Revitalising the social foundations of the separation of powers?

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I. The challenges and limits of a positive theory of separation of powers

References to the 'separation of powers' may have multiple meanings. The literature on the topic is extensive and varied – conceptually, teleologically, methodologically – so that much of it speaks (and is intended to speak) only to a subset of issues or scholars. Nonetheless, whether classically conceived as a safeguard against tyranny or in a more positive sense as promoting some substantive value or governmental good, accounts of separation tend to share the same anti-monocratic impulse: to prevent a concentration of government power. In a very general sense, therefore, the scholarship's basic concern is with the separation of power.

This is a reminder of two rudimentary points. The first is the necessity for system of separation to prevent concentrations of power for it to be adjudged as minimally effective. The second is that it is in the shift from separation of *power* to separation of *powers* that the disagreements arise. This is not assisted by the imprecision of an English terminology that elides, for example, Montesqieu's differentiation between *pouvoir* and *puissance*. It is striking how 'powers' in the separation of powers has been diversely conceptualised as, inter alia, functions, institutions, offices, persons, authority, or political control. These are differences not just over the identity of the powers but about the concept, context and purpose of the prescribed separation.

It is this transition from the separation of power to the separation of powers that is the focus of this paper. Its primary concern is with the empirical dimension of one of common view of the separation of powers. That is not to suggest that the approach in question is the most historically accurate, conceptually sophisticated or academically influential. The point is simply that it is present in political and constitutional discourse and, for the reasons discussed in Parts II and III, potentially problematic. Put simply, the 'powers' separated under this approach lack the distinctiveness, the reach and the political resonance to adequately regulate potential concentrations of government power. This problem is especially pronounced in states experiencing a rise in electoral populism. Part IV considers the potential origins of this problem before moving on in Part V-VII to examine how it might be addressed.

These later arguments necessarily depend on certain contestable assumptions. The first is that separation should be about more than preventing concentrated power. If a theory aimed only at anti-concentration, then it would be satisfied by a division between any (and likely many)

power-holding persons. The move to a separation of powers tends to assume that there is a purpose to the specific separation being advocated.

The second caveat is that a specific conception of the separation of powers tends to rest on a particular view of the state. This is well brought out in Professor Bognetti's account of how changes in the purpose and processes of government altered the practice and theory of institutional separation. The details of a separation of powers system are neither stand-alone nor self-executing. If the separation has a purpose, that purpose requires independent justification which will, typically, be based on some background concept or criterion of governmental good.

This, in turn, draws attention to how the key question for the transition from separating power to powers is a positive ***and inter-dependent*** one: why give *these* powers to *these* people? This is at the heart of any theory of separation that goes beyond a minimalist concern with concentrated power. However, most work focuses on only one part of this question. Functional accounts, for example, address the first part of this question. The priority is to ensure that the relevant functions are accurately identified and separated. The question of how or by whom the functions are exercised is a secondary one. Checks and balances accounts, by contrast, are more concerned with the identity of the person exercising power. Here, it is less important what power the person is exercising provided that the system provides adequate oversight. That is not to say that these approaches discount other aspects of the separation. They do, however, tend to justify the separation in a way that foregrounds one part of the question so that the other becomes an ancillary consideration. A comprehensive model, by contrast, would ideally integrate considerations of personnel, process and purpose.

This obviously complicates the separation of powers to a significant degree. Arguably, it calls into question the possibility of analytical or doctrinal precision at all. A choice between precision and comprehensiveness may, however, be unavoidable. This is partly because power – however it is conceived – is a messy and elusive subject-matter. It is also partly because of the point made in the previous paragraph about interdependence. Once a system of separation is said to (ideally) achieve something more than anti-concentration, it becomes about more than one thing. The problems identified in this paper suggest that doctrinal clarity may, under certain conditions, undermine the effectiveness of separation as even a basic safeguard against concentrations of power. In the era of complex government and

personalised political management described by Professor Bognetti, effective separation may call for loose strategies rather than analytical integrity.

II. The 'traditional' model: not so obsolete

Given that the opening augment of the paper is that the accuracy and impact of all separation of powers theories are inherently limited, it might be thought that there is little to be gained from reprising the frailties of the 'traditional' legislative-executive trichotomy. There seems to be a general acceptance in the academic literature that the 'traditional' understanding of the separation of powers is simplistic and, most likely, out of date. It is notable that modern defences of the theory are expressed in historical terms. Professors Bognetti and Waldron's accounts of its rule-of-law merits, for example, lament (with the "mixed sentiment of acknowledgement and melancholy always found in thoughtful souls when watching the twilight of something great, for which the end has now unfortunately come"[1]) that its contemporary relevance may be mainly as a reminder of "something [lost] that was once deemed valuable"[2]. This impression of obsolescence is reinforced by the fact that most other recent "separation of powers" work refines or rethinks the traditional model: whether through a revisionist defence of the doctrine on other grounds[3] or a re-conceptualisation of its core categories to accommodate the modern state.[4]

Yet, for all that the academic literature abjures the traditional model, it remains a core principle of political and constitutional discourse. This is true for judges, politicians and the public as a whole. The principle's "powerful place in the tradition of political thought long accepted as canonical among us"[5] is significant because it forms part of the popular, political and institutional context for the working constitution. The model may be regarded as outdated at an academic (and quite niche) level but it continues to influence everyday thinking about constitutional issues.

[1] Giovanni Bognetti, Dividing Powers: A Theory of the Separation of Powers (Antonia Barragia & Luca Pietro Vanoni (eds); Kieran Bailey (trans)) Wolters Kluwer 2017 (draft) 37.
[2] Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 B.C.L. Rev. 433, 467.
[3] Christoph Moellers, The Three Branches (Oxford University Press, 2013).
[4] Peter Strauss, 'Separation of Powers and the Fourth Branch' (1984) Columbia L. Rev. 573.
[5] J Waldron, 437.

