

Assembling the Plebeian Republic

Popular Institutions against Systemic Corruption & Oligarchic Domination

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ABSTRACT

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Democracy seems to be in crisis and scholars have started to consider the possibility that “the only game in town” might be rigged. This dissertation theorizes the crisis of democracy from a structural point of view, arguing that liberal representative governments suffer from systemic corruption, a form of political decay that should be understood as the oligarchization of society, and proposes an anti-oligarchic institutional solution based on a radical interpretation of republican constitutional thought.

If one agrees that the minimal normative expectation of liberal democracies is that governments should advance the welfare of the majority within constitutional safeguards, increasing income inequality and the relative immiseration of the majority of citizens would be in itself a deviation from good rule, a sign of corruption. As a way to understand how we could revert the current patterns of political corruption, the book provides an in-depth analysis of the institutional, procedural, and normative innovations to protect political liberty proposed by Niccolò Machiavelli, Nicolas de Condorcet, Rosa Luxemburg, and Hannah Arendt. Because their ideas to institutionalize popular power have consistently been misunderstood, instrumentalized, demonized, or neglected, part of what this project wants to accomplish is to offer a serious engagement with their

proposals through a *plebeian* interpretative lens that renders them as part of the same intellectual tradition. In this way, the book assembles a “B side” of constitutional thought composed of the apparent misfits in a tradition that has been dominated by the impulse to suppress conflict instead of harnessing its liberty-producing properties.

As a way to effectively deal with systemic corruption and oligarchic domination, the book proposes to follow this plebeian constitutionalism and institutionalize popular collective power. A proposed *plebeian branch* would be autonomous and aimed not at achieving self-government or direct democracy, but rather at an effort to both judge and censor elites who rule. The plebeian branch would consist of two institutions: a decentralized network of radically inclusive local assemblies, empowered to initiate and veto legislation as well as to exercise periodic constituent power, and a delegate, surveillance office able to enforce decisions and impeach public officials. The establishment of primary assemblies at the local level would not only allow ordinary people to push back against oligarchic domination through the political system but also inaugurate an institutional conception of the people as the many assembled locally: a political collective agent operating as a network of political judgment in permanent flow. The *people as network* would be a political subject with as many brains as assemblies, in which collective learning, reaction against domination, and social change would occur organically and independently from representative government and political parties.

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Introduction

Even if only a decade ago, when Barack Obama had just been elected President of the United States, and there was still hope that, with the right leadership, the political system could work for the many instead of the few, today the idea that democracy is in crisis has become ubiquitous. The project I present here, which offers a hypothesis for the crisis of our political systems and analyzes structural solutions, is not the result of academic opportunism, but rather of a deep-seated constitutional skepticism¹ that begun taking institutional form, against the current, in the years of Obama cool. Even if it was only after Donald Trump was elected President that the “crisis of democracy” narrative went mainstream, this particular cycle of political decay in our constitutional regimes appears to have begun in the 1970s and 80s with the first neoliberal experiments led by Augusto Pinochet in Chile, Margaret Thatcher in the United Kingdom, and Ronald Reagan in the United States.² Increasing income inequality and immiseration of the working classes was effectively de-politicized and naturalized to the point that today it is considered legitimate that three individuals in the U.S. own more wealth than the bottom 50% —while their wealth grew 6,000% since 1982, median household wealth went down 3% over the same period, and now one out of five children lives in poverty in the richest

¹ Rooted in the experience of having lived under an illegitimate constitution in Chile.

² For a historical account of neoliberalism see Quinn Slobodian, *Globalists. the End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press, 2018). Slobodian misses the illiberal origins of neoliberalism, first implemented in Chile under Pinochet with the help of the so-called Chicago Boys, trained in the US in the 1960s.

country in the world.³ Because patterns of accumulation and dispossession are far from natural, part of what I want to accomplish here is to extend the horizon of analysis so we can better appreciate our political regime as an experiment in need of review, an artificial political infrastructure that we have designed for ourselves, and that the same as it was first established, it can be overhauled. It has been done before, and there is no reason to believe it cannot be done again.

This dissertation theorizes the crisis of democracy from a structural point of view, arguing that liberal representative governments suffer from systemic corruption, a form of political decay that should be understood as the oligarchization of society, and proposes a *plebeian* institutional solution based on a radical interpretation of republican constitutional thought.⁴ If one agrees that the minimal normative expectation of liberal democracies is that governments should advance the welfare of the majority within constitutional safeguards, increasing income inequality and the relative immiseration of the majority of citizens would be in itself a deviation from good rule, a sign of corruption. Through an in-depth analysis of the institutional, procedural, and normative innovations proposed by modern and contemporary plebeian thinkers, I propose to constitutionalize popular collective power to establish a mixed constitution as the most effective way to deal with systemic corruption and oligarchic domination.

Since the mixed constitution necessarily entails the opposing institutional powers of the *few* and the *many*, this project takes as a premise that representative democracies are not mixed orders but monocratic regimes with separation of functions,⁵ a form of government in which the democratic element does not have a collective institutional form, but in which it is atomized, and its power has been reduced to selecting representatives and proposing and voting referenda through the aggregation of individual

³ Chuck Collins “The wealth of America's three richest families grew by 6,000% since 1982” The Guardian October 31, 2018 < <https://www.theguardian.com/commentisfree/2018/oct/31/us-wealthiest-families-dynasties-governed-by-rich>>

⁴ I approach the decay of constitutional democracies and possible institutional solutions from the perspective of radical republican thought, and therefore I will not engage with other diagnoses and solutions offered from within democratic theory —most prominently coming out of participatory and deliberative democratic theory— but rather focus only on the republican tradition and its model of mixed constitution.

⁵ Pasquale Pasquino, "Classifying Constitutions: Preliminary Conceptual Analysis," *Cardozo Law Review*, 34.3 (2013), 999-1020.

preferences. While legislative, executive, and judicial powers are the virtual monopoly⁶ of the selected *few* —who exert legitimate power based on citizens’ consent— the *many* —common citizens who do not effectively govern— do not have a collective institutional role in the political decisionmaking process,⁷ and therefore there is no effective counterpower to an increasingly corrupt representative government. I argue the most effective way to deal with domination stemming from systemic corruption is to introduce an institutional counterweight by constitutionally empowering ordinary citizens through the establishment of popular institutions able to articulate a political will close to the reasoned opinion of the majority.

The proposed plebeian branch of a non-corrupt republican constitution would be autonomous and aimed not at achieving self-government or direct democracy, but rather at an effort to both judge and censor elites who rule. To accomplish this, the dissertation proposes a decentralized network of radically inclusive local assemblies, empowered to initiate and veto legislation as well as to exercise periodic constituent power, and a delegate, surveillance office able to enforce decisions and impeach public officials. The establishment of primary assemblies at the local level would not only allow ordinary people to push back against oligarchic domination through the political system but would also inaugurate an institutional conception of ‘the people’ as the many assembled locally: a collectivity which is not a homogeneous, bounded subject but rather a political agent that operates as a network of political judgment in permanent flow. The *people-as-network* would be a political subject with as many brains as assemblies, in which collective learning, reaction against domination, and social change would occur organically and independently from representative government and political parties.

In Chapter 1 I provide a diagnosis for the crisis of democracy and argue representative democracies suffer from systemic corruption, understood as the

⁶ All modern constitutions today lack a popular institution in which citizens can collectively participate in the decisionmaking process by proposing, deliberating, and deciding on law, except for the Swiss “cantonal assembly” system (Landsgemeinde), one of the oldest surviving forms of *direct* democracy, which is only practiced in 2 of the 25 Swiss cantons. They are nevertheless subject to Swiss federal law.

⁷ Elections, recalls, referenda and popular initiatives are powers of the individual, not the many as collective subject. In addition to being weak, in my view, these political instruments (or ‘methods’ as Machiavelli calls them) have already been (ab)used as weapons of domination by the better-organized parts of civil society.

oligarchization of the political system. The chapter first surveys different conceptions of corruption in the history of political thought, and retrieves from that history a systemic conception of political corruption. I first reconstruct from the works of Plato, Aristotle, Polybius, and Machiavelli a notion of political corruption particular to popular governments, and then I engage with recent neo-republican and institutionalist attempts at redefining political corruption. I argue that we moderns still lack a proper conception of systemic corruption comparable in sophistication to the one offered by the ancients because we are as yet unable to account for the role that procedures and institutions play in fostering corruption through their normal functioning. The chapter concludes by proposing a definition of systemic corruption as the oligarchization of power within a general respect for the rule of law. This conception of corruption appears as intrinsically connected to increasing socio-economic inequality because it enables inequality of political influence and the drift toward oligarchic democracy: a regime in which citizens empower, through their ballots, the power elites who enable their own dispossession and oppression.

The recognition of systemic corruption as a relentless process of political decay prompted ancient and modern political thinkers to study existing constitutions and engage in efforts to design the perfect regime: a political order that would be immune to the degradation of its institutions and procedures, and thus insulated from social decay and regime decline. Chapter 2 traces the intellectual history and institutional iterations of the theory of the mixed constitution, which originated as a critique of pure, mono-archic constitutions and a realist redress for systemic corruption based on the institutionalization of different forms of social power. I offer a genealogy of two main strands of interpretation: 1) an elitist-proceduralist strand commenced by Polybius and Cicero, reinterpreted by Montesquieu, constitutionalized by Madison, and recently brought perhaps to its highest level of philosophical sophistication by Philip Pettit; and 2) a plebeian-materialist strand originating in the political experience of the plebs within the ancient Roman republic and Machiavelli's interpretation of this experience in light of the political praxis of the *popolo* during the Florentine republic. I make the distinction between elitist and plebeian based on who has final political decision-making power in a

given constitution: the selected few or the common people. This chapter provides an in-depth analysis of the elitist-proceduralist strand, engaging with Polybius, Cicero, the English constitutional tradition, Harrington, Montesquieu, the American founding, and the recent neo-republican interpretation of the mixed constitution provided by Pettit.

To rethink the republic from a structural perspective implies not only the need to theorize the crisis of democracy at the systemic level, and to find adequate institutional solutions, but also the necessity of approaching constitutionalism from a point of view that allows us to acknowledge ever-expanding systemic corruption and oligarchic domination. Chapter 3 proposes a novel methodological approach to the study of constitutions that goes beyond the written text and jurisprudence, to incorporate the material structure of society. This materialist interpretation originates in the factual organization and exercise of power that is allowed and enabled by foundational institutions, rules, and procedures—or lack thereof. What I term *materialist constitutionalism* is premised on the idea that the organization of political power cannot be analyzed without taking into account socio-economic power structures, and therefore establishes a constitutional ideology that stands opposed to legal positivism, formalism, and proceduralism. The chapter begins by putting forward this materialist approach, which I trace back to Machiavelli, and distinguishing two strands: one “institutionalist” developed by Jefferson, Condorcet, and Arendt, and more recently by John McCormick and Lawrence Hamilton, and another “critical,” developed by Karl Marx, Evgeni Pashukanis, and Antonio Negri, and more recently by Marco Goldoni and Michael Wilkinson. Within this taxonomy, Rosa Luxemburg’s materialist critique of law and her proposal for institutionalizing workers councils is positioned as a bridge between the critical and institutionalist traditions.

I dedicate the second part of the dissertation to reviewing the constitutional thought of four thinkers that have made contributions to plebeian thought in the 16th, 18th and 20th centuries. All those who dared propose the institutionalization of popular power and endowed it with supreme authority to protect political liberty, have suffered reactionary backlashes from those in power. Their work has consistently been misunderstood, instrumentalized, demonized, or neglected, and therefore part of what I

want to accomplish in this section is to offer a serious engagement with their ideas and proposals under a plebeian interpretative lens under which they fit together. In this way, I am assembling a “B side” of constitutional thought composed of the misfits in a tradition dominated by the impulse to suppress conflict in the favor of harmony, stability, and security.

I begin Chapter 4 by presenting Machiavelli’s constitutional thought as the foundation of a type of constitutionalism that is materialist in its analysis of law and procedures, and anti-oligarchic in its institutional design. Recognizing the influence that socio-economic inequalities exert over political power, Machiavelli embraces conflict as the effective cause of free government and strives to empower and channel emancipatory, plebeian energies through the constitutional order. The chapter focuses on Machiavelli’s most important contribution to materialist constitutionalism: the plebeian nature of constituent power. I argue that the constituent power in Machiavelli serves not as a bridge between basic principles and politics, but rather as the power to resist oppression by restraining oligarchic power. While in democratic theory the constituent power has been conceived as the *autopoietic* power of the community, a republican theory of constituent power would be defined functionally, that is, determined by the goal of achieving liberty as non-domination. Because for Machiavelli liberty is attained through the realization of a plebeian desire not to be dominated—a situation that is gained through conflict and tumults—the preservative power of free government would be the power of the people to periodically redraw the boundaries of what is considered permissible and what is deemed oppressive. Only the many—who desire not to be oppressed and do not partake in ruling—should be the guardians of liberty. I analyze Machiavelli’s proposal for reforming Florence through his theory of institutional renewal aimed at redeeming corrupt republics, focusing on his proposal to normalize instances of constituent creation and punishment in ten-year intervals as the antidote for systemic corruption.

Chapter 5 is devoted to the constitutional thought of Nicolas de Condorcet, the challenge of representing the sovereign demos, and his proposal for considering the people in its institutional character rather than as an atomized collective subject that can

never be made fully present and therefore properly represented. As an alternative to the liberal constitution established in the American colonies, Condorcet proposed a republican framework in which the ruling power of making laws and decisions about administration is concentrated in a representative assembly, which is legally responsive to an institutionalized popular power—a network of primary assemblies—aimed at checking its laws, policies, and abuses. The chapter presents an in-depth analysis of the 1793 constitutional plan for the French republic proposed by Condorcet, read through the lens of his egalitarian tracts on education, slavery, and the rights of women.

While Condorcet was writing at the birth of modern representative government and was concerned with preserving the revolutionary spirit to protect the republic from corruption, Rosa Luxemburg proposes to embrace workers' councils as a political infrastructure of emancipation at a moment when the modern party system had begun to consolidate. It is when the Social Democratic party—a party in support of the interests of the working class—had gained control of the German government that she realized that the liberty of the working class demanded a different political infrastructure. The betrayal of the revolutionary party proved to her the truth of Marx's argument that the "working class cannot simply lay hold of the ready-made state machinery and wield it for its own purposes," and therefore she proposed to alter "the foundation and base of the social constitution" from below by institutionalizing workers, soldiers, and peasant councils and establishing a national council of workers as part of a revolutionary constitutional order.

The final chapter in this section analyzes Hannah Arendt's critique of the American founding and her proposal for establishing a council system. According to Arendt the moment the founders focused on representation and neglected "to incorporate the township and the town-hall meeting into the Constitution," the revolutionary spirit was lost and government became mere administration. Despite the potentiality for inclusion exhibited by the constitutional document, which allowed for revolutionary legal reforms that ultimately extended citizenship to the majority of the population, freedom as spaces for action remained lost in the American polity. Following Jefferson's plan of "elementary republics," which demanded continual interaction among citizens alongside

representative government, Arendt puts forward the council system as an alternative form of government aimed at the continual reintroduction of freedom as action and expansion of the public sphere. I argue that we should understand Arendt's proposal as a novel interpretation of the mixed constitution, one in which the division between the few and the many is replaced by that of parties dedicated to administration, and councils dedicated to political judgment.

In the third part of the dissertation I survey the development of plebeian thought in the 21st century, its philosophical foundations and institutional proposals. In Chapter 8 I analyze plebeianism as a political philosophy in the works of Martin Breugh and Jeffrey Green, and provide an in-depth analysis of two recent attempts by John McCormick and Lawrence Hamilton at retrieving the mixed constitution and proposing institutional innovations. I first engage with McCormick's proposals to revive the office of the Tribune of the Plebs and bring back plebeian power to exert extraordinary punishment against agents of corruption, and argue that his radical republican interpretation of Machiavelli has placed class struggle, the threat of plutocracy, and the need for popular institutions to control the rich at the center of material constitutionalism. I then problematize the illiberal nature of his proposals and the legitimacy problems arising from lottery as mode of selection. The chapter then analyzes Hamilton's proposal to combine consulting participatory institutions with an "updated tribune of the plebs" and a plebeian electoral procedure, and discuss the challenge of proliferating sites of popular participation and competing authorities arising in such a scheme.

Finally, in Chapter 9 I make my own contribution to plebeian constitutional theory by proposing to constitutionalize popular power in a "plebeian branch" that is thought through Arendt's model of parties and councils, and incorporates features of all the proposals for establishing a plebeian republic analyzed in the previous sections. I first analyze a way to separate the few from the many that would in principle conform to the current liberal constitutional framework, and then describe the two institutions that would make up the proposed plebeian branch: a network of primary assemblies with the power to initiate and veto/repeal any governmental action as well as to update the constitution, and a Tribune office aimed at enforcing mandates coming out of the network of

assemblies and fighting political corruption. Finally I offer a tentative juridical framework for this plebeian branch, which is meant to be incorporated into any existing set of representative democratic regime and is aimed at empowering plebeians — common people who only enjoy second-class citizenship within the current constitutional structure— and offering a more enduring solution to the systemic corruption of representative systems and the oligarchic domination that inevitably comes with it.

1.

Corruption as Political Decay

I begin this project from the premise that liberal democracy, as any other political regime throughout history, is flawed and perfectible, a product of fallible human thinking. Of the many deficiencies of our current regime perhaps the most problematic is its inability to effectively deal with corruption. According to Transparency International corruption is a serious problem. In 2016 only two countries —Denmark and New Zealand— out of 176 states surveyed scored above percentile 90 (equivalent to an A in political cleanliness) and over two thirds scored below 50%, which indicates that the majority of representative governments¹ suffer from “endemic corruption,” a kind of “systemic grand corruption [that] violates human rights, prevents sustainable development and fuels social exclusion.”² Even if the Corruption Perceptions Index attempts to explicitly account for *systemic* corruption —as opposed to mere cash for votes, *quid pro quo* corruption— the current definition of political corruption does not yet allow for an accurate measurement of its structural layer because it remains blind to the role procedures and political institutions play in fostering corruption through their normal functioning. In this article I argue that we are working with an imperfect, reductionist explanation of political corruption that, even if it allows for quantitative research and generalizations based on discreet observable variables, it does not capture the broader,

¹ According to the Democracy Index, 69% of the 167 countries surveyed are considered a type of democracy (full, flawed, or hybrid).

² *Corruption Perceptions Report 2016*

more intractable and pernicious form of systemic corruption that ancient and modern political thinkers wanted to avoid.

The predominant definition of corruption as “illegal actions concerning public officials” is narrower and departs in significant ways from the meaning that was attached to corruption in earlier periods of Western thought.³ Our current understanding of political corruption is positivist and individualistic, which has served well the research model that became hegemonic in the social sciences in the 1990s, which demanded the development of concepts that could be easily measured and plugged into large N-models. Corruption has thus been conveniently reduced to its most visible and clear expressions: illegal acts involving public officials (e.g. bribery, fraud, nepotism). But even if the reduction of political corruption to a discreet set of expressions serves the reliable measurement of the phenomenon, this account can only be partial since it is clear that political corruption is a slow-moving process, where meaningful change in the independent variable occurs only over the long run, tending then, in practice, to fall off the radar within this type of quantitative methodology.⁴

Despite a recent renewed empirical interest on systemic corruption and the most effective ways to deal with it,⁵ the concept is yet to be adequately defined and understood. The bulk of research done on corruption is policy-oriented, aimed at ameliorating the negative economic consequences associated with corruption, especially in the developing world.⁶ “Corruption is thus presented as if it were a matter of misconduct on the part of public officials who are seen, especially in poor countries, as pursuing their own private interests and likely to act corruptly in return for money and other favours, thereby undermining economic development.”⁷

³ Manuhua Barcham, Barry Hindess and Peter Larmour, eds., *Corruption: Expanding the Focus* (Acton, A.C.T: Australian National University Press, 2012), 8.

⁴ Paul Pierson, “Big, Slow-Moving, and... Invisible: Macrosocial Processes in the Study of Comparative Politics,” in James Mahoney and Dietrich Rueschemeyer, eds., *Comparative Historical Analysis in the Social Sciences* (New York: Cambridge University Press, 2003).

⁵ Michael Johnston, *Syndromes of Corruption: Wealth, Power, and Democracy* (Cambridge: Cambridge University Press, 2010); Alina Mungiu-Pippidi, *The Quest for Good Governance. How Societies Develop Control of Corruption* (Cambridge: Cambridge University Press, 2015);

⁶ Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 2016).

⁷ Barcham et al, *Corruption*, 3.

In conformity with the individualistic model that undergirds the current conception of corruption but acknowledging the limitations of analyzing corruption only through its narrow definition, the different organisms aimed at combating corruption have relied on individuals' *perception* of corruption as a way to complement the tallying of individual illegal acts as proxy for the rate of corruption in society. This is of course very problematic. If there is no working definition of corruption beyond the legal, on what evidence are respondents of these surveys basing their perceptions? Corruption conceived in this way is guilty of moral relativism and legal positivism because it does not consider an independent standard to judge the law and thus could even end up legalizing the most prominent means of corruption (e.g. campaign finance, donations, lobby).⁸ In our current juridical conception of corruption, for example, there is no way to account for *legal* corruption, for laws and policies that promote the interests of a few against the common good, what the Ancients would understand as the gradual decay of good government.

The few attempts at engaging with the concept at a theoretical level fall short from fully conceiving the fundamentally systemic nature of political corruption⁹ or adequately grounding it on intellectual history and its contexts,¹⁰ and thus potentially liable to anachronism through “mythologies of doctrines.”¹¹ This chapter contributes to this emerging theoretical literature by providing a contextualized theoretical analysis of a type of political corruption that seems a systemic feature of all constitutional popular governments. Systemic corruption, which encompasses structural forms of corruption such as legal and institutional corruption, is not only different from the actor-based meanings of the term —the bending and breaking of the law by a clan or class for their

⁸ While lobbying was illegal for much of US history, today it dominates politics. For a historical account see Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press, 2014).

⁹ Peter DeLeon, *Thinking About Political Corruption* (New York: Routledge, 1993); Paul Heywood, ed., *Political Corruption* (Oxford: Blackwell, 1997); Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington: Brookings Institution, 1995).

¹⁰ See Patrick Dobel's gathering of “scattered insights” by Thucydides, Plato, Aristotle, Machiavelli, and Rousseau. “The Corruption of a State,” *American Political Science Review* 72.3 (Sep., 1978), 958-973. A notable exception is *An Intellectual History of Political Corruption* (Hampshire: Palgrave Macmillan, 2014) edited by Lisa Hill and Bruce Buchan, even if it centers on tracing the current individual, juridical concept of corruption, devoting only few pages to systemic corruption.

¹¹ Coherence, prolepsis, and parochialism. “Meaning and Understanding in the History of Ideas,” *History and Theory* 8 (1969): 3–53.

own benefit, or the buying of political influences by private interest¹²— but also differs from definitions of corruption as the undermining of the rule of law.¹³ Systemic corruption is a term that seems to directly address the nature of the superstructure itself, and not the manipulation or dismantling of a structure that is seen as the normative ground for neutrality.

Through a historical conjunctural analysis I connect ideas about corruption to the specific political form and contingency in which they developed, and show how systemic corruption was considered in the history of ideas as regime-specific. I divide this exploration in three parts. In the first section I begin with an analysis of the ancient Greek concept of corruption (φθορά) in pre-Socratic thought and then focus on Plato and Aristotle in the context of the consolidated Athenian democratic regime of 4th century BC, and on Polybius who argued, based on the structure of the popular Roman republic of the 2nd century BC, that a mixed constitution was necessary to escape the cycle of corruption. In the second section I provide an in-depth analysis of Machiavelli's understanding of corruption in republican Florence as a systemic problem rooted on laws, procedures, and institutions. Then I engage with two recent strands of thought —neo-republican and institutionalist— that attempt to redefine political corruption, and argue that neither of them offers a satisfactory definition of systemic corruption because they miss the current drift into increasingly oligarchic systems of rule in the majority of countries around the world. I conclude by proposing to embrace the Machiavellian approach to corruption, and therefore to understand it systemically, as determined by the constitution of the state, which forces us not only to measure corruption at the level of rules, procedures, institutions, and their outcomes, but also to see it as intrinsically connected to the current drift into increasingly oligarchic systems of rule in the majority of countries around the world.

¹² In his taxonomy of corruption Michael Johnston identified the corruption of “influenced markets” in which private interests seek political influence as the most pervasive in advanced market democracies. *Syndromes of Corruption: Wealth, Power, and Democracy* (Cambridge: Cambridge University Press, 2010).

¹³ Bo Rothstein, *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective* (Chicago: University of Chicago Press, 2011).

I. Systemic Political Corruption in Ancient Thought

Even though today we associate corruption with illegal action, the etymological origin of the word has a far more complex meaning. The Greek ancestor of the word corruption has been traced to *phthora* (φθορά), which meant destruction, decay, and “passing away” as correlative to genesis—the beginning of a process.¹⁴ While in early pre-Socratic texts the word was used only to denote the moral degradation of women and youth, and the ruining of crops due to bad weather, the concept appears to acquire a decisively abstract meaning in 6th century BC. The theoretical conception of *phthora* was first developed, according to Aristotle, by Thales of Miletus, the founder of the school of philosophy that identifies unchangeable elements in nature, principles that are “neither generated nor destroyed, but persist eternally.”¹⁵ The Physicists—as Aristotle called this school of thought—attempted to understand how could plurality in the cosmos be generated from matter as a “single underlying substance.” Anaximander argued matter was governed by a “diversifying antithesis” in which matter is constantly being generated through “condensation and rarefaction,” and that *phthora* was the natural process through which things returned to the original, indefinite principle.¹⁶ Empedocles and Anaxagoras assigned a direction to this *poietic* process of generation. While for Empedocles generation of matter was circular, always coming back to its starting point, for Anaxagoras this movement was spiral, never repeating itself.¹⁷

The concept of corruption acquired a political meaning when it was first attached to the constitution of the state by Plato, and then furthered analyzed by Aristotle in the *Politics*—work explicitly dedicated to the analysis of the corruption (φθορά) and preservation of constitutions. I would argue both authors developed their conception of corruption responding to their own socio-political context, and thus we should analyze their ideas on political corruption as inherently tied to a stable democratic regime in a diminished, post-imperial Athens. Through a contextual analysis of their ideas, in what follows I show that while for Plato the source of corruption in democracy was the

¹⁴ F.E. Peters, *Greek Philosophical Terms: A Historical Lexicon* (New York: New York University Press, 1974), 158.

¹⁵ Air, water, earth, and fire. Aristotle, *Metaphysics*, 984a

¹⁶ Simplicius, *Commentary on Aristotle's Physics*, 24.13-21

¹⁷ Aristotle, *Physics*, I.IV. 187a

constitutive principle of liberty, which gradually eroded hierarchies and rule, for Aristotle corruption sprung from the full realization of the principle of equal share in government.

Since the series of constitutional reforms begun by Cleisthenes (508/7 BC) based on the principle of *isonomia* (ἰσονομία), right up to Pericles's pro-democratic policies, the popular sectors in Ancient Athens were gradually empowered until acquiring preeminence. By the 4th century almost all magistrates were selected by lottery from a broad pool of citizens¹⁸ who enjoyed *isegoria* (ἰσηγορία) —the equal right to speak to the assembly— and were paid by the state to exercise political power.¹⁹ The empowerment of non-elite citizens came hand in hand with Athens' increased naval power and state revenue, and with the diminishing of the elite's institutional power. While during Athens golden years the increased participation of the masses in political power was financed through colonial tributes and high production of state silver mines, after Athens lost its empire and the production of mines begun to decrease, equal share in government was mostly financed through indirect taxation on the leisured classes, whose political influence decreased especially after the aristocratic Areopagus was stripped from its veto power.²⁰

An Athenian citizen of high status, Plato came of age in the midst of the Peloponnesian War (431–404 BC), in which Athens was ultimately defeated, and the long-time brewing 411 oligarchic coup.²¹ After the restoration of democracy shortly after, Plato witnessed the execution of his mentor, Socrates, condemned to death by the Athenian assembly for corrupting the youth and religion. Pay for assembly goers and jurors, and the establishment of the *nomothetai* (νομοθέται) selected by lot,²² had effectively made the popular sectors the judges of behavior and the interpreters of law, and in Plato's eyes the death of Socrates came to evidence the hubris the multitude was capable of when drunk with liberty. *Dēmokratiā* was certainly not a perfect form of

¹⁸ Even wage laborers, *thêtes*, could become officeholders. Aristotle, *On the Constitution of Athens*, 7.4; Josiah Ober, *Mass and Elite in Democratic Athens. Rhetoric, Ideology, and the Power of the People*. (Princeton University Press, 1989), 80.

¹⁹ Citizens were paid for exercising all three functions of state power: judging, lawmaking, and decision-making/executing. Ober, *Mass and Elite*, 53–103.

²⁰ Ephialtes' reforms in 462 undermined the elite's power to preserve the status quo through vetoing "unconstitutional" decisions by the Assembly. Ober, *Mass and Elite*, 77.

²¹ Thucydides, *History of the Peloponnesian War*, 8.48.3–98

²² Hansen, Mogens H. *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology* (London: Bristol Classical Press, 2001).

government, and its consolidation (or radicalization) was seen by Plato as only one more phase in the relentless decay of political organizations. In *Republic* he envisioned the best form of government as that of the philosopher kings, an aristocracy of the guardians of virtue, who are able to organize society in the best way possible because they lack a stake in it; guardians would live communally, separated from other classes and barred from owning property. However, even this seemingly perfect constitution maintained by the most virtuous elite would not be able to escape corruption, because “*phthora* (φθορά) awaits everything that has come to be, [and] even a foundation of this kind will not survive for the whole of time.”²³

Even if in later writings Plato further explores *phthora* only as a process of degradation that is proper to *physis*, since there is no strict separation between the natural and the political in his thought, this process of decay would also rule the political realm created by men.²⁴ In *Timaeus* Plato puts forward a basic intuition about the decay of bodies, which would later be validated by the discovery of the second law of thermodynamics²⁵ as revealing an inherent process of degradation through the transfer of energy:

For when any one element suffers a change of condition that is contrary to nature, all its particles that formerly were being cooled become heated, and the dry presently become moist, and the light heavy, and they undergo every variety of change in every respect. For, as we maintain, it is only the addition or subtraction of the same substance from the same substance in the same order and in the same manner and in due proportion which will allow the latter to remain safe and sound in its sameness with itself. But whatsoever oversteps any of these conditions in its going out or its coming in will produce alterations of every variety and countless diseases and corruptions. (*Timaeus* 82a–b)

What Plato depicts as the extremely difficult process to preserve the nature of things is what the second law of thermodynamics explains as the inevitable transfer of heat energy and the resulting increase of entropy (disorder) in closed systems. Degradation occurs because internal energy is transferred within different bodies in a

²³ Plato, *Republic*, 546a; Plato, *Laws*, 894a

²⁴ Aristotle further develops the relation between *physis* and politics arguing political virtue also requires *ethos* and *logos*. See Julie Ward “Two Conceptions of *Physis* in Aristotle’s Ethics and Politics” *Asia International Forum* (4 June 2010).

²⁵ Discovered by Robert Clausius, 1850

given system, and in this inevitable transfer process, energy is transformed and wasted until the process ends at a certain temperature in which there is no difference of heat between the inside and outside of a body. The only way to reverse this process of decay is by applying ‘work’ through an *external* energy source. So, if the system is for instance an ice cube with tight molecules, the natural process according to the second law is for these molecules to move more and more, and for energy to be transferred from the warmer parts to the colder ones, until the molecules have separated and spread out and the cube has completely melted. The only way to preserve the ice cube is to artificially keep the molecules tight by creating an environment below freezing level through the use of external energy.

The same as an ice cube will inevitably melt at room temperature and cease to be an ice cube and become water, the constitution of a given state would be completely ruined by the entropy inevitably produced by its normal functioning, and turn into a different political order. From *Kallipolis*’ utopian aristocracy, according to Plato political forms would gradually degrade first into the lesser form of timocracy (the regime by the honorable), then into oligarchy (rule by the wealthy), then into democracy (based on equal share in political power and liberty) and finally into tyranny, the worst form of government that imposes “the harshest and most complete slavery.”²⁶ Tyranny is for him an order that is the complete opposite of the virtuous aristocracy of the guardians, in which all citizens are virtuous and contribute in their particular roles to the harmony of the polis. Tyranny is for Plato anarchy, the transgression of natural hierarchies and the absence of rule.

When developing his idea of political decay Plato’s target was the democracy of his own time. While he recognizes that liberty is the principle of democracy, he argues that liberty is itself a liability, a source of disorder because it results in individuals living according to “their own constitution,” having their own rules, pursuing only their own interests, and respecting no other authority but their own will.²⁷ For Plato, corruption in a democracy would be the inevitable result of the equal distribution of liberty, which allows for the pursuit of individual interest and the consequent increase of “entropy”

²⁶ Plato, *Republic*, 564a

²⁷ Plato, *Republic*, 557b-e

within the constitutional framework. In other words, liberty as constitutive to the democratic regime is for Plato a liability that contaminates the public realm, weakening the possibility of *arche* and virtue, permanently undermining hierarchies, tradition, and rules, and making government prone to *hubris* and destined to injustice and tyranny.²⁸

Departing from Plato's linear pattern of corruption as a gradual process of decay from aristocracy to tyranny, Aristotle argues for a typology of regimes based on the fundamental "diversifying antithesis" of genesis and *phthora* that exists in everything. Since "all things that come into existence in the course of nature are either opposites themselves or are compounded of opposites," corruption can be analyzed as a movement "along the determined line between the terms of contrast; or (if we start from some intermediate state) the movement towards one of the extremes."²⁹ On this premise of the generative nature of opposites Aristotle bases one of his most original observations, with far-reaching political implications: that change comes about through the corruption of nature, that "change (μεταβολή) is primarily a 'passing away' (φθορά)."³⁰ *Phthora*, therefore, is an inevitable, natural force driving change in the physical world, working within bounded spheres determined by the opposition implied in the "coming into being" of a thing; each thing has a principle (or mixture of them) and it is its realization what brings about corruption. Every thing begins to corrupt the moment it is fully realized, and *metabole* occurs when that realization is fully negated.

Since "all things arose out of what existed, and so must be there already,"³¹ according to Aristotle every constitution would have constitutive principles that would become fully realized, enabling its demise. The degree of corruption of constitutions would relate to the movement within its extremes. Following this idea, Aristotle conceived of three good constitutions (kingship, aristocracy, and *politeia*) based on the nature of the sovereign (one, few, or many) and their final cause (ruling for the common interest, eudaimonia), and their corresponding perverted forms brought about by corruption (tyranny, oligarchy, and democracy) aimed not at advancing the common

²⁸ Plato, *Republic*, VIII: 558a

²⁹ Aristotle, *Physics*, I.V: 188b

³⁰ Aristotle, *Physics*, IV.xiii: 222.b

³¹ Aristotle, *Physics*, I.iv.187b

good but at satisfying the personal interests of the rulers.³² There is much debate about the fundamental feature of the ideal *politeia* in Aristotle's thought. While some define *politeia* as a combination of democracy and oligarchy, and thus a mixed government in which the interest of the few and the many keep each other in check,³³ others emphasize its "constitutional" character given that the ultimate authority would reside on fundamental law and not on the will of the majority.³⁴ I would argue these interpretations are not mutually exclusive.

As Aristotle described in *On the Constitution of Athens* and the *Politics*, Athenian democracy during his time corresponded to the most extreme and corrupt form of democracy—the absolute rule of the many for their own benefit. In his classification of regimes, he identified four types of democracy based on the social basis of the sovereign, the degree of participation in government, and the supremacy of the law. The first three types of democracy, in which the masses share equally in constitutional rights but are unable, due to material constraints, to actually exercise their sovereign power, the rule of law is supreme and thus Aristotle considered them as 'good,' constitutional forms of government. The fourth type of democracy, however, which he identifies with the Athenian democracy of his time, is inherently corrupt since the "mass of the poor," thanks to a system of state-payment for attending the assembly, are "the sovereign power instead of the law."³⁵ This 'extreme' form of democracy is brought about by "leaders of the demagogue type," who arrive precisely because decrees and not laws are sovereign, enabling the transformation of the sovereign *demos* into a type of despotic autocrat.³⁶ This form of government has no proper constitution, since the people are sovereign in all matters,³⁷ and is easily influenced by demagogues who have no official position other than the one conferred by the contingent favor of the masses. Demagogues educate the poor on how to advance their own interests, increasing their power,³⁸ and thus are the agents of corruption, enabling interest to be made into law. The full realization of equal

³² Aristotle, *Politics*, III. vii, §2

³³ Pasquino, "Classifying Constitutions"

³⁴ Dario Castiglione, "The Political Theory of the Constitution" *Political Studies* 44.3 (1996): 417-435.

³⁵ Aristotle, *Politics*, IV.vi §2–6

³⁶ Aristotle, *Politics*, IV.vi §25–31

³⁷ Aristotle's argument stands against the codification of law at the turn of the century and the establishment of the *nomothetai* as a constitutional court of sorts. See Hansen 2001.

³⁸ Aristotle, *Politics*, IV.iv §26–30

share in government appears then to inevitably produce regime change since such a regime, in which “everything is managed merely by decrees, is not even a democracy.”³⁹

In Aristotle’s particular historical account of Athens’ history, demagoguery plagued the state since the rise of Pericles, who not only “took powers away from the Areopagites” but also “impelled the state toward naval power [and] as a result of this power it befell that the masses took confidence and began in greater degree to draw the whole constitution into their hands.”⁴⁰ Thus, departing from Thucydides’ account of Athenian history, which puts total control of government in the masses *after* Pericles’ death in 429 BC, Aristotle argues that the extreme form of democracy begun three decades earlier with the reforms of the Areopagus, which enabled a regime change (*metabole*).⁴¹ While the absolute liberty the assembly gained after the last aristocratic constraints were removed would mark the beginning of regime change, the complete realization of democracy occurs only when the principle of equal access to political power is fully applied.

Even though a corrupt state implies for Aristotle a loss of virtue both by rulers and common citizens, he is very clear that virtue depends on the appropriate legal structure to thrive. Because virtue is not natural to human beings, but needs to be acquired by habit and action, the degree of virtue and corruption in the *polis* is determined by the law and its effects on the members of the state.⁴² In Aristotle’s account, good character—desire in accord with right reason—cannot exist without habituation. Moral virtue is difficult to acquire because it is concerned with pleasures and pains, the discipline of the appetites, and the internalization of social norms. Therefore, the right habituation must be learned from others and exercised constantly to create a sort of second, moral nature.

For pleasure causes us to do base actions, and pain causes us to abstain from fine ones. That is why we need to have had the appropriate upbringing—right from early youth, as

³⁹ Aristotle, *Politics*, IV.iv §30

⁴⁰ Aristotle, *On the Constitution of Athens*, 27.1

⁴¹ This interpretation appears based not on *de jure* modifications, but on *de facto* changes evidencing for Aristotle a change in the spirit of democracy. James Day and Mortimer Chambers, *Aristotle’s History of Athenian Democracy* (University of California Press, 1962), 140.

⁴² Aristotle, *Nicomachean Ethics*, II, 1

Plato says—to make us find enjoyment or pain in the right things; for this is the correct education.⁴³

At the political level, it is the legislator who, grasping the principles of the common good, creates a constitution that can make “the citizens good by habituating them.”⁴⁴ Good laws make good citizens by providing them with the principles of virtuous action, the form to which they should shape their character; the legal framework materializes the universal principles guiding action toward the common good, providing both the limits and the opportunities to engage in virtuous action. The same can be said for corrupt action (preferring individual/sectional interest against that of the *polis*), as being enabled by the legal structure, with the crucial difference that corruption is a natural tendency that will exist regardless of laws. Therefore, each regime needs to habituate their citizens appropriately through good laws aimed at fostering moral and civic virtue against relentless, unavoidable corruption. If they fail to do this and laws become inadequate, allowing and even fostering greed and the thirst for domination in the sovereign, citizens become habituated in this way and the *polis* inevitably becomes a corrupt state. Democracy as absolute, unconstrained rule by the people, a form of government effectively lacking a constitution as higher law, is thus for Aristotle inherently corrupt.

Despite their different theories of constitutions, both Plato and Aristotle agree that political corruption occurs in pure regimes due to a loss of virtue in the sovereign body when personal interests take the place of the common good as the final cause of government. If viewed from the second law of thermodynamics, the process of political corruption as *phthora* could be conceived as the natural increase of entropy generated by the pursuit of individual/sectional interest against the common good within a given constitutional framework. This loss of virtue in the ruling body would mark the beginning of the end of a given good constitution, if no constant or episodic external ‘work’ is applied to it to counteract the thrust of actions aimed at the satisfaction of partial interests. Moreover, because corruption and the increase of entropy inevitably

⁴³ Aristotle, *Nicomachean Ethics*, II, 3

⁴⁴ Aristotle, *Nicomachean Ethics*, II, 1

produce a change of nature and thus an effective modification of the constitution of the state, the quest for virtue is connected to the idea of *preservation against corruption*.

Aristotle aims at counteracting corruption by proposing as the best form of government one based on a mixture of natures and principles, in which both the few and the many share in government, and the majority of citizens are part of the middle classes. Aristotle's *politeia* is a constitutional direct democracy in which "the masses govern the state with a view to the common interest,"⁴⁵ and the masses are composed mainly of the middle classes, who possess "moderate and adequate property."⁴⁶ This best "practicable" constitution— an intermediate regime between the extremes of oligarchy and democracy— would successfully combine qualifications of wealth and legal equality because the middle classes, as majority, would effectively control government.

Being a mixture of constitutions and thus in an intermediate position, one could argue that, following Aristotle's ideas on corruption, the *politeia* as an ideal type could become corrupt by tending either to oligarchy or democracy. However, the same as Plato, he only entertains a corrupting tendency towards democracy, even if from his ideas of the nature of things it is clear that things that are in intermediate positions inevitably drift toward either of the extremes that define them. The same as a *politeia* would suffer *metabole* if the principle of equal share in government is fully realized, if the principle of oligarchy —inequality based on wealth, status, knowledge— becomes predominant and driven to its extreme —with a handful of people owning most of the property— the *politeia* would inevitably undergo a regime change into an oligarchy, a regime "analogous to the last form of democracy" in which the sovereign is unbound to seek its own advantage, "closely akin to the personal rule of a monarch."⁴⁷

Extending Aristotle's taxonomy of good and deviant constitutions, and combining it with Empedocles' cosmological theory of cyclical change,⁴⁸ the Greek historian Polybius, who documented the rise of the Roman republic from 264 to 146 BC, articulated a "cycle of political revolution, the course appointed by nature in which

⁴⁵ Aristotle, *Politics*, III.vii §3

⁴⁶ Aristotle, *Politics*, IV.xi §10–1

⁴⁷ Aristotle, *Politics*, IV.vi §7–11

⁴⁸ G.W. Tromp, *The Idea of Historical Recurrence in Western Thought: From Antiquity to the Reformation* (University of California Press, 1979).

constitutions change, disappear, and finally return to the point from which they started.”⁴⁹ According to his *anacyclosis*, pure regimes, starting from the best one —kinship then aristocracy and finally democracy— are bound to degenerate into their deviant forms, until the tyranny of the many establishes the rule of violence, and the people “degenerate again into perfect savages and find once more a master and monarch.”⁵⁰

For Polybius corruption is inevitable in pure regime forms.

just as rust in the case of iron and wood-worms and ship-worms in the case of timber are inbred pests, and these substances, even though they escape all external injury, fall a prey to the evils engendered in them, so each constitution has a vice engendered in it and inseparable from it.⁵¹

Following Aristotle he argues only mixture could stave off corruption. However, instead of combining the worse two regime types as Aristotle did, following the example of Lycurgus, Polybius argues we must regard as the best constitution a combination of the three best forms of government —kinship, aristocracy, and democracy— which he conceived as forms of *limited* government. While the king’s actions were bounded by rational principles, and aristocratic rule was limited by the morality and wisdom of the few selected to administrate public affairs, democracy was the regime in which majority decision prevailed within a traditional framework of popular obedience to the dictates of religion, elders, and civil laws.⁵²

The Roman constitution was of a mixed nature because it institutionalized these three sources of authority, which shared “in the control of the Roman state.”⁵³ While the Consuls exercise authority in Rome over all public affairs, the Senate exerted control over the republic’s finances and public works, in addition to dispatching embassies and declaring war, and giving advice to magistrates.⁵⁴ The people, on the other hand, had the “right to confer honors and inflict punishment,” especially on individuals who had held public office, and the power of approving or rejecting laws and ratifying issues related to

⁴⁹ Polybius, *Histories*, VI, 9

⁵⁰ Polybius, *Histories*, VI, 9

⁵¹ Polybius, *Histories*, VI, 10

⁵² Polybius, *Histories*, 6, §4

⁵³ Polybius, *Histories*, 6, §2 & 5

⁵⁴ Advice that was generally followed. Polybius, *Histories*, 6, §12–13

war and peace.⁵⁵ These three forms of authority and institutional power were, moreover, in permanent dynamic balance in a system in which “none of the principles should grow unduly and be perverted into its allied evil, but that, the force of each being neutralized by that of the others, neither of them should prevail and outbalance another.”⁵⁶ Corruption in this mixed regime, which Polybius associates to the Roman republic, is not the full realization of an *antithesis*, but the result of an *imbalance* of political power in the constitution, which allows for the domination of one of the principles/factions over the others. However, Polybius does not acknowledge the corruption slowly unraveling at the moment he was writing the *Histories*.

Even if by the late Republic the Plebian Tribune appeared as a strong institution able not only to give protection to individuals against the Consuls, but also to obstruct the Senate and initiate legislation, it was unable to ultimately thwart the overgrowth of the power of the nobility. The republic kept progressively drifting into oligarchy mainly due to the cooptation of tribunes into patrician ranks and the Senate’s disregard of the legislative authority of the Plebeian Council.⁵⁷ The tumults that resulted from this disregard of plebeian authority plagued the late Roman republic, and served as a catalyst for regime change and the birth of imperial authority.

II. Individual Corruption and the Machiavellian Challenge

The translation of *phthora* into the Latin root *corruptus* kept its abstract meaning of destruction and decay at the systemic level⁵⁸ alongside a substantive, moral meaning related to individual political actions: to bribe, falsify, seduce or pervert.⁵⁹ It was mainly Cicero who used the word *corruptus* in a political sense to refer to the decay of mores and the “depravity of evil custom”⁶⁰ as the culprit of the decline of Rome. Following closely Plato’s analysis of the corruption of democracy, Cicero blames the decay of the

⁵⁵ Polybius, *Histories*, 6, §14

⁵⁶ Polybius, *Histories*, VI, 10

⁵⁷ Chaim Wirszubski, *Libertas As a Political Idea at Rome During the Late Republic and Early Principate*, (Cambridge, UK: Cambridge University Press, 2007); Andrew Lintott, *The Constitution of the Roman Republic* (Oxford: Clarendon Press, 2002).

⁵⁸ The meaning of “damaged or spoiled,” closer to the original *phthora*, was predominant in Ancient Rome. Perseus Digital Library Project.

⁵⁹ The Romans had a specific word for “electoral bribery,” a common vice: *ambitus*. Buchan & Hill, *An Intellectual History*, 27–29.

⁶⁰ Cicero, *The Laws*, Book 1

republic to the success of the “extreme liberty” that inevitably reaches everything in a commonwealth in which everyone is free and “all sense of shame is lost.”⁶¹ This individual moral meaning of *corruptus* was further developed during medieval times in which the sinful nature of human beings took center stage. Following closely the Ciceronian legacy, Augustine famously argued all earthly governments are inherently corrupt because rooted in the original sin, and veered the focus of analysis to civic stability as the highest attainable political good. This approach spawned more than ten centuries of “mirror of princes” texts centered on the moral virtue of rulers as a form of achieving stability and good rule.

After the reintroduction of Aristotle to philosophical inquiry in the thirteenth century, political analyses on virtue and corruption shifted once more from the moral qualities of individual rulers towards the institutional merits of political regimes. Within scholastic thought, Aquinas fused moral values to the Aristotelian conception of “right reason” producing a new political meaning of virtue and corruption associated with the *res publica christiana*.⁶² Political corruption was once again associated with the preference for individual interest against the common good⁶³ but remained pegged to Christian morality and the Augustinian framework that conceived of civic stability as the highest political goal, and of civic discord as a sign of corruption. As Quentin Skinner shows, scholastic thought had a significant impact on the new humanist strand that developed in early *quattrocento* Florence, which attempted to defend the republican experiment in scholastic terms based primarily on virtue ethics.⁶⁴ It is in this Ciceronian-scholastic humanist legacy —according to which political corruption is reduced to individual vicious actions— that our current juridical conception of corruption is grounded.⁶⁵

A crucial challenge to the scholastic view of political corruption centered on individual virtue came from a “civic” strand of humanist thinkers from the Italian city-states being threatened by papacy and empire in the fourteenth and fifteenth centuries.

⁶¹ Cicero, *On the Commonwealth*, I. 67

⁶² Aquinas, *Summa Theologica*, I.CIII, 3 resp.

⁶³ Aquinas, *Summa Theologica*, I-II.XC, 2

⁶⁴ Skinner, *The Foundations of Modern Political Thought: Volume 1* (Cambridge: Cambridge University Press, 1978), 145.

⁶⁵ Buchan & Hill. *An Intellectual History*. I disagree fundamentally with their interpretation of Machiavelli’s approach to corruption.

