limits — due process, impartiality, no interference with the judiciary, and so on. This is certainly an important thread in the literature on the rule of law, but many theorists take the rule of law to be more substantive. According to Ronald Dworkin, for example, the rule of law is partly a matter of judges making the correct decision: respecting the moral rights people actually have. He contrasts what he calls the “rule-book” conception of the rule of law with the view he ultimately defends: the “rights” conception. The rule-book conception “insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all.”¹² The rule-book conception does not restrict the content of the rules that are valid. Whether or not these rules are just is a separate question that we might care about, but that is not properly dealt with under the umbrella of the rule of law. We might think of Levy’s account of the rule of law as something like the rule-book conception: it is concerned that the procedures are proper and impartial, and that the rules are followed, but does not consider the question of whether the rules are just to be a matter of the rule of law. Under Dworkin’s rights conception, by contrast, we must assess the content of the law. For Dworkin, the rights conception:

... assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights.¹³

This means that judges, in deliberating about what they must do in a given situation, have to face certain fundamentally moral questions. Judges in hard cases must ask “whether the plaintiff has the moral right to receive, in court, what he or she or it demands.”¹⁴

I am not going to fully defend a Dworkinian account of the rule of law, or any substantive account of the rule of law here. Instead, I want to simply explore the question of what the complex relationship between the rule of law, the separation of powers, and the idea of checks and balances looks like if we are to take a somewhat more substantive view of the rule of law.

What happens to the idea of the separation of powers if we incorporate a more substantive vision of the rule of law — i.e. one where the judge’s role is not just to protect the processes that ensure impartial treatment, but also to provide limits on the substance of law? The more substantive vision of the rule of law requires judges to make a judgment about the justice of an enactment, and not just to apply it impartially.

11 *Ibid* at 10.

12 Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1985) at 11.

13 *Ibid* at 11-12.

14 *Ibid* at 16.

One result would be that we would see judges less as enforcers or protectors of something another branch enacted,¹⁵ and more as independently seeking to do justice as required in a given situation. This is, itself, a vision of separation. The rule of law as Levy sees it is a matter of impartiality and due process. But impartial and consistent application of the law as it is laid down might lead to a kind of subordination of the judiciary to the legislature. They would be separate, but one might still be very much doing the bidding of the other. On a more substantive view, the idea is that a judge is seeking to do justice rather than the bidding of the other branches. This is a form of separation of powers that also empowers each branch to act independently in the service of justice, rather than to act in a way that conforms to what other branches have laid down. So a widening of the scope of the rule of law to include principles of substantive justice might strengthen the separation of powers, or at least strengthen the judiciary's ability to "check" the actions of the other branches.

But this is only one form of checking that goes on in government. While one branch may check another, and might be able to influence what another branch does through its own processes and decisions, each branch must also engage in a substantial amount of what we might call "self-checking." Whichever version of the rule of law we accept, we should recognise that promoting and protecting it requires internal as well as external checking. The next section explores this idea in more depth.

IV. The Rule of Law, Role Morality, and "Self-Checking"

The rule of law has, in my view, always required a strong element of "self-checking." In other words, it depends less on external checks and balances than we might often think, and more on a strong sense among those who exercise power about the limits and expectations of their role. Much of the literature on role morality is concerned with the question of how roles can alter our moral obligations. Is it possible for one's role as a judge to trump one's moral obligation to do the right thing? This is a bigger question than I can answer here. But I want to discuss one aspect of the literature on role morality: that is, the idea that one's sense of one's role plays a significant part in one's practical decision-making.

First, what are roles? Michael O Hardimon, focusing on institutional roles, defines them as "constellations of institutionally specified rights and duties organized around an institutionally specified social function."¹⁶ Similarly, Jeremy Evans and Michael Smith define roles as "the complex web of behaviours and expectations of individuals and collectives in persisting social

15 This vision of the judicial role as that of merely an enforcer of law laid down by another branch can be seen in Montesquieu. See, e.g., Montesquieu, *The Spirit of the Laws*, ed and translated by Anne M Cohler, Basia C Miller & Harold S Stone (Cambridge: Cambridge University Press, 1989) at 163: "[T]he judges of the nation are, as we have said, only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor. Therefore, the part of the legislative body, which we have just said is a necessary tribunal on another occasion, is also one on this occasion; it is for its supreme authority to moderate the law in favor of the law itself by pronouncing less rigorously than the law." Levy, in his vision of the rule of law, seems to draw on this sort of view in understanding the relationship between the judicial and legislative branches in the separation of powers. My thanks to Mary Liston for drawing my attention to this point.