It is this sociological sense of the separation of powers that is the concern of this paper. As such, the remainder of the discussion sidesteps many of the familiar questions around the definition and design of the separation of powers. These questions are important in a technical sense but, in reality, have limited impact outside the specialist scholarship. In the wider sociological sense, it is the (simplistic) ideal-type that is most influential. Professor Bognetti's discussion of the influence of the classical model in previous centuries arguably remains apposite today:

> It is a serious misunderstanding of the nature of the liberal division of powers to claim — as sometimes happens — that the concept is unable to explain the real processes in place for the governance of the people during the liberal age. People have argued that it was little more than a concept based on pretences and assumptions that were impossible to realise. The distribution of functions between distinct Powers — that were held to be fundamental — has been argued to be fictitious, a principle that was constantly contradicted in fact because of the infinite exceptions….
>
> The misunderstanding comes from ignoring that the liberal division of powers was an ideal model, an ideal-type that was present in the mentality of the western political classes for about three centuries. It was not a dogma, but a practical guide for the organisation of the state structure that was gradual improved. It existed in versions that accepted variations and, generally, it existed concurrently with other ideal and material influences that resisted or contrasted it.[6]

While the limitations of the ideal-type may not deny it influence, it does raise the possibility that the influence may not be wholly positive. If there are "infinite exceptions" to a "fundamental" constitutional principle, the question naturally arises as to whether and how those exceptions are constitutionally regulated.

That becomes more pressing where, as Professor Bognetti's work proceeds to argue, there has been a radical change in the nature of the government activities being (un)regulated. The traditional ideal-type was closely linked to a rule-based conception of government. The three functions are defined in terms of the formal stages of government-by-law. This also means

[6] G Bognetti, 16.

that they can be justified as promoting rule-of-law-related values like generality or legal certainty. The traditional theory's underlying assumption is that power in a constitutional system is exercised via formal legal means.

It is at the point of this premise that the inconsistency between ideal-type theory and contemporary practices becomes problematic. Two aspects of modern government seem particularly notable. The first is the expansion of more discretionary forms of government. The emergence of a substantial administrative apparatus is one factor in this trend. The nature of the new tasks entrusted to the administration – complex, fast-moving, disaggregated – naturally favour executive (and less formal) control, given the limited temporal and administrative capacities of the other traditional branches.[7] These factors also militate against rule-based decision-making (and thus legislative or judicial oversight). [8]

The second is how modern politics has de-emphasised formal methods of political control. Political parties, for example, provide non-legal means of exerting influence across institutional boundaries. The breadth and diversity of government bureaucracy provides ample opportunity for gaming formal checks that are intended to promote accountability or oversight. The personalisation of modern politics has also reinforced the capacity of elected leaders to exert influence, whether by direct instruction or indirect signalling. More recently, the increased opportunities for political leaders to instantaneously address high-profile public controversies provides a further opportunity for informal methods of influencing public opinion or the actions of lower-level officials. It is interesting to note, for example, that previous (and notably pre-President Trump) work in the US argued that domestic political dynamics could preference the partisan and media-savvy in ways that may facilitate the election as president of outsiders[9] or extremists[10] while also providing the president with the political incentive and practical authority to overwhelm the more formalistic constraints of a separation of powers system.

[7] William Scheuerman, Liberal Democracy and the Social Acceleration of Time (Johns Hopkins University Press, 2004).
[8] Benjamin Kleinerman, The Discretionary President: The Promise and Peril of Executive Power (University Of Kansas Press, 2009).
[9] Juan Linz, Presidential or Parliamentary Democracy: Does It Make A Difference? in Juan Linz & Valenzuela Arturo (eds), The Failure of Presidential Democracy, (Johns Hopkins University Press, 1994)
[10] Bruce Ackerman, The Decline and Fall of the American Republic (2000).

Taken together, these considerations all highlight the extent to which the traditional law-oriented account of the separation of powers misses much of how power (in a loose sense) is actually exercised in government. This is well illustrated by Professor Bognetti's identification of "political management" as a distinct function of government – and by how the other functions identified are largely conceived in terms of their engagement with the exercise of political management by the 'executive'. This reflects a view that government has changed and that it is in the area of political management – not legislative enactment – that the greatest possibility for a concentration of power exist. The value of the traditional model, with its promise of legal certainty and the rule of law, becomes more questionable when "[t]o be honest, in the contemporary world, legal certainty is, when looking at constitutional values, forced into second place".[11] Yet, the problem with the persistence of the traditional model may go beyond its limited capacity to regulate a political management it does not formally recognise: under certain conditions, it may actually entrench the concentration of power.

The first risk in this regard is that the traditional approach may mislead. Eschewing Madison's warning about the practical limitations of "parchment barriers", it actively directs attention away from real-world power relationships towards artificial and essentially meaningless demarcations of function. This analytical misdirection may encourage complacency and inhibit the identification of undue concentrations of power.

Secondly, by closing its eyes to underlying power structures, a formalistic approach may end up legitimising practices that are substantively suspect (in that they do not meet the basic anti-concentration objective of separation) but which can be characterised as complying with the tripartite model. The classic example of this in an American context were the decisions in *INS v Chadha*[12] and *Bowsher v Synar*[13], in which Supreme Court majorities struck down mechanisms for legislative veto and oversight on the basis that they overlapped with, and therefore unlawfully interfered with, the executive function. The Court's approach was criticised as "enforcing separation for the sake of separation, exacerbating democratic

[11] G. Bognetti, 35.
[12] 462 US 919 (1983).
[13] 478 US 714 (1986).

deadlock, and encouraging growth of powers in the least defined of the three categories, the executive branch … thereby threatening the tyranny the separation was designed to avoid."[14]

The counter-productive potential of the traditional approach is perhaps most clearly demonstrated by the European Union's response to constitutional developments in Hungary. It is well known that there has been a multi-pronged attack on the substance of the formal separation provided by the constitutional system with a particular focus on negating the practical power of the constitutional court. Government actions have, however, scrupulously complied with the requirements of legal form. This included the establishment of a National Judicial Office with extensive powers over judicial administration, as well as the introduction of a lower retirement age for sitting judges. In formal or procedural terms, these measures appear relatively innocuous. In substance, however, they vest significant practical power in the executive. As every practising lawyer knows, the day-to-day minutiae of administering justice – which judge gets what case under which procedure – can have enormous, even dispositive, effect on the outcome of a case. The lower retirement age, meanwhile, had the practical consequence of removing 274 judges from the court system which, in turn, created hundreds of vacancies for the new National Judicial Office to fill.