Reintroducing Ancient Roman political values, this humanist tradition brought to the fore the political concept of liberty as connected to civic virtue and good, popular government,⁶⁶ and put corruption as an evil in need of permanent contention in their proposed constitutional designs. Even if Machiavelli was not the first thinker of the Renaissance to focus on the role of corruption in politics, according to Skinner he reveals a “heightened awareness of the problem, and devote[s] an unprecedented amount of attention to the investigation of its causes.”⁶⁷ By challenging humanists’ virtue ethics and their support for the rule by an educated elite as the best form of government, Machiavelli proposes a structural understanding of corruption that puts the burden of good government on institutions, laws, and procedures rather than individual actions by the ruling elite. While ‘virtue-ethics’ humanists saw virtue in the ruling class as the key to good government,⁶⁸ for Machiavelli republican liberty was the result of good laws, which are themselves the product of the institutional conflict between the few and the many.⁶⁹

Machiavelli’s preoccupation with political corruption was embedded in the extraordinary democratic experiment of the republic of Florence, which begun in 1494 with the establishment of the Great Council, a form of direct democracy that allowed for extensive citizen participation in legislative, electoral, and judicial authority within the republic. Despite the extensive powers of the Council, the republic remained effectively dependent on the financial oligarchy due to its reliance on mercenary armies that were paid by an extraordinary system of public debt. According to Jérémie Barthas, as Secretary and Second Chancellor of the republic, Machiavelli saw as his central task to liberate the republic from the grip of the financial oligarchy through the introduction of a project of mass conscription, an “ordinary and socialized mode of defense” that would establish the autonomy of the Republic of Florence from the financial power of the *grandi*.⁷⁰ I argue Machiavelli’s conception of corruption needs to be understood as connected to this constant threat of oligarchic power, and thus his constitutional

⁶⁶ Skinner, *Foundations*, 6–12

⁶⁷ Skinner, *Foundations*, 166

⁶⁸ James Hankins, “Machiavelli, Civic Humanism, and the Humanist Politics of Virtue” *Italian Culture*, xxxii. 2 (September 2014), 102

⁶⁹ Machiavelli, *The Prince*, IX; *Discourses*, I.4

⁷⁰ Jérémie Barthas, “Machiavelli, the Republic, and the Financial Crisis,” in *Machiavelli on Liberty and Conflict*. D. Johnston, N. Urbinati, and C. Vergara eds., (Chicago University Press, 2017), p. 273.

proposals should be analyzed as socialized modes of defense against the relentless force of political decay.

Following the Aristotelian definition of political corruption as the favoring of individual interests instead of the common good, in *History of Florence* Machiavelli defines a corrupt state as the one in which “laws and ordinances, peace, wars, and treaties are adopted and pursued, not for the public good, not for the common glory of the state, but for the convenience or advantage of a few individuals.”⁷¹ Since for Machiavelli men are by nature wicked and fickle, prone to breaking the rules⁷² “at every chance for their own profit,”⁷³ every form of government has a natural tendency toward corruption. Even though a good foundation can counteract this egotistic inclination, it does not eliminate it, so the degeneration of political rule is a constant threat that needs to be averted through extraordinary measures.⁷⁴

In his analysis of corruption, Machiavelli distinguishes three interrelated elements: matter, form, and method. In a city the matter is constituted by the citizens, the form by the laws, and the methods by the rules and procedures for selecting magistrates and making laws.⁷⁵ Even if Machiavelli certainly denounces “gifts” and “promises” as frequent means to corrupt individuals,⁷⁶ and agrees with Cicero that a corrupt government necessarily entails corrupt mores, his conception of corruption is decisively institutional and his analysis thus focuses on the rules and procedures that enable citizens to exert domination. For Machiavelli the corrupting process does not begin in the *matter* (governed in part by the unavoidable egoistic tendencies of individuals) but on the *form* restraining individual interest and the *methods* by which rulers are selected. Individual interest is a force permanently trying to unduly influence government but only succeeding, and thus effectively corrupting the republic, if laws and methods are flawed and liberty’s scaffolding is already being slowly dismantled from within: “an evil-

⁷¹ Machiavelli, *Florentine Histories*, IV.6

⁷² In our society, gaming the rules is a more serious problem than breaking them. I thank Jon Elster for this insight.

⁷³ Machiavelli, *The Prince*, XVI

⁷⁴ For Machiavelli on dictatorship as the ordinary method to deal with extraordinary circumstances see Marco Geuna 2017.

⁷⁵ Machiavelli, *Discourses*, I.18

⁷⁶ Machiavelli, *Discourses*, I.40; *The Description*

disposed citizen cannot effect any changes for the worse in a republic, unless it be already corrupt.”⁷⁷

For Machiavelli good laws promote civic virtue, and bad laws enable general corruption. Throughout his writings he identifies two types of corrupting norms promoting two forms of evil: license and socio-economic inequality. Referring to the case of Scipio —“that most excellent man, not only of his own times but within the memory of man, against whom, nevertheless, his army rebelled in Spain”⁷⁸ —Machiavelli makes the case that norms allowing for increased license bring ruin even to the most glorious men and institutions. Scipio was called “the corrupter of the Roman soldiery” because he was too lenient and “gave his soldiers more license than is consistent with military discipline,”⁷⁹ which encouraged them to become unruly.⁸⁰ And the same as good, disciplined soldiers became bad and rowdy through the lifting of restraints to their behavior, the general corruption of mores is allowed to begin when

the laws that restrained the citizens were often altered, such as the law relating to adultery, the sumptuary laws, that in relation to ambition, and many others, which were changed according as the citizens from one day to another became more and more corrupt.⁸¹

In addition to promoting moral license and undermining virtue, laws play a key role in allowing for inequality, which ultimately makes the protection of liberty and the republican project impossible. Because republics need relative equality to exist —great inequality produces princedom, relative equality is conducive to republican rule—⁸² if laws allow for accumulation of wealth in the hands of a few and the destitution of the majority, the gradual transition from good government into a corrupt one is inevitable. Because Machiavelli sees the republic as a type of political organization that is inherently tied to the socioeconomic structure of society, republican liberty demands that citizens

⁷⁷ Machiavelli, *Discourses*, III.8

⁷⁸ Machiavelli, *The Prince*, XVII

⁷⁹ Machiavelli, *The Prince*, XVII

⁸⁰ For further analysis on Scipio see John McCormick, “Machiavelli’s Inglorious Tyrants: On Agathocles, Scipio and Unmerited Glory” *History of Political Thought*, 36, 1 (2015), 29-52.

⁸¹ Machiavelli, *Discourses*, III.18

⁸² Machiavelli, *Discourses*, I.55. For further analysis of the relation between inequality and constitutions in Machiavelli see John McCormick, “‘Keep the Public Rich, But the Citizens Poor’: Economic and Political Inequality in Constitutions, Ancient and Modern,” *Cardozo Law Review*, 34, 879

live in *relative* equality, in a correspondence based on individual labor and frugality. For Machiavelli lords (*gentiloumini*) “who without working live in luxury on the returns from their landed possessions” are dangerous for any republic; they are the beginners of “corruption and the causes of all evil.”⁸³

But even if Machiavelli strongly denounces wealthy elites and their great influence as “the cause of states being reduced to servitude,”⁸⁴ he also acknowledges that a “republic that has no distinguished citizens cannot be well governed”⁸⁵ and that it is the job of the institutions of the state to adequately channel individual interest for the benefit of the republic. Bad laws enable undue influence on government from “fatal families” and the division of society into factions that “will strive by every means of corruption to secure friends and supporters” in order to satisfy their interests.⁸⁶ Good laws, on the other hand, establish necessity and duty to create virtuous citizens and make sure the influence of wealth “is kept within proper limits”⁸⁷ by prohibiting the legal ability to command enormous fortunes, castles, and subjects.⁸⁸ Anti-corruption laws putting limits to the command of wealth and patronage are thus essential to preserve a good constitutional form.

Even though in Machiavelli’s theory fundamental laws make good citizens⁸⁹ by establishing appropriate limits, rights, and duties, it is for him on the *methods* were the burden of the maintenance of the constitution and the virtue of the citizens appears to be finally placed. Because human affairs are in constant flux, and the matter is not homogenous but composed of two opposing humors (the desire to oppress and to be left alone), there is a dynamic relation between form and matter, laws and men. Therefore, the methods regulating the creation of law and the exercise of power, the procedures allowing for the institutional balance between the elite and the people, are crucial. Good laws are not enough to shape good citizens and keep corruption at bay; an appropriate

⁸³ Machiavelli, *Discourses*, I.55

⁸⁴ Machiavelli, *Discourses*, I.55; III.18

⁸⁵ Machiavelli, *Discourses*, III.28

⁸⁶ Machiavelli, *Discourses*, III.27

⁸⁷ Machiavelli, *Discourses*, I.1

⁸⁸ Even though Machiavelli refers to the German citizens, who if they get gentlemen “into their hands, they put them to death,” he does not want to bring equality by murdering the rich, but by adopting laws to curb inequality.

⁸⁹ Machiavelli, *Discourses*, I.3

method of allocating political power and the management of state rule —good procedures aimed at non-domination— is also necessary. It is at this point in his analysis that Machiavelli criticizes, as vehicles for corruption, what are the two most fundamental elements of our current liberal representative systems: elections and free speech.

Using as an example the Roman republic, Machiavelli describes how corruption derived from inequality at the political level ultimately undermined the constitutional order. The procedure for the selection of magistrates, based on voluntary candidacy, and the right to propose legislation and speak in the assembly, even though were in the beginning good, allowing for the most able to become magistrates and for “each one who thinks of something of benefit to the public” to have the right to propose it,⁹⁰ were the means through which corruption crept into the political system, undermining liberty:

such a basic custom became bad, because only the powerful proposed laws, not for the common liberty but for their own power, and for fear of such men no one dared to speak against those laws. Thus the people were either deceived or forced into decreeing their own ruin.⁹¹

While the procedure of election, based on the political equality to compete for office, brought corruption through the self-selection of candidates, the right to speak in the assembly, what for Athenian democracy constituted the fundamental principle of *isegoria*, became the vehicle through which the powerful imposed their values and ideas on the many, forcing their consent. The rights to election and political speech, at least as they were originally conceived, were thus the mediums through which corruption through hegemony⁹² was imposed, creating a state in which the many chose and decreed their own ruin, undermined their actual power and destroyed the republic. Consequently, for Machiavelli it is when the *grandi* dominate the *popolo* based on their own (forced) consent, by creating through deed and speech a narrative of their worldview which is gradually accepted as legitimate, that the matter is corrupted and laws are not enough to maintain liberty. In other words, when socio-economic inequalities permeate the political process and laws are consistently being made (or not approved) for the interest of the

⁹⁰ Machiavelli, *Discourses*, I.18

⁹¹ Machiavelli, *Discourses*, I.18

⁹² “The ideas of the ruling class are in every epoch the ruling ideas... nothing more than the ideal expression of the dominant material relationships.” Karl Marx, “The German Ideology” in *The Marx-Engels Reader* (Norton 1978), 172.

few, amidst generalized complacency, universal corruption ends up transforming the republic into a tyrannical government. This gradual corruption of the republic into oligarchy happens then not despite institutions and procedures, but enabled by them.

At least two lessons are to be learnt from what Machiavelli discovered in the examples of the Ancients: that neither the matter or the form are inherently virtuous, and that even if the matter has been made good through an original virtuous form, the form is not enough to keep citizens good when corruption has been introduced through legitimate political methods and has become pervasive. Moreover, when the matter is corrupt, the form and the methods do *nothing more* than fostering corruption, and republics increasingly drift into an oligarchy of consent through the natural functioning of its methods.

III. Institutional Corruption and Corrupting Dependence

As seen from a *longue durée* perspective, it is clear that the concept of political corruption was meant to account for a systemic phenomenon, a layer of great explanatory value that was almost entirely dropped from theoretical analysis after the eighteenth century, when corruption was reduced to its current juridical form. While the ancients thought of corruption as inherent to everything, and thus inescapable for political forms, Machiavelli was perhaps the only modern thinker to engage, at length, with the problem of universal corruption as a constitutional challenge. I argue we need to pick up this lost thread of thinking that conceptualized political corruption as systemic, and draw the contours of this structural form of political corruption for our present time. This alternative meaning of corruption should be seen as complementing, instead of replacing, political corruption as individual acts of misconduct by public officials, since particular instances of corruption are expressions of a universal phenomenon that cannot be reduced to their aggregation. This attempt at rethinking political corruption from a republican approach is meant to contribute to an emerging literature that has been assertive in criticizing the neo-republican interpretation of corruption (for not being different enough from the liberal conception) but not propositive enough.

The most prominent scholars to dedicate attention to corruption in republican thought are J.G.A. Pocock, Quentin Skinner, and Philip Pettit. Despite their invaluable

contributions in bringing republican thought to the forefront during the last four decades, I would argue their misreading of Machiavelli makes them unable to grasp the systemic nature of political corruption. This misreading is of course not rooted in their lack of knowledge about Machiavelli, but rather on their own fierce commitment to liberal democracy. To question the constitutional structure of a regime that was progressively becoming “the only game in town” in the last stages of the Cold War would have been perhaps ludicrous, especially after legal positivism and a minimalist procedural conception of democracy became hegemonic in the social sciences.⁹³ But it is precisely the consolidation of liberal democracies —when, according to Adam Przeworski, the regime “becomes self-reinforcing” and “no one can imagine acting outside the democratic institutions”⁹⁴— what for Aristotle would prompt *metabole*, allowing for systemic corruption to begin taking hold of institutions, relentlessly moving the regime into oligarchy. This drift was missed by mainstream academia, oblivious of rising inequality and its effects on the political system,⁹⁵ dedicated to studying the institutional framework instead of appraising it, and thus unable to recognize systemic corruption and articulate a structural critique of liberal democracy. Republican theory was no exception to this blind spot.

In his civic humanist reading of the Florentine Secretary, Pocock famously identifies in Machiavelli the emergence of contingency as an “irruption of temporality in political discourse,” which positioned republican thought as a radically immanent approach to theorizing the political.⁹⁶ Nevertheless he understood Machiavellism as a mode of thought that pursued “universal values in transitory form,”⁹⁷ minimizing both the role of institutional conflict to produce good laws and the radical creative force of *virtù*

⁹³ Adam Przeworski famously defended the minimalist definition arguing the ability to change governments through popular vote made democracy inherently valuable because it avoided bloodshed. “Minimalist Conception of Democracy: A Defense” in *Democracy's Value*, Ian Shapiro and Casiano Hacker-Cordón eds., (Cambridge, U.K.: Cambridge University Press, 1999).

⁹⁴ Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991), 26.

⁹⁵ For a critique of the obscuring of inequality and its effects on American democracy see Alfred Stepan and Juan J. Linz “Comparative Perspectives on Inequality and the Quality of Democracy in the United States” *Perspectives on Politics*, 9.4 (December 2011), pp. 841-856.

⁹⁶ Elias J. Palti “On the Thesis of the Essential Contestability of Concepts” *Redescriptions: Yearbook of Political Thought and Conceptual History*, Kari Palonen, Pasiu Ihalainen & Tuija Pulkkinen, eds. (LIT Verlag Münster, 2005), 123; Althusser. *Machiavelli et 'Nous'* (Paris: Talandier, 2009).

⁹⁷ Pocock, *The Machiavellian Moment* (Princeton: Princeton University Press, 1975), 333.

during republican refoundings. In his recent critique of Pocock, Robert Sparling argues this Aristotelian reading of Machiavelli coupled with Pocock's attempt to construct a conceptual continuous tradition of corruption from the early Renaissance to the late eighteenth century resulted in a misleading interpretation of political corruption and the pessimistic outlook derived from it. If corruption is connected to universal values that cannot be fully realized in any given institutional form, then corruption is perennial and liberty at most only partial. What Sparling misses in his critique is that Pocock chooses principles as the source of normativity because he neglects the pivotal role institutional conflict between the few and the many plays in Machiavelli's theory of republican liberty. It is not constitutionalized principles what for Machiavelli keeps the republic free from corruption, but rather political conflict and periodic renewals of fundamental laws and institutions.

The hopelessness to effectively deal with corruption in an era determined by commerce and self-interest also seems to run against Machiavelli's account of *virtù* as an inherently contingent force, grounded on necessity and effectual truth (*verità effettuale*), capable of bringing republics back to their beginnings even in the case of universal corruption. Machiavelli's project in the *Discourses* was to figure out how to reestablish liberty and then keep it. In his theory of foundings, Machiavelli argues that refounding a republic is the most glorious action because it is the most difficult—because of the strength with which individuals benefiting from corruption will defend the status quo—and thus we should not only admire the actions of extraordinary leaders such as Romulus, Lycurgus, and Solon, but also imitate them.⁹⁸ As Sparling argues, in *The Machiavellian Moment* the language of corruption is one of “rhetorical excess and of moral absolutes,” which is neither coherent with the radical immanence of Machiavelli's thought nor conducive to a republican critique of corruption in liberal democracies, serving more as “dynamite than foundation”⁹⁹ for reformers aimed at dealing with the threat of oligarchy.

Even if in Pocock's interpretation of Machiavelli political corruption is an “irreversible, one-way process”¹⁰⁰ of moral decay, and thus it is the degeneration of

⁹⁸ Machiavelli. *Discourses*. I. Preface.

⁹⁹ Sparling, “The Concept of Corruption in J.G.A. Pocock's *The Machiavellian Moment*” *History of European Ideas* (2017) 43:2, 170.

¹⁰⁰ Pocock, *The Machiavellian Moment*, 211

customs and mores what renders the constitutional framework ineffective to reactivate civic virtue, it is Skinner who decisively positions corruption within the current liberal, juridical paradigm. As Amanda Maher shows in her critique of Skinner’s interpretation of Machiavelli, his humanist reading of the Florentine Secretary coupled with his project to combine civic participation and negative liberty obscured the “sociological foundations of political corruption in Machiavelli’s republicanism.”¹⁰¹ Skinner reduces corruption to a sinful disposition, to being unable “to devote one’s energies to the common good,”¹⁰² “a failure of rationality”¹⁰³ that can be best counteracted by promoting civic virtue and a sense of patriotism in the citizenry. Even if he acknowledges both the role of institutions in fostering virtue through participation and the connection between corruption and the capture of the state by oligarchs, the same as Cicero Skinner puts the burden of liberty on the virtue of individual citizens instead of on institutions, procedures, and material conditions. Because he detaches this “ineptitude for a free way of life”¹⁰⁴ from its fundamental cause —inequality— in his analysis Skinner is unable to account for the structural conditions that determine individuals’ public spirit incompetence.

Systematizing Skinner’s interpretation of Machiavelli, Philip Pettit put forward a theory of republicanism based on the conceptualization of republican liberty as the lack of arbitrary interference. Despite Pettit’s important contribution to the decoupling of domination from interference —broadening the conception of negative liberty to account for domination even in the absence of interference— his conception of corruption is even further removed from Machiavelli’s than that of Pocock’s and Skinner’s. By reducing domination to arbitrary power Pettit is unable to escape laws and procedures as parameters for arbitrariness and legitimacy, and thus his theory of liberty as non-domination creates a problem of endogeneity with respect to corruption. If domination is defined by arbitrary power, and what is considered arbitrary is determined by the legal regime, then there is no external referent to judge laws and procedures in terms of their potential corrupting tendencies.

¹⁰¹ Maher, “What Skinner Misses about Machiavelli’s Freedom: Inequality, Corruption, and the Institutional Origins of Civic Virtue” *The Journal of Politics*, 78:4 (2016), 1005.

¹⁰² Skinner, *Foundations*, 164.

¹⁰³ Skinner, “The Republican Ideal of Political Liberty” *Machiavelli and Republicanism* (Cambridge: Cambridge University Press, 1990), 304.

¹⁰⁴ Skinner, *Foundations*, 166.

Even if Pettit conceives interference as being non-arbitrary if it “track[s] the interests and ideas of those who suffer the interference,”¹⁰⁵ this surely can only apply to interference coming from the state, leaving interpersonal relations of domination largely unaccounted for. One could not reasonably expect that individual contracts must track equally the interests and ideas of all the parties involved—at least not in our capitalist societies in which relations of production are necessarily unequal. Moreover, because for Pettit liberty as non-domination is advanced “through a legal regime stopping people from dominating one another without itself dominating anyone in turn,” the burden of keeping this basic constitutional structure free from corruption relies on citizens’ “virtuous vigilance” and their effective contestation through institutional mechanisms.¹⁰⁶ However, while citizen’s civic judgment might be “clouded by uncivic inclinations born of radical material inequalities,”¹⁰⁷ institutional mechanisms might be too corrupt to allow for meaningful input and reform.

In Pettit’s framework, if a citizen suffers domination she has the civic duty to contest it through a process that on the ground tends to be time-consuming and frustrating. From a collective action perspective, to expect aggrieved citizens to stand up for their interests, given the high costs involved in claim procedures, is wishful thinking.¹⁰⁸ To put the burden on keeping corruption at bay on individual agency is thus a recipe for disaster because it allows for the silent, gradual, apparently consented slip into oligarchy. Pettit is unable to see that material conditions determine the possibility of civic virtue—there is no vigilance when mere survival is at stake, and one does not need to be in abject poverty to be overwhelmed enough to remain passive instead of seeking redress when wronged. In addition to time-consuming, dealing with bureaucracy and the courts is not a particularly pleasant experience, and thus placing the struggle against domination in the hands of individual citizens seems, from a realist point of view, not very different from leaving institutions to their own devices.

Recognizing the institutional corruption that the neo-republican conception of corruption neglects, in the mid-1990s there were increasing attempts in the fields of

¹⁰⁵ Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999).

¹⁰⁶ Pettit. *Republicanism*. Introduction.

¹⁰⁷ Sparling, “Political Corruption,” 21

¹⁰⁸ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 2012).

ethics to challenge the prevailing positivist, individualist approach to political corruption, which pushed the focus of corruption studies towards the political structure. Dennis Thompson was the first to identify a type of corruption that is institutional, “usually built into the routines and practices of organizations,” that pertains to actions that tend to undermine institutions’ normal processes, frustrating their primary purposes.¹⁰⁹ Corruption is for him the “condition in which private interests distort public purposes by influencing the government in disregard of the democratic process.”¹¹⁰ He highlights the case of democratic elections in which laws allowing for private financing of campaigns and lobby generate institutional corruption by enabling the distortion of public purposes by private interests.

Building on this perspective, Lawrence Lessig argues that institutional corruption is the outmost threat to democracy because it promotes “corrupting dependence”¹¹¹ based on material relations of subordination, which undermines citizens’ trust on democratic institutions. According to Lessig, corruption should be understood as:

a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution’s effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public’s trust in that institution or the institution’s inherent trustworthiness.¹¹²

Corruption occurs when institutions deviate from their “intended dependence,” what Lessig deems their “magnetic north,” because of a competing dependence that skews institutions’ public compass. Seen from this perspective, campaign finance laws would enable institutional corruption not only because it facilitates the distortion of public purposes but, more importantly, because they normalize and foster the dependence of elected representatives on their financiers rather than on voters.

Despite the important contribution of the institutionalist approach to corruption, which allows us to see more clearly the corrupting dependence fostered by electoral rules

¹⁰⁹ Thompson, *Ethics in Congress*; “Two Concepts of Corruption: Making Electoral Campaigns Safe for Democracy. *George Washington Law Review*, 73 (2005), 1036–1069.

¹¹⁰ Thompson, “Two Concepts,” 1037

¹¹¹ Lessig, *Republic, Lost: How Money Corrupts Congress –and a Plan to Stop it* (New York: Twelve Hachette, 2011).

¹¹² Lessig, “Foreword: ‘Institutional Corruption’ Defined” *Journal of Law, Medicine and Ethics*, 41, 3 (July 14, 2013).

and the normal functioning of representative institutions, its functionalist definition leaves open the problem of determining the proper objective of government and therefore it is unable to provide a systemic account of corruption beyond the direct link between financiers and elected representatives. Moreover, it has been argued that corruption might even be functional to the primary purpose of institutions since some forms of clientelism may result in a more *efficient* delivery of goods and services, depending on the relative weakness of the state; if an institution is inefficient and unable to fulfill its task, patron-client relations may increase its efficiency, allowing it to fulfill its goal.¹¹³ Finally, because it does not provide for criteria for the “magnetic north” of government, institutional corruption seems to be applicable only to particular institutions in relation to the political structure, taking basic institutional and procedural arrangements as a given.¹¹⁴

Perhaps as a way of salvaging the neo-republican tradition, Sparling suggests republican thought should incorporate this institutionalist conception of corruption by conceiving domination as a form of dependence. Since liberal democracies have eradicated “dominating dependence,” Sparling argues republican theory should focus on analyzing and averting “corrupting dependence,” which is the dependence “at issue in systemic corruption.” Even if I agree that republican thought needs a new theory of freedom to account for this type of systemic corruption,¹¹⁵ and that it is necessary to identify socio-economic inequality and an “unbalanced regime”¹¹⁶ form as the structural origins of corruption, Sparling’s attempt to reduce corruption to a form of dependence seems to me misguided. First, because dependence is not inherently corrupting, the need for a substantive agreement on what kind of dependence would be considered corrupting would still be needed. Second, if corruption is the opposite of civic virtue, it has more to do with the prevalence of interest against the common good rather than directly with dependence —corrupting dependence being the result of corruption. And finally,

¹¹³ Efficiency in fulfilling an institution’s primary purpose through clientelism would nevertheless damage the institution in the long-run. Mark Philp, “Defining Political Corruption” in *Political Corruption*, 35-44; Arnold Heidenheimer, ed., *Political Corruption*, part 4: ‘Corruption and Modernization’ (New Brunswick: Transaction, 1970), 477–578.

¹¹⁴ For a liberal critique of institutional corruption see Emanuela Ceva and Maria Paola Ferrett “Political Corruption” *Philosophy Compass* (September 2017).

¹¹⁵ Sparling, “Political Corruption,” 3

¹¹⁶ Sparling, “Political Corruption,” 22

reducing corruption to dependence does not allow us to escape interpersonal relations as the locus of corruption, leaving us unable to properly define systemic corruption structurally.

IV. Systemic Corruption and the Oligarchization of Power

In his essay analyzing the problems associated with developing an encompassing definition of political corruption, Mark Philp argued that the main challenge any such definition encounters is that it presupposes a notion of an ideal, uncorrupt form of political rule.¹¹⁷ If democracy should be understood as a procedural,¹¹⁸ deliberative¹¹⁹ or radical¹²⁰ political form is in itself a controversial issue. I do not wish to contribute to this debate but simply to identify a minimal condition of good popular government.

Following Aristotle's logic, representative government could be conceived both as a compound ideal type defined by its terms of contrast, and as an intermediate political regime that moves towards one of its extremes. Being a hybrid regime composed of the principles of democracy and liberalism, a minimal definition of an ideal liberal democracy would be a regime that fully realizes its democratic and liberal ends: to accurately represent the interests of the majority within the limits imposed by individual rights and separation of powers. The complete opposite of this ideal type would be an unrepresentative illiberal government, in which neither the interests of the majority nor basic norms are respected. This corrupt government would fall within the Ancient definition of tyranny, in which those in power benefit themselves without any limitations on their will but their own power of coercion.

From the perspective not of principles but of the regime's ruling element, given that representative government is factually a collection of individuals elected by citizens to make law and policy decisions, this minimalist conception of an ideal type of liberal democracy would be akin to a constitutional electoral aristocracy: a government by the

¹¹⁷ Philp, "Defining Political Corruption," 34

¹¹⁸ Maria Paula Saffon and Nadia Urbinati, "Procedural Democracy, the Bulwark of Equal Liberty" *Political Theory*, 41, 3 (2013), 441 – 481.

¹¹⁹ Joshua Cohen, "Deliberative Democracy and Democratic Legitimacy" in *The Good Polity*, Hamlin, A. and Pettit, P. eds., (Oxford: Blackwell, 1989) pp. 17–34.

¹²⁰ Miguel Abensour, "Savage Democracy and Principle of Anarchy" *Philosophy Social Criticism* 28 (2002), 703.

few (the best, wisest, most representative) chosen by the majority to rule within established constitutional limitations. Seen through a republican lens, the corrupt form that completely negates liberal democracy would be then an illiberal oligarchy: a government by few, for the benefit of few, without constitutional constraints. Even if everyone would agree that a government that does not represent the majority and does not respect rights is no longer a democracy, this analysis is not helpful for developing a definition for systemic corruption, which thrives within highly guarded constitutional frameworks.

If we conceive this ideal type as an intermediate regime that corrupts by moving towards either of its extremes, liberal democracy would corrupt by becoming either unrepresentative of the majority, or illiberal, depending on what principle is being undermined or realized. Therefore, a liberal democracy could corrupt and become either 1) an *oligarchic democracy*, a non-representative liberal government in which individual rights and separation of powers are upheld but the interests of the majority are consistently not represented, or 2) an *illiberal democracy*, a representative but illiberal government in which the majority's interests trump the rights of minorities. While an oligarchic democracy is still a democracy in which there are 'free and fair' elections and formal individual rights are protected, an illiberal democracy is a totalitarian form of government in which human rights of minorities are systematically violated.

Even if certainly there have been examples of these three corrupt forms of government —illiberal oligarchy, oligarchic democracy, and illiberal democracy— the type of systemic corruption republican thinkers were most concerned about, and that is ubiquitous today, is the gradual decay of "representativeness" and the increasing oligarchization of government and society within a general respect for the rule of law. A conception of systemic corruption thus needs to be connected to increasing socio-economic inequality, which enables inequality of political influence and the drift into oligarchic democracy, a regime in which citizens empower, through their ballots, those who enable their own dispossession and oppression.

Perhaps the first contour we need to draw to accurately define systemic corruption is its political nature. Currently, political corruption relates to fraudulent action involving public office, which puts the focus on the corrupt nexus between public and private.

Given the complex relation between corruption and the law, a definition that focuses mainly on the agents of corruption and their exchanges seems inappropriate to conceptualize the systemic layer of political corruption. The conception of institutional corruption, even if a step in the right direction —away from the mainly juridical conception— is also unable to appropriately track the oligarchic component of systemic corruption given its ungrounded functionalism that avoids substantive definitions of primary purposes. I would argue systemic corruption in liberal democracies should be understood as a long-term, slow-moving process of oligarchization of society’s political structure, and thus it should be analyzed at the macro level. Instead of looking at the inputs of political corruption (undue influence, which is hard to prove and thus prosecute), we should focus rather on its outputs, as anything pertaining to rules, procedures, and institutions that has the *effect* of benefiting the wealthy at the expense of the majority. We need to move away from *intention* and towards the *consequences* of political corruption to identify and measure its structural character.

Following the Ancients’ insights on systemic corruption as an inevitable and progressive process, the first major implication of this alternative meaning of political corruption would be that our liberal democracies would not be exempt from this degenerative movement because of the individual liberty they guarantee. This awareness would make us recognize not only the folly and presumptuousness of the modern and contemporary men who believe their institutional creations were close to perfection, but more importantly to acknowledge that our constitutional systems are inherently flawed and in need of immediate and periodic repair due to the high degree of “entropy” they allow for.

The second implication, which was so evident for the Ancients as for modern republican thinkers like Machiavelli, is that the law is not necessarily a source of virtue, and that not all constitutional forms are virtuous enough to counteract natural and relentless corrupting tendencies. Consequently, what is legal is not necessarily virtuous, and what is corrupt is not necessarily illegal. Campaign finance and lobbying regulations, which legalized forms of bribery and undue influence, are an example of this. If we take as a premise that all constitutions and the laws they produce could tend to foster corruption, the relativity of the *rule of law*, which both neo-republican and neo-liberal

thinkers argue is the mark of liberty, becomes evident. As we saw in Machiavelli's work, corruption is the vehicle for oppression and it originates not only in individuals but also in laws, and thus the rule of law must not be necessarily understood as a source of liberty. Because laws can be manipulated and used as tools for oppression, the rule of law appears not only as an inadequate measure of liberty, but also as an extremely problematic one since it could actually tend to uphold and sustain domination instead of combating it.

A third implication comes from qualifying political corruption as pertaining to rules, procedures, and institutions that affect the socio-political realm: there is an inevitable enlargement of the scope of the phenomenon. If the mark of political corruption is the advancement of individual/sectional interest against those of the majority, then we could think as being corrupt not only laws and policies *actively* favoring the wealthy, and consider as corrupting ideologies those that have this consequence when implemented, but also the negligence of law- and policymakers to counteract oligarchic outcomes, *passively* letting the wealthy keep further enriching themselves. Because conceiving political corruption in terms of its systemic effects allows us to separate corruption from individual immoral disposition and its immediate, tangible actions, ideologies such as neoliberalism—which has the effect of increasing socio-economic inequality and thus the power of the wealthy—¹²¹ and governmental inaction, such as the lack of proper regulation in the financial system—which ultimately enabled the last global economic crisis and the transfer of wealth from the many to the few—¹²² could be conceived as forms of political corruption because they enable the further oligarchization of liberal democracy.

In terms of how we could attempt to measure systemic corruption, the only way to account for the drift into oligarchy would be to take into account the effects that the legal structure and governmental action have on society. And thus a corruption index should include, in addition to corruption laws, number of prosecutions, and opinion polls,

¹²¹ An example of the implementation of neoliberalism at the constitutional level is Chile, which has the highest rate of inequality in the OECD and is among the 15 more unequal countries in the world.

¹²² Between 2009 and 2012, the top 1% of US households captured 95% of total income gains, while the bottom 90% of households saw their income fall by 16%. Immanuel Saez and Thomas Piketty, "Income Inequality in the United States, 1913-1998" *Quarterly Journal of Economics*, 118(1), 2003, 1-39 (updated 2015). Access: <http://eml.berkeley.edu/~saez/>. Individuals and institutions in Wall Street that contributed directly to this upward redistribution of wealth still remain unpunished.

variables relating to the outputs of law and policy such as the degree of inequality, the gap between capital and labor, allocation of GDP among social classes, and regressive/progressive taxation schemes. This data is not only already available, but seems better suited for undertaking a comparison among countries than solely relying on laws, court records, and individual perceptions of corruption, which are in themselves conditioned by the legal political culture.

If one agrees that the minimal normative expectation of liberal democracies is that governments should advance the interests of the majority within constitutional safeguards, increasing income inequality and the relative immiseration of the majority of citizens would be a sign of corruption. However, this insight is yet to be properly analyzed since our juridical, individualist conception of corruption prevents us from fully capturing its systemic nature and its effects on the exercise of individual liberties. Following Machiavelli's analysis, if corruption is reduced to individual illegal actions, the relentless process of political degradation and loss of liberty is obscured. Individual pursuit of interest is an inevitable feature in a free state, and so it is the degradation of the constitutional constraints on undue influence on government. While the former cannot be eliminated, the latter must be acknowledged and remedied to keep corruption at bay.

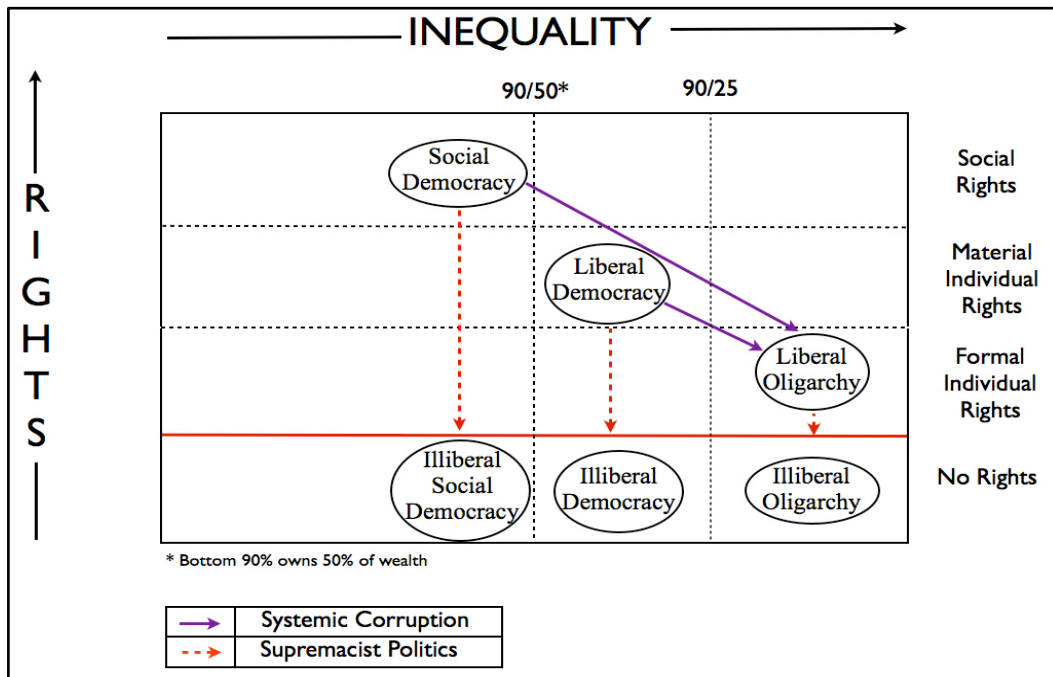


Figure 1.1 Systemic Corruption, Inequality and Rights

2.

Elitist Interpretations of the Mixed Constitution

As the previous chapter argues, systemic political corruption should be conceived as an inescapable phenomenon, a constant threat to liberty that is endemic to all forms of government. The recognition of this relentless process of political decay prompted ancient and modern political thinkers to study existing constitutions and engage in perhaps the impossible task of designing the perfect regime: a political order that would be immune to the degradation of its institutions and procedures, and thus perennial, severed from the inevitable fate of decay and regime change. The theory of the mixed constitution—which can be traced back to Aristotle’s *politeia*, a mixture of oligarchy and democracy¹—originated as a critique of pure, mono-archic constitutions, and proposed a realist cure for systemic corruption based on the institutionalization of different forms of power that are in constant expansion and limitation, checking each other following their own expansionary tendencies rather than purely out of virtue or legal obligation.

In this chapter and the following I will show that there are two main interpretations of the theory of the mixed constitution, which are determined both by the degree of institutionalization of the powers of the few and the many, and the hierarchy given to each within the constitutional structure: 1) an *elitist* interpretation, developed

¹ Aristotle, *Politics*, IV.8 1293b; Pasquale Pasquino, “Machiavelli and Aristotle: The Anatomies of the City,” *History of European Ideas*, 35 (2009), 397-407.

from the vantage point of elites and thus conservative of the existing socio-economic hierarchies, arguing the few a) should rule —authorized and checked by the people— and b) have final decision-making power; and 2) a *plebeian* interpretation, developed from the experience of resistance of the common people against oligarchic domination, arguing the people a) should effectively control the few who govern by *actively* participating in politics through plebeian institutions and b) have final decision-making power. By setting apart *elitist* and *plebeian* interpretations of the mixed constitution, I am not only questioning the rather neat continuity that J.G.A. Pocock saw in modern republican thought from Machiavelli to the American Founders,² but also proposing there can be a sharp distinction between schools of interpretation if we take as point of departure the position and role of the ‘popular’ element in the constitutional structure.³ Thus, instead of conceiving republican thought as exclusively divided between ancients and moderns,⁴ I argue the parting should be done, at least in terms of constitutional thought, between elitist and plebeian approaches to the constitution.⁵

Plebeian interpretations of the mixed constitution, which would place the ultimate political judgment on the common people as guardians of liberty, have yielded only a handful of constitutional models,⁶ with variations stemming from the proper institutionalization of popular authority. Elitist interpretations of the mixed constitution, on the other hand, have produced a range⁷ of constitutional models: from political orders having a highly institutionalized, but subordinate ‘popular power’ such as the one in James Harrington’s *The Commonwealth of Oceana* (1656), to constitutional frameworks like the majority of the ones we have today, completely lacking a popular institution but

² Even if Pocock recognized the different emphasis of Machiavellian, Harringtonian and post-Puritan republicanism, there is no sharp distinction between elitist and popular strands of republican thought.

³ The distinction springs from John McCormick’s distinction between Machiavelli’s assembly-based model and Guicciardini’s electoral, senatorial model. *Machiavellian Democracy*, 9.

⁴ See for example Paul Rahe, *Republics Ancient and Modern: Vol. 2* (Chapel Hill: University of North Carolina Press, 2010).

⁵ I propose to make the distinction based on who should have final political decision-making power in a given constitution—the selected few or the common people. Perhaps this division is as arbitrary as one based on a historical epoch, but it is clear-cut and not based on a convention, but rather on a constitutional rule, which could help better distinguish different strands in the republican tradition of thought.

⁶ Machiavelli, *A Discourse on Remodeling the Government of Florence; Discourses*

⁷ Perhaps because the elitist interpretation of the mixed constitution was the only one preserved from the Ancients. Almost all written sources preserved from the Ancients were authored by members of the elite, and thus we have been analyzing democracy and the republic from the point of view of the critics of democratic and plebeian power.

incorporating instead neutral, counter-majoritarian, unelected elite bodies to play the “democratic” role of checking on government.⁸

My objective in this chapter is to present a compelling reading of the predominant elitist strand of interpretation of the mixed constitution by offering a reading of what Pocock called Atlantic republican thought. I trace the ideas, proposals, and philosophical justifications that yielded the current elitist-proceduralist interpretation of the republican constitution. I argue this interpretation is not only blind to forms of domination occurring within and through legal structures, but also complicit in their reproduction because of its uncritical engagement with the socio-economic hierarchies embedded in the *status quo*. The *elitism* of this strand of thought refers simply to the endorsement of elites —those who are distinct from the common people either by birth, wealth, knowledge, popularity or technical expertise— as being better suited to rule and have final decision-making power. The particular *procedural* bent of this elitist strand comes from the justification of elitism: the belief that a set of procedural mechanisms and constraints are *sufficient* institutional conditions for the rule of law to guarantee and promote liberty for plebeian citizens.⁹ This proceduralist approach to the rule of law is unable to account for the slow progression of systemic corruption and oligarchic power within the constitutional structure because it focuses on formal rules and delegation of powers instead of on how political decision-making is actually done, on modes of selection instead of on the special interests behind candidates, and on equal constitutional rights instead of on the evident structural gender and racial oppression existing alongside formal protections.

In the first part I present the origins and theoretical development of this elitist-procedural interpretation of the mixed constitution by offering a reading of two of the most influential authors shaping Atlantic republican thought: Polybius and Cicero. In the second section I analyze the reemergence of elitist interpretations in England in the 17th and 18th centuries, focusing on Harrington and Montesquieu, the latter being the most influential thinker shaping the American constitution. In the third part I provide a materialist reading of the constituent process in the United States focusing on the

⁸ See Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2013).

⁹ I follow Jeffrey Green’s plebeian interpretation of liberal democracy in which ordinary citizenship is second-class citizenship. I will discuss his plebeian description of the liberal democratic experience in Chapter 8. *The Shadow of Unfairness*.

Founders' support for elite control over political decision-making and their arguments against democracy and popular participation. I end the chapter with a critical analysis of Philip Pettit's republican proposals, which have brought the elitist-procedural republic to its frontier of democratic possibilities and highest degree of philosophical sophistication.

Through a plebeian lens that sharpens the difference between procedural and material, formal and factual forms of power, I focus my analysis on the infrastructure of power that the constitution establishes for the common people. Thus, in my analysis I pay close attention to 1) the degree of institutionalization and the role of the few and the many within the power structure, and 2) the anti-democratic arguments and elitist justifications that served as normative premises for the establishment of elitist republics and liberal democracies. In the subsequent chapter I present the first plebeian interpretation of the mixed constitution¹⁰ originating in Machiavelli's materialist, realist reading of the Roman republican experience¹¹ and his critical reflection on the democratic constitutional regime in Florence.¹² I will also give an account of other plebeian constitutional positions that emerged in France, Germany, and the U.S., and introduce authors I consider as contributing to plebeian constitutional thought: Nicolas de Condorcet, Rosa Luxemburg, Hannah Arendt, John McCormick, and Lawrence Hamilton.

	Elitist	Plebeian
Plebeian Institution	Polybius Cicero	Machiavelli Condorcet Luxemburg Arendt John McCormick Lawrence Hamilton
No Plebeian Institution	Harrington Montesquieu Madison Pettit	

2.1 Republican Interpretations of the Mixed Constitution

¹⁰ There are no surviving documents from this interpretation prior to Machiavelli, which does not make him the first plebeian constitutional thinker, but the first whose writings survived centuries of monarchical and oligarchic rule.

¹¹ Mainly based on Dionysius de Halicarnassus rather than Polybius. Gabriele Pedullà, *Machiavelli in Tumult*, Ch. 6.

¹² And compare it to Francesco Guicciardini's *Dialogue on the Government of Florence*.

I. Foundations of Elitist Constitutionalism: Polybius & Cicero

Republican political thought has been commonly traced back to the Roman republic of the 2nd century BC, originating within a mixed constitution that combined three forms of government: kinship, aristocracy, and democracy. Different from other great states such as Sparta, Rome's constitution was not set up by one virtuous man, but became a mixed constitution in an evolutionary manner, through the struggle between patricians and plebeians over debt and war.¹³ The Roman constitution was not a document, but rather a tradition that incorporated fundamental institutions as well as written and unwritten norms (*ius*) and evolving practices (*mos*).¹⁴ To understand the extent of the power wielded by patricians and plebeians within the constitutional structure, it is thus necessary to analyze formal power through the actual practices of different forms of power in society. Even if not the first to theorize about the mixed constitution,¹⁵ Polybius was the first to attempt a conjunctural narrative of the Roman constitution, putting for the first time "Roman political behavior in a conceptual framework."¹⁶ In his description, written during a period of great expansion and conquest, Polybius accounted for formal and material aspects of political power, and elaborated a model of Rome's evolutionary constitutional tradition aimed at justifying the superiority of the republic as mixed constitution. This aim, I would argue, made him gloss over the "very considerable shifts of power" that occurred during the period in which the republic supposedly was in balance.¹⁷

According to Polybius, institutions giving legal authority to the one, the few, and the many shared "in the control of the Roman state,"¹⁸ allowing for a balance of power that gave stability and endurance to the republic. For Polybius, Rome's mixed constitution made its republic superior to the democracies and oligarchies in the Greek world because of its ability to prevent the overgrowth of power and the corruption

¹³ Andrew W. Lintott, *The Constitution of the Roman Republic* (Oxford: Oxford University Press, 2015), p. 32–38.

¹⁴ Lintott, *The Constitution of the Roman Republic*, p. 4–7.

¹⁵ Dicaearchus of Messene, disciple of Aristotle, would have written *Tripoliticus*, a tract about the best constitution as a mixture of monarchy, aristocracy and democracy, one and a half centuries before Polybius. Kurt Fritz, *The Theory of the Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Ideas* (New York: Columbia University Press, 1954), p. 82.

¹⁶ Lintott, *The Constitution of the Roman Republic*, p. 8.

¹⁷ Fritz, *The Theory of the Mixed Constitution*, p. x

¹⁸ Polybius, *Histories*, 6 §2 & 5

stemming from it. However, as we saw in the previous chapter, his account of Rome's political evolution was unable to grasp the oligarchization process unfolding underneath the formal structure of laws and procedures —perhaps because his aim was to explain the greatness of the Roman system of government, not its incipient decadence.

If we analyze the evolution of the Roman republic through a plebeian lens, the trajectories of plebeian formal and material power within the constitutional framework do not appear to track each other after plebeians were successful in occupying the highest spaces of political power. Since the establishment of the Tribunes of the Plebs in 494 BC,¹⁹ the increase in formal plebeian power through the middle and late republic was progressive. While at the beginning resolutions passed in the Plebeian Council only bound the plebs, and plebeian leadership was limited to obstructing political acts (*intercessio*) and protecting individuals from magistrates (*auxilium*), by mid-4th century plebeian leaders were allowed to become dictators, censors, and consuls, and plebeian resolutions were binding for all citizens.²⁰ By the late republic plebeians could elect magistrates and become elected to the highest offices,²¹ decide on war, peace, and alliances, enact and reject laws, create colonies and distribute public land, inflict the death penalty, and even control admission to Roman citizenship.²² Plebeians appear wielding great institutional power —certainly much more than the institutional power citizens enjoy today.

This broad institutional power of plebeians stands in contrast to the rather narrow institutional prerogative of the Senate, which appears as an advisory body with no institutional power other than its control over finance. However, the power over the public budget made the magistrates effectively dependent on the Senate. The Senate decided on the budget for lucrative contracts, had a say in all matters involving the treasury, even having veto power over withdraws from the treasury.²³ Even if the Senate

¹⁹ After plebeian soldiers refused to march against the enemy, and instead seceded to the Aventine Hill, leaving the city to its fate, patricians conceded by allowing plebeian their own exclusive leaders.

²⁰ *Lex Hortensia* 287 BC

²¹ The last offices to be opened to plebeians were religious. *Lex Ogulnia* (300 BC) opened access to the priesthood and in 254 BC Tiberius Coruncanius was selected as the first plebeian *pontifex maximus*.

²² Lintott, *The Constitution of the Roman Republic*, p. 200.

²³ Expect for the consuls who had free access to the treasury. *Histories*, 6 §13. However, Polybius states at the beginning of book 6 that magistrates can withdraw from the treasury at their own discretion. For an analysis of the contradictions in Polybius' account of distribution of power in Rome see Fritz, *The Theory of the Mixed Constitution in Antiquity*, Chapter 7.

did not have formal power over magistrates, being unable to punish them if they did not follow its directions, magistrates needed to justify their request for money and their decisions to the Senate. The incentive for magistrates to follow the Senate's directions was strong since deviation from senatorial 'advice' would likely bring future denial of funding.²⁴

The Senate's control over the budget, however, does not account for the power patricians had over plebeians. At least formally, the Tribune was the only office that was not under the purview of the Senate; Tribunes were dependent only on the Plebeian Council and aimed at *obstructing* patrician institutional power.²⁵ Polybius gives a class-based explanation for the Senate's power over the people, attributing it to socio-economic dependence.²⁶ In addition to widespread patronage, which gave the nobles control over their dependent individuals, Polybius points to the people's general deference towards the aristocracy, which was connected with the control nobles had over public religion. Priestly power was supreme, and the "interpretation of the requirements of the gods remained an aristocratic prerogative and the ensuing decisions took priority over, and could render void, even resolutions of the assemblies."²⁷ Patricians retained the ultimate veto power over plebeian institutions via the interpretation of divine auguries, to which the *populus Romanus* was deeply devoted.²⁸

In addition to socio-economic dependence, aristocratic authority, and religion, the Senate had control over the office of the dictator, who wielded absolute power in cases of emergency. The magistracy of dictator was set up by a three-step procedure in which the Senate requested a dictator, who was then selected by a consul,²⁹ and then ratified by the *Comitia Curiata*, an assembly organized based on Rome's patrician clans in which plebeians were not allowed to vote. Given the weight of the Senate's authority, this procedure gave elites control over the republic's emergency power institution, effectively excluding the people from influencing the nomination.

