The Separation of Powers and the Challenge to Constitutional Democracy

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I. Introduction[1]

The title of this lecture was going to be "The Separation of Powers and the Crisis of Constitutional Democracy," and in an uncharacteristic moment of worry about expressing too much pessimism, I moderated it. But the thought of a *crisis* of constitutional democracy lurks behind this analysis of contemporary *challenges* to it. The challenges posed by the breakdown of or strain in the separation of powers is a very serious one. It puts constitutional democracy into a more precarious and more vulnerable position than has traditionally been recognized.

I'll begin with a history of the development of the idea of the separation of powers, and an account of the relationship of that idea to some older concepts in the history of political thought and in political and constitutional practice. I'll then describe the transformation of the idea in the era of democratic revolution and constitution-making in the late eighteenth century, and the ways in which that new democratic conception ran aground almost immediately. The democratic conception then developed unexpected relationships to the emergent practice in constitutional monarchies and democracies alike of contestation by political parties; the uneasy coexistence of this practice of party contestation and the separation of powers is the source of the challenges I will go on to discuss.

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1 This article is based on the 31st Annual McDonald Lecture of the same title, delivered remotely due to the COVID-19 pandemic but ostensibly "at" the Centre for Constitutional Studies, University of Alberta Faculty of Law, November 4, 2020. I gratefully acknowledge the research assistance of Ewa Nizalowska and useful conversations with Geoffrey Sigalet, as well as the virtual hospitality and organization provided by Patricia Paradis, Executive Director of the Centre, and Barbara Billingsley, Dean of the Law School.

The separation of powers might well be *the* crucial concept in what we have come to think of as constitutionalism or constitutional government. It's *sine qua non* for describing a system as constitutional. We describe political orders as constitutional even though they do not have written constitutions: Britain is a constitutional monarchy. We describe systems as constitutional even though they don't have strong-form judicial review — or, in some cases, any judicial review at all — over legislation: New Zealand was a constitutional state even before the enactment of its weak-form judicial review. We describe systems as constitutional whether they are parliamentary like Canada, presidential like the United States, or a hybrid like France; whether they are federal like Germany, quasi-federal like Spain, or unitary like Norway.

When can't we describe a system as constitutional? What is it that makes a constitutional monarchy different from an absolute monarchy, of which there are still some in the world? What is it that marks a constitutional democracy as distinct from other kinds of democracy? I suggest that it is, at a minimum, the independence of the judiciary from both legislative and executive direct influence. It is the ability of citizens of a state to know that their relationship to the criminal law will go through a multi-part process in which separate institutions, staffed by separate personnel, enact the law under which they will be charged, and try them to find out whether they're guilty of the offense.

In a state in which it is possible for the holders of executive power to directly order the extrajudicial imprisonment, punishment, or execution of citizens, the *de facto* judicial power is held by political branches of government, and the resulting system is not a constitutional one. The separation of lawmaking and law enforcement into a multi-stage process housed in institutions staffed by separate personnel, with legally segregated duties, is a critical feature that allows us to identify systems as constitutional. And for this separation to have effect, it is not only necessary that there be an independent judiciary. It is also necessary that the holders of executive and police power not be above the law. If a president or prime minister can, with impunity, order armed agents of the state to seize or kill their opponents, then the fact that there are also regular courts staffed by independent judges doesn't make a system constitutional. Holders of executive power must therefore not have impunity, which means that they must face accountability. This 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, is at the heart of the separation of powers, and of constitutionalism. The separation of powers so conceived is a relatively

new idea in the history of political thought. It is older as a *practice*, but as a conscious idea entering into the categorization of regimes or forms of government, it's relatively new.[2]

II. The separation of powers and the mixed constitution

A very old idea out of which the separation of powers emerged was that of the *mixed constitution*, or *mixed government*.