In response, the EU's rhetorical emphasis on constitutional values has been compromised by a formalist strategy. The Commission initiated proceedings before the Court of Justice of the European Union in which it argued successfully that the reduction in retirement age for judges constituted unlawful age discrimination. Yet, this failed to address the key constitutional concern that it allowed for the replacement a substantial number of judges with a group hand-picked by the government. Thus, "[d]espite its nominal legal success, Europe appeared impotent in getting at the real issue, which was political and had nothing to do with the discrimination of individuals".[15] While this partly reflected the legal focus of the proceedings on age discrimination, the real problem became evident with the Commission's ultimate concession that the 'new' Hungarian judiciary formally complied with EU law. As Kim Lane Schepple summarised it:

[14] William Haltom, "Separating Powers: Dialectical Sense And Positive Nonsense," In Michael W. McCann And Gerald L. Houseman, Eds., Judging The Constitution (Scott, Foresman, 1989), 132.
[15] Jan-Werner Muller, Should The EU Protect Democracy And The Rule Of Law Inside Member States? (2015) 21 European Law Journal 141, 148.

> The new government was able to remake the judiciary with its preferred new judges despite having lost the case. Eventually, the Commission had to declare Hungary in compliance with the ECJ's decision without successfully challenging the threat to judicial independence, which was the real danger that should have been addressed.

What the Commission's concession shows is it that the approach pursued by EU authorities not only neglects important dimensions of political power but may legitimise institutional arrangements that, while constitutionally deficient in many respects, nonetheless comply with formal standards. By failing to take due account of the underlying political realities, a rule-based approach may not only miss but actually help to entrench constitutional capture.

III. The limitations of the legal-institutional approach

It is notable that a number of common themes emerge from the preceding overview of the difficulties with the traditional model: that it does not apply easily to modern government; that it is accordingly artificial; and that this artificiality undermines its effectiveness in crucial ways. The link between the model's obsolescence and artificiality suggests that these difficulties may originate with its basic inaccuracy. This, in turn, might be taken indicate that the problems of the separation of powers could be addressed by a descriptively superior approach. This would be logically consistent with the many efforts that have been made to re-adjust the theory to better accommodate contemporary realities.

This section argues that there is a more fundamental weakness with conventional approaches to institutional separation which adjustments in the number or nature of institutional branches would not adequately address. Amending the model so that it incorporates administrative agencies, Ombudsmen or political parties might provide a better description of the contemporary structures. It would still be prone to difficulties when dealing with the more constitutionally critical task of regulating potential concentrations of power within those structures.

The primary impediment to a more effective approach is the predominantly legal-institutional focus of modern separation of powers reasoning. This may (whether for reasons of precedent, practice or pure nostalgia) have been encouraged by an unwillingness to challenge the classic

tripartite model. Of itself, however, the tripartite model neither requires nor explains the contemporary attachment to a legal-institutional approach. Indeed, as section IV argues, this represents a departure from the strategies favoured by Madison, amongst others, in developing their original accounts of the separation of powers. The descriptive limitations of the traditional model are thus a symptom (albeit one that has its own baleful effects) of conceptual frailty rather than its source.

(a) The legitimacy gap in legal-institutional analysis

That is not to say, of course, that legal-institutional analysis is not relevant to the operation of separation of powers system. In an organised constitutional system, disputes about institutional competences clearly require legal and institutional analysis. The key point, however, is that *this is not all that they require*. Yet, there is a tendency on the part of courts and many commentators to apply this kind of predominantly or exclusively legal approach. The consequence of this is that separation of powers–style disputes may be treated as essentially technical questions of constitutional engineering.

It is important, at this point, to recall that power in a constitutional system is something to be limited *but also legitimised*. The legal-institutional approach, however, folds legitimacy into form in a manner that risks weakening both. Applying an a priori model of institutional boundaries means that the focus of the analysis is on identifying and enforcing the relevant limits. This is true of both formalist and functionalist approaches.[16] In each case, the objective is to police the institutional limits that the model provides (or, is interpreted to provide). The implicit assumption is that considerations of legitimacy have been incorporated into the model itself. The practical effect of this approach, however, is that these institutional boundaries are treated as sources of self-evident legitimacy.

As a working approach to institutional boundaries, this may have some merit. Requiring the repeated assessments of legitimacy in each and every inter-institutional disputes would undermine legal certainty and likely prove impractical. The danger with this approach arises, however, where there is a disjunction between these legal-institutional norms on the one hand, and social and political realities, on the other. Where legitimacy is equated with the fact of institutional limits, there is no obvious need to – or space for – taking account of the socio-

[16] Rebecca Brown, 'Separated Powers and Ordered Liberty' (1990) 139 U. Pa. L. Rev. 1513

political dimensions to institutional legitimacy. This may not prove unduly problematic in the short term. In the long term, however, this may undermine the social resonance and, thus, the practical authority of the constitutional system as a whole, or of individual institutions within it. Batory has drawn attention to the fact that surveys recorded widespread dissatisfaction with democracy in Hungary immediately prior to the 2010 election that brought Orban to power.