²⁴ Polybius, *Histories*, 6 §13

²⁵ Cicero, *On The Commonwealth*, II § 58

²⁶ Polybius, *Histories*, 6 §17; Lintott, *The Constitution of the Roman Republic*, 198

²⁷ Lintott, *The Constitution of the Roman Republic*, 198.

²⁸ For an analysis of Roman pagan religion see Elmer T. Merrill, "The Attitude of Ancient Rome toward Religion and Religious Cults." *The Classical Journal*, vol. 15, no. 4, 1920, pp. 196–215.

²⁹ The first dictator Titus Larcius, was a consul nominated by the other consul, Cloelius, who after "abdicated the consulship himself." Dionysius, *Roman Antiquities*, V §72

Another source of elite control over plebeians came paradoxically from the success of the plebeian political struggle. Parallel to the progressive institutional empowerment of plebeians, there was an increasing cooptation of plebeian leadership into patrician ranks, which ended up consolidating a new “patricio-plebeian aristocratic consensus.”³⁰ According to Livy the plebeian struggles of the mid-4th century BC were mainly led by wealthy, politically ambitious plebeians who wanted to “clear for themselves the way to all the other distinctions.”³¹ After *leges Liciniae Sextiae* (367 BC), which gave plebeians access to the consulship,³² and *lex Hortensia* (287 BC), which eliminated the Senate’s approval of legislation, plebeian institutional power appears to have been systematically blunted and disarmed. Plebeian colonization of patrician governing structures not only brought patrician and plebeian elites together, creating a new socio-political bond, but also made plebeian elites the beneficiaries of a *status quo* they now wanted to preserve instead of challenge.³³ Consequently, as soon as plebeians gained full formal access to the governing structure, the so-called Struggle of the Orders ended and plebeian representatives began to serve the structure of power instead of contesting it, becoming “slaves to the nobility.”³⁴

This new form of politico-institutional dependence that resulted in the oligarchization³⁵ of plebeian leadership, appeared to have been manifested primarily through negligence and inaction. Despite the broad range of powers that the Plebeian Council had been granted, if we look at the exercise of these powers it becomes clear that by the late republic plebeians saw a *de facto* retrenchment of their political prerogatives. Even if traditionally plebeians had the power to declare war and peace, and ratify treaties, the Senate appears to have monopolized these decisions in the late republic.³⁶ And even

³⁰ Lintott, 194; Rachel Feig Vishnia, *State, Society, and Popular Leaders in Mid-Republican Rome, 241-167 BC* (London: Routledge, 1996).

³¹ Livy, *The History of Rome*, 6.35.2

³² Rachel Vishnia argues for a new periodization of Roman history in which the *leges Liciniae Sextiae* would be the origin of the Patricio-plebeian consensus. *State, Society, and Popular Leaders*, p.7.

³³ After the initial patrician rejection of sharing the consulship with plebeians, the integration seems to have been rather smooth due mainly from the increased economic benefits resulting from Roman expansion. See W.V. Harris, *War and Imperialism in Republican Rome, 327-70 B.C.* (Oxford 1979) 74-77

³⁴ Livy, *The History of Rome*, 10.37.11

³⁵ For the general process of detachment of leadership from the grassroots. See Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (New York: Dover Publications, 1959).

³⁶ Polybius, *Histories*, 6, §13; Lintott, *The Constitution of the Roman Republic*, p. 197

what Polybius argues is the fundamental prerogative of the people —to allocate honors and penalties, which served the function of protecting against tyrannies of the one or the few³⁷— appears to have been substantially weakened by the time when he was writing. Even if there is evidence of trials being held in the assembly, there are no capital punishment cases resulting in conviction during the late republic, “which calls into question their effectiveness as a popular weapon against the aristocracy.”³⁸

Despite the plebeian formal infrastructure of power, plebeian authority was overridden through negligence, usurpation, contempt, and open violence. Since enforcement of laws was part of the executive function, which was informally under the authority of the Senate, even if plebeians could formally pass laws, the Senate and magistrates could choose to disregard the legislative authority of the Plebeian Council. A little over a decade after Polybius’ *Histories* ends, the Roman republic experienced a constitutional crisis that ended in the assassination of the tribune Tiberius Gracchus in 133 BC over land redistribution. According to Plutarch, Tiberius’s “zeal and determination” in pursuing an agrarian law was “honorable and just” because it did not come from his own desire to advance his office or his name, but was instead kindled by the people themselves, who set up “writings upon the porches, walls, and monuments, calling upon him to reinstate the poor citizens in their former possessions.”³⁹ Despite commanding a majority in the Plebeian Council—which would have meant a favorable plebiscite and the consequent establishment of the agrarian law—the tribune Marcus Octavius opposed the law, vetoing the motion. Plutarch states that Octavius’s opposition was prompted by “the prayers and supplications of many influential men,” and since Tiberius could not pass the law in any other way, he was forced to do something “illegal and unseemly”: to eject Octavius from his office. Tiberius justifies this illegal motion by arguing that a plebeian representative that maims or annuls the people’s power is not only a “bad tribune” but “no tribune at all.”⁴⁰ While the refusal of the Senate to recognize and enable the reforms to the Agrarian Law disregarded the legislative prerogative of the Plebeian Council, the murdering of Tiberius directly violated the foundation of plebeian

³⁷ Polybius, *Histories*, 6, §14

³⁸ Lintott, *The Constitution of the Roman Republic*, 201–202

³⁹ Plutarch, *Tiberius Gracchus*, §8.

⁴⁰ Plutarch, *Tiberius Gracchus*, §9.

power: the sacrosanctity of tribunes.⁴¹ This constitutional crisis was brewing when Polybius elaborated his interpretation of the Roman republican experience, and despite evident signs of oligarchic overgrowth, he insisted in the adequate “balance” of the powers within the constitutional structure.

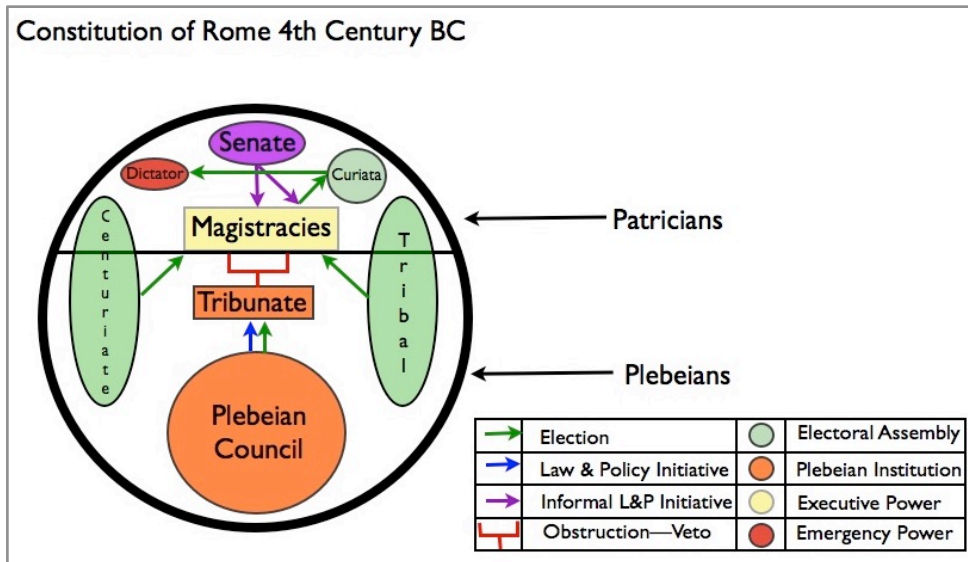


Figure 2.2 Constitution of Rome 4th Century BC

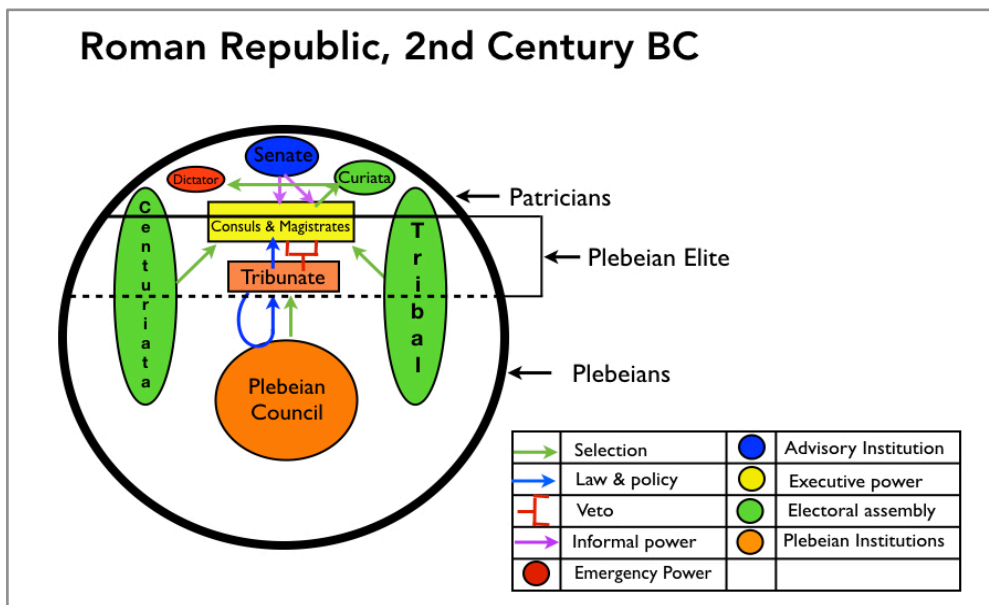


Figure 2.3 Roman Republic, 2nd Century BC

⁴¹ For a description of the powers of the tribunate stemming from its sacrosanctity see Lintott, *The Constitution of the Roman Republic*, 33

While Polybius' analytical description of the Roman republic focused on Rome's apogee, before the first constitutional crisis, Cicero wrote under a crumbling system, rife with violence and corruption. In *On the Commonwealth* he laments the decay of the republic.

...having inherited the commonwealth like a wonderful picture that had faded over time, not only has failed to renew its original colors but has not even taken the trouble to preserve at least its shapes and outline. What remains of the morals of antiquity...?⁴²

While Polybius was unable to account for the increasing oligarchic domination growing parallel to an expansion of formal plebeian power, Cicero acknowledged the corruption of the constitution but his solution was to regain virtue by reasserting the dominance of the ruling elite. He explained the corruption of the republic as due to the loss of "ancestral morality" and "outstanding men,"⁴³ and so the way out of crisis was for him to reestablish morality through good leadership: "whatever moral alteration takes place in the leaders soon follows among the people."⁴⁴ In the voice of Scipio, Cicero states that a good leader, by strengthening the sense of shame among the people, keeps citizens seeking "the praise and respect of the best man."⁴⁵ Cicero not only shifted the focus of analysis away from institutions and toward morality and individual behavior as the source of corruption and erosion of the republic, but he also gave preeminence to the aristocracy as source of normativity. The best commonwealth is for him the one "controlled by its best citizens" in which the liberty of the plebs corresponds only to the "power of honorably pleasing respectable citizens."⁴⁶ Even if Cicero recognized not only the need for a balanced form of government—in which "some things [are] set aside for the judgment and wishes of the people," to avoid giving the plebs reasons to revolt⁴⁷—but also of the positive role played by plebeian tribunes in protecting liberty by checking the ambition of elites, what ultimately produces good government for him is the virtue of the ruling class.

⁴² Cicero, *On the Commonwealth*, V §2a

⁴³ Cicero, *On the Commonwealth*, V §2a

⁴⁴ Cicero, *On the Laws*, III §31

⁴⁵ Cicero, *On the Commonwealth*, V §6

⁴⁶ Cicero, *On the Commonwealth*, III §38

⁴⁷ Cicero, *On the Commonwealth*, III.69

Cicero follows closely Plato's ideas on the damaging effects of extreme equal liberty in democracies, which seems endemic to the "equal share in the constitution and public office."⁴⁸ For Plato the desire for "pure, unmixed freedom" in democracies produces anarchy:⁴⁹ in the family children do not respect their parents, "immigrants are put on a par with citizens," "pupils have an equal contempt for their teachers and their attendants," slavery is abolished, and even "horses and donkeys are in the habit of wandering the streets with total freedom."⁵⁰ Cicero reproduces Plato's argument saying that in a democratic commonwealth "private homes have no master and this evil extends even to animals," "fathers fear their sons," "pupils scorn their teachers," and even "women have the same rights as their husbands."⁵¹ Even if Cicero's anti-democratic position is fragmentary, the thrust of his argument indicates that to avoid democratic tyranny the aristocratic element must be supreme within the power-sharing structure of the republic. Cicero's is not a controversial argument since, differently from Athens, the Roman republic was effectively governed by elites. Cicero's philosophical support for the dominance of elites was thus a normative description of his political reality. According to him, mixed constitution, "this combined and moderately blended form of commonwealth" is more solid than a pure regime that easily corrupts, and also tends to maintain the social hierarchies. "There is no reason for revolutions when each person is firmly set in his own rank, without the possibility of sudden collapse."⁵² Cicero argued the ballot is "a badge of liberty" that should be used to please the "best and most respectable citizens;" having the right to vote is enough satisfaction for the people, who then tend to follow the lead of elites.⁵³

Cicero attempts not only to justify the current constitutional framework but also to innovate by proposing to broaden the legal prerogatives of the ruling class. He reduced the liberty of the people to choosing the most worthy of the few and acting in a harmonious political process in which plebeians would confirm what the senate decided and the magistrates executed. This shift in the scale in favor of elites did not mean

⁴⁸ Plato, *The Republic*, 8. 557e-566

⁴⁹ For the relation between democracy and anarchy see Stathis Gourgouris, "On Democracy's Anarchy," paper presented at Columbia Political Theory Workshop Fall 2012.

⁵⁰ Plato, *The Republic*, 8. 562c-564

⁵¹ Cicero, *On the Commonwealth*, I.67

⁵² Cicero, *On the Commonwealth*, I §69

⁵³ Cicero, *On the Laws*, III §38

however directly attacking the power of the Tribune. Even if among Cicero's circle "everyone agrees" the power of the tribunes was "excessive," Cicero defended the office of the Tribune as necessary.⁵⁴ While he considered of benefit for the republic that the popular sectors have representation in an exclusively popular institution, Cicero considered popular authority as subordinated to aristocratic authority. According to him, the unbound people-as-crowd is more dangerous than their political representatives, who moderate their own behavior out of self-interest, rapidly becoming systemic actors. Even if the Gracchi tribunes had caused much conflict and violence, the unrepresented crowd would be much worse. And even if in some instances tribunes could have made things worse, it would be dangerous to abolish the plebeian office because it could cause a new civil war.

When the senate yielded this power [of representation] to the plebeians, the weapons were put down, the sedition was calmed, moderation was discovered, which allowed the lesser people to think that they were made equal to the leaders; and that was the single source of salvation for the state.⁵⁵

While he had "no quarrels with the Tribune" and thus his ideal regime would preserve the office intact (to the strong disapproval of his interlocutors), Cicero proposed to reassert the dominance of elites, on the one hand by giving magistrates the indirect power to obstruct the plebeian council by "taking the auspices," and on the other by strengthening the authority of the Senate in the making of the law. In his ideal commonwealth magistrates would have "the right to take the auspices and give judgment" which would establish a way to "obstruct many useless but appealing initiatives."⁵⁶ Since the "immortal gods" have usually "suppressed unjust impulses of the people," giving the right to magistrates to take the auspices would neutralize undesirable plebeian motions without causing conflict. Even if you had a Tiberius Gracchus, willing to risk his life for land redistribution, his initiative could be suppressed if the auspices were unfavorable, without any bloodshed. There was no need to abolish the Tribune to reassert the subordination of the plebeians to aristocratic authority. If

⁵⁴ Cicero, *On the Laws*, III §23

⁵⁵ Cicero, *On the Laws*, III §23-24

⁵⁶ Cicero, *On the Laws*, III §27.

controversial motions could be vetoed by the priests as a religious upper chamber, then the power of the Tribunate would be neutralized, becoming an institution reproducing the lead of the ruling class instead of challenging it, unable to counteract the oligarchic tendencies of the few.

In addition to placing an indirect limit on plebeian decisions, Cicero wanted for the senate to dominate the legislative process, giving the nobles the power to decree, and the people the power to ratify.

For it works out that if the senate is in charge of public deliberation, and if the remaining orders are willing to have the commonwealth guided by the deliberation of the leading order, then it is possible through the blending of rights, since the people have power and the senate authority, that that moderate and harmonious order of the state be maintained, especially if the following law is obeyed; for what follows is: “Let the senatorial order be free from fault; let it be a model to others.”⁵⁷

Cicero envisioned a mixed constitution in which the senatorial order was dominant and the power of plebeians was only formal. His elitist model uses institutions and procedures as a way of taming popular power, satisfying and neutralizing the people so to avoid violence. The same as Plato, Cicero’s ideal model is aimed at harmony, a politics of cooperation that is not achieved by directly disempowering the plebeians from their institutional power, but by giving the people a power that is formal and subordinate: “...my law gives the appearance of liberty while keeping the authority of the respectable and eliminating an occasion for dispute.”⁵⁸

⁵⁷ Cicero, *On the Laws*, III §28

⁵⁸ Cicero, *On the Laws*, III §38

II. The English Republican Tradition, Harrington & Montesquieu

Even if Cicero's ideas on the commonwealth were never implemented, his elitist interpretation of the mixed constitution was preserved and later reproduced in medieval Europe mainly through Augustine's citations.⁵⁹ In England the mixed constitution began to be discussed in relation to the English commonwealth in the mid-1500s, becoming the "dominant political theory" in the 17th century.⁶⁰ In 1642, at the verge of civil war, King Charles I declared in his *Answer to the Nineteen Propositions* that England was a mixed government in which the "laws are jointly made by a king, by a house of peers, and by a house of commons chosen by the people, all having free votes and particular privileges."⁶¹ This declaration was a preemptive strategy by the King to define the political future on his own terms. While a "regulated monarchy" would govern according to the laws, the House of Commons ("an excellent Conserver of Libertie, but never intended for any share in Government") would only have the power to levy money and impeach public officials. The Lords would wield "judicatory power,"⁶² which was later interpreted as the power to arbitrate, "to trim the balance, to act as a supreme court of constitutional law."⁶³

While in the English mixed government of the *Answer* the indirect power of the people through their elected representatives was supposed to be narrow, specific to taxation and impeachment, this was the opposite of what was happening on the ground. Despite the English Parliament being a temporary advisory body that did not wield formal institutional power, the House of Commons had been successful in the previous decades in getting legislation passed against the king's wishes, and was "close to claiming the right to issue ordinances without his consent."⁶⁴ Similar to the Roman Senate, which was an advisory body with *de facto* power over the executive function through its control over the budget, the House of Commons was gradually becoming the dominant institution, abrogating the power to legislate and make policy.

⁵⁹ For an account of the tradition of the mixed constitution in the Middle Ages through the study of Aristotle see James M Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton University Press, 1992)

⁶⁰ Vile, M J. C. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p. 41.

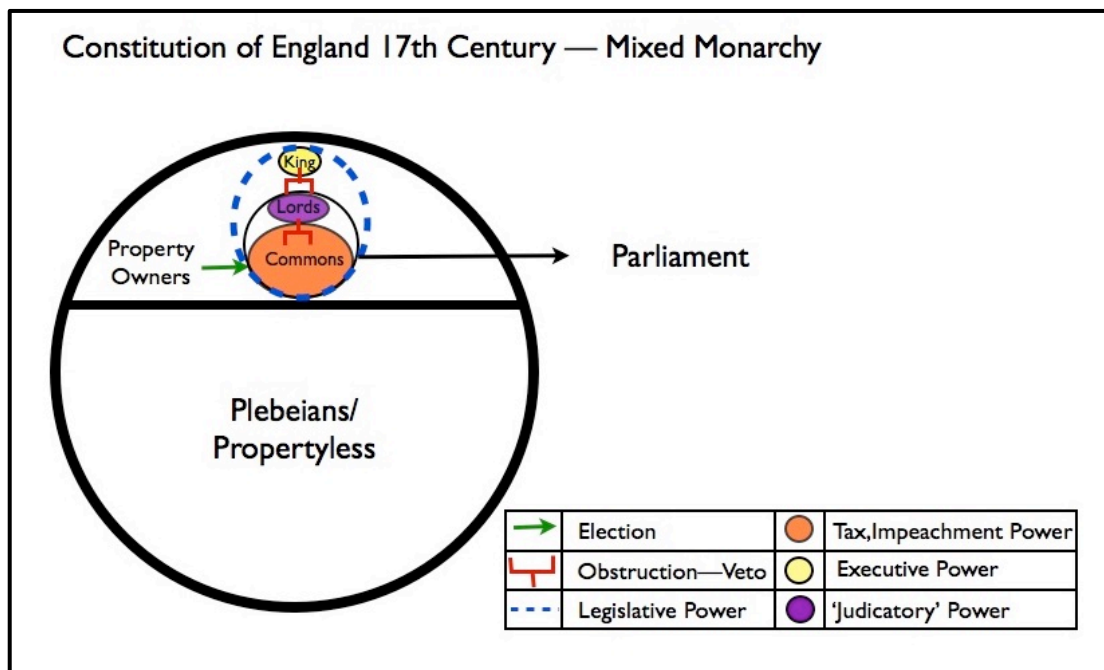
⁶¹ *Answer to the Nineteen Propositions*.

⁶² *Answer to the Nineteen Propositions*.

⁶³ Pocock, *Machiavellian Moment*, p. 361.

⁶⁴ Pocock, *Machiavellian Moment*, p. 364.

According to M.J.C. Vile, because the mixed constitution was seen as a tool to defend a limited monarchy, the tradition of the mixed constitution incorporated the nascent doctrine of separation of powers, allowing for their later confusion.⁶⁵ A year after the *Answer*, Philip Hunton in his *Treatise of Monarchy* aimed at giving supremacy to the law as opposed to the arbitrary will of the monarch by arguing that while the legislative function was to be shared, the king's executive role was his sole prerogative. According to Hunton, the English form of government was a "mixed monarchy" rather than a mixed constitution, because the predominant element—which in this case was the monarch with his monopoly over executive power—"gives the denomination to the whole."⁶⁶ Vile argues that Hunton's arguments regarding the separation of functions as determining the nature of the regime became one of the basic elements of the dominant constitutional theory after the revolution of 1688, which tended to confuse the checks and balances produced by institutional powers grounded in social orders with the mechanistic separation of functions of government.⁶⁷



2.4 Constitution of England 17th Century — Mixed Monarchy

⁶⁵ Vile, *Constitutionalism and the Separation of Powers*, p. 37.

⁶⁶ A *Treatise of Monarchy*, London, 1643, p. 5 quoted in Vile, *Constitutionalism and the Separation of Powers*, p. 45.

⁶⁷ Vile, *Constitutionalism and the Separation of Powers*, p. 37–38.

After the king's death one of the first actions by the Rump Parliament (1649–1653) was to declare England a commonwealth that was to be governed “without any king or house of Lords.”⁶⁸ However, kingly and aristocratic power would be shortly reinstated. After the civil wars and the establishment of the Protectorate under Lord Oliver Cromwell, the doctrine of separation of powers was deployed to justify the 1653 *Instrument of Government*, England's first written constitution.⁶⁹ Part of what was finally incorporated into this constitutional framework came out of the Putney Debates in which the Grandees, the conservative faction of the New Model Army, presented their *Heads of Proposals* in opposition to the Levellers' *Agreement of the People*, which proposed expanding suffrage. The elitist interpretation of the mixed constitution prevailed. The *Instrument of Government* established three political institutions: the advisory Council of State, an elected Lord Protector with monopoly over the executive power, and the Parliament, in charge of legislation, meeting every three years. A property requirement to have the right to elect a representative to Parliament effectively excluded the masses from the “Commons.”⁷⁰ The arguments against the broadening of the suffrage hinged on property being a proxy for independence, and “if there be anything at all that is a foundation of liberty it is this, that those who shall choose the law-making shall be men freed from dependence upon others.”⁷¹ Property owners were independent, and therefore would not be servile to the interests of others, but only to those of the commonwealth. After four years this constitution was replaced by the *Humble Petition and Advice* (1657), which originated in a remonstrance to the Lord Protector by the Grandees. The original document not only rehashed the elitist interpretation of the mixed constitution put

⁶⁸ Samuel Gardiner, *The Constitutional Documents of the Puritan Revolution, 1625-1660* (Oxford: Clarendon Press, 1962), p. 338 cited in Blair Worden, “Republicanism, Regicide and Republic: The English Experience” in *Republicanism. A Shared European Heritage*, p. 315. Despite the dismantling of monarchic and aristocratic institutions, Richard Tuck refers to this political period as being governed by “boards of oligarchs.” *Philosophy and Government: 1572 - 1651* (Cambridge: Cambridge Univ. Press, 2011), p. 222.

⁶⁹ Vile, *Constitutionalism and the Separation of Powers*, p. 52.

⁷⁰ This exclusionary understanding of citizenship is pervasive in aristocratic republicanism, which in early 16th century restricted active citizenship to the gentry, excluding yeomen and burgesses. Markku Peltonen, “Citizenship and Republicanism in Elizabeth England” in *Republicanism*, M. van Gelderen and Q. Skinner, eds. Vol 1., p. 95

⁷¹ Commissary-General Henry Ireton, Extract from the debates at Putney in *The English Levellers*, Cambridge: Cambridge University Press, 1998), p. 129.

forward in the *Answer* and the *Instrument of Government*, but also proposed to convert the office of the Protectorate into a hereditary monarchy.⁷² Cromwell refused the Crown and eliminated the clause of kinship. He also introduced a second chamber similar to the House of Lords to avoid the Commons abrogating judiciary powers.⁷³

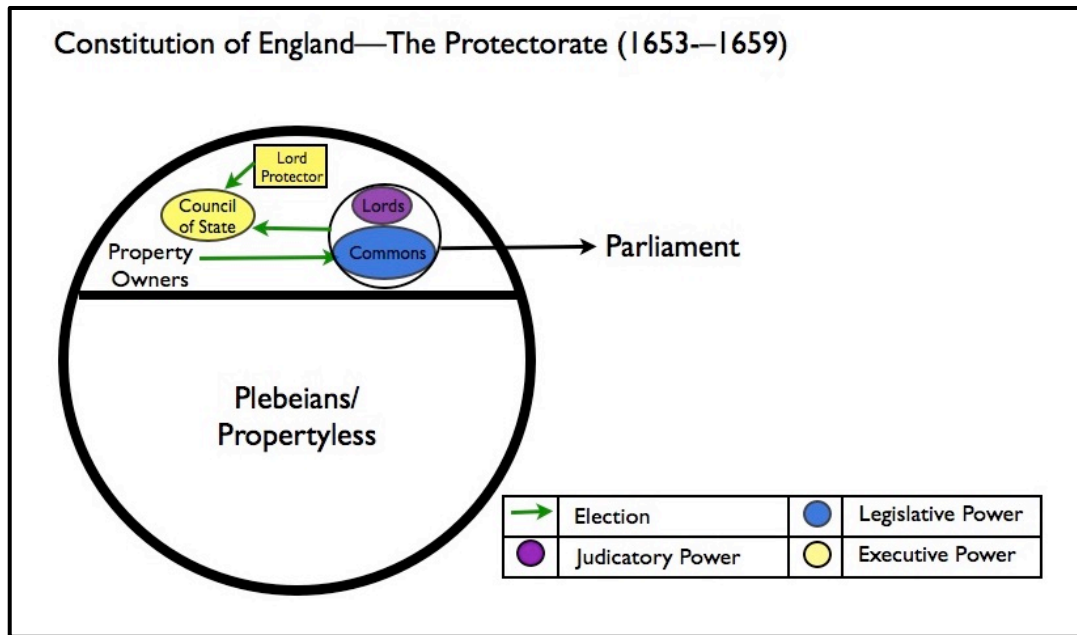


Figure 2.5 Constitution of England —The Protectorate (1653–1659)

A few months before Cromwell signed the new power arrangement, James Harrington had published his powerful materialist critique of the procedural interpretation of the mixed constitution in *The Commonwealth of Oceana*. For Harrington all commonwealths are a form of “domestic empire” that stand on the principles of “good of fortunes” or riches. Because all “domestic empire is founded upon dominion,” and dominion is property, then who holds the property (or a larger proportion of it) should be what determines the nature of the regime. “If one man is the sole landlord of the territory” the regime is an absolute monarchy; if the few are the landlords or “overbalance the people unto the like proportion,” it is a “mixed monarchy;” and if the

⁷² Pocock, *Machiavellian Moment*, p. 384.

⁷³ The case of James Nayler who was judged and harshly punished by the House of Commons on the crime of blasphemy prompted Cromwell to reinstate the House of Lords.

whole people are landlords, it is a commonwealth.⁷⁴ Because political power is grounded on property, a constitution that does not take due account of the distribution of property would not last for long uncorrupted. Harrington attributes the collapse of the Roman republic to increased dispossession of the masses and the inability of the constitution to properly address this problem in time.

Whence by the time of Tiberius Gracchus the nobility had almost eaten the people quite out of their lands, which they held in the occupation of tenants and servants; whereupon the remedy being too late and too vehemently applied, the commonwealth was ruined.⁷⁵

Writing during the breakdown of monarchical authority, Harrington proposes an alternative constitutional arrangement for *Oceana*, a commonwealth that the same as England and Venice also would exist in an island. According to Pocock, Harrington's purpose was to argue against going back to the "ancient" English constitutional tradition based on common law and fixed social hierarchies, and bridge the gap between the Grandees' property requirements for active citizenship and the Levellers' expansion of suffrage to independent citizens.⁷⁶ For Harrington a proper Commonwealth is only possible when the few are not able to disproportionately concentrate wealth and overbalance the people. Therefore, in *Oceana* all people should be landlords, "or hold the land so divided among them" or "the balance of treasure [that] may be equal unto that of land;" only relative material equality would allow for political equality.

Despite his materialist approach to constitutional thought and strong support for land redistribution and strict laws regulating property, Harrington's constitutional proposal is closer to Plato and Cicero than to Machiavelli, who he claims to be most indebted to.⁷⁷ Harrington's ideal constitution endorses an elitist version of the mixed constitution with the few as the dominant element, having the power to set the legislative

⁷⁴ Harrington, *Oceana*, The Preliminaries, p. 11–12

⁷⁵ Harrington, *Oceana*, The Preliminaries, p. 37.

⁷⁶ Pocock, p. 385. The Levellers were fine with excluding apprentices, servants and beggars "because they depend upon the will of other men and should be afraid to displease them." Petty, civilian advisor selected by the rank-and-file. "Putney Debates," p. 130.

⁷⁷ Pocock argues the contrary, taking Harrington's often praise of Machiavelli as an endorsement of Machiavelism. *Oceana*, xv. Jonathan Scott argues on the contrary that Harrington's use of Greek and Roman moral philosophy sets him apart from Machiavelli. "Classical Republicanism in Seventeenth-century England and the Netherlands" in *Republicanism. A Shared Heritage*, Volume I (Cambridge: Cambridge University Press, 2002), p. 66–69.

agenda, and the people having the power to elect the ruling elite and decide only when prompted. Taking Polybius “balanced” mixed constitution and Cicero’s elitist position in which the republic needs to be “controlled by its best citizens,” Harrington’s *Oceana* endorsed the separation of functions, with “the senate proposing, the people resolving, and the magistracy executing.”⁷⁸ Harrington was not so much aiming at a plebeian type of mixed constitution, but rather, as Pocock argues, at trying to “rehabilitate aristocracy in the wake of what he saw as the collapse of feudal oligarchy.”⁷⁹

...I agree with Machiavel that a nobility or gentry, overbalancing a popular government, is the utter bane and destruction of it; so I shall show in another that a nobility or gentry in a popular government, not overbalancing it, is the very life and soul of it.⁸⁰

Different from Machiavelli, who chose the agonistic Roman republic as his model, Harrington’s preferred model was Venice,⁸¹ a hereditary oligarchic republic that he praises as “the most equal in the constitution,”⁸² equal both in “the balance or foundation and in the superstructures, that is to say in her agrarian law and in her rotation.”⁸³ In addition to being the most equal commonwealth—given that all citizens were property owners, sharing in the wealth of trade, and public offices were held in turns through election—Venice was for Harrington also the most democratic republic because even “though she do[es] not take in the people, never excluded them.”⁸⁴ Of course the common people were actually excluded, but in a manner different from the exclusion of the popular sectors in other republics. Venice was founded on an original legal border between citizens, who were all rich merchants, and the rest. This original legal division happened in the late 13th century when “the codification of a list of families authorized to sit in the Great Council marked the formal separation of the nobles from the

⁷⁸ Harrington, *Oceana*, “The Preliminaries,” p. 25.

⁷⁹ J. G. A. Pocock, “The Classical Theory of Deference” *The American Historical Review*, Vol. 81, No. 3 (Jun., 1976), p. 518

⁸⁰ Harrington, *Oceana*, p. 15

⁸¹ For an analysis of the influence of the Venetian model on Harrington see Z. S. Fink, “Venice and English Political Thought in the Seventeenth Century” *Modern Philology*, 38, 2 (Nov., 1940), pp. 155-172.

⁸² Harrington, *Oceana*, p. 33.

⁸³ Harrington, *Oceana*, p. 33.

⁸⁴ Harrington, *Oceana*, p. 17.

rest of the population,”⁸⁵ securing for these families a monopoly over citizenship and political power.

The Venetian constitution completely excluded the *popolani* —those who “we might otherwise call plebeians; those who practice the lowliest arts to support themselves, and have no status (*grado*) in the city,”⁸⁶ who were the great majority of the population.⁸⁷ The *popolani* were never formally excluded from political power, but were “defined rather by what they were not and by what they did not have.”⁸⁸ The total exclusion of the majority of the population from political power kept Venice “undisturbed,” having constant civil peace according to Harrington because its “body consists of one order, and her senate is like a rolling stone,” with rotation disabling “divided or ambitious interests.”⁸⁹ The rotation of the ruling class from a pool of property owners assured that political leaders would serve the commonwealth. This was for Harrington the great discovery of Venice: election and rotation as the basis for a stable republic.

Despite the relative material equality of citizens, the organization of power of the Venetian constitution was decisively elitist. As portrayed by Donato Giannotti, “the most excellent describer of the commonwealth of Venice,”⁹⁰ the republic of Venice had a pyramidal structure of power with the Great Council of 3,000 men at the bottom having mainly an electoral function; the Senate of 335 men in the lower half dedicated to lawmaking; the *Collegio* of 26 men in the upper half exercising executive power; and the Doge at the top as head of state.⁹¹ Harrington particularly liked the fact that the Great Council did not debate laws, but only voted on them when prompted. While letting the people both debate and decide had according to him ruined Athens and Rome, in Venice

⁸⁵ Claire Judde de Larivière and Rosa M. Salzberg, “Le peuple est la cité. L'idée de *popolo* et la condition des *popolani* à Venise (XV^e-XVI^e siècles)” *Annales. Histoire, Sciences Sociales*, 68. 4 (2013), pp. 1113-1140.

⁸⁶ Venetian patrician Trifone Gabriele, quoted in Giannotti, “Della repubblica de’ Viniziani,” in *Opere politiche*, ed. Furio Diaz (Milan: Marzorati, 1974), p. 46. Cited in de Larivière and Salzberg, “Le peuple est la cité”

⁸⁷ Venice had a population of about 170,000 in the mid 1500s. de Larivière and Salzberg, “Le peuple est la cité”

⁸⁸ de Larivière and Salzberg, “Le peuple est la cité”

⁸⁹ Harrington, *Oceana*, p. 160.

⁹⁰ Harrington, *Oceana*, p. 8

⁹¹ Alois Riklin, “Division of Power "Avant La Lettre": Donato Giannotti (1534)” *History of Political Thought*, 29, 2 (Summer 2008), p. 260

deliberation was reserved for a selected group of nobles. The Senate had the prerogative of proposing legislation, and even “sometimes resolving too.”⁹² Therefore, the Venetian “popular” assembly was not only non-deliberative and limited to voting for candidates or motions, but would sometimes yield its “resolving” function to the Senate, which had a monopoly over deliberating and proposing.

Alongside ordinary institutions, the same as Rome, Venice also featured a dictatorial office: the Council of Ten. Even if the members of this council were elected by the Great Council, the office was not under the control of the people, but tended to operate autonomously given that its main tasks were to guarantee security and fight corruption.⁹³

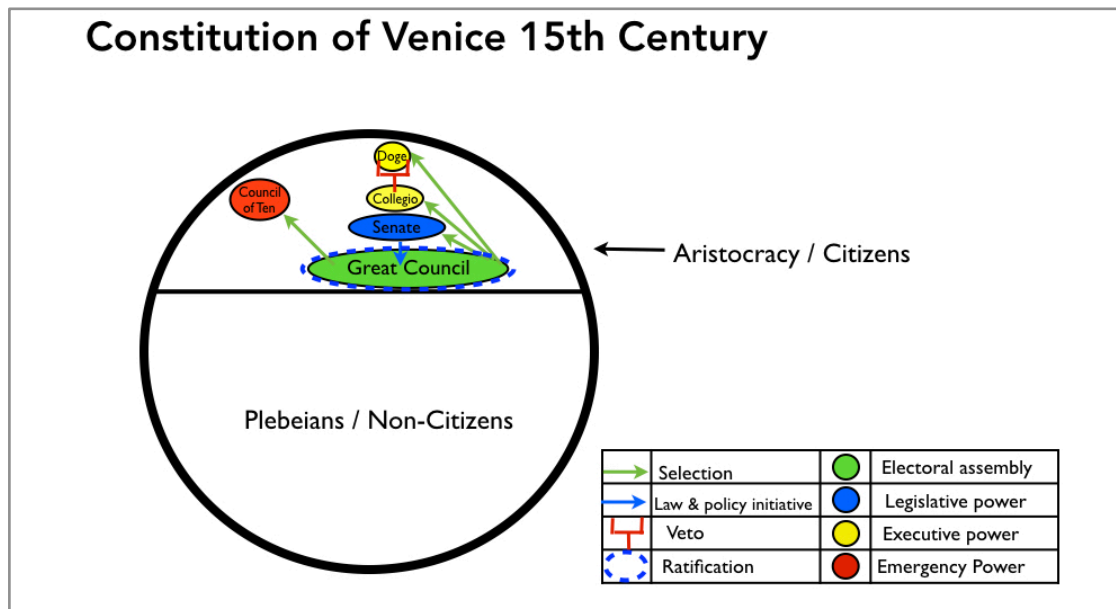


Figure 2.6 Constitution of Venice, 15th Century

Following the Venetian experience, Harrington proposes for Oceana a model based on three orders fulfilling different functions—the senate debating and proposing, the people resolving, and the magistracy executing. The law is debated and proposed by the Senate, sanctioned by the popular assembly, and adjudicated by the magistrates and

⁹² Harrington, *Oceana*, p. 29. The main function of the

⁹³ The Council of Ten played the role of censors. See Margaret L. King, *Venetian Humanism in an Age of Patrician Dominance* (Princeton: Princeton University Press, 1986), p. 110–111.

the courts, which are considered a separate order, replacing the monarchical element of previous versions of the mixed constitution.

The two first orders, that is to say the senate and the people, are legislative, whereunto answers that part of this science which by politicians is entitled *de legibus*, or of the laws; and the third order is executive, to which answers that part of the same science which is styled *de judiciis*, or of the frame and course of courts or judicatories.⁹⁴

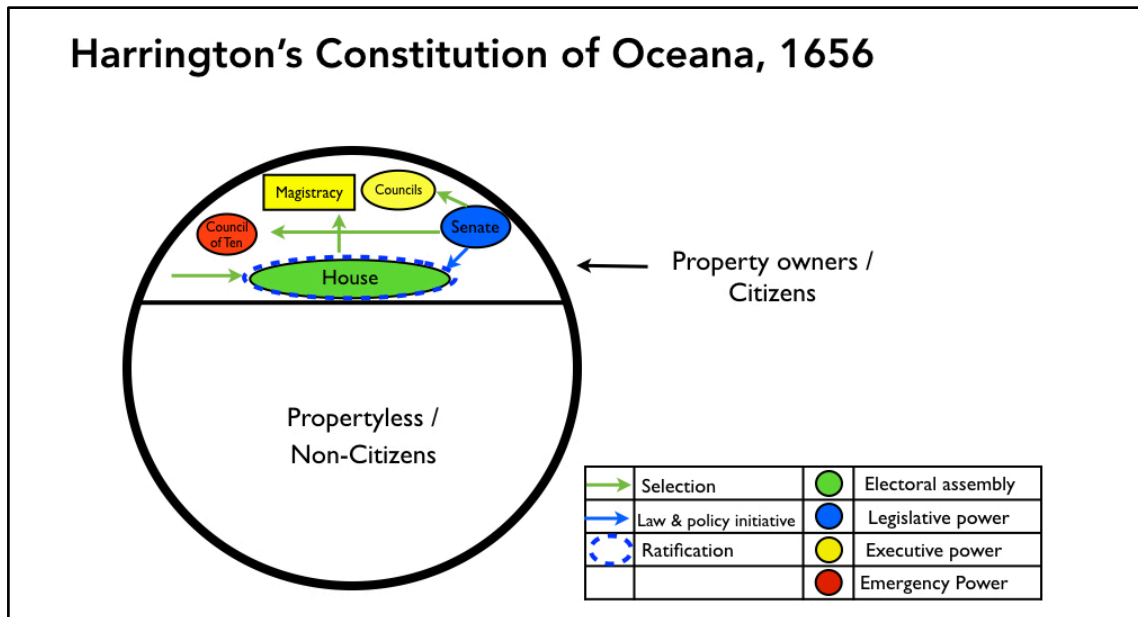


Figure 2.7 Harrington's Constitution of Oceana, 1656

For Harrington the best way to promote equality is to separate those who debate from those who resolve. He uses the example of two girls who want to eat a piece of cake. Only if one of them divides the cake and the other chooses, will the shares be equal. In the lawmaking process, dividing and choosing would translate as debating/proposing and resolving.

If a council capable of debate has also the result, it is oligarchy. If an assembly capable of the result has debate also, it is anarchy. Debate in a council not capable of result, and in an assembly not capable of debate, is democracy.⁹⁵

⁹⁴ Harrington, *Oceana*, p. 38.

⁹⁵ Harrington, "A System of Politics," p. 280.

Despite his peculiar interpretation of democracy as a mixed constitution in which the senate proposed and the popular assembly decided, Harrington follows the ancients in arguing that liberty is the principle of the democratic regime. Democracy for him is “nothing but entire liberty.”⁹⁶ Even if Harrington does not provide a definition of what he means by liberty, he states he is indebted to Thomas Hobbes’ works on *Human Nature* (1650) and *Of Liberty and Necessity* (1654), which are “the greatest of new lights, and those which I have follow’d, an shall follow.”⁹⁷ According to Hobbes liberty is not collective political action, but the “absence of external impediments” to individual action.⁹⁸ While in the state of nature liberty is absolute, lacking a supreme authority to impose limits, liberty under the state is for Hobbes necessarily non-political since tolerating opposition to the will of the absolute, arbitrary sovereign could become an existential threat to the state. In the state liberty is limited by law and therefore ceases to be conceived in binary terms (either you ruled yourself and were free from domination, or a slave), and becomes a relative concept depending on the degree of power being curtailed by impediments. Since the law is an obstacle for action, under the state freedom is possible when the law is silent, and the more intrusive the legal system, the less liberty subjects have to engage in free action. In contrast to the republican interpretation of liberty, for Hobbes “freedom is undermined not by conditions of domination and dependence but only by overt acts of interference.”⁹⁹ While Harrington criticized Hobbes’ endorsement of absolute monarchy and his dismantling of the ancient taxonomy of regime forms, there is no indication that he does not agree with Hobbes about the meaning of liberty, which would make Harrington a “deeply idiosyncratic member of the English flock.”¹⁰⁰

⁹⁶ Harrington, “A System of Politics,” p. 282.

⁹⁷ Harrington, *The First Book Containing A Full Answer to all such Objections as have hitherto bin made against Oceana*, Chapter VII. For an analysis of Hobbes’ influence on Harrington see James Cotton, “James Harrington and Thomas Hobbes” *Journal of the History of Ideas*, 42. 3 (Jul.-Sep., 1981), pp. 407-421; Paul Rahe, *Republics Ancient and Modern*, p. 180.

⁹⁸ Thomas Hobbes, *Leviathan*. Ch. XIV: 72. For further analysis of Hobbes on liberty see Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008), Chapter 5.

⁹⁹ Skinner, *Hobbes and Republican Liberty*, p. 212.

¹⁰⁰ Scott, “Classical Republicanism,” p. 64. Rahe argues Harrington uses republican language to “camouflage” a new form of commonwealth. *Republics Ancient and Modern*, p. 181.

Harrington's constitutional model, which he claims is democratic, is highly institutionalized, with 30 foundational "orders" determining groups, institutions, procedures, and functions.¹⁰¹

The materials of the commonwealth are the people; and the people of Oceana were distributed by casting them into certain divisions, regarding their quality, their ages, their wealth, and the places of their residence or habitation...¹⁰²

According to Jonathan Scott, Harrington would have embraced the mixed constitution only because it allowed him to divide society into groups and in this way control the passions. Against Machiavelli's agonism and closer to Platonic harmony, "Harrington's purpose was to do away with tumults, by rendering the passions impotent"¹⁰³ through division and rotation. This mechanistic interpretation of the mixed constitution as the separation of functions and checks and balances would be reformulated procedurally a century later by Montesquieu, who argued Harrington had "examined the furthest point of liberty to which the constitution of a state can be carried" but that he had misunderstood what liberty actually meant.¹⁰⁴

Even if Montesquieu argued against Hobbes' understanding of human nature as defined by the "desire to subjugate others"¹⁰⁵ and of the possibility of having liberty under a state based on fear, Montesquieu's definition of liberty seems in a paradoxical way very similar to Hobbes'. In *The Spirit of the Laws* (1750) Montesquieu defined liberty in a negative and procedural sense. Liberty is for him both an individual "tranquility of spirit" based on the absence of fear and a sense of security,¹⁰⁶ and "the power of doing what we ought to will, and in not being constrained to do what we ought not to will."¹⁰⁷ According to Annelien de Dijn for Montesquieu security was more important to attain human happiness than self-government, and thus monarchical subjects could be as free as their republican counterparts due to high levels of security of life and

¹⁰¹ Harrington, *Oceana*, p. 75–217

¹⁰² Harrington, *Oceana*, p. 75.

¹⁰³ Jonathan Scott, "Classical Republicanism," p. 74.

¹⁰⁴ Montesquieu, *The Spirit of the Laws*, II.11, 6

¹⁰⁵ Montesquieu, *The Spirit of the Laws*, I.1, 2

¹⁰⁶ Montesquieu. *The Spirit of the Laws*, II.11, 6

¹⁰⁷ Montesquieu. *The Spirit of the Laws*, II.11.3

possessions under some monarchs.¹⁰⁸ While Hobbes argued liberty is absolute in the state of nature and that the sovereign restricts liberty, allowing for its secure enjoyment, Montesquieu reduces liberty to a feeling of security that appears intrinsically related to the limited behavior allowed by laws, mores, and customs. Because to be free is not only to act within the bounds of the law, but also to will within these bounds, there is tranquility and security. While Hobbes justified the absolute state on the need to provide security from violence, Montesquieu, redefining liberty as security, argued for embracing a mixed constitution as a form to guarantee liberty through moderation.

For Montesquieu, constitution and law are bound to the *nature* and *principles* of government, the essential logic of the political form of rule.¹⁰⁹ While the nature of a government is determined by who holds power (one, few or many), the principle is a “spirit,” a sort of Aristotelian effective cause that interacts with the laws, ideally “tighten[ing] all the springs of the government” and allowing for the principle to be refueled through a dynamic process of action and reaction.¹¹⁰ Going against the ancient categorization of regimes and their corrupt forms, Montesquieu conceived of three types of government: republican, monarchical, and despotic. Republican government could take either the form of democracy—a regime in which the people as a whole is the sovereign—or of aristocracy—a regime in which power is in the hands of a few. Premised on a Platonist philosophical framework, for Montesquieu democracy is not a desirable form of government because it is not free; it is by nature a regime without moderation, in which power is easily abused. After briefly surveying the different meanings that had been ascribed to the word liberty in different historical contexts, Montesquieu denounces democracy as recasting liberty as popular power to justify the government by the masses.

As in democracies the people seem very nearly to do what they want, liberty has been placed in this sort of government and the power of the people has been confused with the liberty of the people.¹¹¹

¹⁰⁸ Annelien de Dijn, “On Political Liberty: Montesquieu's Missing Manuscript” *Political Theory*, 39.2 (April 2011), pp. 186–187.