16 Michael O Hardimon, "Role Obligations" (1994) 91:7 *The Journal of Philosophy* 333 at 334, citing RS Downie, *Roles and Values: An Introduction to Social Ethics* (New York: Methuen, 1971) at 127-8.

relationships.”¹⁷ A role obligation, then, is “a moral requirement, which attaches to an institutional role, whose content is fixed by the function of the role, and whose normative force flows from the role.”¹⁸ For Stefan Sciaraffa, “role-duties are ... clusters of social rules that are taken to apply to persons who occupy certain roles within society.”¹⁹

Hardimon draws an important distinction between roles we agree to undertake, and those into which we are born. Roles that are thrust upon us raise different issues beyond the scope of this paper, but Hardimon argues convincingly that such roles can still generate obligations under the right conditions.²⁰ Leaving these non-voluntary roles to one side, let us focus here on roles which we voluntarily undertake, such as doctor, lawyer, or judge. In such roles, there is a further crucial element, according to Hardimon. It is not just the voluntary acceptance of the role that matters. There is also the idea of “role identification” — “the idea of identifying with a role or conceiving of oneself as an occupant of a role.”²¹ Identifying with a role involves seeing the norms of the role as reasons for oneself.²² “If you are a judge who identifies with the role of judge, the fact that this is something judges do (in the normative sense) will give you a reason for doing it.”²³ What Hardimon says that this adds to our understanding of role morality is a source of motivation: “When people identify with their roles they acquire reasons for carrying out the duties distinct from those deriving from the fact that they have signed on for them.”²⁴ Views that neglect this dimension have an impoverished image of those exercising their roles. Such views envision, for example, doctors who heal merely because they have promised to do so.²⁵ In reality, though, “people do identify with their social roles and are motivated by the fact that they identify with their social roles.”²⁶ As Hardimon puts it, “[r]ole identification represents a basic way in which people can conceive of themselves as participants in the dimension of moral life that is lived through institutions.”²⁷ If this is the case, then it becomes apparent how much work this phenomenon of role identification does in driving the decisions of those who occupy institutional roles.

A John Simmons objects to this, pointing out that the important question here is about what people have moral reason to do, not the motivations they in fact have.²⁸ Stefan Sciaraffa presents a more detailed defense of the argument that role identification matters, arguing that by identifying with a role, people can bring about “the fundamental goods of meaning and

17 Jeremy Evans & Michael Smith, “Toward a Role Ethical Theory of Right Action” (2018) 21:3 *Ethical Theory and Moral Practice* 599 at 604.

18 Hardimon, *supra* note 16 at 334.

19 Stefan Sciaraffa, “Identification, Meaning, and the Normativity of Social Roles” (2009) 19:1 *European Journal of Philosophy* 107 at 109.

20 See Hardimon, *supra* note 16. Hardimon makes this argument throughout the piece. The key idea is that unchosen roles, if they are to bind us, must be ‘reflectively acceptable’. *Ibid* at 348.

21 *Ibid* at 357.

22 *Ibid* at 358.

23 *Ibid*.

24 *Ibid* at 360.

25 *Ibid* at 361.

26 *Ibid* at 362.

27 *Ibid* at 363.

28 A John Simmons, “External Justifications and Institutional Roles” in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001) 93 at 97.

self-determination by performing the duties that constitute the role.”²⁹ But Sciaraffa and Simmons are both concerned with justifying reasons, and I wish to skirt that larger question here. I merely want to note, with Hardimon, that roles play an important part in our social fabric, and that in many cases our sense of role obligation does in fact contribute to the actual decisions we make.