> In the 2009 poll, conducted in the seventh year of the Socialist-liberal coalition in office, three in four respondents (77%) in Hungary said they were dissatisfied with the way democracy was working, the highest percentage among the countries in the survey, and unlike in other post-communist countries, the post-1989 generation did not display more positive attitudes than those socialized under communism.[17]

While incumbent unpopularity no doubt played a part in such sentiments, the point for this argument is that the survey indicated a more deep-rooted discontent with the *system* of government. "In the eyes of many Hungarians, what unfolded in the twenty years since state socialism was liberal democracy – and it has failed."[18] The working realities of democracy had not delivered on the promise of the ideal type. This divergence between political practice and norms that seems to have undermined the latter's social foundations, thereby leaving them less equipped to regulate or restrain the potential excesses of everyday politics. Notably, this analysis is also broadly consistent with Paul Blokker's diagnosis of deficiencies in democratic and constitutional practices in several Central and Eastern European states as linked in part to the technical managerialism of legal constitutionalism.[19]

All of this supports the argument that submerging issues of institutional legitimacy beneath a legal-institutional (or indeed, normative ideal-type) analysis risks a hollowing-out of institutional and constitutional authority. The failure of a constitutional or government system to pay adequate heed to changes in the sociological conditions in which it exercises authority can render it vulnerable to challenge, capture or collapse.

[17] Agnes Batory, Populists in government? Hungary's "system of national cooperation" (2016) 23 Democratization 283, 292.
[18] Jan-Werner Muller, "The Hungarian Tragedy," (2011) (Spring) Dissent 5, 6.
[19] New Democracies in Crisis? (New York: Routledge, 2013).

(b) Mind the (legitimacy) gap: the dangers of electoral monism

Of itself, this potential for legal-institutional approaches to generate a legitimacy gap is problematic. However, this concern is intensified by an emerging electoral monism in popular accounts of legitimacy which legal constitutionalism's implied reliance on ideal types seems ill-equipped to counter. "The mandate conception of representation is widespread: scholars, journalists and ordinary citizens rely on it as axiomatic."[20] What this conception is often taken to imply is that any exercise of power which cannot be directly connected to the formal legitimation of an electoral process is *prima facie* problematic. If legitimacy is equated with an electoral mandate, this necessarily implies that the actions of non-elected officials are democratically inferior to the decisions of an elected official. This creates an imbalance of practical authority which, for the reasons outlined in the previous section, a legal-institutional analysis may be oblivious.

Of course, the academic literature provides multiple challenges to an absolutist focus on the electoral process provides an enfeebled account of governmental legitimacy. Modern democratic theorists have long recognised the challenge of "reconcil[ing] the ideal that citizens in democracies aspire to control their political representatives with the reality that elected representatives have substantial leeway to act as they themselves see fit?"[21] This has led Rehfeld, amongst others, to warn against treating popular approval for government measures as indicative of their merits or legitimacy. Sociological legitimacy, he points out, is not the same as democratic or normative legitimacy.[22]

The focus here, however, is on the argument that the converse is also true. The fact that a measure meets normative or democratic criteria of legitimacy does not secure its sociological status. The limitations of electoral monism are well documented in the academic literature. This has not, however, necessarily inhibited the influence of predominantly (or exclusively) electoral accounts of legitimacy in political and popular discourse. A separation of powers system that neglects its sociological foundations may prove ill-equipped to resist electoral

[20] B. Manin, A. Przeworski & S. Stokes, "Elections and Representation", in B. Manin, A. Przeworski & S. Stokes (eds), Democracy, Accountability and Representation (1997), 30.
[21] Ian Shapiro, Susan C. Stokes, Elizabeth Jean Wood & Alexander S. Kirshner (eds), Political Representation (2009), 1.
[22] Andrew Rehfeld, The Concept of Constituency (Cambridge University Press, 2005), 14-16.

monism, let alone the proximate populist narrative "that politics should be an expression of the volonte´ generale of the people"[23].

This again appears to be borne out by experience in some European states. Verbeek and Zaslove argue that the judiciary's practical authority to check executive power in Berlusconi's Italy was restricted by his populist assertions of his own (unitary) electoral authority and an associated de-legitimation of an 'undemocratic' and unfairly politicized judiciary.[24] Hungary and Poland provide even clearer examples of the frailties of legal-institutional accounts of constitutional checks in the face of an aggressive populism that treats one-off electoral success as the gateway to absolute authority

Thus, the problems with this ideal-type go beyond its arcane artificiality. The inconsistency between government as it is, and government as the model assumes it to be, certainly causes difficulties. These persist, however, because of a more deep-rooted and problematic reluctance to integrate legal or constitutional analysis of institutional limits with sociological accounts of institutional power within a particular system. This means that the legal-institutional approach to constitutional checks and balances is, at best, sporadically effective. At worst, however, this disjunction between constitutional theory and reality may leave space for a contest between constitutional norms, on the one hand, and assertions of political or social power on the other. This is a contest which experience suggests may be inherently mismatched – and which, under current political conditions at least, seems specifically vulnerable to populist challenge.

IV: The Madisonian strategy: relating institutional limits to popular legitimacy

(a) The Federalist belief in institutional limits

Modern attitudes to the separation of powers have been influenced in many important respects by the arguments of the early American constitutionalists, especially as articulated in the Federalist Papers. Fears of faction, government partiality or even tyranny have strong contemporary resonance. The value of inter-institutional checking continues to appeal. The argument in this section, however, is that modern versions of the separation of powers err by

[23] Cas Mudde, "The Populist Zeitgeist," (2004) 39 Government and Opposition 541, 543.
[24] Bertjan Verbeek & Andrej Zaslove, Italy: a case of mutating populism? (2016) 23 Democratization 304.

focusing to too great an extent on the institutional details associated with Montesquieu *per* Madison. Where the legal-institutional approach departs from their strategy is by conflating the existence and the legitimacy of institutional limits. By assuming the value of institutional separation in itself, the social foundations of institutional power are made to disappear.