Political life in ancient Greek city-states was marked by ongoing contestation between partisans of democratic rule and partisans of aristocratic or oligarchic rule — of rule by the many and of rule by the few — against the background of a shared conviction that to live in a Greek city-state was to reject monarchy or tyranny, rule by the one, the powerful single ruler associated with such places as the Persian Empire.[3]

In the twilight of that dispute, Aristotle famously, if briefly, suggested that one of the best forms of government — maybe *the* best realistically attainable form of government — would be one that combined or mixed rule by the one, the few, and the many. In *The Politics* he offered relatively little by way of institutional detail about what this could mean, but he implanted the idea into Western political philosophy. There was some precedent for the idea in Plato, and Sparta's constitution with a two-man monarchy alongside elite rule had sometimes been thought of as a mixture of kingship and aristocracy. But it was Aristotle who really cemented the thought that the mixture of rule by one, the few, and the many — of monarchy, aristocracy, and democracy, or popular government — might be the best, most lawful, most moderate kind of government. It might replace the kind of conflicts that always divided the Greek city-states internally, as well as dividing them into rival ideological camps externally. It might draw in as full political participants both the many and the wealthy few who claimed superiority — the *áristos*, the excellent — as well as

2 Although the historical reconstruction I offer is, I think, idiosyncratic to me, the image of what the separation of powers is and means that is summarized in this paragraph is indebted to Jeremy Waldron, "Separation of Powers and the Rule of Law" in *Political Political Theory: Essays on Institutions* (Cambridge, Mass: Harvard University Press, 2016) 45; Judith N Shklar, "The Liberalism of Fear" in Nancy L Rosenblum, ed, *Liberalism and the Moral Life* (Cambridge, Mass: Harvard University Press, 1989) 21; and George Kateb, "Remarks on the Procedures of Constitutional Democracy" in *The Inner Ocean: Individualism and Democratic Culture* (Ithaca, NY: Cornell University Press, 1992) 57.

3 See Josiah Ober, *The Rise and Fall of Classical Greece* (Princeton, NJ: Princeton University Press, 2015). Ober suggests that the development of the world of the Greek city-states was shaped by the shared rejection of one-man rule, until that world was conquered by and absorbed into the Macedonian monarchy.

a kind of unified decision-making ruler that was sometimes idealized as being the wise, or just, monarch.

Aristotle referred to this form of government of as a *polity — politeia* — acknowledging that it is also a generic word for the basic ordering of any city-state (*polis*) in much the same way as we might now use *constitution* either generically to describe every state's basic order or particularly to describe only states that are *constitutional* in a normatively strong sense. The core idea, translated into Latin in the sometimes similarly ambiguous *res publica* or republic, was to have a decisive effect on the long term of Western political thought because of its absorption into Roman constitutional thinking. The Romans had developed their Constitution quite independent of the intellectual influence of the Greeks. The Roman Republic was established when an aristocratic class overthrew a king they took to be abusing their rights and privileges, replacing rule by the one with rule by the few. Beginning about a century later, the plebeian population of Rome successfully fought for institutional inclusion, creating a hybrid form of government: a constitution that centred on a powerful senate, representing primarily the members of the aristocratic class, and one of a couple of different kinds of popular assemblies — directly democratic institutions in which the free citizens of Rome assembled in person, grouped in one way or another, in order to take part in the institutions of Roman government. In place of the traditional *rule by one*, the kingship toward which antipathy remained deep and powerful, the Roman Constitution had *two* consuls, balancing each other and serving for a limited term of office. The Constitution did, however, retain the option of short-term rule by one with the office of the dictator — one person serving in place of the two when unity of decision-making was required, particularly during military emergencies.

The Greek historian Polybius, reflecting on the great accomplishments of the Roman Republic and the success of its expansion across the Mediterranean world, mapped this Roman Constitution — developed as a matter of political imperative and necessity, not a matter of theoretical principle — onto the idea, crystallized in Aristotle, of the mixed constitution as the best form of government practically attainable. Rome had struck upon the best of the constitutions, and this helped to explain the tremendous success that Rome had had in the world.