¹⁰⁹ Montesquieu. *The Spirit of the Laws*, I. 1, 3

¹¹⁰ Montesquieu. *The Spirit of the Laws*, I. 5, 1

¹¹¹ Montesquieu. *The Spirit of the Laws*, II.11, 2

So differently from Plato, who thought the principle of democracy was *liberty*, Montesquieu argued the spirit of the classic republic was not liberty but *virtue* understood as the “love of equality and frugality,” a “feeling” of “love of the republic,”¹¹² and a desire to have “only one’s equals as masters.”¹¹³ Montesquieu sees the power given by democracy to its citizens as a liability because “it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.”¹¹⁴ Extreme, unbound democracy is a threat to liberty due to the advent of arbitrariness. “The more the people appear to take advantage of their liberty, the nearer they approach the moment they are to lose it.”¹¹⁵

According to Montesquieu, the principle of democracy is corrupted both when equality is lost and when there is extreme equality, and the excess of virtue takes hold of the republic. For him, authority in a democracy is achieved through inequalities established by law between citizen and man, and between the citizens who rule and the rest. These distinctions, which are fundamental for the well functioning of the political system, arise from the principle of equality because even if “men cannot render [the republic] equal services, they should equally render it services,”¹¹⁶ and are not arbitrary because are introduced through law, which is an expression of human reason. Consequently, when these necessary, non-subjective inequalities are blurred, the republic incurs in what Montesquieu calls extreme equality, a vice that brings its demise. The parallel with Plato regarding this point is very interesting. While Plato saw democracy as an inherently unstable system, which produced a deficit of power due to extreme freedom—to do whatever one pleases—which permanently undermines hierarchies, tradition, and rules,¹¹⁷ Montesquieu uses Plato’s same arguments to evidence the corruption of the republic, but blames excessive equality instead. In other words, while in Plato’s conception of democracy it is excessive liberty as the lack of interference what ruins the system, for Montesquieu it is the excess of interference towards equality what corrupts it.

¹¹² Montesquieu. *The Spirit of the Laws*, I. 5, 2

¹¹³ Montesquieu. *The Spirit of the Laws*, I. 8, 3

¹¹⁴ Montesquieu. *The Spirit of the Laws*. II.11, 4

¹¹⁵ Montesquieu. *The Spirit of the Laws*. I.8, 2

¹¹⁶ Montesquieu. *The Spirit of the Laws*. I. 5, 3..

¹¹⁷ Plato. *The Republic*. Book 8: 558a—563a.

According to Montesquieu, democracy's excess makes the people want to do everything themselves, which causes a loss of respect for authority.

Then there can no longer be virtue in the republic. The people want to perform the magistrate's functions; therefore, the magistrates are no longer respected. The senate's deliberations no longer carry weight; therefore, there is no longer consideration for senators or, consequently, for elders. And if there is no respect for elders, neither will there be any of fathers; husbands no longer merit deference nor masters, submission. Everyone will come to love this license; the restraint of commanding will be as tiresome as that of obeying had been. Women, children, and slaves will submit to no one. There will no longer be mores or love of order, and finally, there will no longer be virtue.¹¹⁸

Even though for both Plato and Montesquieu the democratic excess leads to despotism, for Plato freedom is lost because "excess in one direction generally tends to produce a violent reaction in the opposite direction," and for Montesquieu virtue and liberty are lost because excessive equality leads to arbitrariness and corruption, which are intrinsically related to despotism.¹¹⁹ However, equality itself is not lost, because men are all equal both in a democratic government and in a despotic one, "in the former, it is because they are everything; in the latter, it is because they are nothing."¹²⁰ Hence, for Montesquieu, what is lost with the excess of democracy is virtue, the love of democracy and equality, but not equality itself. In other words, what is lost with the excess of equality is the passion, the feeling that keeps democracy in motion, the willingness to sacrifice one's own interests for that of the community.

A democratic republic is not only potentially despotic but also unfeasible due to the inadequacy of the spirit of virtue for the modern times. Because virtue in a republic is the love of frugality, one could argue that with the excess of equality this self-containment regarding material possessions and the accumulation of wealth can no longer be maintained, and individual ambitions burst into the republic, corrupting it at its core. Democratic virtue as love of equality and frugality is for Montesquieu too weak to be self-sustaining without a strong legal and social enforcement. Because virtue requires a

¹¹⁸ Montesquieu. *The Spirit of the Laws*. I.8, 2.

¹¹⁹ Montesquieu. *The Spirit of the Laws*. I. 8. 2 & 5.

¹²⁰ Montesquieu. *The Spirit of the Laws*. I. 6

continuous preference for the public interest over one's own, and thus it demands the creation of a sort of second nature in human beings, one that represses innate individual ambitions, "if one is to love equality and frugality in a republic, these must have been established by the laws."¹²¹ However, laws are not enough to prevent the undermining of virtue. When "political men" argue that to sustain the republic only "manufacturing, commerce, finance, wealth, and even luxury" are needed, then "virtue ceases, ambition enters" and freedom *under* the law is exchanged for freedom *against* it.¹²²

Both the painful and precarious sublimation required by virtue as the love of equality and frugality in an open, commercial society, and the lack of moderation of the egalitarian spirit,¹²³ brought Montesquieu to embrace the spirit of commerce, as a moderate, foundational force for the modern republic.¹²⁴ The principle of moderation, which he argues is what virtue means in an aristocratic republic, is for him the most perfect one, the closest to human nature and to freedom because it promotes the balance between inequalities of wealth and power.¹²⁵ As many of his contemporaries, Montesquieu conceived of commerce mostly as a benign, gentle force. Commerce not only would moderate mores and foster peace, but also produce exact justice—as opposed to a justice based solely upon the public good or private interests.¹²⁶ This conception of "commerce as bring[ing] with it the spirit of frugality, economy, moderation, work, wisdom, tranquility, order, and rule,"¹²⁷ appears at best as naïve and detached, on the one hand from the speculation bubbles and the extreme luxury of the upper classes fueled by Great Britain's trading boom of the mid-1700s, and on the other from the poverty and oppression of the popular sectors in the early years of the industrial revolution. Given this erroneous conception of commerce as a moderating factor—blind to the powerful, *immoderate* forces of finance—Montesquieu argued the spirit of commerce would provide a natural balance between collective wellbeing and individual ambitions.

¹²¹ Montesquieu. *The Spirit of the Laws*, I. 5, 4

¹²² Montesquieu. *The Spirit of the Laws*. I. 3, 3.

¹²³ Montesquieu. *The Spirit of the Laws*, I. 5

¹²⁴ For the centrality of the principle of moderation in Montesquieu and its influence on American Founders see Anne M. Cohler, *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*, (Manhattan: University of Kansas Press, 1988).

¹²⁵ Montesquieu. *The Spirit of the Laws*. I. 5, 8

¹²⁶ Montesquieu. *The Spirit of the Laws*. III. 20, 1

¹²⁷ Montesquieu. *The Spirit of the Laws*, I. 5, 6

Not only would his commercial republic be superior to ancient republics, but also becoming commercial would be the inevitable end of any republican government fostering peace and liberty.¹²⁸ The liberty generated in the republic would allow for each citizen to “have his own will and [...] value his independence according to his taste,” and for all the passions to “appear to their full extent,”¹²⁹ including the ardor for enriching and distinguishing oneself. The security for investment and risk-taking given by the political and legal structure of a stable republic would allow for economic development to be accelerated:

one’s belief that one’s prosperity is more certain in these states makes one undertake everything, and because one believes that what one has acquired is secure, one dares to expose it in order to acquire more.¹³⁰

Moreover, anticipating Adam Smith’s self-reinforcing theory of economic growth based on productivity and the size of the market, Montesquieu argues the industry created through the security to acquire would foster new needs that would only be satisfied through commerce. Republics are thus bound to become commercial.

Because commerce thrives in republics where there are reliable public enterprises in which to participate and there is certainty about the laws —security that “makes one undertake everything” to “acquire more”¹³¹— the more political liberty there is in a state —understood as legal security— the more individuals will be inclined to pursue their own ambitions by taking risks to acquire rather than being frugal to preserve. In other words, the more liberty in a state, the more commerce will be fostered, and the more accentuated risk-taking will become. The evident implications of increased economic risk-taking in society are inequality and abrupt socio-economic change. The more possessions one has in a secure environment, the more inclined one is to risk part of them to acquire more. If the risk yields more wealth, inequality will abruptly grow between those who preserved and those who dared, gap that is likely to become exponentially

¹²⁸ Montesquieu. *The Spirit of the Laws*. III. 19, 27. See also on the inevitability of the commercial republic Paul Rahe, *Soft Despotism, Democracy's Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect* (New Haven: Yale University Press, 2009).

¹²⁹ Montesquieu. *The Spirit of the Laws*. III.19, 27

¹³⁰ Montesquieu. *The Spirit of the Laws*, IV.1, 4

¹³¹ Montesquieu. *The Spirit of the Laws*. IV. 20, 4.

wider the more wealth is accumulated. The same happens when the risk-taker makes a bad bet and loses his patrimony, falling into poverty. Adam Smith would argue a decade after Montesquieu that economic inequality inevitably comes together with commerce, and despite some benefits in productivity driven by luxury, a high degree of inequality is pernicious. Even if for Smith inequality was not intrinsically unjust, nor produced bad effects such as dependence, lack of social mobility, or corruption, as Dennis C. Rasmussen has convincingly shown, extreme inequality produces for Smith an even greater evil: a “distortion in our sympathies” that makes us favor the rich and neglect the poor, which “in turn undermines both morality and happiness.”¹³²

The same as Cicero brought normative considerations to justify the Senate’s factual dominant position in Rome, Montesquieu theorizes a constitution that is based on a Whig interpretation of the English political system and proposes a hybrid commercial republic that incorporates the commercial spirit as a moderating force alongside the democratic virtue generated by popular sovereignty. The result is an elitist, proceduralist model in which the common people’s only power is the right to elect representatives, while the few preserve their dominant position in the power structure through a formal institutional balance. Following Cicero’s elitist republicanism, Montesquieu argues that while man has a natural ability to perceive merit and elect, the people in general are not competent enough to be elected.¹³³ Thus, even if Montesquieu argued for extending the suffrage, giving the right to vote to all male citizens, excluding only those “whose estate is so humble that they are deemed to have no will of their own,” for him the right of the people to legislate is only exercised indirectly, through representatives who are selected from the elites. Even though in a free state the legislative power is the prerogative of “the people as a body,” Montesquieu argues “the people should not enter the government except to choose their representatives; this is quite within their reach.”¹³⁴ Representation appears not as a device to bridge the gap between the people and power, but as a

¹³² Rasmussen, Dennis, “Adam Smith on What Is Wrong with Economic Inequality,” *APSR* 110. 2 (2016): 342–52.

¹³³ Montesquieu, *The Spirit of the Laws*, I.2, 2

¹³⁴ Montesquieu. *The Spirit of the Laws*, II.11, 6

mechanism to keep the people *away* from power through the formal expansion of the aristocratic procedure of election to the common people.¹³⁵

Montesquieu's commercial republic is a modified version of a mixed constitution in which the common people's sovereignty was limited to selecting representatives to "do all that they themselves cannot do,"¹³⁶ and the aristocratic element was predominant *de facto* within the organization of power. Inspired by ancient republican experiences, he proposed a bicameral legislative institution composed of two separate bodies: one for the nobles —"people who are distinguished by birth, wealth, or honors"— and the other for the representatives of the people. Legislation entailed both the faculty of *enacting* and *vetoing*, and thus the ambitions of the nobles and the commons would be mutually kept in check through initiating, modifying, and stopping legal motions. In addition to the legislative power, he conceives of the executive power as one that should be in the hands of a monarch, due to its requirement of immediate action, and of the judicial power as null and autonomous, limited to adjudicating the law.¹³⁷ The mechanical separation of these powers would keep these unequal bodies in a dynamic equilibrium, promoting stability and liberty.

It is not surprising that Montesquieu, who was part of the French aristocracy, would make a strong defense for preserving the political privileges of the nobility in the lawmaking process.¹³⁸ However, his defense of the necessity for an aristocratic institution was not based on the superior virtue of elites as in Cicero, but on the realist assessment that elites will aim at subverting liberty if they share an institution with the common people:

if they [the nobles] were mixed among the people and if they had only one voice like the others, the common liberty would be their enslavement and they would have no interest in defending it, because most of the resolutions would be against them.¹³⁹

¹³⁵ Montesquieu. *The Spirit of the Laws*, I.2, 2

¹³⁶ Montesquieu. *The Spirit of the Laws*, II.11, 6

¹³⁷ For an analysis of judicial independence in Montesquieu see Paul Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: Chicago University Press, 2010), Chapters 1 & 2.

¹³⁸ He also advocated for nobles to judge by a special aristocratic tribunal to avoid the envy of the common people.

¹³⁹ Montesquieu, *The Spirit of the Laws*, II.11, 6.

Elite subversion of the constitution through negligence and passivity in an unmixed regime could then be interpreted as being justified as an act of self-defense stemming from the fear of domination coming from the common people. The only way to avoid this inevitable vulnerability, argues Montesquieu, is to institutionalize inequality by giving to the few its own institution with a role proportional to “the other advantages they have in the state,” and veto power over the attempts by the representatives of the common people to ‘enslave’ them. Even if he also gives the same powers of enacting and vetoing to the commons, and thus *formally* allowing the people to resist further oppression from the few, Montesquieu’s model of power allocation *de facto* entrenches power relations by giving the nobles political power commensurate with their socio-economic power, and the faculty to stop any attempts at reform coming from below. While the formal equality of legislative prerogatives in Montesquieu’s model obscures a status-quo bias that gives political dominance to the elite, the introduction of representation through the extension of the suffrage to the common people as an alternative to class-specific institutions radically changed the interpretation of the mixed constitution.

Normatively, Montesquieu’s procedural model is justified because it produces liberty. By defining liberty as “the right to do everything the law permits”¹⁴⁰ and then arguing good laws are those resulting from the correct procedures and institutional checks and balances he endorses, Montesquieu pegs liberty to the rule of law, closing the possibility of legitimately questioning the law outside from formal political institutions that are effectively controlled by the few —hopefully the virtuous, moderate few. Under this constitutional framework, in which law is produced, executed, and adjudicated through a mechanistic division of functions aimed at preventing abuse, all individuals would be considered free simply because they “live under civil laws.”¹⁴¹

If virtue conceived as love of equality needs to be established by law, and virtue as moderation lacks the mistaken beneficial force of commerce to constantly promote moderation, and therefore would also need to be established by law, then the making of the law is the most vulnerable point in Montesquieu’s liberty-producing structure. Laws

¹⁴⁰ Montesquieu. *The Spirit of the Laws*, II.11,3

¹⁴¹ Montesquieu. *The Spirit of the Laws*, III.26, 20

promoting equality and moderation would be aimed at limiting the few, which means that selected elites would be both in charge of making and executing rules aimed at limiting themselves. This problem of self-binding and self-policing is aggravated because Montesquieu's gives equal formal power to the many, even if the few have factual dominance. The few are in an advantageous position and need to protect what they have; the many need to protect themselves from new attempts at domination and push back against pervasive domination by advancing their position. The preservation of the status quo works for the advantage of the few. Therefore giving the "senatorial" power a veto over demands for change coming from the popular sectors allows elites to legally, and peacefully, keep their dominant position. And even if in England the House of Commons ended up becoming the government, absorbing executive and legislative functions — something that was already happening under Walpole while Montesquieu was living in London— the supremacy of parliament was not the result of an increase of popular power vis-à-vis the power of the few, but the result of the displacement of the old aristocracy from the real seat of power by the new commercial elite.

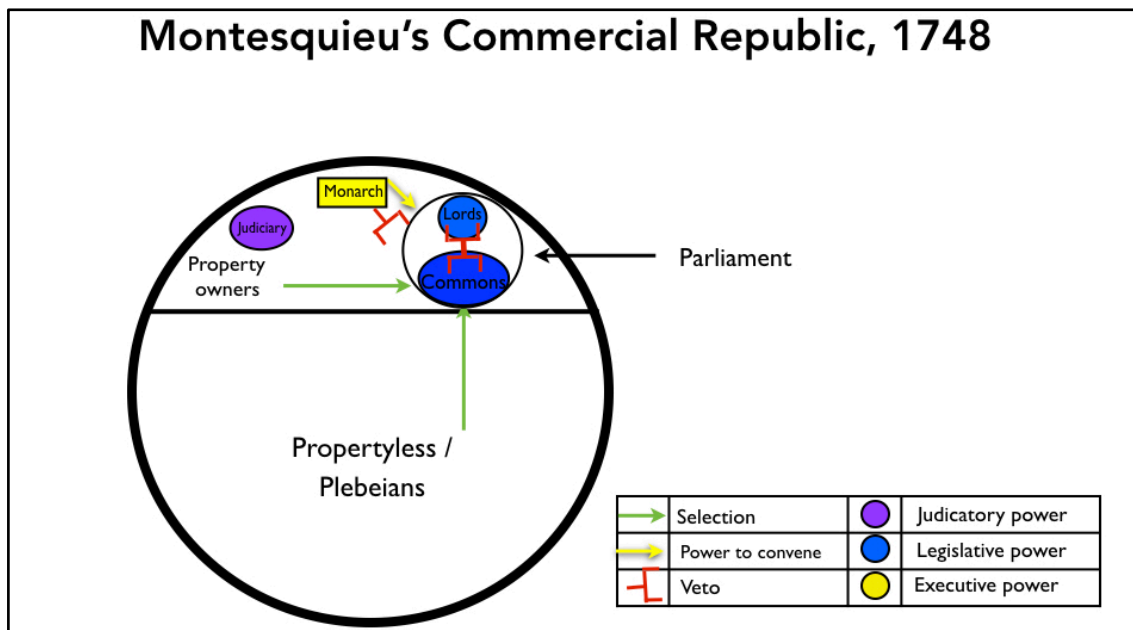


Figure 2.8 Montesquieu's Commercial Republic, 1748

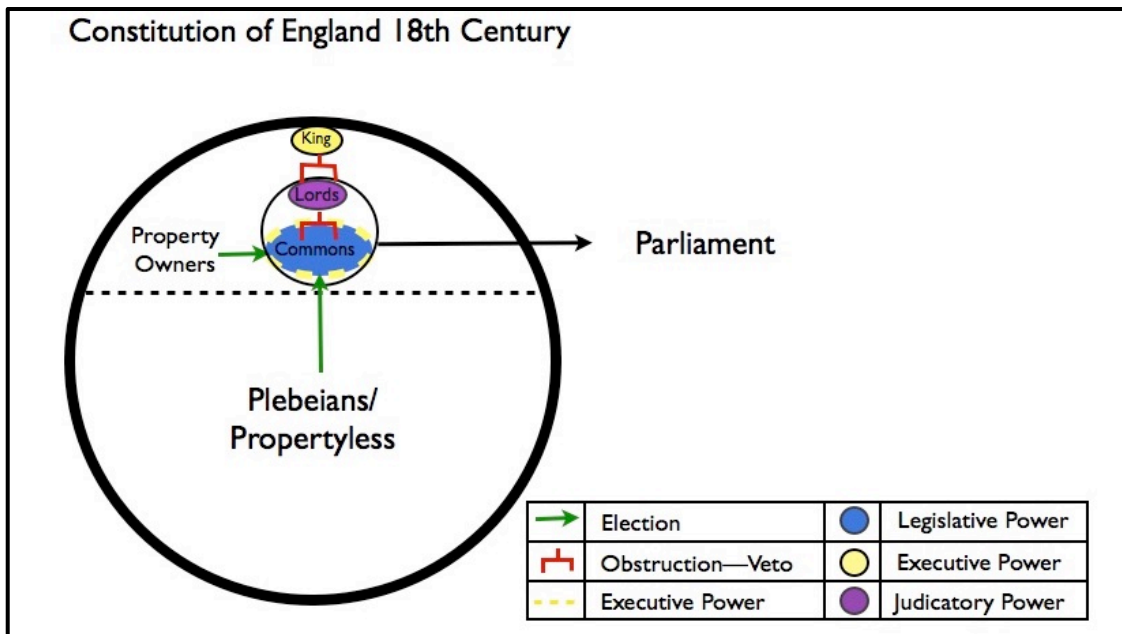


Figure 2.9 Constitution of England, 18th Century

Even though Montesquieu praises England for always subordinating political interests to that of commerce,¹⁴² he does not openly advocate for liberty as non-interference in relation to trade, but still follows the republican conception of liberty in which law is the condition of possibility for public life.

Liberty of commerce is not a faculty granted to traders to do what they want; this would instead be the servitude of commerce...in agreements that derive from commerce, the law should make more of public convenience than of the liberty of a citizen.¹⁴³

This tendency to decide in favor of the public interest instead of private ambition regarding lawmaking cannot be motivated by the spirit of commerce, but by virtue. But can virtue be maintained when the equality of fortunes that sustains frugality is relentlessly being undermined by the risk-taking spirit of commerce? When mores are being heavily influenced by new needs and ambitions? How can the law be kept independent from the servitude of commerce, how can freedom be sustained, if

¹⁴² Montesquieu. *The Spirit of the Laws*. IV.20, 7. For an analysis of Montesquieu's critique of the English constitution see Sharon Krause, "The Spirit of Separate Powers in Montesquieu" *The Review of Politics*, 62. 2 (Spring 2000), pp. 231-265.

¹⁴³ Montesquieu. *The Spirit of the Laws*. IV.20, 12 & 15.

inequality, individual ambitions, and risk-taking permeate mores and lawmaking itself, permanently pushing for *laissez-faire*? On the one hand, to follow one's ambitions is easy, natural, and encouraged by a legal context that secures individuals from arbitrary seizing of property by the state or other citizens, and on the other hand, the cultivation of virtue, the suppression of individual interests for the common good, is difficult and demands of citizens a second nature born out of sublimation. Consequently, without strong legal restraints and a fierce republican ethos, it seems the spirit of commerce, which was at the center of the new American republic, does not merely come to moderate virtue, but to push for its extinction.

In the next section I will analyze how Montesquieu's model was adapted to establish the first modern representative government in America. I will begin by engaging with the conception of liberty that became functional to the justification for the new organization of power under the American constitution, and then delve into a materialist analysis of the founding and of Madison's constitutional thought.

III. From Mixed Constitution to Liberal Representative Government

The problematization of concepts has been at the core of political philosophy since ancient times. Because concepts and categories set up the theoretical framework through which we think about the political, the redefinition of a term as central as liberty fundamentally changes our understanding of what is a free government. Every form of free political rule is aimed at instituting freedom. The principle of ancient democracy was freedom understood as self-rule through the equal sharing of political power. Thus, citizens had equal rights to deliberate, legislate, and judge in turns.¹⁴⁴ The principle of the ancient Roman republic, which was based on the legal division between the elites and the common people,¹⁴⁵ was also to establish freedom understood as non-domination by giving each group its own political representative institution—the Senate and the Council of the Plebs led by the Tribunes—with powers to check their mutual ambitions. While in ancient democratic theory sharing in government was seen as constitutive of political liberty, and free political action—which presupposed civil liberty of “living as

¹⁴⁴ Thucydides, “Pericles’ Funeral Oration” *The Peloponnesian War*, Book II: 37-50; Plato, *The Republic*, VIII 556b; Aristotle, *Politics*, 1317b: 1-4.

¹⁴⁵ Cicero, *The Republic*, I; Polybius, *The Histories*, VI. 1, 2 & 5.

one like”¹⁴⁶— was the highest *end* all citizens could aspire to, in the republican tradition political participation, which recognized the right to legislate, judge, and veto laws and decrees, is only a *means* to assure security from domination. These two ancient conceptions of political freedom, which presupposed individual freedom to act, were put into question by the birth of liberalism and individualism.

Against Hobbes’ conception of liberty as the lack of external impediments to action, and combining natural law and republican thought, John Locke also argued that liberty is limited, but not by the will of the sovereign but by natural right. Natural, individual rights become the normative foundation of Locke’s ideal political order in which the people are at the same time sovereign —limited only by natural and civil law— and ruled over based on their tacit consent. Locke attached liberty to the law, arguing that liberty is to dispose of “person, actions, possessions, and his whole property, within the allowance of those laws under which he is; and therein not to be subject to the arbitrary will of another...”¹⁴⁷ Individual rights become in Locke’s theory of government the fundamental limit on government; pre-political entitlements that the government must never violate.

Although a proto-liberal conception of freedom would predominate in the American constitutional convention, the first attempts at codifying rights and duties in state constitutions recognized strong political rights that went beyond election and mere protection from abuse. The preamble of the 1780 Massachusetts Constitution, for example, stated a twofold end for government: to secure the existence of the body politic, and to give individuals the power to enjoy their natural rights. While the latter goal is based on a liberal understanding of the state, the objective of securing the political community is based on a republican understanding of politics in which the body politic is the source of freedom as non-domination, and the active role of citizens in checking the power of government is crucial for its maintenance.

Even though the newly constituted American states would institute indirect, representative government, the role of individuals in politics went beyond the selection of magistrates. Article VII of the 1780 Massachusetts Constitution recognized that:

¹⁴⁶ Aristotle, *Politics*, VI. 2, 1317b.

¹⁴⁷ John Locke, *The Second Treatise of Government*. Ch. 5, 57: 289

Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men; therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it.

A similar clause was later proposed by James Madison¹⁴⁸ as a part of the First Amendment to the Constitution, but ultimately rejected. The recognition of the common good, understood as the safety and prosperity of the people as the aim of government, is a central feature in republican thought. The end of government is not the liberal protection of rights to assure individuals only the “enjoyment of their property in peace and safety,”¹⁴⁹ but to *guarantee* security, prosperity, and happiness. While the liberal state is conceived by Locke as a minimal state that comes only to fix what does not work properly in the natural state, as an impartial third party that enforces contracts and secures property, the aim of the republican state is more demanding because it first and foremost has the duty to assure the prosperity of the population as a whole, which may entail the curtailment of individual rights for the benefit of the majority. Interference may be necessary to preserve freedom as non-domination. The republican constitution recognizes the power struggles within the community that may permeate the state, and that can only be dealt with through the active participation of the people in checking government action. Therefore, in a republican constitution, common citizens can legitimately constitute, direct, change, or overthrow a government, not only if there is evident usurpation and tyranny, but also if representatives are not advancing prosperity and happiness¹⁵⁰ properly because of their favoring of a specific class or group of citizens. The crucial role of the people in keeping government honest is therefore guaranteed in political rights that go beyond election. Under Article XIX, citizens had the right to:

assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or

¹⁴⁸ Madison speech proposing the Bill of Rights June 8, 1789.

¹⁴⁹ John Locke, *Second Treatise on Government*. Ch. 11, 134: 328.

¹⁵⁰ Even if these are not properly republican goals, they work as democratic justifications for popular checking power.

remonstrances, redress of the wrongs done them, and of the grievances they suffer.

What articles VII and XIX make evident is that, in the first state constitutions, private citizens were conceived not merely as authorizing through their consent a legitimate representative government, but as having an active role in political power as a counterbalance to the inefficiency of the state apparatus to guarantee prosperity for all, the usurpation of power by government officials, or the instrumentalization of government “for the profit, honor, or private interest of any one man, family, or class of men”¹⁵¹ to exclude the majority from collective benefits. This active role of the common citizens in securing popular sovereignty was part of the democratic legacy of the independence movements, which “shocked many American leaders who feared revolution within America” and actively opposed any “fundamental changes in the political structure of American society.”¹⁵²

Despite the crucial legal role of ordinary citizens in keeping corruption at bay, their political power was kept only in the realm of individual rights, while the powers of representative government were codified and given institutional expression. In other words, while the constitution gave the different branches of government detailed institutional powers, the political rights of the people to contest the actions of government were not given institutional recognition. Assembly was seen as spontaneous—as had happened in the “Committees of Correspondence” formed to organize against the unjust actions of the British Empire—and collective demands and instructions lacked the necessary institutional command to coerce representatives into compliance. The active political rights of citizens, the rights to action and decision in political affairs, were as imperative as commands based on moral duty, relying only on the virtuous character of government officials. The constitution did not recognize the representative government’s legal obligation to obey the organized multitude’s complaints. Consequently, when the personal interests of government officials, or the group that supported them, became in direct conflict with those of a large group of private citizens, as it did during the 1780s

¹⁵¹ Article VII of the 1780 Massachusetts Constitution

¹⁵² Merrill Jensen, *The Making of the American Constitution*. (Van Nostrand, 1964), p. 19.

debt crisis, formal rights were not respected and the *de facto* rulers at that moment were revealed.

At the early stage of the constituent moment, both the national government and common citizens organized in councils and committees suffered from a lack of real, institutional power vis-à-vis the states and their representative governments. Referring to the fundamental defect of the Articles of Confederation, Thomas Jefferson stated that the power of Congress “was only requisitory, and these requisitions were addressed to the several legislatures, to be by them carried into execution, without other coercion than the moral principle of duty.”¹⁵³ The same as the national government lacked the tools to implement laws and statutes at the state level, individual citizens were institutionally powerless to counteract the machinery of state governments. While in the case of the national government the lack of resources hinged on the unwillingness of states to cede sovereign power and autonomy—which was remedied by the 1786 Constitution—the lack of institutional power regular citizens could wield was due to an elitist interpretation of the mixed constitution that undermined the power of common citizens to control their representatives.

According to John Mercer, delegate from Maryland to the Constitutional Convention, the leading voice against the Constitution, representative government was already a *de facto* aristocracy that could not be reigned in by the citizenry:

It is a first principle in political science, that wherever the rights of property are secured, an aristocracy will grow out of it. Elective Governments also necessarily become aristocratic, because the rulers being few can & will draw emoluments for themselves from the many. The Governments of America will become aristocracies. They are so already. The public measures are calculated for the benefit of the Governors, not of the people. The people are dissatisfied & complain. They change their rulers, and the public measures are changed, but it is only a change of one scheme of emolument to the rulers, for another. The people gain nothing by it, but an addition of instability & uncertainty to their other evils.¹⁵⁴

¹⁵³ Jefferson, Thomas. *Autobiography*. In *Political Writings*. (Cambridge, 1999), p. 354.

¹⁵⁴ *The Records of the Federal Convention of 1787*: 769.

According to Merrill Jensen, the main result of the American Revolution was the “enormous increase in the democratic potential” in politics and law.¹⁵⁵ The principle of universal suffrage, the regulation of commerce, state intervention in industry, and the alteration of taxation patterns according to the will of the sovereign people, who effectively controlled state legislatures through annual elections, were part of the legacy of the revolution. The new powers to regulate commerce were put in practice immediately after the war, when 7 out of the 13 states in the confederation took measures to alleviate the scarcity of money and the private debts of farmers, who petitioned the government to issue paper money, which had been abandoned during the war. Due to the fear of devaluation and loss of investments, paper money was bitterly opposed by merchants, planters, and creditors, but the pressure from the yeoman farmers, who accounted for the majority of the population, could not be contained.¹⁵⁶ In the 1780s, the United States was for the most part composed of rural communities. Even though there was a powerful commercial elite settled in the coastal urban centers, the bulk of the population still lived off the land and used barter instead of cash in most of their transactions.

The American Revolution brought about not only liberation from the British yoke and a desire for democratic rule, but also an economic recession. While by severing ties with England the United States lost its most important trading partner, the devastation left by the war meant a material contraction of the economy. Personal income remained stagnant from 1774–1790,¹⁵⁷ and, especially for farmers, who endured the constant looting of their lands and resources during the war, debt became an ubiquitous and constant threat to property, liberty, and full citizenship. Due to the recession, independent farmers, many of them war veterans, became tenants in their own land, were often jailed, and lost their political rights together with their property. Even though the idea of universal male suffrage was starting a trend in several states, and at the time of the Federal Convention the majority of states in the union had extended the right of suffrage beyond freeholders, some states still required property to be able to vote, and all of them

¹⁵⁵ Jensen, *The Making of the American Constitution*, p. 28.

¹⁵⁶ Jensen, *The Making of the American Constitution*, p. 29.

¹⁵⁷ Global Price and Income History Group. <http://gpih.ucdavis.edu/tables.htm>

except for Pennsylvania¹⁵⁸ required a considerable amount of property to become an elected official, which effectively separated the common people from the elites who represented them in government.

The 1780 Massachusetts Constitution granted the right to vote to male owners of local property, valued at least in sixty pounds or combined with an annual income of three pounds.¹⁵⁹ Even though the provision requiring pecuniary qualifications to be able to vote was criticized by some of the towns as “infringement on the natural rights”¹⁶⁰ and “a degree of slavery,”¹⁶¹ the rule opened the path to citizenship to the majority of war veterans, who received a minimum of sixty pounds for three years of service.¹⁶² However, the political right of direct lawmaking and ruling was reserved for the wealthiest individuals; to become a senator a citizen had to own five times the minimum amount of property to be eligible to vote, and to become governor, sixteen times.¹⁶³ Thus, although the property requirements to vote were not too stringent, which made the Massachusetts political process fairly inclusive at that time, the reigns of government were still reserved for affluent citizens. This inequality of wealth between the majority of private citizens and their representatives would prove pernicious when the debt crisis brought the interests of these two groups into direct conflict. As early as 1784, citizens affected by debt, taxes, and lack of currency began to spontaneously organize in committees or councils, from which emanated petitions for redress.¹⁶⁴ However, the representative government remained deaf to the common people’s voice and continued to enforce contracts and agreements, which threw many farmers out of their lands and into jail.

¹⁵⁸ 1776 Pennsylvania Constitution, Art. VII. That all elections ought to be free; and that all free men having a sufficient evident, common interest with, and attachment to the community, have a right to elect officers, or to be elected into one.

¹⁵⁹ 1780 Massachusetts Constitution, Ch. 1, Art. IV.

¹⁶⁰ “Return of the town of Richmond on the Massachusetts Constitution of 1780” In *Vindicating the Founders. Race, Sex, Class and Justice in the Origins of America* by Thomas West (Rowman & Littlefield)

¹⁶¹ “Return of the town”

¹⁶² Carpenter Edward & Charles Morehouse, *The History of the Town of Amherst, Massachusetts*, Volume 1. Ch. XXII: 96, 1896.

¹⁶³ 1780 Massachusetts Constitution, Ch. 1, Sec. 2, Art. V; Ch. 2, Sec. 1, Art. II.

¹⁶⁴ Main, Jackson. *The Antifederalists: Critics of the Constitution, 1781 – 1788*. University of North Carolina Press, 1961.

In addition to a damaged economy and debt collection, farmers were overwhelmed with new taxes being levied to fund the nascent republic. As Plough Jogger argued in the press days before the debt rebellion started in 1786:

I've labored hard all my days and fared hard. I have been greatly abused, have been obliged to do more than my part in the war; been loaded with class rates, town rates, province rates, Continental rates and all rates... been pulled and hauled by sheriffs, constables and collectors, and had my cattle sold for less than they were worth. I have been obliged to pay and nobody will pay me. I have lost a great deal by this man and that man and t'other man, and the great men are going to get all we have and I think it is time for us to rise and put a stop to it, and have no more courts, nor sheriffs, nor collectors nor lawyers, and I know that we are the biggest party, let them say what they will. We've come to relieve the distresses of the people. There will be no court until they have redress of their grievances.¹⁶⁵

When the institutional path for rectification was exhausted, and the representative government remained unaccountable, the organized multitude engaged in direct action by closing and burning courthouses where debt records were kept. According to the more conservative sections of the elite, the rebels were no more than criminals because they wanted to abolish private property and debts, and achieve land redistribution with the help of tender, paper money. In a letter to John Adams, George Washington quotes General Knox's description of the radical group as accounting for a fifth of the population, "a body of twelve or fifteen thousand desperate and unprincipled men,"¹⁶⁶ which positions the rebels as a threat to the moral virtue of the republic. An echo of these arguments is present in Abigail Adams' concerned letter to Jefferson in the midst of the rebellion:

Ignorant, wrestles desperadoes, without conscience or principals, have led a deluded multitude to follow their standard, under pretense of grievances which have no existence but in their imaginations. Some of them were crying out for a paper currency, some for an equal distribution of property, some were for annihilating all debts...¹⁶⁷

¹⁶⁵ Howard Zinn, ed., *The People Speak. American Voices, Some Famous, Some Little Known*. Harper Collins, New York: 2004: 5-6

¹⁶⁶ George Washington to John Adams. November 5th, 1786.

¹⁶⁷ Abigail Adams to Thomas Jefferson. January 29th, 1787

However, the debt rebellion was not the works of a bunch of corrupt men or a deceived multitude, but a popular movement based upon local committees organized for the purpose of exerting their constitutional rights. Even though this rebellion was later known as Shays' Rebellion, war hero Daniel Shays did not initiate the movement, but only led its final armed struggles.¹⁶⁸ The power of the rebellion was not on its leader, but on the collective force of organized common people. Jefferson was perhaps the only prominent official to recognize the beneficial element of the rebellion. For him freedom in the republic hinges on public education and local self-government,¹⁶⁹ and since the debt rebellion was based on local committees, it was the closest expression of his theory of elementary republics. Jefferson's idea of separation of powers and checks and balances referred not only to functions of government, but to the relation between ward, county, state, and national governments. For Jefferson, the ward was the ultimate bulwark of freedom, and the small landholders, the most valuable part of the state.

The elementary republics of the wards, the county republics, the State republics, and the republic of the Union, would form a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government. Where every man is a sharer in the direction of his ward-republic, or some of the higher ones, and feels he is a participator in the government of affairs, not merely at an election one day in a year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.¹⁷⁰

Following a plebeian interpretation of republican thought, Jefferson saw this kind of popular rebellions as constitutive to a good republic, because freedom is only attained through periodic resistance against oppression. For freedom to be preserved, rulers must

¹⁶⁸ See Nobles, Gregory. "Satan, Smith, Shattuck, and Shays": The People's Leaders in the Massachusetts Regulation of 1780" in Young, Nash and Rapahel, eds. *Revolutionary Founders. Rebels, Radicals, and Reformers in the Making of the Nation*. Vintage Books, 2012.

¹⁶⁹ Thomas Jefferson to the Marquis de Lafayette. February 14, 1815.

¹⁷⁰ Thomas Jefferson to Joseph C. Cabell. February 2, 1816.

be regularly warned of the power of the common people: “the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is its natural manure.”¹⁷¹ Representative government and civil society are in permanent need of reconciliation, in a relentless struggle for and against inequality, and when the gap between state and local government is too wide, rebellion is necessary to coerce representative government to achieve more equality through a show of force of the collective power of the multitude.

This unusual view about the productive nature of rebellion was certainly not shared by the rest of political leaders. As Jon Elster claims, the rebellion caused an element of “visceral fear”¹⁷² that was a driving force for the calling of the constituent assembly and influenced the deliberation of the Founders.¹⁷³ But the Federal Convention was not only a response to an emotional reaction based on the violent acts themselves, but also to a rational, “prudential fear,” a fear rooted on the logical expectations brought about by the equalizing effects of emancipation. Political leaders feared that the democratic force born with the revolution and enshrined in the Declaration of Independence would give preeminence to the leveling spirit, to the redistribution of property and the control of commerce for the benefit of all citizens. The fear of the American upper classes was a *prudential fear* —a logical conclusion derived from the principles of democracy and the continuing political equalization in society— which was channeled and made effective thanks to the *visceral fear* ignited in the rebellion that ultimately galvanized support for a counterrevolution and the drafting of the Constitution.

America fits the revolutionary pattern of “two steps forward, one step backward,” a democratic revolution undone by a counterrevolution against democratic ideals.¹⁷⁴ Revolution of the fundamental structure of political society was rooted in the war of independence, in the battlefield —in which the rich and those of moderate means are brought into close contact, and class ceases to be a legitimate division between rulers and ruled. As Plato argues, the close encounter between the rich and the poor in a condition of

¹⁷¹ Thomas Jefferson to William Stephens Smith. November 13th, 1787.

¹⁷² Elster uses Robert Gordon’s distinction between visceral or emotional fear of violence and prudential or rational fear. “Whereas the former is a genuine emotion, caused by the belief in an imminent danger to the agent, the latter does not amount to more than a simple belief–desire complex.” In “Constitution-Making and Violence” *Journal of Legal Analysis* (Spring 2012): 4,1: 8

¹⁷³ Elster, Jon. “Constitution-Making and Violence”: 9

¹⁷⁴ *Idem*.

war is likely to bring about the collapse of oligarchy because the people would be able to see their rulers “carrying a good deal of superfluous flesh... wheezing and struggling,” unworthy of their wealth and high-ranking position.¹⁷⁵ In the American colonies, war had also an equalizing effect that inevitably led to the desire for democracy, which gives “equal share in the constitution and public office.”¹⁷⁶ According to Jensen, the specific expression of democracy that ignited fear in the elites, and ultimately brought about the Convention, was economic legislation aimed at “suspending or delaying the collection of debt and taxes” and the issuing of paper money.¹⁷⁷ James Madison made this clear at the beginning of the Convention by stating that the interests of the majority were a threat to the rights of the minority:

Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is that where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure.

Even though the intellectual aptitude of the framers as lawyers and experienced politicians is the most significant feature often highlighted in historical accounts of the American founding, if one analyzes the composition of the Federal Convention, individual biographies reveal that it was finance, more than lawyering, what was more predominant among the members. While 56% of the framers were lawyers and politicians, 74% of them were moneylenders of some sort,¹⁷⁸ which puts the issue of debt and currency speculation at the top of the list of interests the delegates were probably aiming at protecting when negotiating constitutional provisions. Therefore, not only the overwhelming majority of members were rich property owners—which foreseeably put the protection of property as the principal object of the new state—but were also creditors being threatened by popular measures advocating debt relief against the

¹⁷⁵ Plato, *The Republic*, 8, 556d

¹⁷⁶ Plato. *The Republic*. 8, 556-557

¹⁷⁷ Jensen, Merrill. *The Making of the American Constitution*: 40.

¹⁷⁸ Of the 55 members of the Federal Convention, 41 were lenders, 31 were lawyers and politicians, 21 were planters, 17 were engaged in commercial enterprises, and 13 in real state speculation.

<<http://teachingamericanhistory.org/convention/delegates/>>

enforcement of contracts —which comes to reinforce the role of prudential fear in the constituent process regarding the protection of a specific type of property: financial assets.

Departing from the principles established in the Declaration of Independence, a basic premise in the discussions of those present during the 1787 Federal Convention was that the safety of property rights —not the happiness and prosperity of the people— was the main purpose of the state.¹⁷⁹ Except for a couple of dissenting opinions, there was general agreement among the delegates that the protection of property must be the fundamental aim of the new federation. Within the discussions surrounding representation in Congress, Governor Morris argued for property to be taken into account when estimating the proportion of representatives to the lower branch: “Life & liberty were generally said to be of more value than property. An accurate view of the matter would nevertheless prove that property was the main object of Society.”¹⁸⁰ He was seconded by John Rutledge, planter and lawyer from South Carolina, and Rufus King, lender, merchant, and lawyer from Massachusetts, who stated that property was certainly the “primary object of society.”¹⁸¹ It is striking that the defense of property as the principle aim of the state was not argued for on normative grounds, but just taken for granted, an obvious claim all delegates —rich property owners— shared. The only delegate providing an explanation of this principle was James Madison, who did so through a realist argument grounded on interest:

In all civilized Countries the people fall into different classes having a real or supposed difference of interests. There will be creditors & debtors, farmers, merchants & manufacturers. There will be particularly the distinction of rich & poor... An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in in this Country, but symptoms, of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to

¹⁷⁹ *The Records*: 405, 407 & 411

¹⁸⁰ *The Records of the Federal Convention of 1787*: 405.

¹⁸¹ *The Records of the Federal Convention of 1787*: 407 & 411

give notice of the future danger. How is this danger to be guarded against on republican principles?¹⁸²

In this way, Madison reveals the protection of property, against the dispossessed, as the central aim of the constitutional design based on republican principles. He argued that pressures for wealth redistribution coming from below would be inevitable because “according to the equal laws of suffrage, the power will slide into the hands of the [poor].”¹⁸³ The challenge for him was then how to guard against this “danger” coming from the masses on republican principles. For achieving this enterprise, he relied mainly on Montesquieu—who he calls the “oracle”—and his elitist procedural model of republic based on universal suffrage, representative government, and separation of powers.

Despite being in favor of the continued recognition of hereditary aristocracy as necessary for liberty, Montesquieu became the most influential thinker during the founding of the first modern republic in America.¹⁸⁴ Based on the tenet that ‘power checks power’ and that adequate distribution of powers¹⁸⁵ (executive, legislative, and judicial) was enough to avoid corruption, Montesquieu’s interpretation of the mixed constitution appears as decisively elitist and proceduralist, a mechanistic system of checks and balances designed to produce liberty through correct procedures and institutional interactions, with the people exercising sovereignty only when voting for representatives.¹⁸⁶

Even though Montesquieu’s *The Spirit of the Laws* was one of the most influential texts informing the theoretical framework propping the constitution, and the framers heavily relied on his model to accomplish the Lockean state as protector of property, the model of representative government and separation of powers established in America was different from what the “oracle” had envisioned. Montesquieu’s republican model was a

¹⁸² *The Records of the Federal Convention of 1787*: 328.

¹⁸³ *The Records*: 328.

¹⁸⁴ Donald S. Lutz analysis of citations in American revolutionary political thought from 1760 to 1805 shows Montesquieu was the most cited author, accounting for 8.3% of all citations to specific thinkers, “almost without peer during the founding era for prominence.” “The Relative Influence of European Thinkers of Late Eighteenth-Century American Political Thought,” *APSR* 78 (1984): 189-97.

¹⁸⁵ Montesquieu refers to “distributed powers” (*pouvoirs distribues*) not separation of powers. *The Spirit of the Laws*, XI.7

¹⁸⁶ Montesquieu, *The Spirit of the Laws*, II.11, 6

mixed constitution —an elitist regime based on the unequal relation between the elite and the people expressed in two separate representative bodies, with different interests and equal faculties for enacting and vetoing legislation. The American republic, on the other hand, was based on the liberal principle of universal equality, which made Montesquieu’s mixed constitution, based upon the institutional recognition of the division between the aristocracy and the common people, impossible. The nascent republic demanded the elimination of privilege and the embrace of popular government, which undermined the check and balance between the elite and the people, one of the cornerstones of liberty in Montesquieu’s model.

This elitist view of the republic was pervasive in the discussions in the Federal Convention. Regarding the mode of election to the House of Representatives, there was a strong opposition to the election by the people and there was general agreement that the common people “should have as little to do as may be about the Government” because they are in want of information and “are constantly liable to be misled.”¹⁸⁷ To the few objections against the aristocratic character of the constitution that, given “the inequality of representation,” puts the state “at the mercy of its rulers,”¹⁸⁸ the anti-democratic faction argued the problem was not elite corruption but the inevitable corruption that people enable when entering the government. The problem was not that an elitist cast could grow out of the House of Representatives but that giving political power to the common people would lead to corruption due to the material subordination of the working classes:

Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them. We should not confine our attention to the present moment. The time is not distant when this Country will abound with mechanics & manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty? Will they be the impregnable barrier against aristocracy?... The ignorant and the dependent can be as little trusted with the public interest.¹⁸⁹

¹⁸⁷ Roger Sherman, lawyer and merchant from Connecticut. *The Records of the Federal Convention of 1787*: 65.

¹⁸⁸ James Wilson: *The Records of the Federal Convention of 1787*: 214.

¹⁸⁹ Governor Morris. *The Records of the Federal Convention of 1787*: 680-681.

Endorsing Montesquieu's elitist argument that the spirit of democracy was potentially despotic and the common people should only have the power to elect representatives, the American framers extensively discussed ways in which to undermine the "evils" that flow from the "excess of democracy"¹⁹⁰ by restricting suffrage to property owners. Freeholders were considered as the best guardians of liberty, and "the restriction of the right to them as a necessary defense against the dangerous influence of those multitudes without property & without principle with which our Country like all others, will in time abound."¹⁹¹ There was such agreement among the delegates that it was at first thought that the restriction of suffrage to property owners would not be too unpopular, since "the great mass of our Citizens is composed at this time of freeholders, and will be pleased with it."¹⁹² However, because numerous states had already extended the right to vote to white males, regardless of property, this option was deemed unfeasible. Because it was such a "tender point, and strongly guarded by most of the State Constitutions," the delegates thought the people would not ratify the constitution "if it should subject them to be disfranchised."¹⁹³ Consequently, the right to vote—what for Montesquieu was the people's sovereign action—was left out of the constitution, reserved for the individual states to decide on expanding or restricting the suffrage.

In the American implementation of Montesquieu's model, the framers wanted to accomplish the Lockean state as protector of property. Even if there was no legal nobility in America, the Senate was conceived as the embodiment of the aristocracy, as the guardian of property against the common people.¹⁹⁴ The Senate was seen not only as being able to "filter" the passions of the common people, as famously stated in Federalist 10, but also as *representing* propertied interests because "one of its primary objects [is] the guardianship of property."¹⁹⁵ Given that at least 2/3 of citizens in America were at that time yeomen farmers, the framers saw as the interest of the current majority to conceive of the Senate as a body representing property owners, guarding against a future majority of property-less citizens.

¹⁹⁰ Elbridge Gerry. *The Records of the Federal Convention of 1787*: 65.

¹⁹¹ John Dickinson from Delaware, *The Records of the Federal Convention of 1787*: 679.

¹⁹² *The Records of the Federal Convention of 1787*: 679-80

¹⁹³ Oliver Ellsworth, representative of Connecticut, the lawyer and lender, *The Records of the Federal Convention of 1787*: 679

¹⁹⁴ *The Records*: 69.

¹⁹⁵ *The Records*: 433.