This is, it should be noted, consistent with elements of Madison's approach of the separation of powers. Most obviously, Book 51's famous "policy of supplying, by opposite and rival interests, the defect of better motives" seems to treat institutional limits (and their resulting rivalry) as an inherent good. The threat of faction is countered by America's multiple methods of separation: "society itself will be broken into so many parts, interests and classes of citizens that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority".

The point, however, is that institutional limits form only part of Madison's overall approach. Creating different institutions with different incentives may fulfil the valuable negative function of checking potential abuses. Madison was also – arguably more – concerned, however, with the positive challenge of connecting institutional power with representative authority. This is evident event in Book 51 where, in between outlining the institutional strategies quoted above, the more general observation is made that:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed*; and in the next place oblige it to control itself. *A dependence on the people is, no doubt, the primary control on the government*; but experience has taught mankind the necessity of auxiliary precautions.

This foregrounds sociological considerations of legitimacy in way that distinguishes it from a legal-institutional approach. The "first" step is to enable (or legitimise) government control. The "primary" method of doing this is by connecting it to popular authority. Institutional checks are "auxiliary precautions" rather than an end in themselves. Even Madison's argument about the practical utility of multiple social interests is first qualified by the requirement that "all authority in [the federal republic of the United States] … be derived from and dependent on the society".

(b) Institutional limits as a safeguard against the people

At this point, a legal-institutionalist might legitimately argue that Madison's arguments were clearly and consciously driven by a distrust of popular action. While the discussion of separation of powers in Book 51 may be more directly focused on the threat from faction, other parts of the Federalist Papers support this view. Book 49, for example, cautions against direct and regular forms of recourse to the people in case it "distu[b] the public tranquillity by interesting too strongly the public passions". Allowing "the passions … not the reason of the public [to] sit in judgment" would detract from the whole point of the republican system: to ensure that "[t]he passions ought to be controlled and regulated by the government". The dangers of popular support both explained and justified the Federalist Papers' overriding concern to restrain a legislative branch that "seem[s] sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter, as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity".

This fear of the popular (and thus practical) power of the legislature is evident across the Federalist Papers. The necessity to provide an effective and distinct counterweight to the popular appeal of the House of Representatives informs multiple matters of constitutional design: the functions and privileges of the President; the use of a college of electors; the specific safeguards for judicial independence; the powers and manner of elections for the Senate; and opposition the proposal that a convention be called when two of the three branches concur. Indeed, Book 63 suggests at one point that the novelty of the American republic lies in its institutional exclusion of popular power:

> The true distinction between [the ancient republics] and the American government lies in *the total exclusion of the people in their collective capacity* from any share in the latter….[25]

(c) The people as the lifeblood of institutional limits

It is clearly correct to read the Federalist Papers as motivated by a desire to use institutional separation to put distance between and government policy and popular 'passions'. The mistake, however, would be to see in this a consistently negative attitude to popular opinion.

[25] Book 63. Original Emphasis.

While Madison was (very) wary of popular opinion, he also appreciated the necessity to maintain a relationship between popular sovereignty and government power. This concern to preserve the popular legitimacy government institutions recurs throughout the Federalist Papers. Authority, we have seen, derives from and is dependent on society. The measure of a republican constitution involves a similar emphasis on popular sovereignty. "The ingredients of safety in a republican sense are a due dependence on the people, and a due responsibility".[26]

Notably, the necessity for popular legitimacy is justified in various parts of the Federalist Papers in practical as well as normative terms. While the principle of popular sovereignty plays an important function in legitimising the constitutional system, the authors are acutely conscious that the practical authority of individual institutions is linked to their popular legitimacy. This is important for the system's separation of powers because it directly affects the capacity of the institutions to provide an effective check on each other – and, especially, on the House of Representatives. For the separation to be effective, it must allocate power between institutions that are "separate and distinct" in their constitutional means, their personal motives *and* their practical authority. Madison's concluding remarks on the composition of the Senate reflect the practical strategy that underpins his general approach to separating powers:

> Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.

This encapsulates the Madisonian attitude to popular sovereignty: as a temporal threat to constitutional equilibrium; as the normative value that legitimises the establishment of that equilibrium; and as the sociological source of the practical authority upon which its inter-institutional checks depend. It is in its treatment of popular sovereignty that the legal-institutional approach departs from Madison. Its focus on institutional limits reflects the Federalists' first conception of popular sovereignty as a threat to constitutional balance. The

[26] Book 70.

second normative dimension is assumed but not examined; while the final sociological dimension disappears completely from its legal-technical approach.

V. Alternative strategies of separation

Despite its limitations, the centrality of the tripartite model to theories of government speaks to the intuitive and enduring appeal of a strategy based on separating institutional powers. The basic notion of distributing power in a manner that prevents unitary rule seems eminently sensible. That the tripartite model – at least in its legal-institutional guise – seems ineffective in the face of electoral monism does not necessarily impugn the value of a general policy of separated power. The challenge for contemporary theorists, therefore, is to devise an alternative strategy for separating power which more accurately addresses the reality and the risks of modern governance. This section considers some of the more recent work in the area.

(a) Ad hoc institutional separation

The potential benefits of institutional separation have been taken by some to suggest that a strategy based on multiplying limits may have some merit. In the context of the argument being made here, the obvious difficulty is that involves a relatively pure expression of the legal-institutional approach. Treating separation as an inherent good may provide a shortcut (or bootstrap) to institutional legitimacy but it risks doing so at the expense of the system (or institution's) practical authority.

The European Union's ongoing struggles with legitimacy provide an example of this problem. While many see the EU's complexity as a challenge to its popular legitimacy, some have reasoned by analogy with the separation of powers that its multi-actor character is a source of legitimacy. Moving (tellingly) from the view that "the classic justification for democracy is to check and channel the arbitrary and potentially corrupt power of the state",[27] Moravczik, for example, claims that the EU's complex structures fulfil the constitutionally and democratically important functions of making arbitrary action difficult, protecting minority interests and ensuring pluralistic support for policy measures.