More than five hundred years after the fall of the Western Empire, kings in the kingdoms of northern and western Europe sought to enhance their effective coercive and financial capacity and so, first, included the great feudal nobility in governance at the centre, and then, later, summoned representatives of increasingly wealthy mercantile cities to secure their consent to and

cooperation with taxation.[4] Over time they recreated institutions that looked very much like government by the one, the few, and the many, taking nearly parallel forms in different kingdoms, often referred to by the name of estates, or, in England, taking the shape of what became the two Houses of Parliament: the House of Lords and the House of Commons.[5] This wasn't done in self-conscious imitation of the Romans. Even the Holy Roman Empire, which had a recognizably mixed constitution, claimed descent from the Roman *Empire* that had succeeded the republic, not to the mixed republican constitution itself. Neither was it was done in self-conscious following of Aristotle, though Thomas Aquinas made Aristotle's defense of the mixed government intellectually available and attractive again. It was done because the incorporation of both nobles and commoners effectively served the same purpose that it had served for the Romans: to formally incorporate, and thereby to gain the cooperation and participation of, classes of the population from which the government would benefit.

In all of these cases, the Roman as well as the late medieval and early modern European, what was understood to be happening was a kind of pooling of powers. To mix is not to separate. And the institutions that were created under mixed government were ways to ensure the *joint* activity of different actors in political societies. The ultimate statement of this combination, I think, we can find in the English phrase "the Crown in Parliament," the king or queen acting in conjunction with the House of Lords and the House of Commons. The Crown in Parliament pools *all* of the political powers of the kingdom, and names the final power in the English, and then the British, Constitution. In modified ways, it names the ultimate power to this day in Commonwealth constitutions like Canada's.

That's not a vision of separation. It was transformed into a vision of separation only in the mid-eighteenth century, when the French political theorist and jurist, the Baron de Montesquieu, redescribed the English Constitution, partly with an eye toward encouraging constitutional reform in France. His redescription joined the existing institutions of mixed government with a quite different principle: the rule of law. The rule of law isn't intrinsically a feature of

4 See Deborah Boucoyannis, "No Taxation of Elites, No Representation: State Capacity and the Origins of Representation" (2015) 43:3 Politics & Society 303.

5 The similarity in the medieval development of these institutions across northern and western Europe was an important idea in early modern "ancient constitutionalism," and figures prominently in both Montesquieu's *Spirit of the Laws* and Tocqueville's *Ancien Régime and the Revolution*. I discuss ancient constitutionalism in more depth in Jacob T Levy, *Rationalism, Pluralism, and Freedom* (Oxford: Oxford University Press, 2015).

mixed government or mixed constitutionalism. 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.

The fight to establish the rule of law, and to ensure something like judicial independence from direct political interference, had been a long and slow one in England, where it had advanced the farthest by Montesquieu's time. It had also been a long and slow one in France, where important judicial bodies, the *Parlements*, provincial and Parisian courts staffed by members of the nobility — including Montesquieu himself, who served in the *Parlement* of Bordeaux for a decade, most of that time as president — fought to ensure the independence of their judicial and legal decision-making from direct royal interference.

By the mid-eighteenth century it had become common to connect the British Constitution to the mixed government tradition; there were many happy to see it as the latest instantiation of this best form of government. The common law courts were not a part of this picture; courts don't *rule,* whether as the one, or the few, or the many. But to Montesquieu's mind, the independence of the courts, protections of due process for private citizens, and legal regularity in public government were crucial to thinking about regime types. They defined the difference between moderate governments — what we would come to call constitutional governments — and despotic ones. Moderate governments might be republics or monarchies, but insofar as they were moderate and lawful they enshrined *some* separation of powers, though typically not enough. He found the separation of powers expressed to its fullest degree in the Constitution of England. In analyzing the constitution of England, he identified the separation of powers in the way that we still do to this day: a separation between executive, legislative, and judicial powers.