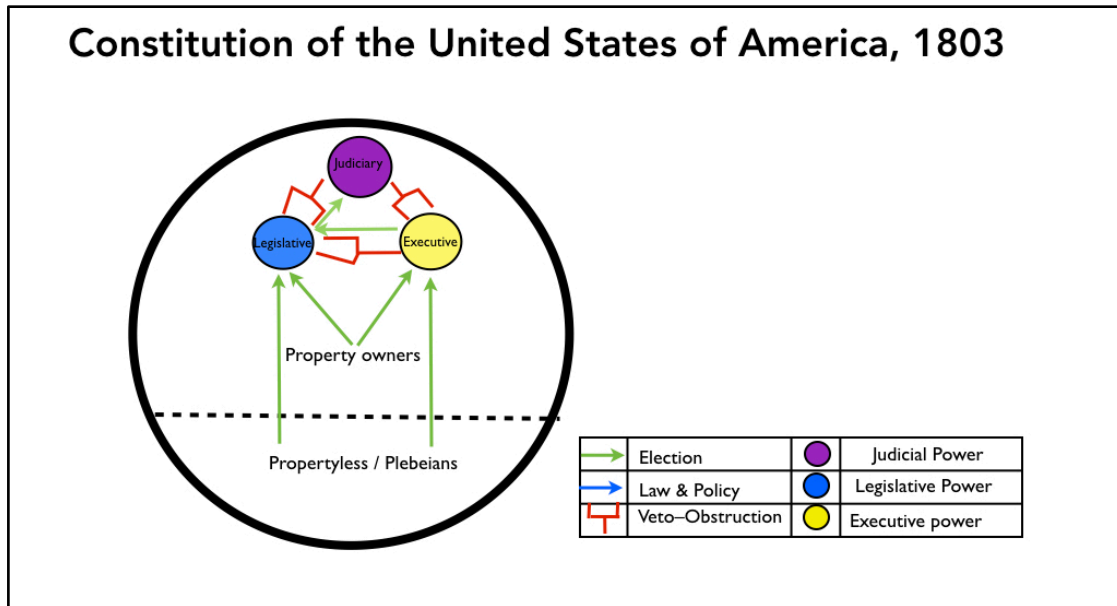


Figure 2.10 Constitution of the United States, 1803

The same as Montesquieu's, Madison's constitutional model was designed against the tyranny of the majority as the greatest danger in the republic because of the majority's leveling spirit. To prevent corruption and domination within government, Madison's mechanistic model of representative government relied on the division of functions and conceived "mutual relations" of the several departments of government as the "means of keeping each other in their proper places."¹⁹⁶ The most effective way to counteract power is by giving officials of different departments the necessary "constitutional means and personal motives to resist encroachment of the others."¹⁹⁷

In the American implementation of Montesquieu's model, the Senate was conceived as the embodiment of the aristocracy, as the guardian of property against the common people. The general object of the constitutional framework was

to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for against this tendency of our Governments: and that a good Senate seemed most likely to answer the purpose.¹⁹⁸

¹⁹⁶ *The Records*: 187.

¹⁹⁷ Madison, *Federalist 10*

¹⁹⁸ Edmund Randolph, planter, lender and real state speculator from Virginia, *The Records of the Federal Convention of 1787*: 69.

The Senate was seen not only as being able to “refine and enlarge the public views,” blocking “intemperate and pernicious resolutions” resulting from the people being “seduced by factious leaders,”¹⁹⁹ but also as *representing* propertied interest. The Senate was conceived as having as “one of its primary objects the guardianship of property,”²⁰⁰ and thus as checking the “excesses against personal liberty, private property & personal safety.” Not only would the Senate have the institutional role of being the guardian of individual liberties, but also the members of the Senate must be wealthy so to

...have a personal interest in checking the other branch... It must have great personal property, it must have the aristocratic spirit; it must love to lord it thro' pride, pride is indeed the great principle that actuates both the poor & the rich. It is this principle which in the former resists, in the latter abuses authority.²⁰¹

In addition to the aristocratic ethos that the framers wished the Senate to embody, the spirit of commerce was also thought of as foundational to the new representative republic. The overly positive view of commerce as the cure of all evils that Montesquieu embraces was also predominant in the Federal Convention, except for the caveat posed by a group of planters, who saw commerce as a source of inequality from which a commercial nobility, “a new order of men will arise.”²⁰² Nevertheless, in the constituent discussions the commercial spirit of free trade triumphed over that of virtue as the foundation of the new constitutional order, and was let free to “reign alone and not be crossed by another.”²⁰³ Moreover, going beyond Montesquieu’s idea that the spirit of commerce would be a moderating force for democratic virtue, the framers thought of democracy and free enterprise almost as opposing principles; while the evils of government were rooted in the “turbulence and follies of democracy,”²⁰⁴ free trade was

¹⁹⁹ *Federalist* 62.

²⁰⁰ Madison. *The Records of the Federal Convention of 1787*: 433.

²⁰¹ Governor Morris, *The Records of the Federal Convention of 1787*: 388-389.

²⁰² General Pinkney of South Carolina, *The Records of the Federal Convention of 1787*: 309.

²⁰³ Montesquieu. *The Spirit of the Laws*. Part I. Book 5. Chapter 6. Page 48.

²⁰⁴ Edmund Randolph. *The Records of the Federal Convention of 1787*: 69.

the source of moderation and liberty, the cure for the excesses of democracy. “Take away commerce, and the democracy will triumph.”²⁰⁵

What Madison and the rest of the founders were establishing was thus not a democracy but a republic, which Madison defines as a “government in which the scheme of representation takes place.”²⁰⁶ This new regime type, defined by its representative character, by “the delegation of the government... to a small number of citizens elected by the rest,” needed as a “sufficient” condition to be considered as a free form of government that the “persons administering it be appointed, either directly or indirectly, by the people,” and that they hold their office according to the law.²⁰⁷ Consequently, the central institution of this new form of republic is for Madison the procedure of election, which is both the method of selecting a ruling elite and the source of normativity for the regime, the “essence of a free and responsible government.”²⁰⁸ If one follows Montesquieu’s criteria for determining regime type, the nature of the representative republic is defined by who has political power. In the American republic’s case, the holders of power are not the few or the many, or a mixture of both, but the representatives: a government by the few authorized and checked by all citizens.

Because procedurally the government is legitimate if elected by majority under set rules, the burden of producing legitimacy and good leaders is placed not on individual elites but on the “right to elect,” a procedure that was for Montesquieu inherently aristocratic. The whole complex federal structure of power put in place by the framers was erected on the right to elect, procedure that was not thought of as faithfully representing the will of citizens, but as a better way to approximate the common good: “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose.” The clear superiority of representation over the democratic method of popular assembly however did not blind Madison to the tyranny likely to occur in such a system in which “men of factious tempers, of local prejudices, or of sinister designs, may,

²⁰⁵ Governor Morris, *The Records of the Federal Convention of 1787*: 389

²⁰⁶ Madison, *Federalist 10*. For a realist analysis of the principles of representative government in the history of political thought see

²⁰⁷ Madison, *Federalist 39*

²⁰⁸ Madison, *Report on the Virginia Resolutions* (1799)

by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.”²⁰⁹

I wish, among other reasons why something should be done, that those who have been friendly to the adoption of this constitution, may have the opportunity of proving to those who were opposed to it, that they were as sincerely devoted to liberty and a republican government, as those who charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.²¹⁰

Madison responded to the challenge that political corruption posed for representative government with an argument based on the beneficial effect of the size of the republic, and another based on the effectiveness of the surveillance exerted by the press and public opinion over public officials. The first argument, developed at length in *Federalist 10*, is mostly probabilistic, premised on the idea that more/larger/bigger is better. Madison argues that while the probability of having good candidates standing for election and of selecting them increases proportionally with the pool of candidates and the electorate, a large republic is “most favorable to the election of proper guardians of the public weal.” But having a larger electorate would not only be beneficial in terms of selecting good representatives, but would also decrease the probability of domination by the majority:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.²¹¹

Given the factual pluralism in a large republic, majorities are difficult to attain and mobilize due to the collective action problems that make it harder to transform the

²⁰⁹ Madison, *Federalist 10*

²¹⁰ Madison, *Defense of the Bill of Rights in Congress* (June 8, 1789).

²¹¹ Madison, *Federalist 10*

will of citizens into actual political power.²¹² Therefore, for Madison having a representative government in a large republic would constitute in itself a guard against the tyranny of the majority by effectively hindering the capacity of organization of the masses at a grand scale. The federal structure would further enhance this anti-majoritarian—but mostly anti-plebeian—feature of the large representative republic, by making it less likely for “a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project...to pervade the whole body of the Union.”²¹³

The structural protection against the domination of the majority, however, does not apply as well to the domination coming from the powerful few, who do not experience the collective action problems of the masses. While separation of functions and jurisdictions is meant to counteract ambition with ambition, mechanical checks only deal with the existence of factions within representative government, not with the quality of the representatives, which hinges on the electoral procedure. For Madison to elect good representatives it is necessary to scrutinize them, and thus the right to free speech and to a free press is the most fundamental political right in the republic giving “value and efficacy” to the right of electing by enabling the censorial power of public opinion and allowing for government accountability.²¹⁴

Even if the American Constitution contained a detailed organization of the powers of representative government, it had little recognition of individual rights²¹⁵ and did not recognize the rights to vote or to freedom of speech. Madison was initially opposed to a formal recognition of rights because a list of rights could never be exhaustive or properly enforced, and thus would only account for “parchment barriers” against government oppression.²¹⁶ Nevertheless, the first ten amendments to the Constitution, which are now called the Bill of Rights, contain a list of individual rights as conceived, in a Lockean fashion, *against* the power of the federal government. It is this fundamental antagonism between government power and individual freedoms what establishes perhaps the

²¹² Olson, *The Logic of Collective Action*.

²¹³ *Federalist 10*

²¹⁴ Madison. *Virginia Report*.

²¹⁵ Habeas corpus (Art. I sec. 9); Bills of attainder & ex post facto laws (Art. I sec. 10); Treason procedure (Art. III sec. 3)

²¹⁶ Madison, *Federalist 48*.

original, most decisive rule of interpretation in American constitutional jurisprudence: a categorical approach to rights in which freedoms are understood as absolute vis-à-vis the government. At least in theory, the government must not infringe on individual rights, and thus liberty acquires a “negative” meaning: lack of state interference.

Madison puts forward an interpretation of the right to free speech as both functional —because aimed at enabling the proper exercise of the right to elect— and absolute, not subject to abridgment. Freedom of the press and speech are not ends in themselves, but means to achieving accountability and virtuousness in politics, expected to expose the truth about public officials and affairs, so citizens can adequately judge characters and measures, and elect good leaders. Absolute free speech, understood as the right to scrutinize public officials, was conceived by Madison both as a necessary premise for exercising the right to elect and as the ultimate guard of liberty, allowing for the formal structure of power based on separation of functions and veto powers to reproduce liberty through the normal functioning of political institutions.

According to Madison freedom of speech should be conceived as absolute because it is a natural right and therefore the federal government lacks the authority to control speech “on the original ground of not being delegated by the Constitution, and consequently withheld from government.”²¹⁷ In addition to the philosophical and jurisdictional justification for conceiving free speech as an absolute right, Madison claims that limiting speech is impossible without undermining the surveillance role of the press and the whole republican structure. Good and abusive speech are for Madison inseparable. Despite the press being “checkered... with abuse,” it is impossible to cut the “noxious branches” without injuring the “proper fruits.”²¹⁸ If free speech is curtailed (either by prior restraint or posterior criminal actions), valuable information about political leaders and the policies they sponsor would be lost, and citizens would choose corrupt leaders, who would govern for their own interest or that of a faction. The burden of virtue in the Madisonian republic is thus placed on citizens’ informed election of representatives, which depends on the surveillance role of the press and the unveiling of truth about candidates, laws, and policies.

²¹⁷ James Madison. *Virginia Report*.

²¹⁸ *Ibid.* 241.7

IV. Neo-Republican Mixed Constitution: Popular Power as Discursive Control

Today perhaps the greatest exponent of the elitist proceduralist strand of republican constitutional thought is Philip Pettit, who interprets liberal democracies as mixed constitutions and seeks to develop the institutional checking power of the people to its highest degree. Searching for a “social philosophy that is at once anti-collectivist and anti-atomist,” Pettit found in modern republican thought a conception of liberty that is “intermediate between the ideals of non-interference and self-mastery.”²¹⁹ According to his reading of republican thought, republican freedom as non-domination would, on the one hand, justify *non-arbitrary* interference, and on the other, require the *absence* of mastery, providing an alternative between the liberal and democratic conceptions of liberty. To be free in a republic would be the status of being only subject to interference that “is not arbitrary and does not represent a form of domination: when it is controlled by the interests and opinions of those affected, being required to serve those interests in a way that conforms with those opinions.”²²⁰

Even if Pettit’s proposed conception of liberty is certainly thicker than a purely Hobbesian one, and he would never endorse the anti-democratic ideas that were pervasive at the moment of the American founding, his proposal is unable to escape the elitist framework of formal equality and the preservation of socio-economic hierarchies. He not only takes the constitutional order as a given, but also interprets it as a form of mixed constitution in which the checking power of the people is exercised individually through the courts and collectively through neutral, technocratic elite bodies. The popular element not only does not have an institution to assemble and exercise direct collective power, but also has the duty to individually resist oppression through the resources provided by the system. Formally egalitarian, when seen through a plebeian lens the *status quo* bias embedded in the connection between non-arbitrariness and individual interests comes to the fore.

Since in many political decisions there are always winners and losers, under Pettit’s normative framework any interference by the state to change the balance of socio-economic power, depriving a minority to empower a majority, would be a form of

²¹⁹ Pettit, *Republicanism*, 27

²²⁰ Pettit, *Republicanism*, 35

domination because it would not track the interests of the few being forced to give up part of their property. According to Pettit, the goal of intensifying non-domination supports state provision of social services to fulfill what Amartya Sen's describes as the basic capabilities for functioning in society, even if it is hostile to material egalitarianism.

In order for the state to provide one person with extra resources, and thereby to extend their undominated choices, it must deprive another person of those resources, and must thereby reduce the extent of that person's undominated choices. There is no reason to think that the transfer will make for a gain. On the contrary, the costs of the state intervention will almost certainly mean that less is given to the second person than is taken from the first and that the transfer makes for a decrease in the extent of undominated choices overall.²²¹

A strict application of Pettit's definition that demands the state to be "controlled by the interests and opinions of those affected" would not allow for redistributive policies beyond universal social services, such as the motion to allow the state to expropriate property without compensation, recently passed by the South African parliament.²²² The result is the preservation of the status quo and its current socio-economic hierarchies based on patterns of accumulation and dispossession that cannot be modified without domination. This seems closer to a liberal conception of freedom in which individual rights are conceived as absolute against the state, rather than to a republican view of liberty in which rights are inherently political, and thus subject to legitimate abridgement and even outright violation, like in the case of expropriation of property, if it is necessary for preserving a free republic.

Following Montesquieu's positivist interpretation of the rule of law as the mark of liberty, Pettit argues that freedom as the lack of arbitrary interference is only possible in a regime with separation of powers in which the people elect representatives. However, for Pettit these are not sufficient conditions for freedom, and therefore proposes to enhance the "contestatory" nature of liberal democracies. Even if the American republic was not conceived as a mixed constitution but as a representative government with separation of

²²¹ Pettit, *Republicanism*, 161

²²² A motion for land reform by South Africa's radical opposition party, the Economic Freedom Fighters (EFF), was passed by parliament and will require a constitutional amendment.

powers and checks and balances, Pettit argues our current system of government is a form of mixed constitution

insofar as it lets final decisions on law and policy be determined, whether simultaneously or sequentially, on the basis of interaction between different centres, civic and official, executive and legislative, constitutional and judicial.²²³

Through Pettit's framework, the mixed constitution is not an institutional structure giving political power to the few and the many, but a "contestatory constitution" based on an "acceptability game" that allows for the rise of "shared policy-making norms," and that guarantees multiple "sites of opposition" such as electoral debates, public justification of policy, and political exchanges in the media.²²⁴ By abstracting the ancient checking role exerted by the people through class-specific institutions, and conceiving it as a system of "popular control" that influences and gives direction to government directly and indirectly, Pettit attempts to reinterpret the representative republic as a mixed constitution in which the people could exert discursive control over the state.

Even if Pettit correctly diagnoses the shortcomings of liberal democracies, highlighting the current lack of effective control of the people over law and policy, his attempt to empower individuals within the current structure does not allow him to exit the elitist constitutional tradition. He rightly argues that the electoral system is deficient in guaranteeing "the people an unconditioned sort of influence" on certain aspects of government because of public officials' unwillingness to comply with popular authority.²²⁵ The best way to force government to yield to popular influence would be, according to Pettit, to embrace a form of mixed constitution that would

ensure the separating of the many powers of government, the sharing of each of those powers by different authorities, and the recognition of popular acquiescence as the ultimate guarantor of the constitution.²²⁶

²²³ Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2014), 283.

²²⁴ Pettit, *On the People's Terms*, 261.

²²⁵ Pettit, *On the People's Terms*, 304.

²²⁶ Pettit, *On the People's Terms*, 305.

While separation of powers and sharing of prerogatives are already institutional features of liberal representative governments, the third normative goal of having popular consent as ultimate guardian of the constitution has endemic problems in terms of the recognition of true consent and the enforcement of indirect popular influence on government.

To address the institutional weakness of popular influence, Pettit proposes a “dual-aspect model” of democracy aimed at enhancing popular control over government by providing citizens with an “individualized, unconditioned, and efficacious influence that pushes [government] in a direction that they find acceptable.”²²⁷ The duality of Pettit’s model comes from the two temporal registers in which popular influence operates: while in the short-term a plurality of citizens exert influence on law and policy, in the long-term the people, conceived as a “group entity, taking the form of a singular agency,” constitute the state itself by ensuring the compliance of law and policy with the norms that frame the exercise of political power.²²⁸ Based on the ideal conceptions of “public interest” —understood as “those goods that anyone who accepts the necessity of living in equal terms with others is likely to have collectively guaranteed or promoted”— and the “invisible-hand mode” —through which electors, seeking their particular interests, would promote a “utilitarian version of the public interest”— Pettit argues these three requirements for achieving a more perfect mixed constitution —individualized, unconditioned, and efficacious popular influence— are already present in our political regimes. While the electoral system would provide for “individualized contestation,” the unconditioned character of this contestation would be based on the “resistive character of the citizenry,” and its efficacy would depend on the “insulation of the channels of popular influence against the distorting effects of electoral pressures and private lobbies.”²²⁹

To force the state to be influenced by the people and track individual interests, Pettit argues that the constitution must establish democratic institutions with both a “positive search-and-identify dimension” equivalent to an “authorial” form of control, and a “negative scrutinize-and-disallow dimension,” which he understands as an

²²⁷ Pettit, *On the People's Terms*, 239.

²²⁸ Pettit, *On the People's Terms*, 309.

²²⁹ Pettit, *On the People's Terms*, 239.

“editorial” form of control.²³⁰ Accordingly, through democratic institutional channels ordinary people would be able to formulate as well as criticize law and policy, exercising the type of popular control proper to a mixed constitutional regime. Despite Pettit’s attempt to empower individual citizens by giving them negative and positive authority to author and edit law and policy, the powers he gives to ordinary citizens are far removed from the common account of authorial and editorial powers, and the power mixed constitutions have afforded to the popular element.

For Pettit the people are “indirect, electoral authors” because they “choose the personnel who will author the laws and decisions.”²³¹ This is a highly controversial claim that he does not philosophically substantiate. Even if individual citizens would contribute with their selection of representatives to the collective legislative and policy-making process, they are certainly not authors. The same as the selection of my favorite group of artists to make a sculpture under certain guidelines does not make me an indirect author of that piece of art, the selection of representatives to make law and policy does not make citizens authors of what is produced by representative government. Citizens indirectly *authorize* the law through their election of representatives,²³² but they do not *make* the law. And even if one were to concede that electing lawmakers is akin to indirectly making the law, this tenuous connection between the right to elect and the right to author becomes even more dubious given the fact of what Pettit calls the discursive dilemma: “that even if all representatives endorse a consistent set of policy judgments, the effect of aggregating their votes may be to support an inconsistent package.”²³³

In addition to conceiving citizens as indirect electoral authors, Pettit argues citizens have an editorial power capable of “rigorously scrutinizing and eliminating those

²³⁰ Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge, UK: Polity, 2001), 159.

²³¹ Pettit, *A Theory of Freedom*, 161

²³² Even if Hobbes makes the connection between author, actor, and authority, this does not apply to all representatives, an “Of Persons Artificiall, some have their words and actions Owned by those whom they represent. And then the Person is the Actor; and he that owneth his words and actions, is the AUTHOR: In which case the Actor acteth by Authority. For that which in speaking of goods and possessions, is called an Owner, and in latine Dominus, in Greeke Kurios; speaking of Actions, is called Author. And as the Right of possession, is called Dominion; so the Right of doing any Action, is called AUTHORITY. So that by Authority, is alwayes understood a Right of doing any act: and Done By Authority, done by Commission, or Licence from him whose right it is.” *Leviathan*, Chapter 16. Despite his authorization model, Hobbes would not argue that individuals make the law through their representatives.

²³³ Pettit, *On the People's Terms*, 246

candidate policies and those modes of policy-implementation that do not advance common avowable interests.”²³⁴ However, the popular editorial power he proposes is not strictly editorial —having the authority to modify law and policy, and even to veto them— but rather a “power of challenge” or “contestation” that is exercised through procedural resources, such as separation of powers and depoliticized decision-making bodies,²³⁵ consultative opportunities for non-binding citizen input, and the judicial system. More than *editors* able to direct and edit the content of law and policy, in Pettit’s framework citizens are better understood as *subscribers* of the government who can challenge the direction and content of law and policy through petitions, public statements, and the courts, but certainly have little pull to make substantial changes to the “editorial line” of the government.

If we compare the powers Montesquieu gave to common citizens within an elitist mixed constitution, to the power Pettit gives to the people in his ideal dual-aspect model of democracy, it becomes clear that common citizens in Pettit’s framework would have even less power to resist the oppression coming from elites than in Montesquieu’s commercial republic. In addition to giving citizens the right to elect representatives, Montesquieu gave to the representatives of the people the powers of introducing legislation and vetoing attempts at domination coming from the elites. In Pettit’s model, by contrast, citizens have the power only to elect representatives and contest laws and policies mainly through the courts, even if in his latest work he also endorses referenda as a desirable way of exercising popular control —not too different from what the American Constitution allows to citizens today. According to Pettit, the existence in liberal democracies of “a multi-dimensional, multi-centred system of popular interaction and decision-making” would mean that “the people rule themselves” to the extent that their influence is present throughout the system of checks and balances,²³⁶ which ultimately gives legitimacy to government and normativity to the law.

Pettit’s interpretation of the mixed constitution as a “contestatory” framework in which individuals and groups have procedural, consultative, and appellate resources to challenge government decisions is, under a plebeian lens, decisively elitist, since it does

²³⁴ Pettit, *A Theory of Freedom*, 160

²³⁵ These institutions are equivalent to what Pierre Rosanvallon calls “counterdemocratic” institutions.

²³⁶ Pettit, *On the People's Terms*, 286.

not conceive of strictly popular institutions and gives to the people only weak channels to effectively control government. This neo-republican model is not only anti-majoritarian but also proceduralist, and thus blind to systemic corruption. Given Pettit's conception of liberty as the lack of arbitrary interference that equates liberty to the rule of law under contestatory conditions, structural forms of domination cannot be properly addressed without putting into question rules, procedures, and institutions. If liberty is achieved under a rule of law that presupposes contestatory institutions and procedures in the making of the law, then there would be no need for extra-legal action such as political protest and social movements, to exert radical social change. Civic virtue and contestatory institutions would be enough to keep systemic corruption in check, by constant, multi-dimensional, multi-centered resistance to forms of oppression by individual citizens. The obvious problem is that while the majority of liberal democracies have all or a great number of Pettit's contestatory institutions and procedures, civic virtue—and the minimum conditions for civic virtue to exist—are lacking, which undermines effective and efficacious popular resistance against oligarchic domination and liberty itself. This endemic problem allows for structural forms of domination such as sexism²³⁷ and racism²³⁸ not only to exist alongside the rule of law, but also to be reproduced through institutions, laws, and procedures that effectively keep gender and racial oppression in place. How are these structural forms of domination going to be dismantled piecemeal if it is mainly up to the victims of domination to act, not only by resisting, but also by actively challenging domination?

While the burden of virtue in the republic was for Cicero in the elites, for Montesquieu in the system of checks and balances, and for Madison in the procedure of election, Pettit places the burden of virtue in the “resistive” character of the citizens who will scrutinize and resist potentially dominating decisions by the government. As I argued in the previous chapter, to place the virtue of the system in the “vigilance” of individual citizens, who perhaps already live in conditions of oppression, puts an unduly burden on

²³⁷ Dorothea Gädeke, “*Against Interactional Domination*,” paper delivered at the 3rd *Biennial of Ideas in Politics*, “*Republicanism in the History of Political Philosophy and Today*.”

²³⁸ Jean Fabien Spitz, “*Is Structural Domination a Coherent Concept?*” paper delivered at the 3rd *Biennial of Ideas in Politics*, “*Republicanism in the History of Political Philosophy and Today*.”

individuals without providing the infrastructure to really guarantee active civic resistance. This would be the equivalent to leaving representative institutions to their own devices.

Republican Constitutional Thought		
	Elitist – Proceduralist	Plebeian – Materialist
Source of liberty	Separation & Balance	Conflict
Institutions	Only oligarchic	Both oligarchic and plebeian
Final decision-making power	Few	Many
Control over government	Individual through the courts + Collective through public debate in the press, and technocratic bodies	Individual through the courts + Collective through plebeian institutions (power to initiate & veto law, punish & constitute)

Figure 2.11 Republican Elitist Thought

3.

On Materialist Constitutional Thought

There is much controversy within critical theory about the meaning of materialism and its centrality within the Marxist tradition.¹ I do not wish to contribute here to this philosophical debate but rather to use materialism as a method to study the constitutional structure and its legality, as a lens to analyze the organization of political and economic power, rights, and the law as constructed in a specific conjuncture,² conditioned by existing power relations and their ideological justificatory structures. A materialist interpretation of the constitution seems to necessarily originate in the factual organization and exercise of power that is allowed and enabled by foundational institutions, rules, and procedures —or the lack thereof. Materialist constitutionalism would be premised on the idea that the organization of political power cannot be analyzed without taking into account the socio-economic power structure, and how the state enables some kinds of actions while disabling others, targeting specific groups not only through the criminalization of certain behaviors (e.g. loitering) and the legalization of

¹ For an overview of this debate see Timpanaro 1975. Timpanaro makes an important contribution to the conception of materialism by re-incorporating biological and ecological conditions into the materialist analysis, but I fundamentally disagree with his natural determinism.

² I follow Louis Althusser's conception of the conjuncture as a historical singularity in which social power struggles are recognized, and the overdetermination of the contradictions of the system as well as the imprints this imbalance leaves behind on the structure are revealed. Althusser 2000.

others (e.g. campaign finance), but also through the selective enforcement of rules and penalties that appear as neutral. The materialist constitutional lens, because it allows for the engagement in a dialectical analysis of the relation between power and law³—the material conditions of society and the legal, juridical, and formal provisions that (are supposed to) determine them— would enable a constitutional ideology that would stand opposed not only to legal positivism and formalism, which deny the political nature of constitutions and reduce their analysis to jurisprudence, excluding the application of law and its consequences in material terms, but also to proceduralism, which enables the masking of inequality and domination flourishing under democratic rules of political engagement.⁴

The material constitutionalism I present here is not the school of constitutional interpretation that developed in Germany after the 1958 Lüth case, which expanded the sphere of constitutional rights into the relation among individuals.⁵ Even if it endorsed the application of constitutional norms to private law—which established the foundation for what has been called the “horizontal effect” of constitutional law, a strategy that has proven successful in accounting for right violations coming from private agents as well as the state⁶— the ‘material’ aspect of German constitutionalism refers not so much to the relation between power and law, but to an “expression of ‘the substantive’ in law,”⁷ as a system of values centered on the principle of human dignity.⁸ The material constitutionalism I develop here, on the contrary, does not have a pre-existing ethical “substance” but rather is premised on the recognition that norms develop in relation to society and are the result of conflict. Law would carry normativity not because it conforms to a pre-determined substance or supreme principle, but because of the role it

³ Close to sociological constitutionalism. See G. Teubner, *Constitutional Fragments* (Oxford University Press, 2012); C. Thornhill, *A Sociology of Constitutions* (Cambridge University Press, 2011). For a critique of the sociological constitutionalism see Marco Goldoni and Michael A. Wilkinson “The Material Constitution”

⁴ I deal with proceduralism and elitism in Chapter 2.

⁵ Lüth case, [BverfGE 7, 198 \(1958\) B.II.1](#).

⁶ Stephen Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights.” *Michigan Law Review* 102, no. 3 (2003): 387-459; Mark Tushnet, “The issue of state action/horizontal effect in comparative constitutional law *International Journal of Constitutional Law*” 1.1 (January 2003), pp. 79–98

⁷ Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press, 2013), p. 74

⁸ 1949 German Constitution, Art. 1.1 “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

serves in the material conflict between domination and emancipation. In order to assess if a given institution, procedure, or law is ‘good’ and thus part of the normative framework of a free society, material constitutionalism would take into account not only the conformity of the institution, procedure, or law to the basic democratic principle of equal liberty,⁹ but also its effects on enabling emancipation and discouraging oppression on the ground.

Material constitutionalism would also differ from Constantino Mortati’s realist interpretation of the Italian constitutional order in its transition to fascism. Mortati, attempting to infuse positivism with a material point of reference to give stability to the state, finds in the material constitution a “supreme source of order”¹⁰ and in the political party a constitutive element of the modern state, the “subject from which the fundamental constitution emanates.”¹¹ For Mortati, the party is the “active element of the original institution” of the state, allowing for the state to assume its “political form.”¹² In this way, the material constitution, the socio-political regime of political parties, is the normative anchor of the formal constitution, enabling the integration of society into the constitutional order. Material social relations, articulated through the party, would constitute a normative basis for the stability of the state, which renders this constitutional theory as conservative of existing socio-political hierarchies.

In contrast to liberal constitutionalism—which sees the constitution as a set of “metaconstraints,”¹³ laws as limits on governmental power, and the rule of law as neutral, even if its final interpretation is the monopoly of the judiciary¹⁴—under the material lens the constitution appears as a political document that is dynamic, constantly undergoing modifications, some of them radical enough to have been considered effectively equal to constitutional amendments, able to change the trajectory of society independently from

⁹ Identified as the principle of representative government for the first time by Condorcet. For an analysis of the principle see Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2010).

¹⁰ Constantino Mortati, *Constitución en sentido material* (Madrid: Centro de Estudios Políticos y Constitucionales, 2000), p. 16 & 23.

¹¹ Mortati, *Constitución en sentido material*, p. 84.

¹² Mortati, *Constitución en sentido material*, p. 83.

¹³ For an interpretation of the constitution as having both regulatory and constitutive rules see Stephen Holmes, “Precommitment and the Paradox of Democracy” in *Constitutionalism and Democracy* edited by Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988).

¹⁴ Even if Montesquieu insisted that when judges effectively become lawmakers “the life and liberty of the subject [are] exposed to arbitrary control.” *The Spirit of the Laws*, 11.6

procedural amendments to the original text. According to Bruce Ackerman, the United States constitution is “an evolving language of politics”¹⁵ and a “historical practice”¹⁶ that is punctured by “constitutional politics”— extraordinary political moments such as the “successful struggle by the New Deal Democrats to place activist national government on solid constitutional footing.”¹⁷ Revolutionary reforms originating in popular mobilizations would be “constitutionalized” by Supreme Court decisions, changing the substance of the constitution and the trajectory of society without the need of a formal amendment. Ackerman’s controversial idea that there are distinct processes of higher lawmaking that do not align with the procedures established in Article V, and that judges tend to adjudicate based on these unwritten, informal changes resulting from constituent politics, puts under the spotlight peak moments of the exercise of constituent power, but does not account for the progressive dismantling of the legal structure put into place by that constituent moment. I would argue that Ackerman’s recognition of informal constituent changes based on limit cases involving strong popular mobilization is insufficient to unveil the cumulative effects of the steady ramification of smaller constituent changes coming out from every other judicial decision affirming and deepening socio-political conditions. The only way to account for these more subtle changes is if we recognize the material constitution as dynamic. Through this lens the constitutional framework could be radically transformed not only through judicial interpretation, which opens and closes paths for adjudication and material possibilities for oppression and emancipation, but also through the power of the state to selectively realize these legal paths. Therefore to track the progression of the material constitution, one needs to go not only beyond legal norms, procedures, and adjudication, but also to incorporate their enforcement and the effects of the constitutional framework on society. Thus, a relative consequentialism, in which the legitimacy of the norm would hinge on its material effects in preventing and containing oppression, would be an integral part of a materialist analysis of the constitution.

¹⁵ Bruce Ackerman, *We the People. Foundations* (Cambridge, Mass: Belknap Press of Harvard University Press, 1993), p. 22

¹⁶ Ackerman, *We the People*, p. 34

¹⁷ Ackerman, *We the People*, p. 47. He also argued that the Reagan ‘revolution’ “was a failed constitutional moment” (p. 56). Today it is evident that Reagan’s neoliberal state (lean and mean) prevailed in the long run.

Seen through the materialist lens, I would argue the liberal rule of law should no longer be defended as a marker of equal liberty.¹⁸ Because liberalism conceives of individual equal rights as immunities against the state (e.g. “Congress shall make no law... abridging the freedom of speech”) and interprets them as a form of negative liberty as non-interference from the state, the constitutionalization of equal rights is not only insufficient to guarantee their equal protection against the state, but also does not offer any security against the violation of rights in social relations in cases where the law is silent, vague, or disregarded. Instead of a rational framework aimed at furthering the common good or realizing a specific principle, legality reveals itself as a means that could be used to liberate individuals from oppression as well as to enforce relations of domination. Therefore having a rule of law does not necessarily translate into equal liberty. This is perhaps best exemplified with the role played by the Supreme Court in defending the rule of law in the American South. By nullifying the 1876 Civil Rights Act that aimed at enforcing the equal protection clause of the Fourteenth Amendment, which would have given African Americans a legal recourse to resist social oppression, the Court enabled Jim Crow laws, forcing former slaves to suffer almost 100 extra years of domination through legal segregation and discrimination. Congress, only after years of popular mobilizations, passed the Civil Rights Act of 1964, the enforcement of which has been mediocre at best. Despite their formal equal status, Black Americans are discriminated against, brutally oppressed by the police and the criminal justice system, and systematically stripped from voting rights. They are two times more likely to be stopped by police, six times more likely to serve jail time and be sentenced to mandatory minimums for non-violent offenses, and four times more likely to lose their voting rights.¹⁹ Therefore, even if they formally have equal rights on a par with white Americans, seen from a materialist perspective, their oppression, allowed and enabled by legal regulation or the lack of it, denies this equality. The same could be said regarding

¹⁸ For an analysis of how neoliberalism coopted the concept of rule of law see Miguel Vatter, “Neoliberalism and Republicanism: Economic Rule of Law and Law as Concrete Order (*Nomos*)” in *The SAGE Handbook of Neoliberalism*, edited by Damien Cahill, Melinda Cooper, Martijn Konings and David Primrose (Forthcoming 2018).

¹⁹ 1 out of every 13 African Americans has lost their right to vote due to felony disenfranchisement versus 1 in every 56 non-black voters. Bill Quigley, [“18 Examples Of Racism In The Criminal Legal System”](#) *Huffington Post*, 10/03/2016

the status of women, gender and ethnic minorities, and the working class, whose exclusion and exploitation has been systematically enabled by the law or its absence.²⁰

The material constitution, and the elements needed to properly study it, differs from the conception of the constitution only as text and jurisprudence. Democratic constitutionalism tends to be formal and procedural in its analysis, and it is representative and liberal in its basic structure. The study of the formal constitution requires analyzing the original constituent moment, the structure of power and body of norms derived from it, the interpretation of these norms, and the legal change to rules and procedures. I argue the material constitution demands a far more complex examination because it conceives of the constitution as an embedded set of norms that can be adequately grasped only if we integrate the political, economic, and social spheres into the analysis of forms of higher law. The proper study of the material constitution demands, in addition to the formal analysis of norms, an account of 1) the superstructure, basic political and social institutions,²¹ and the power they factually exercise; 2) the rules and procedures enabling this exercise of power; 3) the institutionalization and exercise of constituent power; and 4) the social effects of the constitutional framework in terms of socio-economic inequality and the racial, religious, and gender disparities in the application of the law.

I. Plebeian Materialist Constitutionalism

Even if a material interpretation of constitutions can be traced back to Plato, for whom socio-economic inequalities were integral to the structure of political orders, the material assessment of the constitutional power structure did not have an emancipatory thrust or aimed at uncovering concealed forms of domination, but rather helped enforce social hierarchies. Instead of correcting for material and social inequalities, *elitist material* constitutional thought recognized the impact of these inequalities on political power but nevertheless promoted the political dominance of the few and the exclusion and subordination of the many. Even if materialist in its acknowledgment that conflict

²⁰ For the arbitrariness of rules, see Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review*, 89 (1976), p. 1685-9.

²¹ I follow here a broad understanding of the superstructure such as the one discussed by G.A. Cohen. "The superstructure consists of legal, political, religious, and other non-economic *institutions*." *Karl Marx's Theory of History. A Defense* (Princeton: Princeton University Press 2000), p. 45. E.g. President, Congress, courts, political parties, churches, social organizations, media outlets, and social media networks.

between the few and the many is at the center of politics, elitist thought rejected democracy and its equal liberty. Moving away from materialism in its constitutional proposals, elitist thought often turned to idealism by proposing the suppression of conflict and the embrace of harmony, tranquility, security, and peace as foundational principles.²²

In addition to the suppression of conflict being impossible to sustain —like a pressure cooker building up steam without periodic release— after the idea of equal natural rights became hegemonic in the West, elitist materialist constitutional thought could no longer be defended as a legitimate normative basis for a political order. Its proposed constitutional structures, based on cast systems, hereditary citizenship rights, and class-based institutions are certainly not compatible with liberal democracy. Arguably Plato’s ideal republic of guardians in which every individual had a rigid designated role, or Aristotle’s preferred agrarian democracy in which the many were toiling away in the fields and did not actually exercise their voting rights, or Harrington’s democratic aristocracy in which the many were excluded from citizenship, or Guiccardini’s electoral aristocracy in which elections meant de facto *ottimati* rule,²³ would not be adequate models from which to draw lessons to reform modern democracies, since they do not promote equal liberty but the dominance of the few over the many. Building on such models is likely to further increase the systemic corruption of republics, accelerating their oligarchization instead of reverting it. Given that elitist materialist constitutional thought was effectively truncated after the modern revolutions, in a post-liberal world elitist thought has embraced proceduralism as a way to justify the rule of the few on democratic grounds. Freedom of expression and extensive suffrage took the place of active popular deliberative and decision-making power in the constitutional structure, becoming the two normative pillars of representative government.²⁴

The plebeian materialist constitutional thought I attempt to reconstruct here recognizes the influence socio-economic inequalities have on political power, embraces

²² Plato, *Republic*; Hobbes, *Leviathan*; Montesquieu, *Spirit of the Laws*.

²³ “The fruit of liberty and the object of establishing free republics was not to enable everyone to rule, since only those who are qualified and deserve it should do so.” Guicciardini, Ricordi, #109 in Guicciardini Dialogue on the Government of Florence, edited by Alison Brown (Cambridge: Cambridge University Press, 1994) p. 173; McCormick, *Machiavellian Democracy*, pp. 107-10.

²⁴ Urbinati, *Principles of Representative Government*.

conflict as the effective cause of free government, and seeks to channel its emancipatory, anti-oligarchic energy through the constitutional structure to produce and maintain liberty as non-domination. This strand of thought, commenced by Machiavelli,²⁵ sees conflict as productive of liberty, and seeks to justify the control of the many over political power through active participation on republican grounds: as necessary for keeping the republic free from oligarchic domination. In addition to supporting institutional means for common people to engage in political decision-making at the level of ordinary politics, plebeian thought also has proposed ways to institutionalize the constituent power—the power to intervene the basic structure—which has been theorized in radical democratic theory as a form of extraordinary politics opposed to the constituted order,²⁶ and in republican thought as the revolutionary spirit that allows for the republic to renew its foundational principles.²⁷ Given the pivotal role afforded to conflict in the constitutional structure, in materialist plebeian thought the constituent power is conceived not as a threat to the constituted structure, as it is widely discussed in democratic constitutionalism, but as a source of periodic renewal of the constituted structure to update its anti-oligarchic capabilities, as a necessary means to preserve the original thrust of the constitution of a free government built on popular actions against domination.

Plebeian constitutionalism would aim at establishing a normative framework designed 1) to achieve equal liberty as non-domination—which is currently foreclosed for the majority of wage workers, women, and racial, religious, and gender minorities who suffer oppression from bosses, men, and social majorities through the rules and penalties enforced by the state—and 2) at maintaining this equal liberty by actively dismantling emergent patterns of domination through the institutional exercise of plebeian constituent power. The political thinkers I identify as contributing to this plebeian constitutional thought could be grouped into two major camps depending on their conception of conflict and the rule of law: the revolutionary reformers who

²⁵ There is also the utopian materialist strand of thought of which Thomas More is the most prominent thinker.

²⁶ Andreas Kalyvas analyzes Weber, Schmitt, and Arendt as theorizing a politics of the extraordinary that prompts a change of paradigm. *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge: Cambridge University Press, 2009).

²⁷ Condorcet, “A Survey of the Principles,” in *Condorcet: Foundations of Social Choice and Political Theory*, edited by Iain McLean and Fiona Hewitt (Cheltenham: Elgar, 2007), p. 190; Hannah Arendt, *On Revolution* (New York: Penguin Books, 2006), p. 26–7.

proposed institutional solutions to the problem of oligarchy and the negation of agonistic politics, and Critical theorists who do not propose solutions but reveal law as an enabler of domination, which seems crucial for an adequate development of anti-oligarchic thought. While the two strands begin with Machiavelli's political philosophy, the institutionalist strand developed by Condorcet, Jefferson, Arendt, and more recently by John McCormick and Lawrence Hamilton, is strictly political and propositive of new sites of popular self-rule (democratic) and forms of control over oligarchic power (republican). The critical strand commenced by Karl Marx, followed by Evgeni Pashukanis, Antonio Negri, and more recently by Marco Goldoni and Michael Wilkinson, has remained anti-institutional and adverse to propose solutions to oligarchy, given the tight connection between the capitalist mode of production and the rule of law. Nevertheless, its contribution to the theorizing of the connection between law and domination, and the difficulty to achieve emancipation through the law within a superstructure controlled by the few, is crucial for the radical questioning of the legitimacy of law that is possible through plebeian constitutional thought. This distinction between the institutionalist and critical approaches to the republic is bridged by Rosa Luxemburg's proposal to establish a system of workers' councils alongside representative government as the condition of possibility for proletarian law.

II. Revolutionary Reformist Legal Theory

Machiavelli was the first constitutional thinker to have a materialist interpretation of the republic *and* an institutional proposition aimed at correcting socio-economic and political inequality to prevent the inevitable drift of republics into oligarchy.²⁸ He not only celebrated conflict as the foundation of “good laws” but also gave to the many the role of “guardians of liberty” and armed them to fulfill their function not only with legislative and military power but also with constituent power.²⁹ This meant that Machiavelli's ideal constitutional structure would have not only plebeian institutions

²⁸ For further analysis of the relation between inequality and constitutions see John McCormick, “‘Keep the Public Rich, But the Citizens Poor’: Economic and Political Inequality in Constitutions, Ancient and Modern,” *Cardozo Law Review* (2002) 34. 879

²⁹ For an account of the relation between plebeian liberty and the citizen army in Machiavelli see Jérémie Barthas, *L'argent n'est pas le nerf de la guerre. Essai sur une prétendue erreur de Machiavel*. (Rome: École française de Rome, 2011).

exercising decision-making power during normal politics, but also that the many would have the extraordinary power to intervene the basic structure, able to create new institutions and rules to periodically renew the republic and liberate it from oligarchic domination. As I discuss in detail in Chapter 4, in Machiavelli this form of plebeian constituent power was not only creative, but also avenging, aimed at punishing those who actively undermine liberty. According to Machiavelli, to have a republic free from corruption the people must renew its foundations by periodically modifying its basic structure *and* inflicting extraordinary punishment to remind the ruling few of the mighty force of plebeian foundational power. Without this material enforcement of liberty through plebeian authority, the republic would be doomed, corrupted through its own structures and procedures.

The contribution of Machiavelli to materialist constitutional thought was only systematically revisited in the 18th century. The renewed interest in Machiavelli, the mixed constitution, and plebeian constituent power sprung from a critical approach coming from the revolutionary experience in France to the United States constitution. Perhaps the strongest critic in the Girondin camp was the Marquis of Condorcet who argued the system of separation of powers was a complicated machine that could not replace the mixed constitution, only serving to conceal a parallel ruling system based on “intrigue, corruption and indifference.”³⁰ Condorcet was the last of the *philosophes* and the only one to provide a constitutional proposal to institutionalize the revolution in France. As a rationalist who embraced knowledge as a necessary condition for liberty, general education and the exercise of public judgment were at the center of his ideal constitutional framework. But as a republican thinker, Condorcet’s principal concern was not with human intellectual flourishing but with corruption, the inevitable degradation of the system of restraints and incentives aimed at limiting representative government, “the vices which will corrupt even the best organized constitution if it remains unaltered.”³¹ His constitutional plan for France offers a three-pronged cure for corruption: frequent renewal of the representative assembly, an institutional popular “protest power” exercised

³⁰ Condorcet, “A Survey of the Principles Underlying the Draft Constitution” [1793] In *Condorcet: Foundations of Social Choice and Political Theory*, translated by Iain McLean (Cheltenham: Elgar, 2007), p. 199

³¹ Condorcet “A Survey of the Principles” p. 221.

through primary assemblies to check on representative government, and the periodic popular revision of the constitution.

Public education and local government were also embraced by Thomas Jefferson, who considered these elements as crucial for the “continuance of republican government.”³² Jefferson, who was a diplomatic envoy in Paris during the revolution, argued in a series of letters to his American friends that liberty for the many is impossible without tumults, and that conflict was a necessary evil to prevent the otherwise inevitable “degeneration of the government.”³³ Jefferson’s constitutional proposals followed closely Machiavelli’s by endorsing the periodic reactivation of the constituent power and the renewal of the constitutional order “every 19 years,”³⁴ so that every generation could be bound by its own laws.³⁵ Even if also seeking to enable the creative instance of constituent power, in contrast to Machiavelli he endorses periodic constitutional renewals not because of their anti-oligarchic benefits but on democratic grounds, as necessary for self-determination.

Jefferson’s approach was also different concerning extraordinary foundational violence. Avengement does not relate to the institutionalized collective power of extraordinary public juries like in Machiavelli, but is rooted in rebellion, which according to him should always be allowed to spontaneously arise:

...a little rebellion now and then is a good thing, & necessary in the political world as storms in the physical... the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it’s natural manure.³⁶

To prevent “degeneration” rulers must be periodically warned that the revolutionary spirit is still present in the people; the government needs to allow for spontaneous revolts, and be prepared to “pardon and pacify” the rebels.

Jefferson also endorsed a republic of wards, a local form of government in which every man would be an “acting member of the common government, transacting in

³² Thomas Jefferson, *Letter to the Marquis de Lafayette*, Feb. 14, 1815.

³³ Jefferson, *Letter to James Madison*, Paris, January 30, 1787

³⁴ Jefferson, *Letter to James Madison*, September 6, 1787: 596.

³⁵ Thomas Jefferson. “Letter to Major John Cartwright” June 5, 1824. *Political Writings* (Cambridge Press): 384.

³⁶ Jefferson, *Letter to James Madison*, January 30, 1787: 108, and *Letter to William Stephens Smith* November 13, 1787: 110.

person, a great portion of its rights and duties.”³⁷ Similar not only to the *Committees of Correspondence* that self-organized against the actions of the British Empire before and during the war of independence, but also to the local meetings from which Shays’ debt rebellion sprung, citizens in Jefferson’s small republics would be organized and active to plan and demand certain courses of action from their representative government. But even if he agreed with Machiavelli and Condorcet that local popular governments as well as periodic conflict and creation are necessary to keep a republic free, his arguments for the renewal of the constitution and the establishment of a republic of wards are not focused on eliminating corruption, but on promoting self-government—the positive liberty of men and the need for individuals to chose collectively their own fundamental rules.

While Jefferson justifies popular uprisings using republican anti-corruption arguments—to keep representative government in check—his support for local government was based on democratic rather than republican principles. This democratic variation of republican thought was then advanced in mid-20th century by Hannah Arendt, who proposed a republican conception of liberty combined with a democratic form of self-government in the council system. Arendt’s thought, which combines the democratic and republican traditions, allows for the interpretation of the mixed republic from the point of view of revolution: as a juridical and spatial structure able to house and preserve the revolutionary spirit by enabling political action. Political liberty is achieved in action, and therefore the constitution of liberty needs to create spaces for political action to take place. It is in the councils, the space in which individuals disclose their opinions and engage in political judgment, where liberty is exercised and new beginnings may arise to found the republic anew.

Pushing back against Arendt’s conception of freedom as political action, Lawrence Hamilton, based on the South African experience, has argued to conceive political freedom as a “power through representation” that requires the involvement of citizens “to the extent that is possible and necessary.”³⁸ For him Arendt’s conception of freedom is unrealistic because “under modern conditions we cannot all be involved

³⁷ Jefferson, *Letter to Major John Cartwright*, Monticello, June 5, 1824

³⁸ Lawrence Hamilton, *Freedom is Power. Liberty Through Political Representation* (Cambridge: Cambridge University Press 2014), p. 193.

actively in *virtuosi* political acts.”³⁹ Hamilton proposes instead to understand political freedom as the power of citizens to exert control over the “general trajectory of the state’s macroeconomic path”⁴⁰ through representation. To achieve this, he proposes a combination of popular institutions with advisory power, a plebeian electoral procedure, and an “updated tribune of the plebs,” which builds on the class-based institution aimed at curbing oligarchic power that was proposed by John McCormick in *Machiavellian Democracy*.⁴¹ Loyal to Machiavelli’s anti-oligarchic political philosophy, McCormick proposes to institutionalize plebeian power by establishing a People’s Tribune with the power not only to curb the excesses of the ruling elite, but also to legislate, opening the possibility for establishing plebeian law.