Evans and Smith also make an argument in favour of role ethics as a robust normative theory, but in the process, they draw on literature from social psychology that is relevant for my present point. They refer to work by Alan Fiske, who has studied human interactions across a wide range of societies, and claim that “all human beings utilize four social-relational schemas to coordinate almost all of their interactions.”³⁰ Human beings tend to categorize the current relationship they inhabit, and then apply the relevant norms that are appropriate to that role. “In short, relational models theory suggests that human beings are intuitively role-based moral reasoners.”³¹ Again, Evans and Smith use Fiske’s work as a jumping-off point for an argument about role ethics as a normative theory. But Fiske’s ideas can be used to make a narrower point: simply that human beings do have a tendency to understand their world according to roles, and to tailor their behaviour to fit that role. Fiske says that “[p]eople believe that they should adhere to the models, and insist that others conform to the four models as well...”³² The key is that Fiske’s social scientific research says something about how humans tend to act, and it is this descriptive point with which I am concerned here.

Like Evans and Smith, Sciaraffa is also primarily concerned with role morality as a source of real moral duties. But he too notes in passing that in practice, the maintenance of social roles and institutions requires certain behaviours from individuals in society. Maintaining social institutions, for Sciaraffa:

involves generally following these patterns and praising and blaming others who contravene and conform to these norms ... [M]aintenance also requires trying to make sense of the patterns of the behavior that constitute the relevant social institutions, to uncover what one thinks is their point and

29 Sciaraffa, *supra* note 19 at 110.

30 Evans & Smith, *supra* note 17 at 604, citing AP Fiske, “The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations” (1992) 99:4 *Psychological Review* 689. Those four categories, as summarized by Evans and Smith, are hierarchical, egalitarian, communal, and transactional. Evans & Smith, *supra* note 17 at 605-6. Importantly, social roles that we might inhabit do not map directly onto these four categories. Rather, according to Fiske, “People rarely use any one of these models alone; they construct personal relationships, roles, groups, institutions, and societies by putting together two or more models, using them in different phases of an interaction or at different, hierarchically nested levels.” Fiske, *ibid* at 693. Thus, the role of judge, for example, appears to have elements of hierarchy as well as elements of transactional relationships, which involve the duty of proportionality. Indeed, Evans and Smith argue that “The proportionality duty is also recognizable as the duty that underlies the judicial practice of ensuring that punishments are proportional to the crime.” Evans & Smith, *supra* note 17 at 606. I cannot fully examine these four categories and their relationships to our various roles here. I merely want to draw on Fiske, as Evans and Smith do, for the observation that human beings tend to categorize their relationships and roles, and draw from that categorization conclusions about how they ought to act. In other words, they tend to understand their roles as limiting the boundaries of appropriate behaviour.

31 Evans & Smith, *supra* note 17 at 604.

32 Fiske, *supra* note 30 at 716.

purpose, to act in accordance with that underlying purpose, and to criticize the institutions to the extent that they run afoul of it.³³

Again, Sciaraffa says all this in sketching out what duties this places upon us, but I think it also helpfully demonstrates what must actually take place for institutions to in fact be upheld. And since we do find such social roles and institutions in existence, it must be the case that much of this work does in fact get done on a regular basis. The key point I want to highlight is how *internal* such work is. It involves agents observing the norms of an institution, interpreting them, and *choosing* to act in ways that uphold them. This work is done by the individual, and not by any external body checking or constraining the individual.

My argument is this: in much of the discussion of the separation of powers and checks and balances, our attention is on checks and constraints that come from the outside. But that is only a part of what shapes the behaviour of those operating within institutions. A major determinant of institutional decision-making comes instead from what I have been calling “internal checking” or “self-checking.” A judge’s particular conception of her role is one of the primary drivers of her decision-making processes. Because she sees herself as a judge, and identifies with that role, and because she has a particular sense of what that role requires, she then chooses to act in certain ways that are different than they would be if she did not identify with the role or if she held a different understanding of the role.

Indeed: if external constraint were needed to police the judge’s every act, we may start to think it makes little sense to describe her as a judge at all. A judge is someone who, by virtue of her own self-understanding, constrains and polices her own behaviour to a significant extent such that it conforms with her and her society’s understanding of what a judge ought to do.³⁴ Recall the definition of role obligations above, as moral demands that attach to institutional roles.³⁵ The obligations attach to the role, and by virtue of inhabiting that role and identifying with it, the judge alters her behaviour. Because she is a judge, the moral obligations she must fulfil follow from that role. So part of what it is to be a judge is to understand and carry out those obligations. To the extent that this behaviour has to be imposed on her from the outside, we would begin to think of her as something more like a tool for governmental ends, and not as performing the role of judge at all.

