

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

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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/>.