III. Critical Legal Thought

In addition to this ‘positive,’ institutionalist strand of materialist constitutionalism, Machiavelli’s thought—predicated on the conflict between the few and the many—also influenced a critical theory of law that was predominantly ‘negative,’ constructed *against* the legal system under capitalism and grounded on the conflict between capital and labor.⁴² While revolutionary reformers have proposed institutional solutions to the problems of oligarchy and the negation of agonistic politics, critical theorists have focused mainly on revealing representative government and the liberal rule of law as enablers of domination. While the reformist strand advocates for the institutional participation of common people in politics, the critical materialist line, developed through Marx *against* the superstructure of capitalism has tended to follow a path closer to anarchism in its distrust of institutions and laws to bring about real liberty for the proletariat.

Marx’s radical critique of capitalism, the liberal republic and its juridical system proposed, instead of institutional reforms, an alternative system, communism, conceived as a “*real* movement which abolishes the present state of things,”⁴³ eliminating the

³⁹ Hamilton, *Freedom is Power*, p. 38.

⁴⁰ Hamilton, *Freedom is Power*, p. 194.

⁴¹ McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011).

⁴² Even if Marx does not cite Machiavelli, he carefully studied his thought in mid-1843, as has been found in his ‘Kreuznach Notebooks.’ Hudis 2013, p.47fn53.

⁴³ Marx 1978b, p. 162.

structure of production based on private property, overcoming class, and therefore also what for Machiavelli is the socio-ontological divide between the few and the many.⁴⁴ While the institutionalist reformist strand aims at institutionalizing plebeian power as supreme authority within the constitutional structure, the critical strand aims at transforming the foundations of society to abolish class and in this way enable the divided whole to become a species-being.

As a theorist of emancipation concerned with the material and juridical foundations of society, Marx should be situated within plebeian constitutional thought.⁴⁵ One of his greatest contributions to this strand is his critical analysis of individual rights and legal emancipation. In *On the Jewish Question* Marx leveled a critique against the formal interpretation of individual rights because it allows for the endurance of alienation and social forms of domination. Emancipation through formal individual rights is for Marx only a partial form of liberty that is not conducive to actualizing our species-being. While “free conscious activity” rests on the recognition that individual power is inextricably social, individual rights codify the barriers protecting individuals against the state as well as separating individuals from each other, which negates the social character of individual power.

Political emancipation is a reduction of man, on the one hand to a member of civil society, an *independent* and *egoistic* individual, and on the other hand, to a *citizen*, to a moral [juridical]⁴⁶ person.

Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and his relationships, he has become a *species-being*; and when he has recognized and organized his own powers (*forces propres*) as *social* powers so that he no longer separates this social power from himself as *political* power.⁴⁷

For Marx liberty through equal individual rights is not only inherently partial but also contributes to the endurance of relations of domination that are presupposed even if

⁴⁴ For a radical interpretation of this divide from the point of Althusser’s ‘aleatory materialism’ see Lahtinen 2009. For an analysis of the post-capitalist society in Marx see Hudis 2013.

⁴⁵ For republican interpretations of Marx see Leipold 2017; Roberts 2018.

⁴⁶ Translation in the [Marxist archive](#).

⁴⁷ Marx, *On the Jewish Question*, in *The Marx-Engels Reader*, p. 46

legally abolished.⁴⁸ He developed further his critique of the legal system in the *The Grundrisse* where he argues the juridical structure is a “stabilizing” force that influences and reproduces specific forms of distribution and production,⁴⁹ legalizing the domination of the few over the many.

...every form of production creates its own legal relations, form of government, etc...this principle [of might makes right] is also a legal relation, and that the right of the stronger prevails in their ‘constitutional republics’ as well, only in another form.⁵⁰

The principle of the strongest prevails not *despite* the law, but *through* the law, complacent with it.⁵¹ Making a parallel between laws and the structure of distribution, Marx seems to suggest that laws determine the distribution of rights and burdens at the same time that they are being produced as commodities, determined by the structure of production.

The structure of distribution is completely determined by the structure of production. Distribution is itself a product of production, not only in its object, in that only the results of production can be distributed, but also in its form, in that the specific kind of participation in production determines the specific forms of distribution, i.e. the pattern of participation in distribution.⁵²

The legal superstructure, which stabilizes relations of distribution, is conceived as being determined by the structure of production. Because socio-economic inequalities based on relations of production determine the patterns of distribution, which are preserved or modified through the law, the trajectories of the economic and legal spheres should be seen as developing dialectically. From this initial insight, Evgeny Pashukanis developed in 1924 *The General Theory of Law & Marxism* a materialist theory of legal forms that takes as its object of analysis the legal relation, “the cell-form of the legal

⁴⁸ Marx, *On the Jewish Question*, p. 33. For a discussion on relations of production as “effective power” and legal ownership see Cohen, *Karl Marx’s Theory of History*, p. 63.

⁴⁹ Marx, *The Grundrisse*, in *The Marx-Engels Reader*, p. 235.

⁵⁰ Marx, *The Grundrisse*, p. 226

⁵¹ An insight Corey Robin has recently brought back to the political discussion: “The worst things that the US has done have always happened through American institutions and practices – not despite them.”

“[American institutions won't keep us safe from Donald Trump's excesses](#),” *The Guardian*, 02/02/17.

⁵² Marx, *The Grundrisse*, in *The Marx-Engels Reader*, p. 233

fabric.”⁵³ For him legal relations are premised on social relations, with the law coming to give legal form to what is already happening on the ground.

...the economic relation of exchange must be present for the legal relation of contracts of purchase and sale to arise. Political power can, with the aid of laws, regulate, alter, condition, and concretise the form and content of this legal transaction in the most diverse manner. The law can determine in great detail what may be bought and sold, how, under what conditions, and by whom.⁵⁴

Against Hans Kelsen’s “formal-juridical method,”⁵⁵ which saw law as the aggregation of norms, “merely a lifeless abstraction,” Pashukanis argues the law should be analyzed as a legal relation that is rooted in material conditions, which always have “primacy over the norm.”⁵⁶

...to assert the objective existence of law, it is not enough to know its normative content, rather one must know too whether this normative content materializes in life, that is on social relations. The usual source of error in this case is the legal dogmatist’s way of thinking—for him, the specific significance of the concept of the valid norm does not coincide with that which the sociologist or the historian understands by the objective existence of law.⁵⁷

Pashukanis rejects the equation of law and norm because of the relation of law with the capitalist mode of production. He argues the ‘final cause’ of the legal system in a capitalist society is “commodity circulation,”⁵⁸ and thus the power of law to influence the patterns of distribution and production would not be able to produce real emancipation. According to his commodity exchange theory of law, “the logic of juridical concepts corresponds to the logic of the social relations of a commodity producing society,”⁵⁹ a relation between subjects who are individual bearers of property rights; law therefore

⁵³ Evgenii Pashukanis, *The General Theory of Law & Marxism* (London: Routledge 2017) p. 85. For an extended analysis of Pashukanis see Michael Head, *Pashukanis: A Critical Reappraisal* (New York: Routledge, 2008).

⁵⁴ Pashukanis, *The General Theory*, p. 93.

⁵⁵ Pashukanis, *The General Theory*, p. 87, also p. 52; Hans Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre* (Tubingen: J.C.B. Mohr, Paul Siebeck, 1920)

⁵⁶ Pashukanis, *The General Theory*, p. 87.

⁵⁷ Pashukanis, *The General Theory*, p. 87.

⁵⁸ Pashukanis, *The General Theory*, p. 100.

⁵⁹ Pashukanis, *The General Theory*, p. 96.

would not be a proper tool for emancipatory structural change. Because his aim was to question private law and the system of private property, Pashukanis argues it is not a norm but the relation among subjects, and thus the power struggle inherent in that relation, what produces law. The legal superstructure is rooted on material relations of domination, and thus unable to upend these relations. As China Miéville has argued, Pashukanis appears to be

hostile to law, inasmuch as he understood it to be a reflection of capitalist property relations, an integral part of a class society where the market has a commanding role, and he did not believe that it would last as communism flowered.⁶⁰

Pashukanis' materialist constitutional thought thus did not transcend his critique of capitalism and the Marxist dogma that the state and its rule of law are mere tools at the service of the capitalist class and thus no longer necessary when property and class are abolished.⁶¹ This reductionism made him dismiss the possibility of a "proletarian law," which was for him an oxymoron given the intrinsic connection between law and capitalist relations of exploitation.⁶²

The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law... The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations.⁶³

Pashukanis' refusal to conceive of the possibility of having emancipatory laws working to dismantle socio-economic hierarchies instead of only reifying them, is connected not only to his reduction of legal forms to private property, but also to his reduction of material conditions to social relations of exchange under the capitalist mode of production. For him the legal subject "is the abstract commodity owner elevated to the

⁶⁰ China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto, 2006), p. 98.

⁶¹ Frederick Engels, *Socialism: Utopian and Scientific* in *The Marx-Engels Reader*, p. 713; Vladimir Lenin, *The State and Revolution*, Chapter 5: The Economic Basis of the Withering Away of the State; Evgeny Pashukanis, "Economics and Legal Regulation" [1929] in Evgeny Pashukanis, *Evgeny Pashukanis: Selected Writings*, ed. Piers Beirne and Robert Sharlet (London: Academic Press, 1980), 268–69.

⁶² Miéville, *Between Equal Rights*, p. 99.

⁶³ Pashukanis, *The General Theory*, p. 61.

heavens” and his legal desires are “to alienate in acquisition and to acquire in alienation,”⁶⁴ and therefore the agency of legal subjects would also be determined by capitalist relations of exchange. These reductions do not only obscure other relations of domination that precede and transcend capitalism,⁶⁵ but also made him dismiss the possibility of radical constitutional change through legal means. Seen from a republican perspective, his denial of the possibility of proletarian law hinges on his conception of conflict. While Machiavelli attributed to conflict a normative force, as being productive of good laws, Pashukanis argues there is always conflict at the base of every legal relation, which “comes into being only at the moment of dispute. It is dispute, conflict of interest, which creates the legal form, the legal superstructure.”⁶⁶ Going against Hegel and Kelsen, Pashukanis argues material conditions are at the origin of the legal structure, and even if the relation between matter and form is dialectical after that original point, the premises of law are always “rooted in the material relations of production.”⁶⁷ Therefore, for Pashukanis conflict is not seen from the side of popular resistance to oligarchic power—as productive of liberty—but as a permanent feature of all legal relations, which are not derived from basic principles but are “directly generated by the existing social relations of production.”⁶⁸ Conflict is not productive because it is reduced to the subjacent conflict implied in all relations of domination, denying the possibility that conflict coming from popular pushback against domination could generate emancipatory law.

A reengagement with a critical analysis of law was enabled in the late 1970s by the Critical Legal Studies movement, which aimed at engaging critically with the law while moving away from Marxist determinism. The two overriding concerns of CLS were, on the one hand, the critique of legal formalism and objectivism, and on the other, the “purely instrumental use of legal practice and legal doctrine to advance leftists aims.”⁶⁹ While CLS was successful in demystifying the law by pointing to its

⁶⁴ Pashukanis, *The General Theory*, p.121.

⁶⁵ Igor Shoikhedbrod, “Estranged Bedfellows: Why Pashukanis Still Charms Legal Formalists,” *Legal Form. A Forum for Marxist Analysis of Law*, June 15, 2018. See also Robert Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London: Pluto Press, 1984), p. 157.

⁶⁶ Pashukanis, *The General Theory*, p. 93

⁶⁷ Pashukanis, *The General Theory*, p. 94

⁶⁸ Pashukanis, *The General Theory*, p. 96

⁶⁹ Roberto Unger, “Critical Legal Studies Movement” *Harvard Law Review* 1986, p. 567.

indeterminacy, internal “disharmonies,”⁷⁰ and political character,⁷¹ the few institutional proposals that came out of this critical analysis tended to be reformist. For instance, in the late 1990s Roberto Unger proposed a “democratizing alternative to neoliberalism”⁷² which would expand equal access to capital and democratize “the partnership between government and business,” in tune with a liberal-left political project.⁷³

Marxist thought also yielded a radical democratic interpretation of law, the constitution, and the constituent power, mostly anti-institutional and anarchic. Writing soon after the fall of the Berlin Wall, the defeat of communism, and the triumph of capitalism and constitutional democracy as the dominant economic and political systems, Antonio Negri analyzed the emancipatory nature of the constituent power as “crisis” and “living labor,” and its relation to the constituted order. Through a radical democratic interpretation of Machiavelli, in which the republic is equivalent to an absolute democracy, Negri generates not only an interpretation of constituent power as “the passion of the multitude,”⁷⁴ “absolute and untamable,”⁷⁵ but also the need for a constitutional model in permanent becoming, “capable of keeping the formative capacity of constituent power itself in motion.”⁷⁶ For Negri the constituent power is in constant movement, and is at the same time creative and destructive, subject and strength, “a radical subjective foundation of being,”⁷⁷ the basis of the political: an absolute, unfinalized process that “comes from the void and constitutes everything,”⁷⁸ that is always referring to the future and implies a multidirectional plurality of time and spaces. Negri also recognizes in the constituent power “the negative power par excellence,”⁷⁹ due to the destructive force inherent in the process of permanent becoming. The double nature of the constituent power, as positive/creative and negative/destructive, is realized in

⁷⁰ Unger, “Critical Legal Studies Movement”

⁷¹ Unger, “Critical Legal Studies Movement,” p. 578. See also Hugh Collins “Roberto Unger and the Critical Legal Studies Movement” *Journal of Law and Society*. 14: 388 (1987).

⁷² Unger, *Democracy Realized: The Progressive Alternative* (New York: Verso, 1998), p. 235

⁷³ Unger, *Democracy Realized*, p. 273.

⁷⁴ Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Minneapolis: University of Minnesota Press, 2009), p. 304

⁷⁵ Del Lucchese, “Machiavelli and Constituent Power: The Revolutionary Foundation of Modern Political Thought” *European Journal of Political Theory* 2017, Vol. 16(1), p.6

⁷⁶ Negri, *Insurgencies*, p. 25

⁷⁷ Negri, *Insurgencies*, p. 319

⁷⁸ Negri, *Insurgencies*, p. 16

⁷⁹ Negri, *Insurgencies*, p. 21

relation to its opposition to the constituted order, which, instead of being the basis of the political, is its summit, an accomplished finality, a rigidified and formal framework always referring to the past, which implies a limited time and space.

Sovereignty presents itself as a fixing of constituent power,
and therefore as its termination, as the exhaustion of the
freedom that constituent power carries.⁸⁰

Against this ossified structure and the death of the political, “the only possible concept of constitution” is for Negri “that of revolution: precisely, constituent power as absolute and unlimited procedure.”⁸¹ A working proposition for this kind of constitutional framework, able to accommodate permanent constituent revolution as constant becoming, is yet to be elaborated, and thus Negri’s contribution to plebeian legal thought remains at the level of pure critique.⁸²

More recent Marxist legal analyses have also preferred to remain in the critical description rather than engage in the normative and prescriptive. Despite acknowledging that the strength of the material constitution rests on the social “support for the political aims (or even finality) of a regime,”⁸³ Goldoni and Wilkinson explicitly embrace the explanatory over the normative analysis of the material constitution. From a post-liberal perspective,⁸⁴ bringing pluralism into critical legal analysis, they argue the study of the material constitution cannot be “reduced to the study of the underlying economic base” because economic and politics are inter-related.⁸⁵ As a way to escape the reduction of economics over politics, they negate Pashukanis’ insight of the factual dominance of material conditions over the norm by arguing that in this interrelation “the economic base must not be presented as over-determining the material constitution.”⁸⁶ In their account conflict is not primarily between the few and the many, capital and labor, but is

⁸⁰ Negri, *Insurgencies*, p. 22

⁸¹ Negri, *Insurgencies*, p. 24

⁸² See also Miguel Abensour, *Democracy Against the State: Marx and the Machiavellian Moment*, translated by Max Blechman and Martin Breugh (Maiden, MA: Polity, 2011)

⁸³ Marco Goldoni and Michael A. Wilkinson “The Material Constitution” *Modern Law Review*, (forthcoming)

⁸⁴ I understand a post-liberal perspective as embracing the basic tenants of political liberalism such as the respect of individual rights and pluralism. A post-liberal Marxist interpretation is by necessity a hybrid.

⁸⁵ Goldoni and Wilkinson “The Material Constitution”

⁸⁶ They limit their analysis to “four ordering forces of the material constitution: political unity; a set of institutions; social relations, and fundamental political objectives.”

“conducted by a plurality of subjects whose positions are conditioned but not determined by already established relations.”⁸⁷

The replacement of class struggle with agonistic pluralism,⁸⁸ and the negation of the factual dominance of economics over politics by putting economic and political power in equal standing, is not to my mind a materialist analysis of the constitution, since the dominance of the few over politics has been a constant feature since the origins of representative government.⁸⁹ The political influence of lenders, real state speculators, and slave owners produced in the US a constitution constructed explicitly against democracy and the power of the popular sectors.⁹⁰ All members of the constituent convention agreed that the constitution they were writing was not a democracy but a republic i.e. a representative government, which had as its principal objective the protection of private property.⁹¹ To put the power of politics as equal to material power both obscures the factual dominance of economic over political power, and overestimates the political power of individuals to exert changes to the superstructure. It is not surprising then that Goldoni and Wilkinson place on individuals the burden of achieving and protecting liberty:

political subjects are thus essential in the formation and then preservation of a particular political economy, as well as in fomenting change through putting pressure on reforming the political-economic structure.⁹²

This post-liberal contribution to critical legal studies is liable therefore to the same problems as proceduralism, in which the burden of the maintenance of liberty is placed on individuals, which is, as I have argued before when discussing Philip Pettit’s neo-republican model, practically equivalent to leaving the system to its own devices.

⁸⁷ Goldoni and Wilkinson “The Material Constitution”

⁸⁸ For the political philosophy of agonistic pluralism see Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” *Social Research*, vol. 66, no. 3, 1999, pp. 745–758.

⁸⁹ See Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 2010).

⁹⁰ Of the 55 members of the Federal Convention, 41 were lenders, 31 were lawyers and politicians, 21 were planters, 17 were engaged in commercial enterprises, and 13 in real state speculation.

<http://teachingamericanhistory.org/convention/delegates/>. For the anti-democratic sentiment see *The Records of the Federal Convention of 1787*, p. 65

⁹¹ *The Records of the Federal Convention of 1787*, pp. 69, 433.

⁹² Goldoni and Wilkinson “The Material Constitution”

Structural oppression makes individuals powerless to resist domination and exert changes to the legal structure if collective power is not institutionalized in the constitution.

Despite the lack of a model for a plebeian materialist constitution, critical constitutional thought has provided a strong critique of legal formalism. In addition, its push for connecting the power of the many in Machiavelli with the theory of constituent power has greatly contributed to plebeian constitutionalism by allowing for a partisan conception of the power to renew the republic. Finally, even if the anti-oligarchic side of plebeian thought precedes Marx, the current radical republican interpretation of Machiavelli put forth by McCormick owes much to Marx's analysis of capitalism and class struggle, even if indirectly via an interpretation of Machiavelli through the lens of critical political economy. Through a post-Marxist⁹³ (but not post-liberal)⁹⁴ application of Machiavellian thought, McCormick has placed class struggle, the threat of plutocracy, and the need for class-based institutions to control the rich, at the center of material constitutionalism.

⁹³ I understand a post-Marxist perspective as embracing basic tenants of Marxism such as class struggle. Even if I agree with G. Pedullà that McCormick “does not place Machiavelli in Marx’s shadow,” his interpretative lens appears to have been influenced by critical theory and the current conjuncture.

⁹⁴ Class-based institutions and penalties are not post-liberal in the sense that they do not embrace formal equal rights and political equality.

Part II

PLEBEIAN CONSTITUTIONAL THOUGHT

4.

Machiavelli and the Plebeian Power to Create and Punish

The tradition of elitist-procedural republican thought, which took inspiration from the English mixed government of the 1700s and crystalized in the establishment of an anti-majoritarian, electoral constitutional framework in America, stands in stark contrast to the materialist plebeian strand that developed from Machiavelli's assessment of the Roman republic, from the viewpoint of the democratic experience of the Florentine Republic (1494–1512). While under the Medici Florence had a *governo stretto* directed by the *ottimati*, after taking power Girolamo Savonarola embraced *governo largo* by establishing in 1494 the Great Council as a popular legislative and electoral assembly. The new constitutional structure of the state, which acquired its definite form in 1499, was a new mixed *ordini* that lasted until 1512. The introduction of a democratic assembly with a membership of about 1,000 citizens who participated in turns,¹ alongside other councils and magistracies, meant that for the first time the plebeian socio-political element was institutionalized in Florence. As a public official in the Florentine republic, Machiavelli had a first-hand experience of the inner workings of institutions and the struggle between social groups to exert influence on government. I argue his support for a mixed constitution in which the few would govern within limits and the many would be

¹ Citizenship was restrictive since it demanded membership in one of the seven great guilds. The Council had between 1,150 and 2400 members who could effectively participate. Citizens were divided into three sections to deliberate and decide. Nicolai Rubinstein and Sarah-Louise Raillard, "The early years of Florence's Grand Council (1494-1499)" *Revue française de science politique* (English Edition), Vol. 64, No. 6, Florence (1200-1530): Reinvention of Politics (2014), p. 103–106.

active guardians of liberty, both in the *Discourses on Livy* and his *Discourse on Remodeling the Government of Florence*, is rooted in his direct assessment of the limits of democratic rule to contain the informal power of the great in Florence.

I. The Republic as a Mixed Constitution

From radically different methodologies, both Leo Strauss and the Cambridge School² interpret Machiavelli's work as advocating for a republic ruled by elites. However, Machiavelli's conception of mixed constitution departs from the predominant, elitist strand of republicanism initiated by Cicero and picked up later by Montesquieu, which gives to the aristocratic element (the selected few) the reigns of government, while reserving for the many only the power to choose representatives.³ For Machiavelli, to live in liberty plebeians must not only approve or reject policies, but also dictate them, not only obey laws and institutions, but also establish them. As McCormick has shown, these elitist interpretations of Machiavelli distort his theory of the plebeian republic because they "underemphasize class conflict," disregard the necessary role of active, popular participation in political rule, and conceive of liberty in a formal, narrow manner, which "rather meekly addresses forms of social domination aside from slavery."⁴ For 'aristocratic' republicans, only the best citizens should control the government because they contribute much-needed moderation to the republic; the many should be limited to elect the best citizens to rule.⁵ On the contrary, for Machiavelli a regime of liberty demands a dynamic balance of power between the few and the many that is only achieved through institutionalized political conflict allowing for the few to satisfy their

² John Pocock, *The Machiavellian Moment* (Princeton: Princeton University Press, 1975); Quentin Skinner "Machiavelli on the Maintenance of Liberty," *Politics* (1983) 18: 3–15; Maurizio Viroli "Machiavelli and the Republican Idea of Politics," in *Machiavelli and Republicanism*, Gisela Bock, Quentin Skinner, and Maurizio Viroli, eds. (Cambridge: Cambridge University Press, 1990); and Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

³ For an extensive critique of the aristocratic strand see McCormick, *Machiavellian Democracy*.

⁴ McCormick, *Machiavellian Democracy*, p. 9–10; "Machiavelli Against Republicanism: On the Cambridge School's "Guicciardinian Moments" *Political Theory* (2003) 31.5, pp. 615–643.

⁵ Cicero, *On the Commonwealth*, Book 1 [52]: 23; Montesquieu, *The Spirit of the Laws*, Part 1, Book 3, Ch. 4 & Part 2, Book 11, Ch. 6; Madison, *Federalist Papers*, #62.

ruling ambition and for the many to defend liberty through their active participation in political power.⁶

Machiavelli's materialist constitutional analysis begins with his interpretation of the Roman plebeian experience recorded in detail in the *Discourses*, work that according to Gabrielle Pedullà aims at recovering “the actual political prudence of the Romans through a hermeneutics of the ancient historical narratives,” achieving with his republic of tumults an alternative to “the classical and humanistic tradition of concord.”⁷ In Rome's *ordini*, while the authority of the Senate and the Consuls rested in tradition, the authority of the Tribunes was not based on the sacred, original foundation of Rome, but on the force exerted by the plebeians due to their crucial role in defending the republic. The authority of the people was thus rooted in their actual power to extract political concessions from the elite by deserting and, thus, paralyzing the city.⁸ Machiavelli's critical engagement with the Roman republic evidences the need to account for different forms of power and authority in the mixed constitution springing from the fundamental split of society between the great and the people. While authority based on tradition, seniority, knowledge, or wealth rested with the Senate, which legitimately directed government action, the authority to protect liberty, through the right to legislate and veto government action laid with the organized multitude. The authority of the Consuls, who were co-administrators of government with the Senate, was based upon the recognition of leadership through election. As commanders of the army, the Consuls wielded legal power —the right to execute policies within the boundaries of the law and the counsel of the Senate. The other source of power was the people, who could only command the power of presence, the sheer power of numbers, which is exerted through extra-legal means (e.g. mobilization, occupation of public space, violence). Different from the power of the army —a hierarchical command structure susceptible to cooptation and

⁶ Gabriele Pedullà, *Machiavelli in Tumult: The Discourses on Livy and the Origins of Political Conflictualism* (New York: Cambridge University Press, forthcoming 2019); K.M. Brudney, “Machiavelli on Social Classes and Class Conflict,” *Political Theory*, 12 (1984), pp. 507-19; A. Bonadeo, *Corruption, Conflict and Power in the Works and Times of Niccolò Machiavelli* (University of California, 1973), pp. 37-71.

⁷ Pedullà, *Machiavelli in Tumult*, Introduction.

⁸ In 494 BC, while Rome was at war with two neighboring tribes, plebeian soldiers refused to march against the enemy, and instead seceded to the Aventine Hill, leaving the city to its fate. Mommsen, Theodor, *History of Rome* (S.I.: Forgotten Books, 2015).

instrumentalization—the power of the people, being inseparable from their physical presence, cannot be commanded. It can certainly be invoked and demanded, but the response is always uncertain. Soldiers have proper weapons and training to risk their lives; common citizens have neither, which means that while the influence of the Senate over the Consuls gives the elite the power of the army, the assembled people of Rome as guardians of liberty armed their Tribunes only with a “sacrosanct” authority and an uncertain threat of collective violence.⁹

Despite their institutional and material weakness, plebeians were successful in extracting concessions from the few. Plebeians gained access to lawmaking and magistracies through open conflict, but these gains were lost because institutional means were not enough to back up plebeian legal authority after corruption had taken root. I would argue this is for Machiavelli the tragic element of the Roman republic. While the institutionalized conflict between the elite and the people constituted for him the republic’s normative energy, yielding “all the laws made in favor of liberty,”¹⁰ it was also the cause of its ruin¹¹ because the authority of the Tribunes was never entirely severed from the popular force through which it had originated, and thus never entirely respected by the ruling elite. Therefore the evolutionary way in which the Roman republic was constituted created a precarious dynamic balance of power between the few and the many that was finally upended with the complete disregard of plebeian institutional power by the Senate. The ruin of the Roman republic was brought about by conflict, by the refusal of the Senate to sanction the reforms to the Agrarian Law¹² passed by the people in 133 and 122 BC, and the violent upheavals that ensued, in which the Tribunes Tiberius and Gaius Gracchus were murdered. I would argue Machiavelli wants to correct the institutional imbalance created in a constitution made through class struggle—on popular authority conceded through active resistance—by constitutionalizing what in Rome was grounded on the physical power of the people. Consequently, Machiavelli would be

⁹ Andrew Lintott, *The Constitution of the Roman Republic*, p. 33, 121–124. A promise of protection from violence against the Tribunes.

¹⁰ Machiavelli, *Discourses* 1.4.

¹¹ Machiavelli, *Discourses* 1.4.

¹² Machiavelli, *Discourses* 1.37. For a politico-historical analysis of the period see Fergus Millar, *The Crowd in Rome in the Late Republic* (Ann Arbor: University of Michigan Press, 2005).

seeking to perfect the Roman republican experience by formally constitutionalizing the power of the many to resist the domination coming from the few.

Rome is both a model of a tumultuous republic and a warning, the tragic example of a free republic apparently ruined by its own effective cause: conflict. According to Althusser Machiavelli is a materialist philosopher who inaugurates a conjunctural approach to politics and the law in which liberty is attained only through conflict.¹³ Machiavelli's "aleatory materialism"¹⁴ begins for him from the foundational theoretical premise of the ontological split of society between the few and the many, the *grandi* and the *popolo*, animated by two unequal battling humors: to oppress and resist oppression.

A small part of them wishes to be free in order to rule; but all the others, who are countless, wish freedom in order to live in security.¹⁵

The rich desire to dominate the people, the people desire not to be oppressed by the rich, and the perpetual struggle in a republic between these opposing desires, argues Machiavelli, generates liberty. The power of the organized few to direct government is checked by the power of the organized multitude to initiate legislation and stop governmental action. Liberty is the result of this institutional conflict between the few and the many; desires and conflict are expressed through institutions and procedures, and in this way tamed and oriented for the good of the republic. However, liberty is not caused by the institutional *balance* of two unequal forces, but by the periodical pushback of the many against the inevitable, constant overreach of the powerful few. While theoretically a precarious balance could be achieved between the few and the many, the crucial guardianship of liberty —the right to make the last decision— must always rely on one side. Machiavelli chooses the people over the elite as stewards of liberty because the former merely long not to be ruled,

¹³ Louis Althusser, *Machiavelli and Us* (London: Verso, 2011). For an analysis of Althusser on Machiavelli see Banu Bargu, "Machiavelli after Althusser" in *The Radical Machiavelli: Politics, Philosophy and Language*, Del, Lucchese F, Fabio Frosini, and Vittorio Morfino, eds. (New York: Brill, 2015); Miguel Vatter, "Machiavelli After Marx: The Self-Overcoming of Marxism in the Late Althusser" *Theory & Event*, (2005) 7.4.

¹⁴ Althusser theorizes an aleatory materialism he derives from Machiavelli in *Écrits Philosophiques et Politiques I* (Paris: Librairie générale française, 1999), p. 543–8.

¹⁵ Machiavelli, *Discourses*, I.16: 237.

and as a consequence [have] greater eagerness to live in freedom, since they can have less hope of taking possession of it than the great can.¹⁶

Even though it is a difficult task to completely separate Machiavelli's description of the Romans from his own ideal model in the *Discourses*, his general statements suggest the Roman republic would have benefited from a formalization of the role of the people as guardians of liberty. This interpretation implies not only Machiavelli's plebeian partisanship—which was already evident to John Adams who described him as the founder of a “plebeian philosophy”¹⁷—but also implies a mixed constitutional structure in which the power of both the few and the many are institutionalized, with the few ruling and the many properly armed with legal and military power to guard liberty.

Despite certainly envisioning an active role for the common republican citizen in politics, I would argue Machiavelli is not a theorist of democracy, in the sense that he does not understand liberty as positive¹⁸—the partaking in rule as an end in itself¹⁹—and does not support monocratic rule, not even that of a democratic assembly.²⁰ Even if Machiavelli is certainly a critic of oligarchic republics, and explicitly advocates for direct participation of the people through lawmaking, voting for magistrates,²¹ judging in political trials,²² and choosing their own, *exclusive* representatives—the Tribunes of the Plebs—I would argue this does not mean that he is sponsoring unmixed, popular or democratic government. Even though he praises the specific characteristic of the people and their form of government, he advocates for an increase of popular power within a republican framework, which is based on his theory of humors in permanent conflict. In other words, Machiavelli does not envision the *popolo* ruling on its own, but for the

¹⁶ Machiavelli, *Discourses* I.5.

¹⁷ “Defence of the Constitutions and Government of the United States of America” in *John Adams, Works*, edited by C.F. Adams (Little & Brown, 1850-56), volume VI, p. 396. See J. Barthas, “Machiavelli in Political Thought from the Age of Revolutions to the Present,” in John M. Najemy (ed.), *The Cambridge Companion to Machiavelli* (Cambridge: Cambridge University Press 2010), pp. 265-66.

¹⁸ Isaiah Berlin, “Two Concepts of Liberty” in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

¹⁹ Democracy is to rule and be ruled, and the exercise of politics is a virtuous action, which is an end in itself. Aristotle, *Nicomachean Ethics*, I.8.

²⁰ Against this interpretation, see J. Barthas “Il pensiero costituzionale di Machiavelli e la funzione tribunizia nella Firenze del Rinascimento” in *Il Laboratorio del Rinascimento*, L. Tanzini (ed.). (Le Lettere, 2016).

²¹ Machiavelli, *Discourses* I.18; III.34

²² Machiavelli, *Discourses* I.7–8.

popolo to have enough power to curb the power of the *grandi* and protect liberty. Liberty is for him non-domination and, therefore, different from the democratic ethos, in which active engagement in politics is an *end* in itself—the most virtuous activity the common man could ever perform—²³ for Machiavelli citizen participation in everyday politics is functional, a necessary *means* for maintaining a republican structure conducive to liberty. Moreover, while liberty is enjoyed by all, he reserves glory for the few able to perform extraordinary actions aimed at benefiting the republic. In Machiavelli the many participate in government primarily to defend their liberty—not to be virtuous or attain glory.

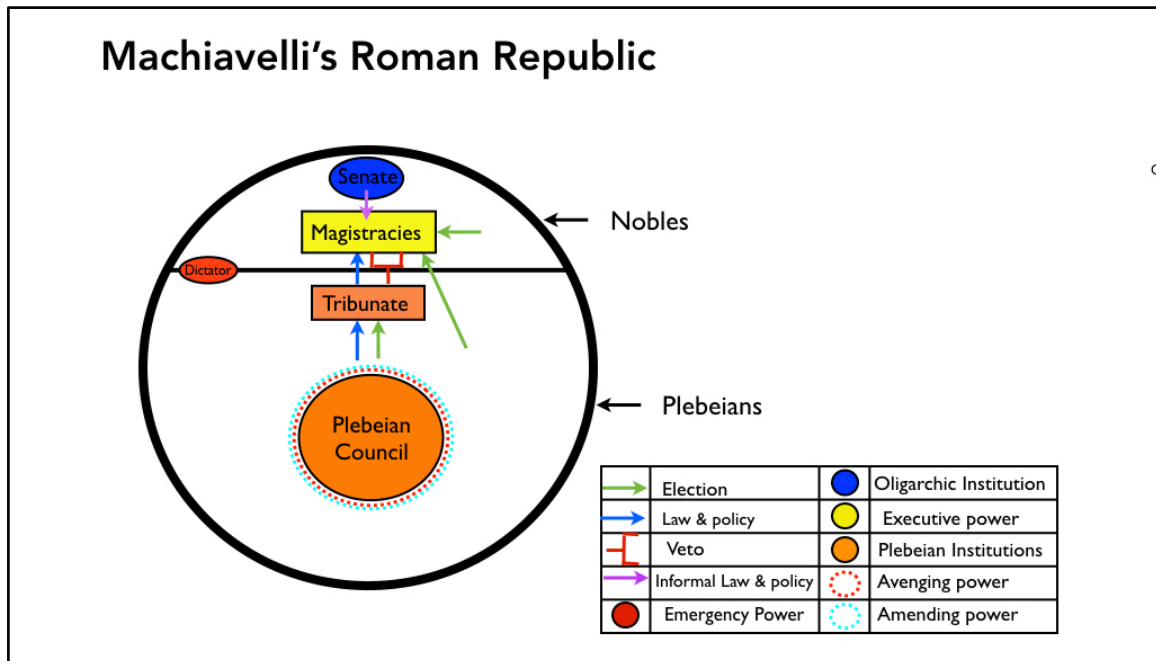


Figure 4.1 Machiavelli's Roman Republic

II. Remaking Florence as a Mixed Constitution

Machiavelli's preoccupation with oligarchy, corruption, and the active resistance of the people was embedded in the extraordinary democratic experiment of the republic of Florence, which began in 1494 with the establishment of the Great Council, a form of direct democracy that allowed for extensive citizen participation in legislative, electoral, and judicial authority. During the brief democratic experiment in Florence, of which

²³ Aristotle, *Nicomachean Ethics*, I, 2. 1094b, 5

Machiavelli was a leading figure, the elites lost the monopoly over government and were constantly trying to regain their dominance. As Jérémie Barthas has argued, despite the extensive powers of the Council, the republic remained effectively dependent on the financial oligarchy due to its reliance on mercenary armies, and Machiavelli's most important task as Secretary and Second Chancellor of the republic, was to liberate the republic from oligarchic control by introducing a project of mass conscription.²⁴

After the return of the Medici and the end of the Florentine democratic experience, Machiavelli argues to remodel Florence so as to give the city a lasting republican structure that satisfies all "those elements that must be contented"²⁵ and creates a mechanism to "establish fear in great men."²⁶ He criticizes the institutional framework of the Florentine republic of 1494 because it neither adopted a form that would endure, based on the satisfaction of the fundamental elements of society, nor established the punishment of elites who set up factions to satisfy their own interests. Machiavelli argues there are three different kinds of individuals, "the most important, those in the middle, and the lowest."²⁷ Because some citizens are ambitious and desire to outrank others, this desire needs to be satisfied in the republican organization of power if the regime does not want to end up having the same fate as Florence democratic experiment which "fell for no other cause than that such group was not satisfied."²⁸ Because the *grandi* seek glory, the best constitution is the one able to satisfy the interest of the elite in a manner conducive to liberty.²⁹ Instead of satisfying their desire for social distinction through riches or power, the few should have an institutional space to attain glory and distinguish themselves in the service of the republic. Machiavelli uses this same argument of satisfaction of desires through institutional means to push for the reopening of the Great Council in Florence.

²⁴ Barthas, "Machiavelli, the Republic, and the Financial Crisis," in *Machiavelli on Liberty and Conflict*, David Johnston, Nadia Urbinati, and Camila Vergara, eds (Chicago: University of Chicago Press 2017) p. 273; *L'argent n'est pas le nerf de la guerre*.

²⁵ Machiavelli, *A Discourse on Remodeling the Government of Florence* (1520) in *Machiavelli Chief Works and Others* translated by Allan Gilbert (Durham: Duke University Press 1989), p. 101.

²⁶ Machiavelli, *A Discourse on Remodeling*, p. 102.

²⁷ Machiavelli, *A Discourse on Remodeling*, p. 107.

²⁸ Machiavelli, *A Discourse on Remodeling*, p. 108.

²⁹ Machiavelli, *A Discourse on Remodeling the Government of Florence* (1520) in *Machiavelli Chief Works and Others* (1989), translated by Allan Gilbert. Durham: Duke University Press, p.102–3.

In his *Discourse on Remodeling the Government of Florence* Machiavelli argues that a constitution that does not satisfy the people after they have already experienced the exercise of political power, would be certainly short-lived.³⁰ “Without satisfying the generality of the citizens, to set up a stable government is always impossible.”³¹ But even if Machiavelli is certainly sponsoring republican institutions and the reopening of the Great Council, his main argument is not that the council of the people should be the *only* institution, but that it should be restored because the common citizens also needed to be satisfied as well as the elites. Machiavelli’s proposal for Florence envisioned, on the one hand a consolidation of the executive councils into the Council of Sixty-Five³² from which the Gonfalonier of Justice would be selected, and the legislative councils into the Council of Two Hundred (of the Selected), and on the other a re-empowerment of the *popolo* with the reestablishment of the Great Council and the creation of a surveillance office: the Council of Provosts. In terms of its membership, the Great Council should be considered as a plebeian institution. While only guild members were eligible for the executive and legislative councils, and 80% of the members selected to serve were taken from the mayor guilds, which represented the rich merchants and artisans,³³ the membership of the Grand Council was broader given the establishment of the *beneficio dei tre maggiori*, which allowed office holders of the three major offices and their descendants to serve. This meant that about a quarter of its members were drawn from either the Council of the People or the Council of the Commune,³⁴ and thus from plebeian ranks.

It is clear from this constitutional proposal that Machiavelli, as a theorist of the republic as mixed constitution, aimed at giving an appropriate place in the constitution both to the elite, so to channel their desire to rule (analogous to the ancient Roman Senate or the English Parliament), and to plebeians by creating stronger popular institutions to effectively censure and control those who rule. Reaffirming this republican line of

³⁰ Machiavelli, *Discourse on Remodeling*, p. 101-2 & 106.

³¹ Machiavelli, *Discourse on Remodeling*, p. 110.

³² The Council was divided in two groups, each governing alternate years. The council would be divided into groups that would carry on all executive functions, finance and trade, foreign and military affairs.

³³ Gilded members eligible for these offices accounted for only 1/3 of the male adult population of Florence. See John M. Najemy, “Guild Republicanism in Trecento Florence: The Successes and Ultimate Failure of Corporate Politics” *The American Historical Review*, Vol. 84, No. 1 (Feb., 1979), pp. 53-71

³⁴ Rubinstein, “The Early Years”

interpretation, in addition to reopening the council open to the many, Machiavelli proposes to add a Council of Provosts: a popular surveillance office aimed at providing a tiebreak vote in matters of discord within political institutions and, more importantly, to oversee government officials, taking away their power and appealing their decisions, in case they do things opposed to the common good.³⁵ The Council of Provosts, composed of sixteen Gonfaloniers of the Company of the People would take turns in supervising government action. This anti-oligarchic institution, whose members could not be part of the Council of Sixty-Five, was dedicated to control government officials and “make them abstain from actions that are not good.”³⁶ In turns, the Provost would reside in the palace with the Signores to be witnesses of their proceedings.

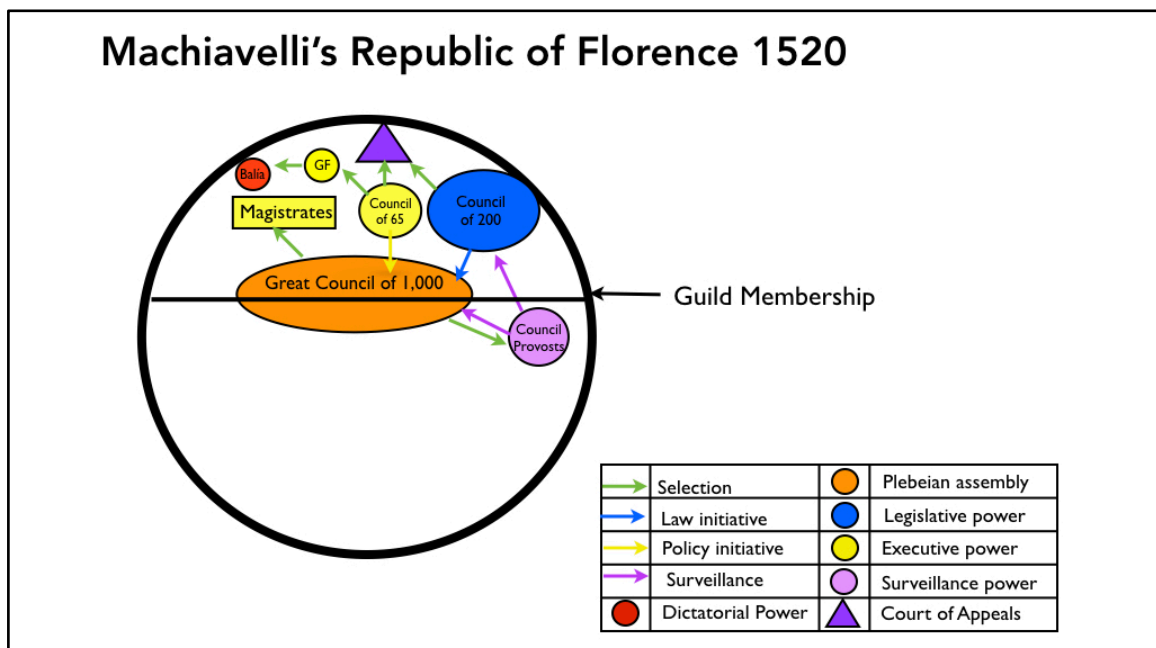


Figure 4.2 Machiavelli's Republic of Florence, 1520

According to McCormick, the Council of Provosts should be understood as being an improved version of the Roman Tribune because the Provosts would function as “popular agents of elite accountability,” serving as “the people’s eyes and ears in both the republic’s executive committee and senatorial council and that explicitly wields veto or

³⁵ Machiavelli, *A Discourse on Remodeling*, p. 112.

³⁶ Machiavelli, *A Discourse on Remodeling*, p. 111–2.

referral power over the policies proposed within them.”³⁷ Even if the Provosts’ surveillance power is clear, their power to actually obstruct dominating motions coming from the few is far removed from the veto power wielded by the Tribunes in Rome, since the provosts “would not have other authority than to delay a decision” by the executive council by appealing to the legislative council, and “could not do anything other than take a case away from the Council [of Selected] and appeal it to the Grand Council.”³⁸ Despite the weak powers Machiavelli gives to the Provosts, McCormick argues this office is radically democratic in the sense that it provides “invaluable political education” by allowing common citizens to “observe in close quarters the deliberations and decisions of the most powerful and prominent citizens of the republic.”³⁹

The recognition of the need for popular institutions strong enough to control the ruling elite also makes evident in Machiavelli the relativity of law and the need for popular constituent power as a necessary condition for attributing an emancipatory character to the rule of law. Because corruption, which is linked to oppression, begins both in individuals —when “a citizen is allowed to get more power than is safe”— and in laws —“the nerve and life of free institutions”⁴⁰— liberty cannot be equated with the rule of law, because laws can be manipulated and used as a tool for oppression. The rule of law is not necessarily conducive to liberty and, because of unavoidable corruption, even an originally emancipatory rule of law would tend to uphold and sustain domination instead of combating it, legalizing domination, allowing only for the mere illusion of liberty. Neither should freedom be reduced to the lack of arbitrary rule⁴¹ because, as Machiavelli argues, the reestablishment of freedom demands moments of arbitrariness — of suspension of the law— to reorganize power and regain liberty by bringing greater equality and introducing new methods, institutions, and laws into the constitution.⁴² Consequently, the principle of liberty must not be reduced to law, which is just a *means* to keep individuals free from subjection. Without the people being effective guardians of

³⁷ McCormick, *Machiavellian Democracy*, p. 106.

³⁸ Machiavelli, *A Discourse on Remodeling*, p. 112.

³⁹ McCormick, *Machiavellian Democracy*, p. 106

⁴⁰ Machiavelli, *Discourses*, I.33.

⁴¹ Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998).

⁴² Machiavelli, *Discourses*, I.18

liberty, a constitutional framework would inevitably become corrupt, “a naked oligarchy.”⁴³

As I showed in Chapter 1, Machiavelli argues the procedure of election and the individual right to speak in the assembly ended up allowing for the people to be manipulated into decreeing their own ruin. But despite the perverse outcome of these corruption-enabling methods, Machiavelli does not want to eliminate them but to create new ones so as to counteract their negative, unintended results. Consequently, different from Rousseau, who entirely forsakes representation and deliberation in the sovereign assembly,⁴⁴ Machiavelli wants to keep equal access to election and *isegoria*, and complement it with new methods aimed at “enforcing” the foundation. He argues ordinary exercise of popular legal power is not enough, and that periodical extraordinary measures are needed to keep the oligarchic tendencies of the ruling class in check. In the next section I analyze the two extraordinary methods he proposes in the *Discourses* for the containment of corruption: 1) periodic revision and creation of fundamental laws and institutions, and 2) extraordinary popular punishment to remind elites of the founding fear in which plebeian liberty was gained through force.

III. Plebeian Constituent Power

Even if Machiavelli is a theorist of extraordinary politics, concerned primarily with the mutation of the constitutional order,⁴⁵ his work has not been seen as contributing to the theory of constituent power that developed within democratic thought.⁴⁶ The 500-year anniversary of *The Prince* in the aftermath of the 2008 financial and political crisis, however, allowed for a renewed engagement with Machiavelli’s work from which emerged a radical democratic interpretation concerned with extraordinary politics.⁴⁷

⁴³ McCormick, *Machiavellian Democracy*, p. 107.

⁴⁴ Rousseau, *The Social Contract*, Book II. Chapters 1 & 3.

⁴⁵ See Pedullà, *Machiavelli in Tumult*; Sebastián Torres, “Tempo e politica: Una lettura materialista di Machiavelli” in *The Radical Machiavelli*

⁴⁶ Modern democratic theories of constituent power have been traced back to Marsilius of Padua in the early fourteenth century. For an analysis of the concept in the history of ideas see Andreas Kalyvas, “Constituent Power” [Political Concepts. A Critical Lexicon](#)

⁴⁷ Even if Negri was the first to propose reading Machiavelli through the theory of constituent power, his interpretation, heavily influenced by Spinoza, was not systematic but merely instrumental to his theory of insurgent democracy. For the latest radical democratic interpretations of Machiavelli see the edited volume *The Radical Machiavelli*.