So too with presidents, whose exercise of power is a major concern in Levy’s lecture. A president must have an understanding of what it is to act “as a president.” What obligations attach to that role? The specifics of the role obligations might be a matter of debate, but the idea that the president must use a conception of the role to determine their behaviour applies here just as it does with the judge. A good president is someone who understands the limits of their role and makes a good faith effort to act within that role. The situations in which that sense of role identification drives the president’s decision-making must, I think, be seen as just as important as the situations in which presidential power is checked by one of the other branches.

33 Sciaraffa, *supra* note 19 at 124.

34 Her understanding and society’s understanding may, of course, come apart. Often, those in important institutional roles have a conception of that role that is shaped by a shared social conception of that role. But of course, this is not universal; there is contestation about what a role requires. My main point is that the agent’s perception of what is required will be a driver of how she ultimately acts. In some cases, this will also reflect a more widespread social idea of the role, but not always.

35 Hardimon, *supra* note 16 at 334.

With this idea of self-constraint in mind, let us return to the point raised above: the separation of powers, checks and balances, and the rule of law are interrelated but different concepts. Separating the processes of lawmaking and law enforcement is a vision of separation, but it is not necessarily a vision of independence. Indeed, it seems potentially the opposite: a properly separated judiciary might well do the bidding of the legislature slavishly, not because of pressure but because of an understanding that that is its proper role: to enforce the law and not to create or change it. Moreover, as I argued above, that tendency might be different if the judge conceives of the rule of law differently and therefore understands her own role differently. If the rule of law is framed as a more substantive ideal, then the judge may have an obligation to question the content of the formal law and not simply to enforce it. But what is important to notice here is how much turns on the judge's self-conception. If she believes the rule of law requires careful control of her actions such that the rules are applied as written, what she will do will more closely track the desires of the legislature. But if her conception of the rule of law, and therefore of her role, is different, then she will conclude that different, more "interventionist," acts may be required.

What I have tried to draw attention to above are the different ways in which checking functions. I want to suggest that it does not only take the form of external checks on power. It is also to some extent internal. When the judiciary "checks" the power of the legislature, they do so by interpreting the law in a particular way. But they do that with a vision of the limits of their own power in mind: they consider themselves constrained by the rule of law to decide in a particular way, or to avoid rewriting legislation wholesale. There is, in other words, some amount of internal respect for the system, and that internal sense of what is appropriate does much of the actual checking. Learned Hand's famous quotation about liberty comes to mind here: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."³⁶ If we apply the same thought to institutional values such as the separation of powers and the rule of law, we will see that it is crucial to have commitment to these values held dear by those who make up the institutions. It cannot only be enforced from the outside by competing institutional powers, but must come from people's own sense of the right use of their own power.

In Mary Liston's reply to Levy in this same issue of the *Constitutional Forum*, she asks us to examine the foundational insight from *Roncarelli v Duplessis*³⁷ that "there is no such thing as absolute and untrammelled 'discretion'"³⁸ in public law. She invites us to apply that idea to other parts of the executive branch, up to and including the political executive.³⁹ The upshot, in Liston's view, is that judicial review would be far more widespread, applying to "most, if not all, exercises of public power..."⁴⁰ I think this is a tremendously important insight, and we should move towards a stronger default of reviewability of exercises of public power. This is one important direction for reform. What I have been arguing here, though, is that we should

36 Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand, Collected, and with an Introduction and Notes, by Irvin Dilliard, Together with the Bill of Rights: The Oliver Wendell Holmes Lectures, 1958 by Learned Hand*, 3rd ed (Birmingham, AL: The Legal Classics Library, 1989) at 190 (speech at "I Am an American Day" ceremony, Central Park, New York City (21 May 1944)).

37 1959 CanLII 50 (SCC), [1959] SCR 121.

38 *Ibid* at 140.

39 Mary Liston, "Bringing the Mixed Constitution Back In" (2021) 30:4 Const Forum Const 9 at 22.

40 *Ibid*.

also think of constraint as internal as well as external. I want to suggest that we should think about how to expand our conception of internal constraint. We should recognize that the absence of absolute and untrammelled discretion is a foundational idea in all three branches. When we reflect on how our government is structured, we will see that there is a deep commitment to the idea that legislatures and executives can't simply do what they wish. Their discretion is limited by their role. But their role is something they choose to inhabit, and decisions they make within that role are enforced from the inside as well as from the outside.