[27] Andrew Moravcsik, "In Defence of the "Democracy Deficit" (2002) 40 Journal Of Common Market Studies 603, 606.

The logic here seems to be that if separation provides value, why stop at only three branches? Why not establish a multiplicity of independent institutions? The emptiness of this ad hoc scheme would expose it to many of the same criticisms to which the traditional legal-institutional approach is susceptible: that it is artificial; that it is ignorant of the realities of political influence; and that it would accordingly be ill-equipped to prevent undue concentrations of that influence. The broader difficulty is – as the EU experience seems to show – that this may generate not popular approval but an unhelpful confusion about both the role of individual institutions and the legitimacy of the system as a whole.[28] This underscores the point made earlier about the need to be cognisant of the sociological foundations of institutional power.

(b) Diversifying the separation of functions

Similarly, the fate of the tripartite model suggests that a strategy based on the recognition of new functional categories would not avoid the difficulties identified in this piece. That is not to say that the Australian notion of a fourth 'integrity branch' of government, like Peter Strauss' four-branch model, Henry Merry's five-branch model,[29] Bruce Ackerman's suggestion of multiple "special-purpose branches"[30] or Professor Bognetti's five-function classification would not represent a substantial improvement on the tripartite theory. These models all come closer to an accurate description of the practice and challenges of contemporary governance, and provide for a more nuanced system of separation.

The problem, however, is that an approach which is premised on separating functions may be undermined by both the definitional indeterminacy and the relative lack of normative and political resonance of a functional model. These characteristics weaken the practical authority of individual institutions. A functional model leaves the boundaries of institutional power open to debate, while doing little to equip politically weaker branches with the conceptual or rhetorical tools to prevent the more powerful institutions from exercising the sort of "overruling influence over the others"[31] which an effective theory should prevent. Under the rules of everyday democratic politics, an open-textured functional mandate will rarely trump the claim to speak for the People. This suggests that the turn to functionalism is something of a conceptual cul de sac. The functional model may be refined and improved. The risk,

[28] Pavlos Eleftheriadis, The Idea Of A European Constitution (2007) 27 Oxford Journal Of Legal Studies 1.
[29] Five-Branch Government: The Full Measure of Constitutional Checks and Balances (1980).
[30] The New Separation Of Powers, 113 Harvard Law Review 633 (2000), 723.
[31] Book 48.

ultimately, however, is that it lacks the necessary traction in the real world to supply either the personal motives or constitutional means to secure institutional authority.

(c) Abandon legal-institutional separation

Thus far, this paper has made repeated criticisms of the technical formalism that characterises the legal-institutional approach to separating power. From this perspective, Posner and Vermeule's work on the executive branch warrants consideration given its similar scepticism about the discrepancy between legal accounts of institutional limits, on the one hand, and their socio-political legitimacy, on the other. In fact, their work challenges the notion of institutional separation in itself. Their solution to the questions of how to legitimate executive or administrative action is to trust to the limitations imposed by political and popular supervision. In their view, "as the bonds of law have loosened, the bonds of politics have tightened their grip. The executive, unbound from the standpoint of liberal legalism, is in some ways more constrained than ever before".[32]

Their recognition of both the influence of politics and the law's limited ability to see, let alone limit, much of what transpires in government chimes closely with many of the points made in this piece. It may over-extend these insights, however, to suggest that a strategy based on partial substitution of "the rule of politics for the rule of law" is adequate to ensure that "the demise of liberal legalism, of the separation of powers, even of the rule of law itself, need not imply autocracy".[33]

First of all, their work is focused on the executive branch so neither purports to nor provides a template for a new system of checks and balances. Secondly, while the empirical work which they cite provides support for the notion that politics *can* ensure a degree of scrutiny of executive action, this does not demonstrate that a system based on electoral or political checks *will* secure impartial and balanced government – especially in light of the well-known biases in electoral politics that have already (briefly) been identified. Thirdly, this overlooks the important strand in separation of powers scholarship that emphasises the normative and instrumental benefits of a formal legal separation. This connection between institutional separation and values like the rule of law is prominent, for example, in many process-oriented accounts institutional separation such as the German concept of *Vorbehalt des Gesetzes* or

[32] Eric A. Posner & Adrian Vermeule, The Executive Unbound (2010), 5
[33] Ibid, 14.

Professors Waldron and Bognetti's work. Indeed, Cameron Maxwell has argued that a formal separation of institutions provides not only a normative but a necessary socio-cognitive foundation for rule-based government.[34] Thus, while it has been argued that the legal-institutional approach over-emphasises technical matters at the expense of socio-political influences, Posner and Vermuele seem to go too far in the other direction.

(d) A separation of parties or interests

More promising, therefore, may be those recent models of separation that endorse formal institutional limits but seek to re-divide them by purportedly fixed differences of social or political perspective. This follows the Madisonian approach of combining legal and sociological dimensions of institutional power. Daryl Levinson and Richard Pildes have suggested that the theory should be re-focused to concentrate on the separation of political parties rather than functional powers.[35] Josh Chafetz[36] and Jessica Bulman-Pozen[37] argue that the divergence of interests and views between central and local governments can be characterised as a vertical separation of powers. The pertinent point for this paper is that these accounts separate power in a way that tracks the presence within society of an autonomous and independent perspective. That is not to say that the demarcations identified by these different models will always lead to opposing views. The point is rather that, by separating power between bodies that are likely – whether for political, representative or institutional reasons – to have independent will and (some level of) power, these approaches have anti-concentration potential.