The bare idea of distinguishing among powers was not novel to Montesquieu; John Locke, for one, had foregrounded relations between legislature and executive in his political theory. But Locke didn't elevate the judicial power to an equal constitutional standing. Rather, Locke distinguished among legislative, executive, and *federative* powers — the latter the power over war and foreign relations, conceptually separate from the domestic power to execute laws, though wielded by the same hands. Montesquieu elevated the judicial power to equal standing, and unlike Locke insisted on institutional, not only concep-

tual, separation among the powers. Montesquieu identified this separation of powers with the rule of law and emphasized that it prevented the violation of the principle of natural justice that no one may be a judge in their own cause. This principle did important work in Locke's political theory as a problem for lawful relations among persons in the state of nature. It was more familiar to the common law because of its use by the great judge Edward Coke as a public law principle, one limiting the kinds of privileges and institutional rules even Parliament could create. It was used as a principle of public law by Montesquieu as well. He noted that the executive is already a party to criminal cases, in its capacity as prosecutor. Think of the familiar fact that the named prosecuting party in a criminal case in Canada and similar systems is the Crown.

In that case, Montesquieu argued, the Crown can't also be the judge, because that would be to judge in one's own case. It is only by vesting the judicial power somewhere else that we can appropriately move from the enactment of a general law by a legislature, to its execution by the wielder of armed state force, to a trial that will assess whether or not the subject has broken the law. It is only through that kind of separation 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.

Montesquieu mapped these three powers onto an interpretation of the British mixed Constitution. The many, the House of Commons, held primary legislative power, which was increasingly true in actual practice by the mid-eighteenth century. The executive power was wielded by the one — the monarch — in consultation with his ministerial advisors. The complicated part of the mapping is the judicial power. Part of the judicial power in England was vested in common law courts, with juries and grand juries, which Montesquieu more or less quickly waved past, saying that the judicial power was to that degree almost invisible as a real use of *power*, because the juries were drawn from the population at large. However, the constitutional-level judicial power was vested in the few, that is to say, in the House of Lords. Why?

The House of Lords was, until the creation of the British Supreme Court in 2009, the highest court of appeal for England, Wales, and Northern Ireland (though not Scotland). Beginning in the late nineteenth century the judicial powers of the House were exercised by a specialist group of Law Lords, judges appointed as life peers for this purpose; in Montesquieu's time, this appellate judicial power was simply held by the Lords as a body. This set the few at the apex of disputes in criminal law and private civil law. The House held further judicial capacities that made it an important actor in the public law of the

Constitution. One was that they acted as the jury of peers in trials of members of the nobility. The second and the more important one was that the House of Lords had the power of impeachment: the power to impeach the king's ministers. In eighteenth century Britain this power seemed to be increasing in importance and use, though in nineteenth century Britain it fell into disuse and more or less disappeared from the British vocabulary.

The House of Lords, therefore, held the visible, public, and constitutional judicial power, by contrast with the invisible power of the jury system. This couldn't help but remind Montesquieu's French readers of the way that the *parlements* in France, staffed by members of the *noblesse de robe*, held the judicial power. Montesquieu thus identified the three separate powers with the three traditional classes of mixed government theory. This had the effect, in his theory, of ensuring that the judiciary would 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.

It's important, throughout Montesquieu's *Spirit of the Laws*, that members of the nobility have enough honour, enough sense of their own status, that *they will say no*; they will refuse orders from the king. A monarchy is kept moderate by facing people who are difficult to cow, people who will insist on their rights and privileges; even if those rights and privileges are "odious in themselves," the determination to stand on them leads nobles to stand against royal power in a way that staves off despotism. And when that noble sense of status is tied to both refusing that which is *dishonourable* and to judicial office, the regime can be kept genuinely lawful.[6]

This is how the separation of powers was first articulated in the familiar executive, legislative, and judicial triadic form: rule of law processes channelled through separate institutions that remained separate and independent at least in part because they represented the three distinct social orders of traditional mixed constitutionalism. Only a few decades later, it was transformed by the founders of the American state constitutions during and immediately after the Revolutionary War, and then of the federal level in 1787.

6 This idea runs through Montesquieu's constitutional thinking; 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 important to constitutional balance and moderation. I discuss this at greater length in Jacob T Levy, "Montesquieu's Constitutional Legacies" in Rebecca E Kingston, ed, *Montesquieu and His Legacy* (Albany, NY: SUNY Press, 2009) 115; and in Levy, *supra* note 5. See also Sharon R Krause, *Liberalism With Honor* (Cambridge, Mass: Harvard University Press, 2002).