We have general norms of constraint and limited discretion in all branches, but only in some cases are they enforced from the outside. Often, the constraint is internal, and in such cases we often miss that it is constraint at all. The person occupying the role develops a self-conception of what that role entails, and adjusts their behaviour accordingly. What we need to do, in addition to building up external checks, is develop our socially agreed-upon conceptions of the various political roles, such as that of the executive, and promote conceptions of those roles that suit the norms of governance we want to uphold.⁴¹ To draw on the idea of moderation Liston refers to, we should develop ideas of role that promote "good judgment, practical wisdom, and responsiveness to context."⁴²

Fundamentally, the idea of constraint requires either external or internal checking. My point here is to ask: what does it mean for the rule of law, for the separation of powers, and for checks and balances, if that constraint is (at least partially) dependent on goodwill or trust, and on the process of internal or self-applied checks on power?

In his lecture, Levy notes the problem of internal motivation. He says that, in Montesquieu's theory, the judiciary was designed to have "the independent social standing and clout to be able to stand up for itself against the threat of interference by either the legislature or executive."⁴³

But further, those in such roles must also have "enough sense of their own status, that they will say no; they will refuse orders from the king."⁴⁴ This point goes to the internal tendency to protect one's own territory from encroachment by others. But I believe that same sense of role morality has always also required a certain tendency to self-check and limit one's *own* power. A belief in the importance of roles goes both ways: those occupying them must believe both that others ought not to encroach, and that they themselves must stay within certain limits.

I think this is crucial, both to understanding the separation of powers and the rule of law in general, and to seeing a way to a possible solution. One of the major concerns articulated in Levy's piece is that the growth of political parties is problematic for our constitutional structure. Parties aren't able to fulfill the role of holding one another accountable in the way that

41 Of course, there are complex questions about how a person's conception of role is related to and influenced by conceptions of role that might be endorsed in wider society. See *supra* note 34. The question of how to generate change in the conceptions of role that people hold is a difficult one that I cannot fully address here. But I am assuming here that there is some possibility of influencing the views held by those in institutional roles, through, for example, law school education, think tanks, research institutes, media, social media, and so on.

42 Liston, *supra* note 39 at 23.

43 Levy, *supra* note 1 at 8.

44 *Ibid.*

different branches of the government were designed to do. This is a particularly stark problem when the legislature and executive are controlled by the same party.⁴⁵ The role of the executive, in Levy's view, comes with an additional complexity that changes how one occupying it might act: the executive is the actor best placed to claim to speak for the whole people.⁴⁶

But if I am right that self-checking is as important as the separation of powers or the checking of one branch by another, then in some ways the problem Levy highlights is not a new one. The executive has always had the ability to present itself in this way; whether or not it does so, or what it understands "speaking for the people" to mean, depends very much on the vision the person occupying an executive office has of that role. Political parties don't change this very substantially, because the extent to which they alter the incentives people have depends on people's conception of the relationship between party and institutional role. This is not to say that partisanship and worries about the executive gathering greater power by claiming to speak for the people are not important worries. They are. But they are worries that are not fundamentally different from those we have always faced. It has always been the case that good governance required good faith actors with a particular conception of their role to occupy that role and carry out their vision of what it requires. They might have better or worse conceptions of that role. But that has always been the case. And so this suggests that what we ought to do, in service of improving governance, is work on building robust conceptions of role morality, and developing shared ideas of the limits of all institutional roles, especially the executive. The widespread acceptance of these limits is at least as effective a way of creating change in behaviour as reliance on external checking, given how much of our decision-making depends on the self-checking that is done by the people occupying specific roles. We should focus on promoting the idea of a limited executive even in times when we are governed by an executive we happen to agree with, so that the vision of the executive role as a limited one gains power and salience for people. Then, when an executive we happen not to agree with is in power, it will matter less if both the executive and the legislature are occupied by the same party, because internal conceptions of role will be the primary drivers of behaviour within each branch of the government.

45 *Ibid* at 12.

46 *Ibid* at 15.