Given the focus of this piece is on horizontal forms of institutional separation, Levinson and Pildes' is the more directly relevant. This is also borne out by its position as one of the most persuasive contemporary accounts of separated powers. By reintroducing socio-political considerations, their theory provides a much more accurate description of how the distribution of power across different bodies actually operates. '[I]n the broad run of cases, … party is likely to be the single best predictor of political agreement and disagreement'.[38] Furthermore, by focusing attention on a category of social interests that is liable to actually

[34] Cameron Maxwell, Strong Constitutions: Social-Cognitive Origins of the Separation of Powers (Oxford University Press, 2013).
[35] D. Levinson & H. Pildes, Separation Of Parties Not Powers 119 Harvard Law Review 2311 (2006).
[36] Multiplicity In Federalism And The Separation Of Powers, 120 Yale Law Journal 1084 (2011).
[37] Federalism As A Safeguard Of The Separation Of Powers 112 Columbia Law Review 459 (2012).
[38] D Levinson and H Pildes, 2324.

inspire personal and institutional allegiance, the model demonstrates how influence can be accumulated and dispersed.

A focus on political parties alone, however, cannot provide a normatively complete model of separated powers. While politics may provide one important demarcation of social interests, it cannot provide a full account of the diversity of interests that exist within society. Treating all government decisions as, at heart, matters of party politics is open to charges of Schumpeterian elitism. This also risks reproducing electoral biases more widely across government. Indeed, a system based on a separation between political parties might rationally be expected to incline towards either a convergence of elitist interests (on the basis that political elites have more in common with each other than the public at large) or a system characterised by partisan extremism (on the basis that there is no incentive to co-operate once in office). That an analysis based on party politics would not constrain such partial decision-making underlines the point that the separation of parties is a descriptive model which has substantial explanatory but little, if any, normative force. A separation of parties rightly directs attention to a political reality that legal-institutional accounts have under-emphasised. It would be problematic, however, to make it the centrepiece of the separation system. Political parties are an important part of the story – but they are only a part. Furthermore, the potential for them to have their own struggles with popular and sociological legitimacy means that the authority of a separation of parties system would not necessarily be immune from the populist challenge previously described.

VI. What is the core of the separation of powers?

What all of this indicates is that a comprehensive model of institutional separation needs to integrate normative, legal and sociological dimensions of power. How might this be achieved? The fact that institutional separation is compatible with multiple normative and sociological models suggests that it may be appropriate to begin by considering the institutional conditions necessary for a functioning separation. Identifying the structural conditions for separated power may provide a (relatively) neutral or 'thin' foundation for thicker models of separated powers.[39]

[39] N.W Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59.

(a) Separation as a prerequisite for process values

Furthermore this could also go some way to shoring up current legal-institutional approaches to constitutional balance. Despite the criticisms above, a formal separation of institutional powers may have positive substantive and procedural effects.[40] Separation engenders inter-branch communication, which provides a degree of *transparency* and *publicity*.[41] The *independence* of the branches increases the informational (and thus political) costs of pursuing policy objectives, which tends to encourage *generality* and discourage attainder. If an institution wishes to target a particular group but is dependent on the assistance of other institutions to achieve this, it can only be certain of success if it makes its intentions clear. Separation does not preclude this, but it does limit the potential for surreptitious tyrannies. The burden of persuasion identified above also means that an institution may, in practice, be required to explain its favoured course of action. The provision of this type of institutional *justification*, in turn, means that the actions of that institution are more *susceptible to challenge and/or review* by other agencies of government. This also has the potential to enhance the degree of *expertise* in government by allowing other agencies with particular experience or specialisations to identify and correct errors in the reasoning provided. Taken together, these process values promote institutional *accountability*, which in turn fosters *non-arbitrariness* in government.

This overview of the values variously associated with institutional separation calls attention to a core assumption that seems to underpin each claim: that these are arms-length transactions between institutions with the independence and authority to constitute a genuine check on each other. This suggests that there may, in practical terms, be two essential components of an effective system of separation: that the institutions involved are independent; and that they have the authority to hold each other to account.

Separation of powers scholarship has long acknowledged the centrality of this first criterion of institutional independence. This is illustrated by the way in which the theory can sometimes be elided with the related (but logically distinct) principle of judicial independence. Less commonly discussed, perhaps, has been the second consideration

[40] Rebecca Brown, Separated Powers and Ordered Liberty 139 University Of Pennsylvania Law Review 1513 (1990).
[41] Whether within government, or to the public at large.

identified above: that the system consists of independent institutions that provide an accountability check. It might be suggested that this is ether unnecessary or to some degree implicit in the notion of independent institutions sharing power; that the practical realities of power and self-interest mean that institutions will inevitably hold each other to account. A key argument of this paper has been, however, that this is not sufficient to secure a constitutional system based on the rule of law. A system based on ad hoc forms of strategic or self-interested engagement does not provide genuine accountability (and therefore support the other positive constitutional values derived from it) because it subordinates its designated separation of powers to institutional pragmatism. A system that trusts to either formal limits or assumed ambition alone risks making accountability contingent on institutional boundaries that lack practical authority, or unappreciated socio-political factors like institutional reputations or self-image. This could, for example, encourage a wilful or populist institution to unilaterally determine the extent and manner of its engagement with other institutions. Ambition may be an effective means of generating institutional rivalries but it does not, of itself, signify much about how those rivalries ought to play out in practice.

The difficulty is that this approach risks falling short of the kind of formal accountability that is a necessary part of an effective constitutional system based on the rule of law. For example, it is conceivable that situations will arise where institutions that are rivals nonetheless have a common interest in having their conflicts mediated away from public scrutiny. The EU institutions' use of closed-door trilogues is one example of where mutual convenience trumps inter-institutional rivalry in a systemically detrimental way. This underlines the point that the accountability that is critical to effective constitutionalism requires the presence of a certain type of relationship in which separated institutions are entitled *as of right* to make certain demands of each other *through formal rule-based procedures*. Constitutionalism requires rules not realpolitik; and those rules require authoritative backing.