The American revolutionaries and constitutional framers were devoted readers of Montesquieu. Indeed, much of what they thought they knew of the British Constitution of their era came more from Montesquieu than from direct acquaintance, given many decades of separation across the Atlantic. And what Montesquieu taught them was that a free government — a government that protected the liberty of its subjects — wasn't just the mixed government or mixed constitution of the republican tradition, but was one in which the powers were *separated*, not pooled.

But the Americans had no nobility or monarch on which to rest two out of those three powers. The American constitutional solution was to hope that institutions and offices could themselves provide officeholders with the determination to use their powers independently, to constitutionally check and limit one another. That is, they envisioned members of Congress being sufficiently partisan *on behalf of Congress*, caring enough about their office and its status, that they would consistently resist incursion on the legislative power by the executive. This was the "interest" and "ambition" planned for in one of the most famous passages of *The Federalist*:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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.[7]

Federalist 51 was about the separation of powers in a republican state, and the solution advanced there is specifically distinguished from the one available in systems with hereditary class power which sought to resist majoritarian despotism by creating a "will in the community independent of the majority that is, of the society itself." Although the British and Roman antecedents of the House of Representatives and the Senate represented distinct social orders, in the American case they were all of them, directly or indirectly, representatives of the people, the many. Although the president didn't have a separate social standing, the way a monarch does; and although judges didn't have separate

7 Publius, "The Federalist No. LI" in Henry B Dawson, ed, *The Federalist: A Collection of Essays, Written in Favor of the New Constitution As Agreed Upon By The Federal Convention, September 17, 1787: Reprinted from the Original Text* (New York: Charles Scribner's Sons, 1864) 358 at 360.

social standing, the way the judges of the *parlements* or the House of Lords did; still, they all had their separate *offices*. Publius argued that jealousy of office, the desire to protect one's status and the prerogatives of one's office, would lead them all to help limit one another.

This led to the emergence of a vocabulary of checks and balances around the separation of powers in the American context, but the separation of powers is not merely checks and balances. Any sufficiently complicated organization — even the government of Nazi Germany — will have rival power centres. These will check and balance each other sometimes. The SS and the Gestapo and the Wehrmacht had different agendas; they competed for power, and they tried to limit each other's political successes. The separation of powers isn't merely that. The separation of powers is the version of institutional separation and competition that promotes the rule of law by separating the particular processes of lawmaking and law enforcement. The Americans also saw that the separation of powers would require mutual monitoring between legislative and executive, and, in particular, would require the legislature to be able to limit any aspirations on the part of ambitious executives to set themselves up as absolute rulers, in the fashion of Caesar or Cromwell, or to set themselves up as kings. So, they vested lawlike power, the power of impeachment, in the legislature, empowering it to maintain effective limits on the political power and the political ambition of the president.

This is the democratic version of Montesquieu's separation of powers. It included the same three powers, the same core agenda, and the same relationship to the rule of law, but instead of building separation out of the raw material of the independent social standing of the three groups — the one, the few, and the many; king, lords, commons — the American founders hoped that attachment to office itself could do the work. There is reason to doubt that they were right; the powerful can coordinate rather than compete, and left to its own devices the electorate in a large complex society doesn't have the ability to meaningfully monitor them.

The system they created survived this because of a development they didn't envision, and certainly didn't want: political parties. 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. The orientation toward harmonious cooperation one found in the mixed government tradi-

tion carried over into republican political thought more broadly: the stability of republicanism relied on social distinctions not turning into opposed political factions. The American constitutional framers thought that because they didn't have nobility, because they didn't have sharply differentiated permanent economic classes among their free citizenry, because they had only *the people* as a whole, they could escape this threat. Although *The Federalist* was famously friendlier to the existence of factions than the older republican tradition, this was a friendliness toward a multiplicity of factional divides. The plurality, fluidity, smallness, and cross-cutting distinctions of factions in a diverse extended republic could *prevent* the emergence of the dangerous kinds of factions: a small number of large, fixed groups struggling for power, that is to say, parties.