Filippo Del Lucchese recently proposed to trace back to Machiavelli the genealogy of the concept of constituent power as a “living force within the social order,”⁴⁸ highlighting Machiavelli’s theory of socio-political humors and the dialectic relation between laws and orders derived from it, as major contributions to the understanding of the conflictual nature of constituent power.⁴⁹ Even if Antonio Negri and Miguel Vatter had already analyzed Machiavelli’s conception of constituent power,⁵⁰ Del Lucchese offers the first systematic reading of Machiavelli’s thought on extraordinary politics. In what follows I argue that the attempt to read Machiavelli through a democratic theory lens, which begins from the premise of a community constituting itself, inevitably obscures the originality of Machiavelli’s *republican* conception of constituent power, which is predicated on the socio-ontological split between the few and the many, which Vatter briefly analyzes from the perspective of a “modified, ‘no-rule’ republicanism.”⁵¹

Through a critical analysis of Del Lucchese’s interpretation of Machiavelli, in what follows I argue that the constituent power in Machiavelli is not a bridge between basic principles and politics, but rather the power to resist oppression by restraining oligarchic power. While in democratic theory the constituent power has been conceived as the autopoietic power of the community, a republican theory of constituent power would be defined functionally, determined by the goal of achieving liberty as non-domination. Republican thought conceives of constituent moments happening within an already constituted reality in which the community is never whole or in a vacuum, but existing in the perpetual struggle between the few and the many, and the legal reality attempting to stabilize it. The constituent power is the power to establish liberty, and

⁴⁸ Del Lucchese, “Machiavelli and Constituent Power,” p. 9

⁴⁹ Del Lucchese, “Machiavelli and Constituent Power,” p. 7. He also analyzes Machiavelli’s theory of dictatorship, even if he recognizes the dictator was indeed a “commissarial” one within Carl Schmitt’s categorization, and thus as Marco Geuna has convincingly argued, it should be conceived as an ordinary mode to deal with extraordinary circumstances, and not an office called upon to impose social change. Geuna, “Extraordinary Accidents in the Life of Republics: Machiavelli and Dictatorial Authority.” In *Machiavelli on Liberty and Conflict*. Also he argues that Machiavelli’s theory of dictatorship, theory of humors and the relationship he establishes between laws and orders correspond to “three classic pillars of a theory of constituent power, namely its subject, its temporality and its will.” I cannot refute this correspondence here, but I do not see any relation, to which Del Lucchese refers only loosely.

⁵⁰ Negri, *Insurgencies*; Miguel Vatter, “The Quarrel Between Populism and Republicanism: Machiavelli and the Antinomies of Plebeian Politics” *Contemporary Political Theory* (2012) 11. 3, pp. 242–263

⁵¹ Vatter, “The Quarrel Between Populism and Republicanism,” p. 244. For a discussion of the plebeian desire not to be dominated see Vatter, *Between Form and Matter: Machiavelli’s Theory of Freedom* (Fordham University Press, 2014)

thus, as Machiavelli argues, only the civil prince allied with the people is able to constitute a republic.⁵²

...though one alone is suited for organizing, the government organized is not going to last long if resting on the shoulders of only one; but it is indeed lasting when it is left to the care of many, and when its maintenance rests upon many.⁵³

While in extraordinary moments the founder would exercise constituent power by establishing lasting foundations for liberty that can be maintained after the founder's death,⁵⁴ the many should be the bearers of the power to resist oppression during ordinary politics, able to add anti-oligarchic institutions to the constitutional structure in order to deal with inequality and the corruption of older institutions. The constituent power is the power used both to establish a constitutional framework that liberates plebeians from the domination of the nobles, and to maintain it. While democratic constituent power presupposes the community as the subject of constituent power, republican constituent power would not be defined by the political subject and its sovereign will, but by its final cause (i.e. establishing liberty as non-domination) and the fundamental premise of a society that is irremediably split between the few and the many. While the *one* exercises constituent power by establishing a republic with lasting foundations for liberty, the *many* need to exercise constituent power to preserve this liberty, by recreating the founding through amendments to the institutional structure and extraordinary public trials.⁵⁵

Even though Del Lucchese recognizes the centrality of the division between “the people and the great” in Machiavelli, and duly criticizes the democratic theory of constituent power because of its focus on the “attribute of the will and the homogeneity of the constituent subject,”⁵⁶ his analysis of Machiavelli does not escape the democratic tradition and the unitary conception of the constituent power connected to the original founding moment of the community. This lens leads him to miss the role of constituent power in counteracting corruption. According to Del Lucchese, laws would be “ineffective and incapable of resisting corruption” because of the inadequacy of their

⁵² Machiavelli, *The Prince*, Chapter 9.

⁵³ Machiavelli, *Discourses*, I.9

⁵⁴ Machiavelli, *Discourses*, I.11

⁵⁵ For a comparison between Machiavelli and Guicciardini on public trials see McCormick, *Machiavellian Democracy*, Chapter 5.

⁵⁶ Del Lucchese, “Machiavelli and Constituent Power,” p. 10.

enforcement, which is “anchored to the originary constituent situation.”⁵⁷ Abstracting Machiavelli’s ideas from the material conflict between the few and the many, he argues that corruption derives from a disconnect between the founding principles and political contingency—rather than corruption arising from the ambition of the great. Even if he recognizes that for Machiavelli corruption is a systemic phenomenon, an “unavoidable mutation that all republics must endure,” Del Lucchese argues corruption in Machiavelli expresses not the overreaching of oligarchic power, but “a tension between laws and orders, or rather between constituent principles embodied in orders, and the juridical and political life of the republic, embodied in laws.”⁵⁸ Therefore, the constituent power in Machiavelli would be a “bridge between the juridical and the political.”⁵⁹ This abstraction from material conditions, and the projection of the dualism between constituent and constituted power onto Machiavelli’s political philosophy seems misguided since in Machiavelli the fundamental “tension” is not between constituent principles embodied in orders and laws that arise conjuncturally, but between the desires and actions of the orders, which are legalized through political processes, and the effectiveness of basic institutions to counteract the natural tendency of the republic to drift into oligarchy.

The lack of engagement with the threat of oligarchy and the specific function of constituent power in a republic also leads Del Lucchese to inject into Machiavelli a pluralism that is not reflected in his political philosophy, which is predicated on the split between the few and the many. Despite acknowledging Machiavelli’s plebeian partisanship, “in favour of the many, and against the few,”⁶⁰ Del Lucchese does not take this into account when analyzing Machiavelli’s conception of constituent power. For him the ‘people’ in Machiavelli is “irreducibly partial and partisan,” but only a part “among many, a humour among other humours.”⁶¹ Even if this is accurate and the *popolo* is only one of the *umori*⁶² in a republic, that the *popolo* is a partiality does not mean it is equal to other partialities, only one among many. Machiavelli is a plebeian thinker because for

⁵⁷ Del Lucchese, “Machiavelli and Constituent Power,” p. 19.

⁵⁸ Del Lucchese, “Machiavelli and Constituent Power,” p. 19.

⁵⁹ Del Lucchese, “Machiavelli and Constituent Power,” p. 19.

⁶⁰ Del Lucchese, “Machiavelli and Constituent Power,” p. 14.

⁶¹ Del Lucchese, “Machiavelli and Constituent Power,” p. 12.

⁶² Machiavelli also recognizes the soldiers as being a third humour. *The Prince*, Chapter 19. For an analysis see Paul Rahe, “Machiavelli and the Modern Tyrant” in *Machiavelli on Liberty and Conflict*.

him plebeians, due to their *exclusion* from political rule —“the condition that makes it possible for the plebs to act as a constituent power to make equal law”⁶³— are the only legitimate guardians of liberty, and thus not simply a part among many.

Giving constituent power to the people is what radically defines Machiavelli’s partisanship. It is clear that for him most of the “very great disturbances” in a republic are caused by the few, who fear to lose their position, not by the many, who hope to gain what they do not have; the rich need to secure their possessions by acquiring more in order to have greater resources to ignite rebellion and instill in the many the wish to possess and dominate.⁶⁴ Consequently, the few must not have the final say on the liberty of plebeians, because they will try to undermine it and effectively enslave the many. The few, given the position of power they hold in society, could never be the bearers of constituent power. The regime the few would impose would not be a republic but an oligarchy.

Because for Machiavelli liberty is to not be dominated —a state that is gained through conflict and tumults— the preservative power of free government would be the power of the people to replicate this gaining of liberty, to redraw the boundaries of what is considered permissible and what is deemed oppressive. Only the many —who desire not to be oppressed and do not partake in ruling— should be the guardians of liberty. The constituent power belongs to plebeians “in so far as it maintains itself as that part which does not participate in rule,” and thus is not something plebeians possess due to their class per se; to resist oppression the many must not be in a position to dominate.⁶⁵ The case of the Ciompi revolt in 1378 and the betrayal of plebeian leadership should then be seen as a warning. The wool workers overthrew the government and installed a plebeian revolutionary regime under the leadership of Michele di Lando, a comber from humble origin, who Machiavelli depicts as “barefoot and wearing little clothing.”⁶⁶ After becoming the Standard-Bearer of Justice and Podestà, di Lando “became a Thermidorian figure, clashing with the radical wing of the workers and thwarting their more egalitarian

⁶³ Vatter, “The Quarrel Between Populism and Republicanism,” p. 244.

⁶⁴ Machiavelli, *Discourses*, I.5.

⁶⁵ Vatter, “The Quarrel Between Populism and Republicanism”

⁶⁶ Machiavelli, *Florentine Histories*, III.16.

demands,”⁶⁷ and ultimately unleashing the slaughter of the Ciompi by reformist forces.⁶⁸ The plebeian origins of di Lando did not make him a plebeian partisan; it was his ruling position, in which he had the ability to dominate, which ended up determining his anti-plebeian behavior.

According to Machiavelli, Plebeians, given the position of no-rule they occupy in the political structure, should not merely be the guardians of the constitution or the founding principles, as it is today the judicial branch, but the defenders of liberty itself, which could run against established law. Consequently, we should consider the many as the bearers of constituent power, the power to amend the basic institutional and juridical structure of society. During the normal functioning of free government only the many are the bearers of the self-emancipatory force wielded by the plebeians against oligarchic domination in Rome; only the common people are the rightful bearers of this “conflictual power that precedes, drives and exceeds constituted power, not moving beyond law, but rather occupying its centre and transforming its nature.”⁶⁹

The constitutionalization of plebeian ordinary and extraordinary powers would be for Machiavelli a necessary condition for keeping a republic free from domination. In a republic the common people need not only to actively participate in deciding on motions, initiating and vetoing laws in plebeian assemblies, and selecting their Tribunes, but also by collectively offering fundamental changes to the constitutional structure and inflicting punishment on those who have become too powerful, so to bring the republic back to its beginnings and keep plebeians free from the domination of the great. Machiavelli argues citizens must periodically “examine themselves” (*si riconoschino*) and go back to the beginning, to their mighty republican founding. This self-examination of the people vis-à-vis the legal and institutional order, which allows for the renewal of the republic, would happen either by an external “accident” or an internal change triggered either by law or the “striking words” and “vigorous actions” of a virtuous leader. At the beginning of Book III of the *Discourses*, Machiavelli identifies these two means—law and virtue—as

⁶⁷ Yves Winter, “Plebeian Politics: Machiavelli and the Ciompi Uprising.” *Political Theory*, vol. 40, no. 6, (2012), p. 742.

⁶⁸ John Najemy, *A History of Florence: 1200-1575* (Oxford: Blackwell, 2006), p. 124–76.

⁶⁹ Del Lucchese, “Machiavelli and Constituent Power,” p. 7.

the appropriate ones for a republic to periodically be brought back to its beginnings and remain free. There is nothing more necessary for a republic than to regain

the reputation as it had in the beginning, and to strive that either good regulations or good men may produce this effect and that it will not need to be done by an external force.⁷⁰

Since the birth of republics is marked by creation and punishment — institutionalization of popular power and foundational violence—⁷¹ Machiavelli proposes a periodic renewal of the republic through law, triggering a periodic constituent moment, and an extraordinary public impeachment of those who have transgressed the egalitarian foundations of the republic.

Basing his observations in Rome, Machiavelli argues in favor of the reconciliation of law and liberty through the creation of new institutions such as the “Tribunes of the People, the Censors, and all the other laws that opposed the ambition and pride of the citizens.”⁷² Machiavelli’s response to corruption and oppression is thus not to get rid off institutions and procedures that have become corrupted but to add new institutions and legal means of popular censure to restrain the ambition of the few. However, he cautions that the mere establishment of anti-oligarchic institutions does not guarantee liberty since they would be ineffective if they were not “brought to life by the wisdom of a citizen who courageously strives to enforce them against the power of those who violate them.”⁷³ Consequently, even if laws and institutions against corruption are established, the courage of extraordinary popular leaders to enforce them appears in Machiavelli as inescapable. Legal means without *virtù* would amount only to “parchment barriers” against oppression, as James Madison referred to the Bill of Rights of the U.S. Constitution.⁷⁴

In addition to institutional innovation to create new means of controlling the few backed by adequate enforcement, Machiavelli adamantly argues for the need for extraordinary instances of punishment as necessary violence exerted against those who have violated liberty. The republic needs to deal harshly with those who have machinated

⁷⁰ Machiavelli, *Discourses*, III.1.

⁷¹ Machiavelli, *Discourses*, III.1.

⁷² Machiavelli, *Discourses*, III.1.

⁷³ Machiavelli, *Discourses*, III.1.

⁷⁴ James Madison, *Federalist* 48

against liberty such as the sons of Brutus, who conspired against the republic to “profit unlawfully,”⁷⁵ the Decimviri, who usurped political power and became tyrannical, and Melius the grain dealer, who sought to buy the favor of the masses by feeding the people at his own expense.⁷⁶ From his experience in the Florence of the Medici, Machiavelli identifies fear⁷⁷ as a crucial emotion that must be present both in the founding of liberty and in renewal moments. Going back to the beginnings is not only reconciling law and liberty through the creation of new institutions, but also about instilling the same fear of punishment to those who “had done wrong” as it was experienced during the founding. Thus, Machiavelli conceives of this foundational power as essentially creative and avenging, as a constituent power able to create institutions and laws in favor of equality, and ruthlessly punish individuals profiting from the corrupted constituted order. This constituent power as extraordinary enforcement of liberty should be according to Machiavelli legally convoked with

a lapse of not more than ten years, because, when that time has gone by, men change their habits and break the laws; and if something does not happen to bring the penalty back to their memories and renew fear in their minds, so many offenders quickly join together that they cannot be punished without danger.⁷⁸

Because Machiavelli, as I have argued, wants to constitutionalize the evolutionary political institutions of Rome, he argues for normalizing these instances of constituent creation and punishment, so to avoid the overgrowth of inequality and the extreme violence necessary to check it. He proposes to imitate the Romans, who periodically established new institutions and laws in favor of liberty, and were “accustomed to punish large numbers of those who did wrong.”⁷⁹ Therefore, a good republican constitution should codify these instances of constituent power to periodically examine and reconcile the legal framework with social reality through the creation of new methods of *adaptation* and *deterrence* to periodically curb corruption and the overgrowth of

⁷⁵ “...there is no more powerful remedy [against the troubles of a new republic], none more effective nor more certain nor more necessary, than to kill the sons of Brutus.” *Discourses*, I.16.

⁷⁶ Machiavelli, *Discourses*, III.1.

⁷⁷ This constitutive fear is different from the fear in God that Numa, the second founder of Rome, had to establish in order for the citizens to obey the law. Civil religion and fear of the divine are part of the constituted order.

⁷⁸ Machiavelli, *Discourses*, III.1.

⁷⁹ Machiavelli, *Discourses*, III.49.

oligarchy. Only through the constitutionalization of periodic instances of constituent creative and avenging power the republic could remain free from domination.

In addition to this periodic reactivation of constituent power as creation and punishment through law, Machiavelli argues a periodic refounding is also possible through “the mere excellence of one man.”⁸⁰ Citizens are able to recognize good leaders by their reputation, and nothing gets individuals greatest reputation than extraordinary political action. Machiavelli’s new methods thus would work in synergy with elections and free speech, rules and procedures that are crucial for allowing extraordinary, virtuous leadership to arise.

Men born in a republic should, then, follow this formula, and early in life strive to become prominent through some unusual action... either by proposing a law for the common benefit, or by bringing a charge against some powerful citizen as a transgressor of the laws...⁸¹

Excellent men are able to accomplish a renewal of the republic based only on their virtue, “without reliance on any law,” by their extraordinary reputation and example that lead other good men “to imitate them.”⁸² For Machiavelli elections—which imply the possibility of attaining glory through virtuous action, allowing for the moralizing authority of kingly power⁸³ to emerge in defense of liberty—and the equal access to political speech—the equal right to propose a law and speak in favor or against it in the assembly—are *necessary*, but not *sufficient* methods to maintain liberty overtime. Adding new methods for adaptation and deterrence through periodic popular creation and punishment would make the republic incorruptible:

if such instances of enforcement as I mentioned above, together with such individual examples, had appeared at least every ten years in that city, their necessary result would have been that Rome would never have become corrupt.⁸⁴

⁸⁰ Machiavelli, *Discourses*, III.1.

⁸¹ Machiavelli, *Discourses*, III.34.

⁸² Machiavelli, *Discourses*, III.1.

⁸³ From the obedience to the first good chief came “understanding of things honorable and good, as different from what is pernicious and evil...” *Discourses* I.2

⁸⁴ Machiavelli, *Discourses*, III.1.

5.

Condorcet and Primary Assemblies

Nicolas de Condorcet was one of the most progressive and creative thinkers of the 18th century. He was a radical egalitarian who vigorously advocated for the abolition of slavery, citizenship rights for women, equal protection for homosexuals and sex workers, equal and free public education, and active political participation of the masses.¹ As a materialist political philosopher,² Condorcet was particularly adept at seeing the gap between formal rules and procedures, and the actual exercise of rights and their consequences in society. Living in a moment of intense revolutionary activity, in which the old corporate structures of the *ancien régime*, already hollowed out by incipient capitalist markets and secularism, were crumbling, Condorcet sought to play an active role in the making of new ‘enlightened’ institutions. Based on his own experience as a legislator as well as the radical change coming out of the Paris Commune and the storming of the Tuileries, he came to comprehend that equal liberty needed strong popular institutions to properly channel protest coming from the masses and to limit the domination coming from representative government. His constitutional project was therefore designed to protect the republic against what he identified as a new form of

¹ Richard H. Popkin, “Condorcet, Abolitionist” in *Condorcet Studies: 1. (1984).- Xi, 220 S.*, edited by Leonora C. Rosenfield (Atlantic Highlands, NJ: Humanities Press, 1984).

² Condorcet followed Claude Adrien Helvétius’ material philosophy, which proclaimed the radical equality of human beings and the development of their faculties through physical sensation and experience. He rejected however the principle of self-interest which seemed to underlay Helvétius’ utilitarianism. For a discussion between Condorcet and Turgot on Helvétius see K.M. Baker, *Condorcet: from Natural Philosophy to Social Mathematics* (Chicago: Chicago University Press, 1975), p. 215–18. For an analysis on Helvétius’ influence on Condorcet see John Carson, *The Measure of Merit: Talents, Intelligence, and Inequality in the French and American Republics, 1750-1940* (Princeton University Press, 2007), p. 32–36.

domination: “indirect despotism,” a regime in which there is a procedurally sound representative government, but in which representation is “neither equal nor real,”³ a *de facto* oligarchy within the bounds of the rule of law. Given our ongoing ‘crisis of democracy,’ in which there is a general sensation that ‘the game is rigged’ even if the rules are generally being followed, revisiting Condorcet’s constitutional theory, which he constructed against the threat of *de facto* oligarchy concealed through proceduralism, appears timelier than ever.

Even if his contributions to the application of probability theory to voting have been sufficiently acknowledged,⁴ his contributions as a political philosopher have “been judged from the point of view of defeat,”⁵ and therefore have mostly gone unappreciated and understudied.⁶ Raised as part of the nobility but advocating for equality, the Marquis de Condorcet was a class traitor, an aristocrat who betrayed his class interest and embraced democracy. Because he was a nobleman of letters, and thus part of the intellectual structure of the monarchical regime,⁷ the Jacobins saw him with suspicion, as a “timid conspirator,” despite his radical egalitarian agenda.⁸ And even the most liberal part of the bourgeoisie, the Girondins, did not trust him, seeing him “as a weak reed at best, and as a tool of the Jacobins at worse.”⁹ As a result, Condorcet’s 1793 constitutional

³ Condorcet, “On Despotism” in *Condorcet Political Writings*, edited by Steven Lukes & Nadia Urbinati (Cambridge: Cambridge University Press, 2012), III, p. 164. Urbinati interprets indirect despotism as a “degenerated form of representative government.” *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2008), p. 189.

⁴ Condorcet’s voting scheme was tried out in Geneva. Even if it was not successful, his theory of voting was influential. See for example the influence of Condorcet’s jury theorem on James Madison in Norman Schofield, *Architects of Political Change: Constitutional Quandaries and Social Choice Theory* (New York: Cambridge University Press, 2006), Chapter 4.

⁵ For example, Condorcet is analyzed in *The Critical Dictionary of the French Revolution* edited by Francoise Furet and Mona Ozouf from the point of view of his failure to set the agenda for the revolution. This is also highlighted by Urbinati in *Representative Democracy* p. 179.

⁶ There are only a handful of books and articles in English and French that touch upon the constitutional question, but none dedicated exclusively to it.

⁷ Member of the Académie Française and permanent secrétaire of the Académie Royale des Sciences.

⁸ M. Robespierre, *Moniteur*, May 8, 1794. Cited in J. Salwyn Schapiro, *Condorcet and the Rise of Liberalism* (New York: Octagon Books, 1963), p. 97. The Jacobins were a left-wing group that had its stronghold of support in the Paris Commune, and took over government in 1793, initiating The Terror.

⁹ J. Salwyn Schapiro, *Condorcet and the Rise of Liberalism*, p. 96.

proposal was first discarded by the Jacobins and then disavowed by the Girondins, and has remained largely dormant since then.¹⁰

As the only *philosophe* who was an active participant in the French Revolution, Condorcet's ideas on how to harness the revolutionary spirit against systemic corruption from the point of view of praxis are of special interest. As a journalist and political pamphleteer, Condorcet followed closely the proceedings of the newly elected French constituent assembly (1789–1791). In 1790 he became a member of the municipal council in Paris while keeping up “a deluge of criticism and advice to the Assembly.”¹¹ After the 1791 Constitution was unveiled, he strongly criticized it for establishing property qualifications for suffrage and holding public office.¹² In October of 1791 he was elected to the Legislative Assembly, of which he served as President. His most important achievement (even if tabled) was to introduce a report on public education that recommended the establishment of equal, secular, and free public education from elementary school to college.¹³ Given his legislative track record and his furious defense of equality in the press, Condorcet gained the reputation of being “a champion of the people, without being tainted by violent demagoguery,” which made him become elected in 1792 to the National Convention, and then appointed to preside over the commission that would draft the new republican constitution.¹⁴

The constitutional proposal that came out of that commission established a ‘popular branch’ composed of local primary assemblies with the power to elect, censor, and reconstitute the republic. The project was endorsed by the Girondins, which were the majority in the commission, presented by Condorcet to the Convention in February, but only discussed for about a month in mid April 1793. *Le Girondine*, as the constitutional project is commonly known, was bitterly opposed by the Jacobins, who saw in Condorcet's proposal for establishing a system of primary assemblies a scheme devised to bolster conservative strongholds in the provinces and dilute the power of the Paris Commune. Seeing their material power under threat by this radically democratic, de-

¹⁰ Analyses of Condorcet's constitutional proposal remain partial and scarce. An exception is Nicholas Quinn Rosenkranz, “Condorcet and the Constitution: A Response to “The Law of Other States” *Stanford Law Review*, Vol. 59, No. 5, Symposium: (Global Constitutionalism) (Mar., 2007), pp. 1281-1308

¹¹ Schapiro, *Condorcet and the Rise of Liberalism*, p. 85.

¹² Condorcet, *Adresse à l'Assemblée Nationale, sur les conditions d'éligibilité*, X.

¹³ Condorcet, *Sur l'instruction publique*, VII. Considered part of the canon in the history of education.

¹⁴ Robespierre lost the election. Schapiro, *Condorcet and the Rise of Liberalism*, p. 95.

centralizing proposal coming out of a Girondin-dominated commission, in June the Jacobins expelled the Girondins by force, took over the Convention, and approved (but never implemented) a mutilated version of *Le Girondine* that although instituted primary assemblies it limited their capacity for opposition and binding decision-making power, and did not include procedures or ways to enforce the popular will.¹⁵ It also did not include the right to education, which was for Condorcet a necessary condition for the proper exercise of sovereign power in these assemblies. If implemented by the Jacobins, primary assemblies would likely end up having a toothless “advisory” role with no incentive for commoners to participate, and no procedural or material educational support for them to exercise political judgment. During the referendum on the new constitution Condorcet published a pamphlet condemning the project and urging citizens to vote against it.¹⁶ The Jacobins denounced this as a seditious act, and the Convention decided to arrest him on treason charges in early July. After escaping arrest for eight months, Condorcet was finally apprehended, dying on a prison cell while awaiting to be guillotined.¹⁷ The revolutionary experience, unable to produce a stabilizing constitutional framework, would end five years later in the coup d’état of 18 Brumaire and the return of kingly power to France.

In what follows I seek to recuperate Condorcet’s neglected wisdom during this revolutionary period in which old structures were being destroyed and there was no suitable blueprint for a post-revolutionary future. I engage first with Condorcet’s critique of separation of powers and the American constitution, and then analyze his constitutional plan, focusing on his proposal to institutionalize the popular protest power that arose with the revolution. I argue we should understand Condorcet’s proposal as a mixed constitution that institutionalizes the power of the many within the framework of the modern state. His proposed popular institution does not share in government—as a branch along side the executive, legislative, and judiciary branches—but is conceived as

¹⁵ Primary assemblies had only a 40-day window to protest a law. Within this period, at least one tenth of all primary assemblies in the country would have to protest for the law to be vetoed (Art. 59). If there is protest, the legislative body calls together all primary assemblies to decide on the matter (Art. 60). However, there is no article dedicated to procedures or enforcing decisions made by primary assemblies, so the power could be interpreted as non-binding.

¹⁶ Condorcet, *Aux citoyens français. Sur la nouvelle constitution*, XII.

¹⁷ When he was arrested, Condorcet was in a precarious health condition. He was found “half-starved, footsore, with a copy of Horace in his pocket.” Schapiro, *Condorcet and the Rise of Liberalism*, p. 106.

censorial, as exerting control over government through political judgment. Because “nothing could be easier than to devise forms which would create and then preserve bad laws,”¹⁸ representative constitutions need a non-ruling power able to periodically judge—from outside of government— law and policy. The constitutionalization of this no-rule, protest power appears for Condorcet as the only reasonable guarantee against systemic corruption and slow-moving, relentless oligarchic domination.

I. The Modern Mixed Constitution

While the first to write on a mixed constitution in which the people had the final say on law, policy, and punishment was Machiavelli, who sketched a plebeian republic in which good laws are the result of the conflict between the few and the many, Condorcet was the first one to write a full-fledged plebeian framework constitutionalizing the power of the many and giving them constituent power. Building his project on old participatory structures, his 1793 constitutional plan for the French republic seek to reform and entrench the village assemblies that were convened for the elections of the Estates-General,¹⁹ and the self-governing experience of the communes to establish a ‘popular branch’: a decentralized network of radically inclusive local assemblies with the power not only to elect officials but also to initiate and veto legislation, and exercise periodic constituent power.

As a republican thinker, Condorcet’s main concern was to prevent systemic corruption, the process in which “slow and secret abuses” take hold of institutions, allowing for the few to control representative government.²⁰ Even if for him “the true

¹⁸ Condorcet, *Letters from a Freeman of New Haven to a Citizen of Virginia on the Futility of Dividing the Legislative Power among Several Bodies (1787)*, Letter Three, in *Condorcet: Foundations of Social Choice and Political Theory*, edited by Iain McLean and Fiona Hewitt (Cheltenham: Elgar, 2007) p. 316.

¹⁹ Communal gatherings for putting together *cahiers de doléances*. After the electoral statute was promulgated, local assemblies were convoked to elect delegates and put together a list of grievances. See Peter Murray Jones, *The Peasantry in the French Revolution* (Cambridge University Press, 1988), p. 62–4; Malcolm Crook, “The Persistence of the Ancien Régime in France: The Estates General of 1789 and the Origins of the Revolutionary Electoral System” *Parliaments, Estates and Representation* (1993) 13:1, 29–40. For the importance of popular reunions and committees at this time see Alain Dalotel, Alain Faure and Jean-Claude Freiermuth, *Aux origines de la Commune* (Paris 1980); Jean Dautry and Lucien Scheler, *Le Comité Central Républicain des vingt arrondissements de Paris* (Paris 1960); and Martin Philip Johnson, *Paradise of Association* (1997); Ross, Kristin. *The Emergence of Social Space* (London: Verso, 2008).

²⁰ Condorcet, “A Survey of the Principles” in *Condorcet: Foundations*, p. 221.

perfection of man” was certainly a central duty of society,²¹ his constitutional project was not so much aimed at the “enactment of political autonomy” but rather, based on a negative conception of political liberty, at enabling resistance against tyranny.²² Following Machiavelli, for whom corruption is enabled by the methods of selection and decisionmaking,²³ Condorcet criticizes Montesquieu’s doctrine of separation of powers and its proceduralism,²⁴ and rejects the constitutional framework put in place in America, designed based on this doctrine, as not sufficient for controlling corruption and guaranteeing liberty.²⁵

In Montesquieu’s constitutional model, liberty is an individual “tranquility of spirit” based on the absence of fear and the sense of security²⁶ that result from good procedures that presuppose a division of functions and a balance of power. For Condorcet, this separation of powers does not provide an adequate mechanism for maintaining liberty because “only tend[s] to separate and complicate individual interests.”²⁷ Condorcet argues that seeing the executive, legislative, and judicial powers as independent forces that, by seeking their own interest, balance and regulate one another against the encroachment of liberty, denies the possibility of domination happening despite this formal division of government functions.²⁸

What becomes of public freedom if, instead of counterbalancing one another, these powers unite to attack it?²⁹

James Madison, too zealous against the tyranny of the majority and too confident on public opinion and electoral procedures, did not provide in the constitutional structure any recourse against oligarchy and the corruption of foundational institutions, except for a constituent process requiring supermajorities and excluding the direct participation of

²¹ Condorcet, “Sketch for a Historical Picture of the Progress of the Human Mind” in *Condorcet: Political Writings*, p. 126.

²² Urbinati, *Representative Democracy*, p. 188.

²³ Machiavelli, *Discourses*, I.18

²⁴ Condorcet, *A Commentary and Review of Montesquieu's "Spirit of Laws"*

²⁵ Shortly after the draft of the Federal Constitution, Condorcet published his *supplément*, in which he criticized it. John Adams responded to this criticism in *Defense of the Constitutions of America*.

²⁶ Montesquieu. *The Spirit of the Laws*, II.11, 6

²⁷ Condorcet, *A Commentary and Review of Montesquieu's 'Spirit of Laws,'* “Letter I: Letter of Helvetius to President Montesquieu”

²⁸ For a discussion on the difference between separation of powers and functions see Pasquale Pasquino “Machiavelli and Aristotle: The anatomies of the city,” *History of European Ideas*, 35:4 (2009), 397-407.

²⁹ Condorcet, “A Survey of the Principles,” p. 199.

the people.³⁰ For him, separation of powers was an “auxiliary precaution” to prevent corruption and the negative effects of factions,³¹ which together with a free press would protect the republic from vicious political leaders.

According to Condorcet’s account of the principles that should undergird republican institutions —“equality, economy, and simplicity”³²— the new American constitution, which chose “identity of interests rather than equality of rights” as organizing principle,³³ and enshrined the separation of powers as the best design to keep the republic uncorrupted, would stray too far from the republican tradition and thus was unlikely to serve as a real bulwark of liberty. While embracing interest over equality of rights would increase rather than ameliorate ‘artificial’ inequalities and the forms of domination they reproduce,³⁴ Condorcet criticized the system of separation of powers because it “disfigured” the simplicity of constitutions. Separation of functions would not only be unsuccessful in keeping corruption at bay, but it would also allow for its concealment and reproduction.

Experience everywhere has proved that these complicated machines destroyed themselves, or that another system emerges alongside the legal one, based on intrigue, corruption and indifference; that, in a sense, there are two constitutions, one legal and public but existing only in the law books, and the other secret but real, resulting from a tacit agreement between the established powers.³⁵

Separation of powers is thus not only an inadequate framework to keep corruption in check, but would also serve to obscure the actual domination being exerted “off the books” through the actual collusion of representative institutions against equal liberty. Without a popular censorial power making sure elites are not self-serving, the American

³⁰ U.S. Constitution, Art. V.

³¹ Madison, “Federalist 51”

³² Condorcet, “The Theory of Voting” in *Condorcet: Foundations*, p. 210.

³³ Condorcet, *Lettre d’un Théologien*, cited in Constance Rowe, “The Present-Day Relevance of Condorcet,” in *Condorcet Studies*, p.21.

³⁴ Rowe, “The Present-Day Relevance of Condorcet,” p.30.

³⁵ Condorcet, “A Survey of the Principles” p. 199

constitution put “the fate of the State dependent on the degree of stubbornness or corruption in each branch.”³⁶

When the people of a nation are reduced to fearing the errors, passions or corruption of their own representatives, they have to entrust other men, chosen just as much by chance, with the authority to prevent these representatives from abusing their power. The nation’s fate is not therefore in the hands of the reason, virtue and identity of interest of its citizens and their representatives. On the contrary, it is prey to the balance of opposing passions, of conflicting interests and clashing prejudices. In both administration and legislation, we must try to find a way of binding men to their duties when it is only chance, masquerading as free choice, which has endowed them with power in the first place.³⁷

For Condorcet representative government without a proper surveillance power censoring it, is equivalent to trading one form of despotism for another, “suffering under several types of oppression rather than fearing just one.”³⁸ And even if not all of those in power have oligarchic tendencies or are inept at protecting the interest of the people against them, having a few good leaders does not guarantee the dismantling of structures of domination. Condorcet learned through his experience in politics that reasonable arguments and truth are unlikely to carry the day, and thus the fate of the system cannot be placed on representative institutions.

...indeed, the major defect of all known assemblies is not that they lack talented men and virtuous citizens, but that they are full of stupid and corrupt men.³⁹

From a critical engagement with the American constitutional model, especially the Constitution of Pennsylvania, which instituted a checking power in the Council of

³⁶ Condorcet, “Letters From a Freeman of New Haven,” Letter Three, p. 322. For further analysis of Condorcet’s critique of the American Constitution see Max M. Mintz, “Condorcet’s Reconsideration of America as a Model for Europe” *Journal of the Early Republic*, Vol. 11, No. 4 (Winter, 1991), pp. 493-506.

³⁷ Condorcet, “On the Form of Election” in *Condorcet: Foundations*, p. 169.

³⁸ Condorcet, “On the Form of Election,” p. 169.

³⁹ Condorcet, “On the Form of Election,” p. 178. He had so little faith on the virtue of candidates that he designed his electoral system to “ensure that the plurality of the votes will always be obtained by men who have a perhaps mediocre, but sufficient, amount of the qualities necessary to fulfill the functions entrusted to them” (p. 169).

Censors in its article 47, and Turgot's plan of local assemblies,⁴⁰ Condorcet proposed a republican organization of political power aimed at addressing the inevitable erosion of law and its democratic foundations. As an alternative to the liberal constitution established in the United States, Condorcet proposed a mixed constitutional framework in which the ruling power of making laws and decisions about administration and foreign affairs would be concentrated in a government that would be constitutionally bound to obey decisions reached in local assemblies. In this way, he made "the sovereign unencumbered and thus the best candidate to be the judge of government and its agents."⁴¹ Different from Madison's theory of factions, in which ambition counters ambition and the most effective way to deal with the pernicious effects of factions is to multiply them,⁴² Condorcet proposes a government composed of different bodies (administrative, executive, legislative) that are not designed to check each other but to fulfill a particular role at different levels of government, and an external popular power to check corruption and avoid oligarchic domination.⁴³ While the American constitutional structure gave citizens the *individual* right "to petition the Government for a redress of grievances"⁴⁴ without providing any enforcement mechanism to see that petitions were taken into proper account in governmental action, Condorcet's popular branch would constitute an *institutionalized* popular power aimed both at electing the members of government and censoring their decisions. Rather than embracing the idealist position of trusting on elite self-policing, Condorcet follows a materialist approach to the constitution and gives the censoring power to popular primary assemblies, which are conceived as the institutionalized form of collective protest power.

Because spontaneous assemblies appear as constitutive to a free society born out of revolution, they should be considered as the central pivot of Condorcet's constitutional plan to stabilize the thrust of the French Revolution and preserve its recently gained,

⁴⁰ Anne-Robert-Jacques Turgot, *Mémoire sur les Municipalités* (1775). Among the many departures Condorcet took from Turgot's plan was the latter's endorsement of property as a requirement for active citizenship.

⁴¹ Urbinati, *Representative Democracy*, p. 217.

⁴² Madison, "Federalist 10"

⁴³ Condorcet also proposed an independent public treasury able to contain "the greed or ambition of the leaders of the government." "A Survey of the Principles," p. 207.

⁴⁴ American Constitution, First Amendment.

fragile liberty.⁴⁵ Given that he recognized that such a decentralized institution of decision-making would not be able to enforce its own decisions against the centralized power of government, Condorcet saw the need for another institution dedicated to oversee that the law was properly applied and enforced: a council of national overseers selected by the people. In the following sections I first analyze the scheme of primary assemblies, then focus on the procedures to initiate a constituent process, and finally analyze the council of overseers from a plebeian point of view.

II. Constitutionalizing the Revolutionary Spirit: Primary Assemblies

Condorcet was ahead of his time and was very aware that unveiling truth would make him a target of “ridicule.”⁴⁶ He was one of the first to call out the absurdity of excluding women from active citizenship and of the legality of slavery. His materialist approach to law allowed him to understand the mechanism behind these exclusions and the justifications that are constructed based on the material conditions of dependency of women and slaves. For him the same as men have negatively determined women’s education and aptitudes by making “oppressive laws against them,” establishing a “huge inequality among the sexes,”⁴⁷ and then sanction their incapacity for active citizenship, “we deprived the Negro of all his moral faculties and then declare him inferior to us, and consequently destined to carry our chains.”⁴⁸ For Condorcet the causes of inequality are not individual faculties, but the social structures that condition human development. His project is therefore aimed at eliminating the man-made distortions of the natural equality of “being capable of reason and moral ideas,”⁴⁹ by establishing an egalitarian legal and institutional infrastructure in tune with the principle of equal rights coming out of the French Revolution.

Our hopes for the future condition of the human race can be
subsumed under three important heads: the abolition of

⁴⁵ Counterrevolution was at its highest. See Arno Mayer, *The Furies. Violence and Terror in the French and Russian Revolutions* (Princeton: Princeton University Press, 2013).

⁴⁶ Condorcet, “Letters From a Freeman of New Haven,” Letter Two, p. 299.

⁴⁷ Condorcet, “Letters From a Freeman of New Haven,” Letter Two, p. 297

⁴⁸ Condorcet, “Rules for the Society of the Friends of Negroes,” in *Condorcet: Foundations*, p. 342.

⁴⁹ Condorcet, “Letters From a Freeman of New Haven,” Letter Two, p. 297

inequality between nations; the progress of equality within a single people; and true perfection of man.⁵⁰

Given Condorcet's radical egalitarian worldview and his materialist constitutional lens, the framework he proposes is not aimed at suppressing the revolutionary spirit and demobilizing the people by reserving political action for the enlightened few, but at creating the institutional infrastructure necessary to harness the emancipatory nature of popular politics for the benefit of the republic.

Grouping the citizens into primary assemblies is more a means of reconciling peace with freedom than a threat to public tranquility.

Because this foundational framework would need to accommodate his egalitarian position, Condorcet's model is a radically inclusive one in which the state had the duty to provide for basic welfare and education, and all adult residents could participate in politics at the local level, which all together would guarantee the minimal conditions for adequate human development. In his constitutional proposal all males who were 21 years old and residents for more than a year could become active citizens,⁵¹ even if to his mind there was no reason beyond social dependence to exclude women from education and active citizenship.⁵² Despite *Le Girondine* not giving the franchise to women, in terms of the degree of inclusiveness and participation, its proposal is quite radical since it argued not only for equal civil rights, but also for equal political rights, which were previously restricted to property-owning citizens in the 1791 Constitution. Even if Condorcet considered legitimate the exclusion from the franchise based on a state of dependence in which an individual "no longer obeys his own will," he denied the legitimacy of social relations perpetuating dependence in society and denounced the 1791 legal framework as not only unable of "destroying all vestiges of this dependence" but also as "helping to consecrate it in our new laws."⁵³ He found wealth requirements for voting and holding public office a baseless malice:

⁵⁰ Condorcet, "Sketch," p. 126.

⁵¹ *Le Girondine*. Title II. Art. 1.

⁵² There is no record, at least that I have found, on the debates on *Le Girondine*, but it is likely Condorcet would have pushed for giving equal citizenship for women, but failed at convincing a majority in the drafting committee.

⁵³ Condorcet, "A Survey of the Principles," p. 213. He also criticized youth discrimination, and opposed the high age requirement to serve in office in the American Constitution, which was set at 35 years for the

we could be neither stupid nor contemptible enough to believe that rich men are less prone to vice and corruption than poor ones. The only justification for a condition of this kind would be the advantage of choosing men who had received a better education and who could therefore be assumed to be more enlightened. We would consequently have to require a fortune of some considerable size. Clearly, all conditions of this kind are either illusory or lead to oligarchy.⁵⁴

The only requirement Condorcet endorses for the exercise of political rights, in addition to local residency, is a proper “theoretical education” enabling individuals to enjoy their rights, the very exercise of which forms part of a second, “political education.”⁵⁵ Because without knowledge and the skills to judge critically we do not have the capacity to recognize truth from falseness, ignorance undermines the “genuine improvement of the human person,” and therefore proper education must be a constitutional right, guaranteed by the state to every citizen.⁵⁶

Society thus has another duty—to provide all individuals with the means of acquiring the knowledge of their intelligence and the time they are able to spend on educating themselves put within their reach. The probable result is that the scales will be weighted in favor of those who have more natural talent and those with private means, giving them freedom to spend longer on their studies; but if this kind of inequality does not subject any individual to another, and if it affords support for the weak without imposing a master on them, it is neither an evil nor an injustice; indeed, a love of equality that is afraid of swelling the ranks of the enlightened and adding to their knowledge would be a most sorry thing.⁵⁷

President. For him this was not legitimate and would prevent great leaders—such as Scipio Africanus who defeated Hannibal at age 22— from coming to power. George A. Billias, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* (New York: New York University Press, 2016).

⁵⁴ Condorcet, “A Survey of the Principles,” p. 216

⁵⁵ *Ibid.*, p. 215. This idea of political rights as inherently active, of the exercising of political judgment as a learning-by-doing process, would be later invoked by J.S. Mill as part of an ideal constitution *Considerations on Representative Government* (1861).

⁵⁶ *Le Girondine*, “Déclaration des droits naturels, civils et politiques des hommes,” Art. 23 guarantees elementary education to all members of society.

⁵⁷ Condorcet, *Premier mémoire sur l'instruction publique*, “Premier Mémoire: Nature et objet de l'instruction publique,” I.

The expansion of general instruction to all citizens was so crucial for Condorcet that a year before his constitutional proposal he presented to the French National Assembly a project to make education compulsory to men and women—a necessary condition for his participatory constitutional project. Because for Condorcet true political liberty entails being free from ignorance, having the necessary knowledge to enjoy our rights and be truly independent, compulsory instruction would be the “price for liberty,” and the duty of society is “to provide all individuals with the means of acquiring the knowledge of their intelligence and the time they are able to spend on educating themselves put within their reach.”⁵⁸ This necessary learning process does not only take place in classrooms but also in political assemblies where political knowledge is created and shared, and political judgment is exercised and perfected through decisionmaking.

The radical inclusion of *Le Girondine* in terms of citizenship was coupled with a participatory institutional framework aimed at forming the general will of all assembled citizens to elect and check representative government. Primary assemblies of between 450 and 900 citizens would be established by law in every district *alongside* representative government,⁵⁹ which means that the nascent French republic could have had about seven million active citizens organized in as many as 16,000 local assemblies⁶⁰ if *Le Girondine* would have been established. This bottom-up process of will formation based on a multiplicity of times and spaces of sovereignty and deliberation⁶¹ would not only be superior in terms of determining the general will than having only district or national representatives,⁶² but also would provide the opportunity for the political education of the people, which is necessary for the full enjoyment of their rights.

Condorcet’s materialist approach to the constitution directed him to build on already existing popular organization as a springboard for radical change. His intention was to formalize the “partial, spontaneous protests and private voluntary gatherings” that arose with the revolution into primary popular assemblies, which “following legally

⁵⁸ Ibid.

⁵⁹ *Le Girondine*. Title III, art 1.

⁶⁰ Even though there is no accurate record of the percentage of the population of voting age, for a population of 20 million, roughly seven million are likely to have been males older than 21.

⁶¹ Nadia Urbinati “Condorcet’s Democratic Theory of Representative Government” *European Journal of Political Theory* 3.1 (2004) 53–75.

⁶² Condorcet, “On the Constitution and the Functions of Provincial Assemblies,” in *Condorcet: Foundations*, p. 168.

established procedures, [would] carry out precisely determined functions.”⁶³ Condorcet is against allowing for private forms of protest to drive government action because it would be a source of inequality:

sporadic protests and the rebellions or movements which may result from them will have more influence if they occur in or near the town where the national powers are based.⁶⁴

Because his constitutional framework was designed to “suit a people in the final stages of a revolution” by bringing order “without weakening the public spirit,”⁶⁵ he acknowledges these extra-legal popular councils born out of the revolutionary experience as existing *outside* of the constituted order and in need of institutionalization.

Even if as a rationalist Condorcet was primarily concerned with good deliberation and decisionmaking, I would argue his primary assembly system is not democratic in the sense that his constitutional scheme does not give primary assemblies ruling power (*kratos*), but only the power to check government, as a reactive power responding to the (in)actions of the representative body. His constitutional proposal conceived of the power of lawmaking and passing administrative measures as a monopoly of the national representative assembly;⁶⁶ “all other authorities will be required simply to execute the laws and resolutions which this assembly produces.”⁶⁷ In this way, Condorcet “liberated the citizens of all governmental burdens” so they could adequately judge governmental action.⁶⁸

⁶³ Condorcet, “A Survey of the Principles,” p. 190.

⁶⁴ Condorcet, “A Survey of the Principles,” p. 197.

⁶⁵ Condorcet, “A Survey of the Principles,” p. 190.

⁶⁶ Members to a unicameral representative assembly would be elected by primary assemblies in each department through a two-tired system. I will not focus on this electoral function of the assemblies, but just briefly refer to it. To avoid corruption in the selection process, Condorcet proposed a voting system in which the citizens gathered in primary assemblies would select candidates through two ballots: one “preparatory” in which a list of potential candidates is created, and a second “final” ballot based on this list. The first pre-selection of candidates takes places in primary assemblies in which citizens put forward names of candidates —triple the number needed to fill the seats.⁶⁶ Each assembly would send its list of candidates to the regional administration, which would make all the lists public and put together a definitive regional list with the candidates who obtained the most votes. This list is sent back to the primary assemblies, in which the second, definitive vote is cast.

⁶⁷ Condorcet, “A Survey of the Principles,” p. 199.

⁶⁸ Urbinati, *Representative Government*, p. 217.

Besides giving primary assemblies the power of electing candidates for the national assembly, and thus the power to constitute government, Condorcet conceived of local assemblies as the site for the people's institutionalized form of appeal, a "legal means of protest which could cause any law to be re-examined."⁶⁹ This "right of censure" could be exercised by any citizen, who after collecting 50 supporting signatures, could request her primary assembly to review an existing law or consider proposing a new one.⁷⁰ These proposals would not be immediately debated in the assembly but first analyzed and reformulated to become what Condorcet calls a "simple proposition." Following Rousseau, Condorcet argues there should be no formal debate in primary assemblies, but only a yes/no vote on questions that have "already been reduced to their simple component propositions."

Let us call a proposition which may only be accepted or rejected, but not amended, a 'simple proposition'. It is on propositions like these that voters should be asked their opinion, and not on the reasons which make them accept or reject the various propositions. The analysis should stop there.⁷¹

However, despite his stance against structured deliberation and in favor of silent voting, Condorcet conceives of primary assemblies as permanent sites of deliberation, where "members can, of course, debate freely in the assembly rooms in between the proposal and resolution of a question, but these debates remain completely private."⁷² Assemblies must be opened every Sunday to enable for citizens' deliberations.⁷³ By understanding politics as political judgment Condorcet positions assembled citizens and their "reasoned opinions" as the core site of sovereignty and legitimacy.⁷⁴ Primary assemblies, because of their capacity to aggregate particular knowledge and relate it to the general interest, would allow for a recursive relation between local and national politics and the truest expression of the general will.

⁶⁹ Condorcet, "A Survey of the Principles," p. 192.

⁷⁰ Condorcet, "A Survey of the Principles," p. 197. *Le Girondine*, Title VIII, art. 3; Title IX, art. 5 & 6

⁷¹ Condorcet, "On the Constitution," p. 161.

⁷² Condorcet, "A Survey of the Principles," p. 196.

⁷³ *Le Girondine*, Title III. Sec. V. Art. 3.

⁷⁴ Urbinati, "Condorcet's Democratic Theory of Representative Government," p.

To allow for primary assemblies to be self-governing, Condorcet proposed a council composed of one member for every 50 citizens registered in the primary assembly records (9–18 members per assembly). In addition to keeping the voting roles up to date, convening the assembly in the cases determined by the Constitution, and making the necessary demands to other assemblies or the regional government for the exercise of the people’s right of petition and censure,⁷⁵ the council must also reduce citizen’s petitions to simple propositions —the answer to these statements would allow an individual to “arrive at a true expression of his own opinion.”⁷⁶ The council would be in charge of analyzing the subject and bringing all the necessary information to the assembly. This power to frame the discussion by analyzing that subject and reducing all the different opinions about it to a series of “basic propositions and their contradictories,”⁷⁷ “must not be confused with giving any group of men, or even any individual, the right to suggest a subject for debate.”⁷⁸ Condorcet does not give agenda-setting power to the council; its prerogative would be limited to bringing to the assembly the initiatives of citizens, presenting the “whole subject of debate and a table of all propositions in which they had to vote.”⁷⁹ After being presented with a simple proposition, citizens would have eight days to deliberate on the matter and cast their vote during the next session.