This reinforces the importance of legal authority within a constitutional system of separated powers. It is legal authority that underwrites the entitlement to hold another institution to account that is, in turn, critical to constitutionalism. Legal authority generates and sustains a formal power relationship in which one institution holds authority and another is subject to it. This means that institutions act within and are subject to reciprocal power structures. Crucially, the engagement that occurs within such structures is one which denies the subject

institution the possibility of unilateral or unfettered power. Rather, it is answerable for its position to an external actor. This is both formal symbol and practical safeguard of the rule of law. Separation may encourage the kind of institutional dynamics that make rivalry more likely but it is the presence of formal authority structures that transforms competition into constitutional checking.

(b) The role of institutional authority

However, this paper has also argued that formal structures are not, in themselves, sufficient to produce practical effects. In the same way that ambition alone does not suffice, a reliance on formal limits making accountability contingent on institutional boundaries that lack practical authority. What is needed, therefore, is a conception of institutional authority that combines legal form with practical effect. This, it is argued here, requires an approach to institutional authority that takes due account of two central characteristics: that it is relational; and that it is recursive.

The first of these calls attention to the fact that institutional authority is not exercised in a vacuum. It is always authority in respect of another institution or actor. In a separation of powers system, the relevant question is not whether an institution has legal or practical authority per se: it is whether it has adequate legal or practical authority *relative to the other institution being considered*.

It is in this context that the recursive character of institutional authority assumes importance. This conceives of authority not as legal fiction or social fact but as a concept that necessarily comprises sociological and normative elements. In other words, authority cannot exist in theory alone – but theory is also not irrelevant to how authority is generated and maintained within a particular social system. This goes back to the point – arguably the central point on which the paper depends – that constitutional theory or norms are not wholly external to a society. They are instead part of the complex processes by which the factual conditions for legitimacy within that particular social structure are produced. They provide a narrative or account of the society and its institutions that is internalised (to a degree at least) and that thereby serves as a basis for creating, testing or preserving the legitimacy of political or institutional claims. The practical authority of an institution is, accordingly, likely to depend to some degree on its socio-normative qualities.

(c) A two-pronged approach: independence and authority

This suggests that there are two core requirements for an effective system of institutional separation: namely that it provides for inter-institutional checks that are both independent and authoritative. While the identity and nature of the institutions separated might differ from system to system (or theorist to theorist), independence and authority seem to be the minimum characteristics for the separation of powers to make an effective contribution to constitutionalism.

A focus on independence alone does little to address specific constitutional questions because it is capable of supporting either the separation or checking of the institutions at issue. More importantly perhaps, the principle is primarily a passive one that focuses on defending institutional prerogatives. Provided that certain boundaries are observed, it offers limited guidance on the more positive constitutional challenge of shaping how institutional interaction should occur.

Similarly, an approach which concentrated on ensuring formal authority structures would be of little benefit if the institutions participating in these structures were not independent in thought and deed, or lacked the practical authority to provide a genuine check. While these formal safeguards may foster some of the process values described above (such as publicity), it is questionable whether a system in which a body is capable of exerting dominion over the agency charged with its checking could be said to provide an effective separation of powers.

By contrast, an approach that takes account of both independence and authority may better capture how intuitions about institutional separation can be converted into a comprehensive separation of powers systems. This two-pronged approach seems to embody the minimum structural elements of an effective separation of powers strategy. Independence is the institutional quality that makes separation possible; authority provides a system of social rules and relationships through which the separation can be made effective. Focusing on these two variables seems to provide a way into the core of a separation of powers system – provided that they are understood in the appropriate socio-normative sense. The two-pronged approach thus has potential both as a means of evaluating current systems of separation; and as a basis for constructing a new approach to the separation of powers.

VII Conclusion

This paper has argued that the legal-institutional turn in separation of powers thinking has generated a profound legitimacy problem. Providing for a system of inter-institutional limits may look like a normative conception of a separation of powers system. It may function over a prolonged period like a separation of power system. The bare fact of institutional separation has its procedural and substantive potential. The problem, however, is that this approach omits the sociological dimension of institutional power, thereby losing sight of the practical necessity to demonstrably consider, establish and maintain the legitimacy of these limits. Adhering to a formal theory that misses much of what occurs in government is artificial; is likely to be ineffective in at least some respects; may unwittingly legitimise practices that are substantively problematic; and may generate a gap between formal theory and everyday reality that undermines the legitimacy and authority of the system as a whole, and of the institutions within it. This may expose the constitutional order to serious, even existential, challenges from actors who are able to draw on arguments or themes that have greater socio-political resonance.

This is important not only from the perspective of constitutional stability but also because experience suggests that institutional structures play a distinct role in countering practices that are democratically or constitutionally questionable. Taggart and Kaltwasser's review found that "two of the most consistent sites of opposition to populism … are constitutional courts and the judiciary".[42] While a legal-institutionalist might attribute this to some aspect of the judicial function, the better view may be that it reflects the likelihood that the notion of independent judicial authority in most states has deep roots in culture, history and popular understanding. The very fact that the courts have been such a priority target in Hungary (and more recently Poland) may reflect a recognition by the regimes of the link between the practical authority (which a court may be amongst the most likely to have) and the potential for effective forms of inter-institutional oversight.

[42] Paul Taggart and Cristobal Kaltwasser (2016) 23 (2) Democratization "Dealing with Populists in Government" 330.

What this suggests is that there is need for constitutionalists to remain cognisant of what it takes to establish and maintain practical authority. It must also be remembered that "[t]his is a matter of social-institutional (and, in many cases, juridical) facts, not a matter of morality or reason"[43]. Normative theory may inform institutional authority in socially and legally important ways but its relational and recursive character makes it a fundamentally contestable concept. This means that, contrary to the working logic of legal constitutionalism, the boundaries of any system of institutional separation are inherently negotiable. Whatever the specifics of domestic constitutional arrangements, the broader point is that there is need for institutions within any system of separation to remain attentive to the logic and limits of their practical authority.

[43] Andrei Marmor, An Institutional Conception Of Authority (2011) 39 (3) Philosophy & Public Affairs 238, 247.