They were wrong. They were wrong about what it is that makes democratic government possible in modern republican forms. With the benefit of more than two hundred years of political experience and knowledge, we now know: democracy in modern conditions, electoral republican politics, *requires* political parties. There is no case of stable democratic government in a large modern state without them. The check on the ambition of any one ruler in our modern electoral systems is that they are constrained by the organization to which they belong, the party, that has a longer time horizon than they do. The solution to the problem that the electorate can't have enough information about enough different candidates to be able to cast informed votes on a vast array of policy questions is that political parties present reasonably cohesive platforms and ideological identities, allowing the electorate to engage in informed approximation about which office-seekers will do what kinds of things.

Political parties emerged *against* the wishes of their participants and creators in the early American republic. Over the course of the 1790s, rival factions emerged, each claiming to be organizing defensively only because their opponents were illegitimately conspiring. Each imagined that, once the opposing conspiracy was defeated, there would be no more faction or party, and the natural unity of the people could be restored. Each was wrong; partisan organization took root and never went away.

Now, the emergence of political parties solves some important problems for democratic or republican rule. It allows for a kind of permanent dynamic of accountability. The electorate at large lacks direct access to enough information to monitor those in power for misconduct or misgovernment. But the opposition party is in the professional business of monitoring the governing party and

organizing the information for presentation to the electorate.[8] Ambition counteracts ambition in a way that the American founders did not anticipate. One might think that this would simulate some of the advantages Montesquieu saw in separate powers being vested in rival social orders.

But this creates problems for the separation of powers. 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. The democratic theory of the separation of powers rests on the hope that the legislature will stand up to the executive just because it's the legislature, thereby protecting the rule of law and executive accountability, and restraining dictatorial or authoritarian ambitions. In a partisan democracy, that hope is disappointed when the legislature is of the same party as the executive. When it's not — when, in the American context, at least one house of Congress is not controlled by the president's party — then tools of investigation, of impeachment, and of legislative limitation of executive power or lawlessness might be used more often, but they will be used in a way that doesn't inspire widespread confidence. It will be thought that instead of being impartial applications of legal and constitutional principles, these legislative moves are mere partisan opposition. The choices become: a relatively unconstrained executive, effectively not subject to the rule of law, or an executive facing *political* constraints that might only coincidentally be related to substantive legal and constitutional principles. Some have argued that the loss to the functioning of the separation of powers is compensated by the monitoring and accountability mechanisms introduced by partisan contestation.[9] That seems to me too optimistic, for reasons that I hope will become clear by the end of this lecture.

The details of the tension between partisanship and the separation of powers were a little bit different in parliamentary systems, but its overall shape was similar. As partisan competition took hold in parliamentary systems, and as the principle was established that the ministerial executive government was responsible to parliament (or its more popular house, in bicameral parliaments) and not to the monarch, it came to be the case that the executive government was hardly separate from the legislature at all.[10] The prime minister is not only

8 See Jeremy Waldron, "The Principle of Loyal Opposition" in *Political Political Theory: Essays on Institutions* (Cambridge, Mass: Harvard University Press, 2016) 93.

9 Daryl J Levinson & Richard H Pildes, "Separation of Parties, Not Powers" (2006)119:8 Harv L Rev 2312.

10 For a fuller account of the development of parliamentary systems with responsible ministerial government, and of its complicated relationship to the Montesquieu/US-style separation of powers tradition because of the partial fusion of executive and legislative power, see William Selinger, *Parliamentarism: From Burke to Weber* (Cambridge, UK: Cambridge University Press, 2019).

a member of the legislature; he or she is the leader of its majority or plurality party or coalition. Now, ministerial *responsibility* to the legislature is an important principle of parliamentary constitutionalism. It allows the legislature not only to monitor and investigate the activities of the ministerial cabinet, but also to remove it from office altogether. And it is worth emphasizing that the withdrawal of confidence in parliamentary systems has turned out to be a much more frequent event than the impeachment and removal of a president in presidential systems. Still, as partisan competition comes to seem to be the crucial mechanism for ongoing political contestation, holding one's own party's leadership accountable for misconduct or abuse becomes a kind of a partisan betrayal. The withdrawal of confidence might be a powerful tool to constrain an increasingly *unpopular* leader, as the party seeks to improve its prospects in the next election, but that is hardly identical to constraining an *abusive* or *lawless* leader.

For the opposition to seek to hold the executive leadership accountable, on the other hand, is merely ordinary opposition. 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. And both presidential and parliamentary systems have shown significant vulnerability to the resulting problems of executives who can act increasingly without legislative constraint, because partisan contestation ends up overriding the separation of powers.

This is probably familiar enough in presidential systems; many of them have eventually fallen to dictatorial rule thanks to the difficulty in constraining executive power. But it's an important feature of important ministerial systems, too. The concentration of power in prime ministers' offices, the marginalization of parliament, and the so-called presidentialization of ministerial office have become widely-recognized features of constitutional politics across parliamentary democracies.[11] The ability of ministerial government to selectively time elections to dissolve parliament opportunistically was taken to be a significant enough source of executive abuse that, in a number of parliamentary systems, it was replaced with fixed-term parliaments. Then it turned out that

11 See the survey in Thomas Poguntke & Paul Webb, eds, *The Presidentialization of Politics: A Comparative Study of Modern Democracies* (Oxford: Oxford University Press, 2005). Observers who agree about the phenomenon of power concentrating in the ministerial executive sometimes disagree about whether "presidentialization" is a useful way to think about it. For example, Philippe Lagassé argues that in the Canadian case it would be better to think of it as "regalisation." See Philippe Lagassé, "The Crown and Prime Ministerial Power" (2016) 39:2 Can Parliamentary Rev 17.

executives could turn that to their further advantage. With fixed-term parliaments, it becomes that much more difficult for ministerial government to be held responsible or removed from office. We have seen the emerging phenomenon of prime ministers who cannot effectively command the confidence of a plurality or majority in their parliamentary houses nonetheless carrying on in government. Prime ministers have discretionary tools at their disposal such as proroguing parliament when they face serious challenges to their authority. They have the capacity to keep sufficient secrets to immunize themselves from parliamentary oversight. The investigative and prosecutorial and justice-administering part of the executive power, the part of the executive power that is housed in a Ministry of Justice, or Department of Justice, headed in either case by a figure like an attorney general, is also part of the partisan executive. This is an important source of executive impunity that is shared between parliamentary and presidential systems. The idea that the executive will be held to account under the law, that the rule of law will be binding on the holders of executive power, is put under sharp strain by the fact that partisan loyalty is a job requirement to enter into a ministerial cabinet, or to hold a post like attorney general in the United States, and that the holder of such a position who does *not* hold sufficient partisan loyalty is vulnerable to eventual removal from office.

In short, prime ministers and presidents alike have tools at their disposal with which to protect themselves from oversight, or prosecution, or investigation; either at the hands of a legislature, or at the hands of the general justice system, which would have to be aided by the investigative and prosecutorial arms of their own executive governments. Partisan contestation is today the critical mechanism of accountability in democratic polities, but it is not by itself up to the task of restraining executive power.

All of that has been an ongoing problem for decades — if not for the whole two centuries of constitutional democratic government, in both parliamentary and presidential systems — even if there have often been countervailing forces preventing the problem from reaching the level of a crisis. But now let's consider what happens when we add in the problem of nationalism or populism. The desire of the American founders and the French revolutionary constitutional republicans for a unified, undifferentiated people; their suspicion of party and special interests and faction — these don't disappear when political parties in fact emerge as permanent institutions. There is an ongoing kind of political bad conscience about how much we need and depend on contestatory political parties. *Partisan* is, for the most part, treated as a dirty word: it is the opposite of impartial; it's the opposite of thinking

independently.[12] And *special interest* is always a dirty word: to be a partisan of a special interest is to oppose the common interest of the unified people.

All of this is a problem for the self-understanding, the political ideology, and the public philosophy of our democratic societies. We don't believe strongly enough that our separation into competing groups is an appropriate and normal part of our political process; we treat it as constantly aberrational, and imagine there's a true, underlying people that someday will overcome those divisions. And there is a political actor who has a significant, asymmetric advantage in claiming to be able to stand for that unified people: the executive. The executive has an easier time than the divided legislature or the multi-judge judiciary in saying: "I speak with one voice, and my one voice is the voice of the people. These members of a legislature, these judges — they are just another corrupt special interest. And to the degree that they stand in my way, they stand in *our* way — we, the unified nation; we, the unified people."

This creates the possibility of a union between lawless executive power and nationalist, populist ideology. And this has been a recurring pattern in the last decade or two in constitutional democracies around the world. If there's a crisis of constitutional democracy today, that's it. Executives, seeking to free themselves from legal and constitutional restraints as well as partisan opposition, purport to be the voice of the undifferentiated, unified, *true* people. They cast dissidents, members of the opposition, critics within government and outside of it, and members of other branches of government who insist on legal regularity and procedures as outsiders to the true nation, outsiders to the true people and the untrammelled expression of its political will.

In our constitutional democracies, the separation of powers doesn't vest in social groups with independent standing that make them stand apart from each other, as Montesquieu had envisioned. It is subject to, and in important respects subordinated to, the separation and contestation of parties. That creates a fragility which nationalist and populist ideology can exploit, offering an apparent normative reason to further empower executives, to free them from the legal and constitutional restraints that the separation of powers in constitutional systems ostensibly puts on them. And this frees them to interfere not only with the authority of legislatures, but to interfere with the independence of legal and judicial processes that presidential and parliamentary constitutional democracies share, the very core of what Montesquieu thought the

12 Nancy L Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton, NJ: Princeton University Press, 2008).

separation of powers had to protect. Lawless and unconstrained executives who are in command of the investigative and prosecutorial functions of government not only immunize themselves from investigation for wrongdoing, corruption, or abuse of rights; they can easily turn those investigative or prosecutorial tools *against* both their opponents within the state and even peaceful, law-abiding critics and dissidents among the private citizenry.

We have seen this in parliamentary democracies — Italy, Israel, India, Hungary — and in presidential systems — Turkey, the United States, Venezuala — alike. The relationship between executive and legislative power is different in parliamentary systems, but it's different not in a way that necessarily leads the executive to be more consistently legally constrained: it is often different in a way that leaves the executive *even less* constrained, because the executive is necessarily in command of at least a plurality of the legislature in the first place. In presidential systems, there's a risk that when opposition finally rears its head, systems will merely break. The capacity to hold a president to account in a presidential system is extremely limited. His own party won't do it; when the opposition party does it, it lacks sufficient credibility to be seen as an enforcement of law within, and in the name of, the constitution. The threat of such prosecution, of being held to account, only further encourages executives to make use of populist ideology, and to assert a unity that would be violated if they should be subject to any such indignity as being held to legal account for their action.

It is possible that constitutional democracies — including constitutional monarchies like Canada and Britain — have stumbled by for much of the last two hundred years, maintaining relatively strong separations of powers with respect to independence of the judiciary, and sometimes, for long stretches, executive accountability, with systems that were more fragile than they looked. Partisan contestation provided some stability to the mechanisms of accountability in constitutional democracies by organizing opposition, but it was an awkward fit. Sometimes, when you stumble by, the luck runs out. Sometimes, the emergence of successful strategies to sidestep constraints, once they're known, can propagate and spread. The gradual centralization of power in ministerial governments in parliamentary systems, turning such governments gradually into quasi-presidents who can govern without very much accountability or responsibility to their parliaments, is a sufficiently widely observed phenomenon now that I think we can express a similar worry across different constitutional systems about whether the separation of powers is breaking down. The same may be true for the spread of populist nationalism. The commitment to multiparty contestation and to pluralism rather than unity in the

political people might be more fragile than we have sometimes thought, and the ideologies of unity might be difficult to check now that their usefulness to power-seekers has become clear.

Perhaps there are other sources of resilience in constitutional democratic systems I have not identified that will meet these challenges. Sometimes I think so, but even then, I think weaknesses have been exposed. And if the challenges are not met, if solutions to the weaknesses are not found, then in this overlap of a fragile separation of powers and a weak commitment to pluralism, of lawless executive power and populist ideologies of unity, we see the potential for genuine and continuing crisis.