Given his aversion to anti-progressive forces in society driven by “fear of innovation,” what for him is “one of the most damaging scourges of the human race,”⁸⁰ Condorcet devised a constitutional plan in which legal, policy, and constituent change could originate at the neighborhood level, in any corner of the republic. Progressive reform could be put into motion organically, spreading through the network of assemblies at the district and regional levels. If a resolution passed in one assembly, this assembly would have the right convoke all other assemblies in the district to decide on the particular motion. If the majority of assemblies in the district agree to go forward with it, all assemblies at the regional level would decide on the matter. If they are also in

⁷⁵ *Le Girondine*, Title I. Art. 7.

⁷⁶ Condorcet, “On the Constitution,” p. 161.

⁷⁷ Condorcet, “On the Constitution,” p. 159.

⁷⁸ Condorcet, “On the Constitution,” p. 166.

⁷⁹ Condorcet, “On the Constitution,” p. 166-7.

⁸⁰ Condorcet, “A Survey of the Principles,” p. 200

agreement, then the national representative assembly must consider if the proposition is “worthy of examination.” If the representative assembly agrees with the motion agreed upon by a majority of primary assemblies at the regional level, it is then transformed into law. But if the will of the representative assembly (based on a simple majority of its members) contradicts that emanating from the primary assemblies in a region, all primary assemblies in the republic are called to decide on the question. If the majority of primary assemblies is in contradiction with the representative assembly, then the latter “would seem to have lost the nation’s trust and must be replaced”⁸¹ by new representatives who would carry out the general will. In this way, Condorcet builds into the lawmaking process an enforcement mechanism of the popular will. If the legislature deviates from the popular will and writes a law that does not track the people’s will, it is recalled. Therefore representatives have a strong incentive to track the will emanating from primary assemblies.

Even if the representative assembly is the ruling power, in charge of legislating and directing government, Condorcet gives the ultimate decision over any matter to primary assemblies, setting his project apart from those of ‘aristocratic’ republicans such as James Harrington⁸² and liberal republicans such as Thomas Paine.⁸³ In Condorcet’s constitutional structure the assembled multitude has the power to oppose change and to generate it, autonomously and effectively setting the direction that government must follow. Moreover, in addition to the functions of electing representatives and repealing/initiating law through censorship procedures, Condorcet gives to primary assemblies the role of approving or rejecting drafts constitutions, as well as to decide whether to initiate a constituent process.

⁸¹ Condorcet, “A Survey of the Principles,” p. 197; *Le Girondine*, Title VIII, Art. 22-26.

⁸² Even though Harrington proposed a popular assembly because without one the Senate “will not be honest,” he restricted political rights to landowners and gave only ratifying power to the ‘popular’ assembly. *The Commonwealth of Oceana* (1656).

⁸³ Even if Paine recognized the people as a whole has a right to abolish government and decide on the constitution, he did not conceive of a popular institution or gave any political power to citizens beyond electing representatives. *Rights of Man* (1792)

IV. Proceduralizing Plebeian Constituent Power

By constitutionalizing non-governmental political activity Condorcet's constitution sought to be more than a mere regulatory document such as the American framework, which mostly contained detailed functions and limits to government. *Le Girondine* established also a creative institutional framework enabling the exercise of popular constituent power. In addition to the "protest power" of primary assemblies to censure government during normal politics, through binding motions for repealing and initiating legislation, Condorcet argued that for the republic to stay free and stable, the constitution needed to provide for procedures to periodically activate the constituent power. In the declaration of rights of his constitutional draft, echoing his friends Jefferson and Paine, he stated that "a generation has no right to subject its laws to future generations" and thus a people "always has the right to review, reform and change its Constitution."⁸⁴ The same as Machiavelli, for whom a periodic activation of constituent power is necessary to push back against oligarchy and protect liberty, for Condorcet the periodic revisiting of fundamental laws is also a necessary condition for the legal system to remain productive of liberty. Because no legal structure is immune to corruption, the constitution must provide for ways "to regulate the way in which a nation can establish a new constitution if citizens feel that the first poses a threat to their freedom."⁸⁵ Moreover, the appropriate procedures for activating the constitute power should take into account both the "profound indifference which often follows revolutions" and "the slow and secret abuses which eventually corrupt human institutions."⁸⁶

Following the premise that even the "best organized constitution" will eventually become corrupted if it is not periodically reformed, Condorcet pushes for constitutionalizing the constituent power, for normalizing extraordinary politics through institutions and procedures.

The only way to bring regular and lasting order to a society whose members have just retrieved their jealousy guarded rights, and who fear that they may lose them once again, is for the citizens explicitly to adopt a constitution which

⁸⁴ *Le Girondine*, Déclaration des droits naturels, civils et politiques des homes, Art. 33.

⁸⁵ Condorcet, "A Survey of the Principles," p. 221.

⁸⁶ Condorcet, "A Survey of the Principles," p. 221.

contains an orderly means of correction and reform. This will also eliminate enthusiasm and exaggerated suspicion, partisan frenzy and the fear of factions, the faintheartedness which says that all disruption will destroy the State, and the fear which constantly sees tyranny in peace and order.⁸⁷

Condorcet offers a model in which the initiation of the constituent process is not the monopoly of an institution or invoked through a single procedure. *Le Girondine* established three ways to activate the constituent process: 1) periodically through law (in intervals of 20 years), 2) by individual citizens through their primary assemblies, and 3) by the national legislature after approval of a majority of primary assemblies. Condorcet's multidimensional strategy to allow for the activation of the constituent power, which proceduralizes individual, institutional, and constitutional methods, is perhaps the most radical, comprehensive proposal to integrate the constituent power into the constitutional structure.

In addition to mandating a constitutional convention to review and improve the constitution every 20 years, *Le Girondine* gave to every citizen the right "to lead the call for a Convention for the reform of the Constitution" through the same "forms and rules established for the exercise of the right of censorship."⁸⁸ With 50 signatures of its members, primary assemblies would be forced to vote on whether or not amending the constitution would be necessary and desirable. Guaranteeing the individual prerogative to initiate a critique of the constitution would foster a dynamic constitutionalism in which change could be initiated at the local level through a capillary system⁸⁹ of political judgment. The question to initiate a constituent process would then spread organically through the network by triggering discussions and decisions one district at a time. If a majority of assemblies agrees, then the legislature would be required to call a National Convention.⁹⁰ This extraordinary assembly would be composed of two members per

⁸⁷ Ibid., p. 225.

⁸⁸ *Le Girondine*, Title IX, Art. 5.

⁸⁹ Foucault uses this concept to explain how power migrates from the margins of society to its center, transforming individuals in the process. "Prison Talk" in *Power/Knowledge: Selected Interviews and Other Writings*, ed. C. Gordon (New York: Pantheon Books, 1980), 37-54.

⁹⁰ *Le Girondine*, Title IX, Art. 6.

region, elected in the same way as members of the Legislature.⁹¹ This would mean that each citizen would have to select and rank six candidates for the Convention, which would have one year to complete a draft to send to the primary assemblies for ratification.⁹²

If we take into account that for Condorcet the only requirements for citizenship are one-year residence and being 21 years old, giving the right to initiate a constituent process to citizens is quiet revolutionary in terms of its radical inclusiveness and the possible articulation of subaltern forms of political judgment this would allow for as well as of its post-national implications. To be a resident is for Condorcet to be a citizen, and the exercise of political rights, including the right to amend the constitution, is done directly, at the local level, where reference to the “national will” are not connected to the ethnic conception of the people developed under the nation-state, but to the decisions reached in a majority of primary assemblies. This majority decision is constructed locally, which allows for the integration of local contexts and conjunctures into the “national will.” However, that this national will is constructed from the aggregate reasoned decisions taken in primary assemblies does not mean that Condorcet wants to “federalize the sovereign or particularize the law.”⁹³ The people are a collective sovereign and therefore individual citizens need to exercise their sovereign rights assembled, in a material and procedural space conducive to deliberation and decision-making.⁹⁴ Generality is only achieved through a collective process of opinion formation that originates at the local level. Therefore the people would operate not as a centralized system of command, but as a grid of political judgment in permanent flow. The *people as network* would be a subject with as many brains as assemblies, in which collective learning, reaction against domination, and social change would happen organically and independently from representative government and political parties.

⁹¹ Each assembly would send its list of candidates to the regional administration, which would make all the lists public and put together a definitive regional list with the six candidates who obtained the most votes. This list is sent back to the primary assemblies, in which the second, definitive vote is cast. The results are sent again to the regional government and published. The two candidates with the majority of votes would be selected as members to the National Convention.

⁹² *Le Girondine*, Title IX, art. 16.

⁹³ Urbinati, “Condorcet’s Democratic Theory of Representative Government,” p. 67.

⁹⁴ For an analysis of Condorcet and political deliberation see Urbinati, *Representative Democracy*, pp. 197–205.

IV. The Council of Overseers as Plebeian Institution

According to Condorcet, under any system in which government legitimately makes law, the right to resist a law that is “clearly unjust,” even if procedurally sound, must be confronted. For him, only the “direct majority of the people, limited only by the laws” can legitimately “judge whether this [legal] injustice is real” because the assembled people—not their representatives—are the “primary political power.”⁹⁵ Only the people themselves, exercising their right to censure in their primary assemblies, are able to legitimately and properly judge if a law is unjust. Because the probability of approximating the best judgment increases in proportion to the number of people deciding on an issue within appropriate rules of engagement,⁹⁶ decisions reached in a majority of primary assemblies would have the highest probability of being correct. It is within this argument of popular sovereignty as a form of judgment passed on the injustice of law and the power to resist laws that enable domination, that Condorcet proposes a popular surveillance institution. This censorial institution, “the council of national overseers,” however, was not included in the final draft of *Le Girondine* and thus is not as detailed in terms of its procedures.⁹⁷

In the interest of uniform action and theory, the constitution needs to establish a council of national overseers in between the legislature and the citizens who must obey the law, and the public officials who must execute the laws or supervise the detailed application of general administrative measures. The council will supervise (*surveiller*) the observance and execution of the laws and arrange the details of general administrative measure, so that they can be applied. It will carry out the will of the nation (*volonté nationale*) and inform the people’s representatives of anything which may require new resolutions to be made.⁹⁸

Condorcet conceives this Council of Overseers as a liaison (*lien*) both between the citizens and the legislature, and between the legislature and the executive and

⁹⁵ Condorcet, “A Survey of the Principles,” p. 204.

⁹⁶ Condorcet, “An Essay on the Application of Probability Theory to Plurality Decision-Making” (1785), in *Condorcet: Foundations*, pp. 131–8.

⁹⁷ More research needs to be done on the reasons why this proposal was not included, and what was Condorcet’s original constitutional proposal before presumably being outvoted by the rest of the commission.

⁹⁸ Condorcet, “A Survey of the Principles,” p. 204–5.

administrative organs. According to Condorcet, such an office, “necessary for social order,” is aimed both at *enforcement* and *surveillance*, at supervising that the will of the people “is carried out precisely, in an orderly and safe fashion.”⁹⁹

Even if Condorcet’s council of overseers does not appear as a straightforward plebeian institution —defending the will of the people against the government of the few— but rather as an office that only claims allegiance to the law, I would argue that it should nevertheless be seen as a form of tribunician power akin to Machiavelli’s Council of Provosts.¹⁰⁰ Following John McCormick’s interpretation through which plebeian institutions would provide not only protection against oligarchic power but also popular learning of the internal functioning of government, I would argue Condorcet’s Council of Overseers, as a “popular agent of elite accountability”¹⁰¹ that observes and supervises elected representatives, should also be analyzed as part of a plebeian tradition of institutionalized tribunician power.¹⁰²

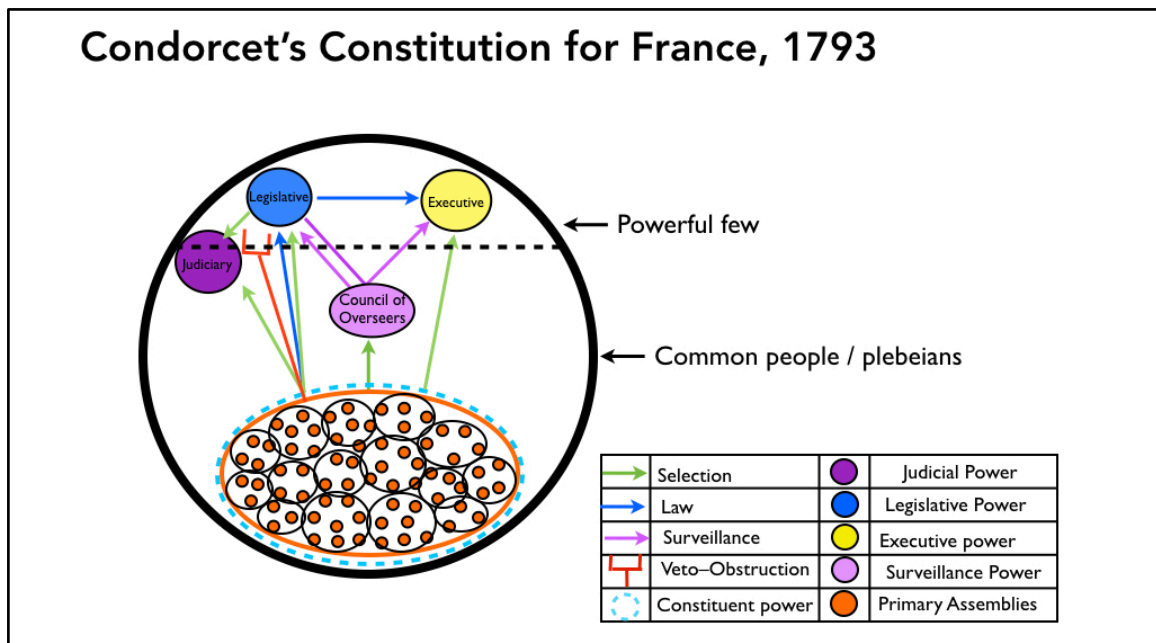


Figure 5.1 Condorcet’s Constitution for France, 1793

⁹⁹ Condorcet, “A Survey of the Principles,” p. 204–5.

¹⁰⁰ For an analysis of Machiavelli’s proposal see Chapter 4.

¹⁰¹ McCormick, *Machiavellian Democracy*, p. 106

¹⁰² Even if Condorcet did not support the dual-authority model of the Roman republic because it led to constitutional crises, the censorial powers he gives to his council of overseers are plebeian and in this way part of the tribunician tradition.

To elaborate his popular surveillance office Condorcet's closest example was the powerful Council of Censors that his friend Benjamin Franklin had introduced in the 1776 Constitution of Pennsylvania. Article 47 established that the members of the Council would be selected directly by the people and would have the duties to:

enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people...For these purposes they shall have power to send for persons, papers, and records; they shall have authority to pass public censures, to order impeachments, and to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution.¹⁰³

In addition to their power to subpoena and impeach, and the right to recommend the repeal of laws to the legislature, the council had the power to call a Convention to amend the constitution.¹⁰⁴ Therefore, the censors would not only oversee that government is performing appropriately and recommend the repeal of corrupting laws, but also would serve as a constituent board, calling a Convention when the constitution needs an overhaul. While Condorcet agrees with Franklin that the duty of a censorial institution should be to oversee that representative government is acting in accordance with its duty, and that its members should be selected by the people, he disagrees on the prerogatives such a council should have. Condorcet gives the power to repeal and propose legislation as well as to initiate the constituent process to primary assemblies, and therefore his proposed censorial institution is narrower in terms of the scope of its powers than the one established in Pennsylvania, but potentially more effective given its sharper focus on surveillance of representative government and closing the gap between law and its application.

Condorcet frames his council of overseers as an enforcer of the law, and its members as “agents of the legislature” and thus “subordinate to those with legislative

¹⁰³ Constitution of Pennsylvania (1776), Art. 47. The Council of Censors was in operation in Pennsylvania from 1776 to 1790, and was also adopted in Vermont from 1777 to 1869. For more information about the office see Lewis H. Meader, “The Council of Censors,” *The Pennsylvania Magazine of History and Biography*, Vol. 22, No. 3 (1898), pp. 265-300.

¹⁰⁴ The calling of a convention required a supermajority of 2/3. All other decisions were taken by simple majority. Constitution of Pennsylvania (1776), Art. 47.

power.”¹⁰⁵ However, despite the subordination of the *members* of the council to the legislature—which “must be able to force council members to obey the law and to curb their deviations”¹⁰⁶—the office itself is not the tool (*créature*) of the legislature, but acts independent from it; its main task is to enforce the national will (*volonté nationale*), which emanates from primary assemblies. Moreover, members of the council of overseers would be elected not by the legislature but by the assembled people, since they are “officers of the people and not of the representatives.”¹⁰⁷ Consequently, I would argue Condorcet’s surveillance council—selected by the people and aimed at enforcing the people’s will by examining every law approved by the legislature and seeing it is appropriately applied—should be analyzed as a plebeian institution of accountability.¹⁰⁸

As a liaison between the people and the legislative, the council resembles the office of the Tribune as an institution elected by the plebeian council that served as the link between plebeians and the seats of power, where law and its application were decided. The tribunes were the representatives of plebeians, and therefore acted as brokers between the ruling class and the common people as well as defenders of the people against the ruling class.

Even if from the point of view of primary assemblies the council has a tribunician character, as an “agent of the legislature” (and not of the people), overseers are conceived as an extension of the legislature: “the hand which enables the legislators to act and the eyes with which they can observe the execution of their decrees and the effects they produce.” In this manner, this popular censorial office is invested with the role to be the hands and eyes of the Legislature in the execution of the law, and force the executive to apply the law in a determined manner. Condorcet’s council, as the agent of the

¹⁰⁵ Condorcet, “A Survey of the Principles,” p. 206.

¹⁰⁶ Condorcet, “A Survey of the Principles,” p. 206. The legislature has the right to impeach council members, but only a national jury, selected at random from the people, can decide “whether or not the accused should be dismissed from office.”

¹⁰⁷ Condorcet, “A Survey of the Principles,” p. 206.

¹⁰⁸ Even if Condorcet criticized the dual-sovereignty model of Rome and chose the assembled people as the sovereign, given that assemblies without tribunes are weak, and decisions without enforcement are merely a wish, he designs a censorial office to enforce the people’s will. There is still authority vested in government as well as actual power, but there is no ‘balance of power’ between government and the plebeians. The assembled people—as opposed to the few holders of state power or the people as a whole—are the sovereign. This is the mark of Plebeian Constitutionalism. It is in this way that I interpret Condorcet’s proposals as part of the plebeian tradition that presupposes the power of ‘the few’; if there was no such power, but government just implemented the common good, there would not be a need for tribunes.

Legislature, could be conceived as a popular accountability office aimed at enforcing the law *against* the oligarchic tendencies of the executive organs. Seen from this perspective, the Council of Overseers is a popular anti-corruption institution checking that oligarchic domination does not creep into the gap between formal rules and their material application.

To avoid the corruption of this plebeian council without undermining its strength, Condorcet proposes that half of the council should be renewed each year.¹⁰⁹ This high rotation would “prevent any habitual opinions or procedures being formed which would inhibit useful reforms and make everything a matter of routine.”¹¹⁰ In addition to preventing bureaucratic logics to become encrusted, high rotation of members would also work to avoid oligarchic takeover of the council and to provide for collective learning, not only of law but also of how the government operates. The council acts not only as the eyes of the Legislature in the process of execution of law, but also as the eyes of the people in the places of power. The same as Machiavelli’s provosts, who would reside in the palace to witness all proceedings, Condorcet’s overseers would observe and analyze how the government implements the law. His overseers seem more powerful than Machiavelli’s provosts since they would not only observe, but also direct and enforce; as agents of the Legislature they would have the institutional power to set limits and expectations for the executive branches in terms of the correct application of the law.

Seen from a plebeian perspective, Condorcet’s Council of Overseers appears as a potentially strong popular accountability institution, playing the role of liaison between the people and government, and of enforcer of the people’s will against the corrupting tendency of the few. While primary assemblies are conceived as sovereign organs of judgment that function as a check on representative government, the Council of Overseers is a delegate censorial institution that does not have a will of its own, but is tasked with making sure popular judgments get codified into law and are properly applied by the executive and administrative organs. Put together, Condorcet’s ‘popular branch’ composed of a network of primary assemblies and a surveillance council appear as a powerful counterpower to representative government, which would be able not only to

¹⁰⁹ The Council of Censors in Pennsylvania would be elected every seven years. Art. 47.

¹¹⁰ Condorcet, “A Survey of the Principles,” p. 205–6.

prevent systemic corruption and the gradual decay of the republic into an indirect despotism, but also to allow for individual flourishing and social progress.

6.

Luxemburg and Popular Emancipation

Even if she was mislabeled as an idealist¹ —an ideological position she decried as working *against* proletarian emancipation— Rosa Luxemburg’s thought is deeply materialist. From her assessment of the Social Democratic Party in Germany to revolutionary politics in Russia, she was able to unveil power relations and their trajectories, and analyze them from the impact they had on the material conditions of subordination of the working class. She comes early to the understanding that Marx and Engels’ insight after the experience of the Commune was correct: that the “working class cannot simply lay hold of the ready-made state machinery and wield it for its own purposes.”² The socialist state needs to be constructed from the bottom up, apart and distinct from the bourgeois seats of power, through its own class-based, local organs of proletarian power. For Luxemburg if the material conditions for exercising collective power do not exist, there is no possible path to socialism and thus no real freedom for the working class. To think otherwise is indeed to be clouded by “illusions” that lead to an untenable idealist position: the belief that socialism could be realized by decree.

¹ Norman Geras argues her thought has also been mischaracterized as determinism, fatalism, and spontaneism. *The Legacy of Rosa Luxemburg*, (New York: Verso, 2015), p. 21.

² Karl Marx and Frederick Engels, [1848] “The Communist Manifesto” in Robert C. Tucker, ed. *The Marx-Engels Reader* (New York: Norton, 1978). Quoted in Luxemburg [1918], “Our Program and the Political Situation” in Hudis and Anderson (eds.), *The Rosa Luxemburg Reader* (New York: Monthly Review Press, 2004), p. 358.

Following Marx, for Luxemburg representative democracy is not a deficient political system, unable to properly channel working class priorities, but the political structure of the ruling class that could never deliver socialism through legal reform.³ Even if this realization made her deny the possibility of proletarian law within the capitalist system, something Evgeny Pashukanis would develop in 1924,⁴ her thought transcended critique as she focused on the conditions that were necessary for proletarian law to become a real possibility. The popular sectors needed to create their own revolutionary institutional infrastructure; without it, the path to socialism and proletarian law would be foreclosed.

In this chapter I suggest that focusing on Luxemburg's critical assessment of legal reform and her proposal to incorporate councils as a foundational democratic institution, could guide us in thinking about effective ways to counteract the increasing corruption and oligarchic domination developing within the contours of our constitutional democracies. In both her structural analysis of law and her endorsement of the council system she offers a materialist reading of politics that is refreshing, given the predominant non-materialist, abstract theory that the Left has tended to produce in the last four decades.⁵ I approach Luxemburg's work through a constitutional theory lens, and argue her ideas on the futility of reform and the need to institutionalize working-class power to achieve social change are part of the plebeian materialist strand of constitutional thought that embraces conflict as productive of liberty, and sees the institutionalization of popular power as a necessary condition for emancipation.

Even if Luxemburg's primary concern was not with constitutional theory, a constitutional interpretation of her political philosophy gives another point of entry not only into her assessment of the revolutionary processes taking place in Russia and Germany in the first decades of the 20th century, but also on the structure of political power she envisioned for the transition period in between the capitalist and socialist society. In what follows I first provide an analysis of Luxemburg's legal thought, and after laying out her arguments on the inadequacy of representative government to establish emancipatory, proletarian law, I focus on her support for worker's councils as the necessary material ground for a new legal system that would express a socialist

³ Frederick Engels, "Socialism: Utopian and Scientific" in Tucker (ed.) 1978 [1878], p.713.

⁴ Evgeny Pashukanis, *The General Theory of Law & Marxism* (London: Routledge, 2017 [1929])

⁵ For example the scholarship produced by the Frankfurt and Essex schools.

instead of a capitalist society. The politics of collective power, organized and deliberative, appear through the lens of Luxemburg's thought as the only one able to guarantee emancipation, being able not only to break with the current legal expression of society but to create a new socialist one, based on the political activity of workers' councils.

I. Legal Reform as Regulation of Exploitation

Luxemburg's critique in *Reform or Revolution* of Eduard Bernstein's revisionist theory of socialism gives an insight into her general critique of law, which she developed further in her final speeches, written in the aftermath of the German Revolution of 1918. Not only does she denounce revisionism as an opportunistic shift away from the socialist goal, but also its contribution to fostering the "illusions" and "self-deceptions" that undermine the power of the working class.⁶ According to Luxemburg, revisionism "lifted the program of the socialist movement of its material base and tried to place it on an idealist base,"⁷ in which the antagonism between capital and labor can be "adjusted" to attenuate exploitation by "bettering the situation of the workers and by the conservation of the middle classes."⁸ This "regulation of capitalism" is certainly not the same as socialism,⁹ which for her cannot emanate from the existing legality. "Socialism will not and cannot be created by decrees; nor can it be established by any government, however socialistic."¹⁰

According to Luxemburg, Bernstein is able to deliver this illusion of "socialism by decree" because his theory "abandons the materialist conception of history"¹¹ and pulls "details out of their living economic context. It treats them as *disjecta membra* (separate parts) of a lifeless machine."¹² By treating factors as separate from the structure instead of as organic links, as "indispensable gear in the mechanism of capitalist

⁶ Luxemburg, "Our Program," p. 367.

⁷ Luxemburg, "Reform or Revolution" in *The Essential Rosa Luxemburg: Reform or Revolution & the Mass Strike*, edited by Helen Scott (Chicago: Haymarket Books, 2008 [1900]), p. 66.

⁸ *Ibid.*, p. 69.

⁹ The same as the collapse of capitalism is not equated with socialism. For a discussion see Geras, *The Legacy of Rosa Luxemburg*, p. 32–42.

¹⁰ Luxemburg, "Our Program," p. 368.

¹¹ Luxemburg, "Reform or Revolution" p. 97.

¹² *Ibid.*, p. 70

economy,” Bernstein misinterprets them as “means of adaptation” able to suppress the internal contradictions of capitalism. Within revisionism the credit system, instead of a “means of destruction,” is seen as a possibility for “patching up the sores of capitalism.” In the same way, legal reforms, which appear as an effective way to achieve socialism from within the capitalist system, should be seen for what they really are: “surface modifications” to “reform capitalism” and forgo the socialist project.¹³

Luxemburg reminds us that legislative reform was from the beginning a bourgeois strategy, serving “to strengthen progressively the rising class till the latter was sufficiently strong to seize political power, to suppress the existing juridical system and to construct itself a new one.”¹⁴ The new political constitutions, born out of the bourgeois revolutions, legalized a type of class domination that “does not rest on “acquired rights” but on *real economic relations*,”¹⁵ and since there is no “single legal formula for the class domination of today,”¹⁶ it is impossible to suppress it the “legislative way.” While in the past domination was expressed in “distinctly determined juridical relations” that were connected to feudal privilege, bourgeois liberalism codified equal liberty while keeping the material conditions for domination intact.¹⁷ For Luxemburg the liberal rule of law is the “political expression of the life of a society that has already come into being,”¹⁸ and therefore, emancipation from exploitation and domination existing within this framework cannot be achieved through the law.

Labor legislation, a main goal of revisionist socialism, is a form of “social control” that is “enacted as much in the immediate interest of the capitalist class as in the interest of society in general.”¹⁹ As such, laws that are championed as socialist, as protecting workers, are “simply the regulation of exploitation.”²⁰ But even if labor laws are not emancipatory —with much socialism as “a municipal ordinance regulating the cleaning of streets or the lighting of street lamps”²¹— this regulation of exploitation

¹³ Ibid., p. 97 & 90.

¹⁴ Ibid., p. 89.

¹⁵ Ibid., p. 90.

¹⁶ Ibid., p. 91.

¹⁷ Ibid.

¹⁸ Ibid., p. 89.

¹⁹ Ibid., p. 61.

²⁰ Ibid., p. 61.

²¹ Ibid., p. 61.

coming out of the “attempt to increase the share of the social wealth going to the working class,” is indispensable as it is marginal to the socialist cause.²² In her analysis of the “industrial constitutionalism” promoted by revisionists in Germany, which incorporated trade unions and industrialists, she argued it is not a socialist type of constitutional project, but a mere regulation of labor relations. Even if born in the political action of the masses, the industrial constitutional project would develop a form of legality aimed at controlling labor without including the “material standard of life as a permanent stage of well-being” as part of its core reasoning.²³

Luxemburg’s denial of the possibility of enacting proletarian, emancipatory law within the existing capitalist legality is predicated on her assessment of parliamentarism—as an elitist organ in which the interests of capital predominate—and of democratic proceduralism as a way of masking oligarchy.

In this society, the representative institutions, democratic in form, are in content the instruments of the interests of the ruling class.²⁴

After the Social Democratic Party obtained a plurality in the German Parliament in 1912, and then decided to switch its position and vote in favor of the war, the “illusion of unity under the socialist banner” began to vanish. Luxemburg denounced the government as not only placating the bourgeoisie with the adoption of a “policy of compensation” and “diplomatic conciliation,” but as a “government representing the bourgeois counterrevolution.”²⁵

In a rather paradoxical move, at least from a democratic theory perspective, Luxemburg condemns the decision of the socialist government to convene a constituent national assembly. Her structural argument against setting up such a constituent body is based on the irreducible antagonism between capital and labor, the power of the few to oppress and the many to resist oppression. Because political institutions are forms of power that either reproduce capitalist society or oppose it, she condemns the decision by the socialist government to convene a national constituent assembly because it would

²² She uses the image of Sisyphus, pushing a rock up the mountain. Luxemburg, “Reform or Revolution” p. 83.

²³ Luxemburg, “The Proletarian Woman,” in *The Rosa Luxemburg Reader*, p. 185.

²⁴ Luxemburg, “Reform or Revolution,” p. 64.

²⁵ Luxemburg, “Reform or Revolution,” p. 68; Luxemburg, “Our Program,” p. 367.

develop the power of the bourgeoisie (the selected few) and do nothing to advance the interest of the working class (the organized many). Luxemburg saw the National Assembly as an institution constitutive to bourgeois revolution, a symbol of the triumph of the new bourgeois social order over the feudal structure of power.

The National Assembly is an outmoded legacy of bourgeois revolutions, an empty shell, a requisite from the time of petit-bourgeois illusions of a ‘united people’ and of the ‘liberty, equality, fraternity’ of the bourgeois State.²⁶

According to Luxemburg, through the wielding of state power the revolutionary government was establishing a “bourgeois counter-weight to the workers’ and soldiers’ representatives,”²⁷ and thus rather than empowering the workers, it diverted “the revolution on to the track of a bourgeois revolution,” which is not only unable to threaten the “capitalist class rule”²⁸ but also effectively works “against the proletariat and against socialism.”²⁹ Instead of consolidating the power of working-class councils, giving constituent power to the masses, the government, following the bourgeois track of constitution making, established an institution for the selected few to decide on the rules for the new “socialist” society. This was for Luxemburg a counterrevolutionary act that was legitimized under a narrative of democracy and the fantasy of the people-as-a-whole.

All the “people,” the whole “nation” should be called to decide on the further destiny of the revolution by majority vote. This slogan is, for the open and disguised agents of the ruling classes, self-evident. We shall discuss neither *in* the national assembly nor *about* the national assembly with the guardians of the capitalists’ safes.³⁰

The belief that the leaders of the working class could negotiate in a bourgeois institution with the “guardians of capital” to legally suppress capitalism is for her a dangerous illusion. Proletarian law challenging the political and economic systems is impossible to achieve within the structure of representative government, which legislates to reproduce the system (for which it needs labor laws in order to *regulate* exploitation

²⁶ Luxemburg, “Die Nationalversammlung”

²⁷ Luxemburg “The Socialization of Labor,” in *The Rosa Luxemburg Reader*, p. 344.

²⁸ *Ibid.*, p. 344.

²⁹ Luxemburg, “Our Program,” p. 367.

³⁰ Luxemburg, “Die Nationalversammlung”

and prevent violence). Law coming out of workers' council would not aim at relatively empowering the many within the current structure, but to radically emancipate them from the domination of the few, a form of revolutionary reform that subverts the predominant structure of class domination. Different from the minimal program of social reform sponsored by Bernstein, the maximal program of the socialist society advocated by Luxemburg was aimed at the subversion of capitalism. Even if this subversion would be attempted through a new form of legality, its force would not be grounded on procedural legitimacy but on the power of the working class.

Because proletarian law can only come out of the councils, through class consciousness and the performance of emancipatory politics, the legal subversion of the system would be grounded on material conditions, backed up by the collective power of the organized masses. This is why, when proletarian law finally arises out of the proletarian councils to challenge the economic system, and the capitalist class reacts, a civil war between the ruling forces and the organized masses would inevitably ensue. For Luxemburg a peaceful transition from capitalism to socialism is impossible, not because the working class would need to take governmental power by force (elections have already placed the SPD in government), but because of the violent response of the ruling class to proletarian, anti-capitalist law. Barbarism thus comes from the counterrevolution, from the pushback of the ruling class to the radical social change initiated in the workers' councils.

Red Rosa —as her antagonists called her— did not advocate for violence; Luxemburg recognized the inevitability of bloodshed and the need to plan for it. For her, the ideal of a peaceful transition advocated by SPD leaders, “profound Marxists [who] have forgotten the ABCs of socialism,” is another pernicious illusion that undermines the proletarian emancipatory movement.

[They want] to spare themselves the revolution, the use of force, the civil war with all its horrors. Petit-bourgeois illusions! They imagine that the mightiest revolution since the beginning of mankind will develop in such a form that the various social classes will come together, engage in a pleasant, calm and ‘dignified’ discussion with each other, and will afterwards hold a vote, perhaps even one with a famous ‘division’. When the capitalist class sees that it is in the minority, it, as a well-disciplined parliamentary party,

will declare with a sigh: There's nothing we can do! We see that we are outvoted. All right, we shall submit and hand over all our lands, factories, mines, all our fire-proof safes and our handsome profits to the workers...³¹

Given that oligarchs would never give up their wealth willingly and peacefully, proletarian authority is bound to be disavowed, and blood to be shed. Institutional popular power within a system in which the organized few run the state inevitably leads to competing authorities, an unsustainable dual-sovereignty model that ends in a constitutional crisis. Is in this moment when the power of deadly violence breaks through the constitutional scaffolding of rights and democratic institutions, negating the legitimate authority of the people to make anti-capitalist law.

These gentlemen Junkers and capitalists will remain quiet only so long as the revolutionary government is content to whitewash over capitalist wage relationships. They will be good only so long as the revolution is good, that is, long as the vital nerve, the artery of bourgeois class pile—capitalistic private property, wage relationships, profit—are left undisturbed. If profit is called to account, if private property is to be done away with, then this is going too far.... Once the bourgeoisie is touched in the heart—and its heart beats from within a fire-proof safe—it will fight a life-and-death battle for its rule and will develop thousands of open and covert methods of resistance against the socialist measures.³²

Given their class interests, ruling elites are bound to disregard legitimate popular authority, and the resulting constitutional crisis would then radicalize and accelerate the course of the revolution.

II. Democratic Rights and Workers' Councils

Luxemburg was a creative thinker who did not “profess” any particular ideological position other than the evidence she discovered from the historical materialist method she learned from Marx. Her prescient, sharp critique in 1904 of the “ultra-centralist” strategy pursued by Vladimir Lenin, which she further developed in her 1918

³¹ Luxemburg, “Die Nationalversammlung”

³² Luxemburg, “Die Nationalversammlung”

analysis of the Russian Revolution, was unpopular and relegated her to the margins of socialist thought.³³ She accused Lenin's revolutionary party of strengthening "the conservatism that springs inevitably" from social democratic parties, which tend to defend what they have gained against "further innovation at a greater scale."³⁴ She saw in Lenin's centralism not the creative, constituent energy of the masses, but the "sterile spirit of the night-watchman state."³⁵ She argued that the party's attempt to control the movement, to 'oversee' the revolution instead of fostering it, would end up stifling it. According to Luxemburg, Lenin's aim at controlling the party was concerned "with *narrowing* and not with *broadening*, with *tying the movement up* and not with *drawing it together*."³⁶

Fourteen years later, in her analysis of the Russian Revolution, she denounced the progression of the centralist strategy and the "cool contempt" the revolutionary government had for democratic rights such as suffrage and freedom of the press and assemblage.³⁷ Luxemburg argued that it was necessary for these rights not only to be formally respected, but also to be backed by material conditions and exercised through political action. Her analysis of democratic rights was not informed by liberalism,³⁸ but by the conclusion she drew from her critical approach to women's political rights: that formal equal rights "conform quite harmoniously with the bourgeois state."³⁹ Women's political rights, because they do not "encroach upon the domination of capital," do not bring the emancipation of women from the exploitation of domestic labor or overturn the state.⁴⁰ This coexistence of formal rights and domination in the case of women came to reinforce what she had learned from Marx's analysis of individual rights: that formal rights are not only an inherently partial form of freedom but that they also contribute to

³³ Already in 1925 Comintern her political ideas were being demonized as part of the 'Bolchevization' of socialism. John Peter Netti, *Rosa Luxemburg* (London: Oxford University Press, 1966), vol. 2, pp. 533, 800–1, 805–6; Geras, *The Legacy of Rosa Luxemburg*, p. 28-9.

³⁴ Luxemburg, "The Mass Strike," *The Rosa Luxemburg Reader*, p. 255

³⁵ Luxemburg, "The Mass Strike," p. 256.

³⁶ Use of italics in the original. Luxemburg, "The Mass Strike," p. 256.

³⁷ Luxemburg, "The Beginning," *The Rosa Luxemburg Reader*, p. 294.

³⁸ For a liberal interpretation of Luxemburg see Ernst Vollrath, "Rosa Luxemburg's Theory of Revolution" *Social Research*, Vol. 40, No. 1, Spring (1973), pp. 83–109. For a refutation of this liberal interpretation see Geras, *The Legacy of Rosa Luxemburg*, Ch. IV.

³⁹ Luxemburg, "The Junius Pamphlet," p. 244.

⁴⁰ Luxemburg, "The Junius Pamphlet," p. 244.

the endurance of relations of domination that are presupposed even if legally abolished.⁴¹ For rights to be emancipatory they need to be grounded on material conditions and relations of power. The same as giving the right to vote to women does not bring their emancipation from domestic domination, giving formal political rights to the masses without actual collective political activity, would not only not contribute to the emancipation of the proletariat from the capitalist state, but would allow for the endurance of relations of domination while giving the appearance of liberty.

Political activity is for Luxemburg crucial for developing class consciousness among the proletariat. She argues that the active exercise of democratic rights⁴² is for the proletariat indispensable not only because it renders the “conquest of power both *necessary* and *possible*,”⁴³ but more importantly “because only through the exercise of its democratic rights, in the struggle for democracy, can the proletariat become aware of its class interests and its historic task.”⁴⁴ This does not mean that the exercise of democratic rights should be the final goal of the revolution. Even if Luxemburg sees value on parliamentary activity and trade unionism due to the class awareness it promotes through party organizing, and as a means for advancing workers’ interests, she sees grave danger in trading means for ends, and conceiving the party as the main goal of socialist politics.⁴⁵ When the means are “separated from the movement” and “made an end in themselves, then such activity not only does not lead to the final goal of socialism but moves in a precisely opposite direction.”⁴⁶ Even if the party appears as an indispensable means to conquer the state, neither the conquering of the bourgeois state nor the maintenance of the party structure are connected to the final goal of a socialist society, which can only be built from the ground up, by the workers themselves. Consequently, actions by the party to control the movement by undermining democratic rights are ultimately self-defeating.

To be sure, every democratic institution has its limits and shortcomings, things which it doubtless shares with all other human institutions. But the remedy which Trotsky

⁴¹ Marx “On the Jewish Question,” in *The Marx-Engels Reader*, p. 33.

⁴² Freedom of speech and assembly, and the right to vote.

⁴³ Luxemburg, “Reform or Revolution,” p. 93.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 67.

⁴⁶ *Ibid.*

and Lenin have found, the elimination of democracy as such, is worse than the disease it is supposed to cure; for it stops up the very living source from which alone can come the correction of all the innate shortcomings of social institutions. That source is the active, untrammelled, energetic political life of the broadest masses of the people.⁴⁷

The “deprivation” of democratic rights under a socialist government is especially damaging for the revolution because it undermines the collective power of the proletariat and therefore the internal checking power to correct for inevitable institutional weaknesses of the political and economic systems. Luxemburg also observed in the anti-democratic tendencies of centralism the revolutionary party’s contempt for local proletarian organizations. The Bolsheviks saw the soviets —the incipient revolutionary popular infrastructure that spontaneously emerged in Russia— with suspicion, and designated them at first as “reactionary” because the majority of council members were peasants.⁴⁸ Even if Lenin was a strong supporter of the soviets in the aftermath of the 1905 revolution, arguing that “politically the Soviet of Workers’ Deputies should be regarded as the embryo of a *provisional revolutionary government*,”⁴⁹ his embrace of centralism once in power stifled the autonomous development of the worker’s councils. According to Luxemburg only the *correct* organs of the workers were conceived as valid interlocutors, and even those were being deprived of the necessary liberties to operate autonomously. By suppressing grassroots politics the revolutionary government, occupying the oligarchic state machinery, had established not a dictatorship of the proletariat (soviets) but a dictatorship of the selected few (party leaders) to which the masses were forced to support.

...with the repression of political life in the land as a whole, life in the soviets must also become more and more crippled. Without general elections, without unrestricted freedom of press and assembly, without a free struggle of opinion, life dies out in every public institution, becomes a mere semblance of life, in which only the bureaucracy

⁴⁷ Luxemburg, “The Beginning,” p. 302.

⁴⁸ Ibid., p. 304.

⁴⁹ Lenin, “Our Tasks and the Soviet of Workers’ Deputies” in *Lenin Collected Works* Vol. 10 (Moscow: Foreign Languages Publ. House, 1965), p. 19. I thank Peter Hudis for pointing to Lenin’s original idea of the workers’ councils as being the main actors within the new governing structure.

remains as the active element. Public life gradually falls asleep, a few dozen party leaders of inexhaustible energy and boundless experience direct and rule. Among them, in reality only a dozen outstanding heads do the leading and an elite of the working class is invited from time to time to meetings where they are to applaud the speeches of the leaders, and to approve proposed resolutions unanimously—at bottom, then, a clique affair— a dictatorship, to be sure, not the dictatorship of the proletariat but only the dictatorship of a handful of politicians, that is a dictatorship in the bourgeois sense...⁵⁰

In Germany, the incipient council system also came under attack from the ruling socialist party. Even if Luxemburg prioritized the mass strike over workers' councils in her early writings, after the SPD was voted into office and turned against the workers, Luxemburg goes back to the councils, conceiving them as fundamental institutions of the socialist revolution. This shift in her focus from the mass strike to the councils appears not only as a strategic move after the state machinery had been seized by the SPD, which would have made a mass strike more difficult to pull off, but also as a political project coming out of her critical analysis of Russian centralism and the death of public life.

To push back against the debasement of worker power and continue to oppose the war through revolutionary methods, Luxemburg founded in 1916 the Spartacus League⁵¹ together with Karl Liebknecht, Clara Zetkin, and Franz Mehring. In a series of speeches published in the League's newspaper *Die Rote Fahne*—within the two months after she was released from jail and shot by the government-sponsored Freikorps⁵²— Luxemburg denounced “the systematic destruction of the system of workers' and soldiers' councils” and called for reinvigorating the council system by spreading its mode of organization to the peasantry.⁵³ For her, because the revolution aims “at the foundation and base of the social constitution” it needs to “work from beneath,” and the duty of the revolutionary party should be to support councils as part of a revolutionary democratic constitution.⁵⁴

⁵⁰ Luxemburg, “The Beginning,” p. 307.

⁵¹ Spartacus led the largest slave rebellion during the Roman republic (73 BC).

⁵² The Freikorps were a right-wing paramilitary militia. *The Rosa Luxemburg Reader*, “Introduction,” p. 29.

⁵³ Luxemburg, “Our Program,” p. 371.

⁵⁴ *Ibid.*, p. 372-3

The path of the revolution therefore is not centralization, but the strengthening and spreading of the council system.

All power in the hands of the working masses, in the hands of the workers' and soldiers' councils, protection of the work of revolution against its lurking enemies —this is the guiding principle of all measures to be taken by the revolutionary government.⁵⁵

Luxemburg sees as an imperative to first dispel the illusion that to achieve socialism it is only “necessary to overthrow the old government, to set up a socialist government at the head of affairs, and then to inaugurate socialism by decree.”⁵⁶ The proletarian masses need to realize that they cannot be liberated from the top, but need to emancipate themselves through political action. The “essence of socialist society” is that “the great laboring mass ceases to be a dominated mass” —a collection of “dead machines assigned their place in production by capital”— and workers become agents giving “conscious, free, and autonomous direction” to the life in common.⁵⁷ This requires a transformation of the proletariat. Because “one cannot realize socialism with lazy, frivolous, egoistic, thoughtless and indifferent human beings,” individual men and women have to cultivate “inner self-discipline, intellectual maturity, moral ardor, a sense of dignity and responsibility,” what Luxemburg deems “a complete inner birth of the proletariat.”⁵⁸

Socialism, which appears constitutively tied to local councils as sites of self-rule, cannot be established by decree but “can only be won by a long chain of powerful struggles, in which the proletariat, under the leadership of the Social Democracy, will learn to take hold of the rudder of society to become instead of the powerless victim of history, its conscious guide.”⁵⁹ The only way for workers to undergo this transformation, from a dominated to an empowered class, is by exercising power in the “school of action,”⁶⁰ “through constant, vital, reciprocal contact between the masses of the people

⁵⁵ Luxemburg, “The Socialization of Labor,” *The Rosa Luxemburg Reader*, p. 343.

⁵⁶ Luxemburg, “Our Program,” p. 368.

⁵⁷ Luxemburg, “Our Program,” p. 350-1.

⁵⁸ Luxemburg, “The Socialization of Labor,” p. 348.

⁵⁹ Luxemburg, “The Russian Revolution,” *The Rosa Luxemburg Reader*.

⁶⁰ Luxemburg, “Our Program,” p. 372.

and their organs, the workers' and soldiers' councils."⁶¹ The masses need to be educated in the art of power by wielding power, and in this process transform "themselves into the free and independent directors of this process," with the sense of "responsibility proper to active members of the collectivity."⁶²

Our motto is: In the beginning was the act. And the act must be that the workers' and soldiers' councils realize their mission and learn to become the sole public power of the whole nation.⁶³

Because without the material conditions for local worker power, "the naked decrees of socialization by the highest revolutionary authorities are by themselves empty phrases,"⁶⁴ the main revolutionary task is to promote a proletarian institutional structure: the councils as constituent institutions.

...the symbol of the new socialist social order borne by the present proletarian revolution, the symbol of the class character of its true task, and of the class character of the political organ which is meant to execute this task, is: the workers' council, based on representation of the urban and rural proletariat.⁶⁵

If the final objective of the movement is the socialist society, in which the working classes are free from domination, not being 'ruled over' but ruling themselves, the immediate objective of the movement should be to "replace the inherited organs of bourgeois class rule" that rule over the working class, with a working-class political infrastructure aimed at self-rule, at cultivating the proper political character and activity among the proletariat so to adequately train them to "occupy all the posts, supervise all functions, measure all official needs by the standard of its own class interests and the tasks of socialism."⁶⁶ To accomplish this, Luxemburg argues for active organizing and institution-building at the local level, "down to the tiniest parish."

It is a question of fighting step by step, hand-to-hand, in every province, in every city, in every village, in every

⁶¹ Luxemburg, "What does the Spartacus League Want?" *The Rosa Luxemburg Reader*, p. 351.

⁶² *Ibid.*, p. 351

⁶³ Luxemburg, "Our Program," p. 372.

⁶⁴ Luxemburg, "Spartacus League," p. 351.

⁶⁵ Luxemburg, "National Assembly"

⁶⁶ Luxemburg, "Spartacus League," p. 351.

municipality in order to take and transfer all the powers of the state bit by bit from the bourgeoisie to the workers and soldiers councils.⁶⁷

Among the first necessary steps the revolutionary government should take to foster the council system⁶⁸ are 1) to improve the councils “so that the first chaotic and impulsive gestures of their formation are replaced by a conscious process of understanding the goals, tasks and methods of the revolution;” 2) to ensure that they have regularly scheduled meetings and adequate power-sharing processes, and 3) to establish a “national council of workers and soldiers in order to establish the proletariat of all Germany as a class, as a compact political power, and to make it the bulwark and impetus of the revolution.”⁶⁹ The revolutionary government would have therefore the task not only to systematize and standardize the procedures of self-rule used in the councils, but also to establish a new national institution that would further construct the workers’ class identity, empowering them to keep energizing the revolutionary process.

Without the conscious will and action of the majority of the proletariat, there can be no socialism. In order to intensify this consciousness, to steel this will, to organize this action, a class organ is necessary: a national council of the urban and rural proletarians.⁷⁰

The organized masses are for Luxemburg the agents and guardians of their emancipatory process, and therefore the duty of the revolutionary government, elected by the masses to take control of the state and wield its power, is to foster the institutional organization of the proletarian masses. The party should not be guided by centralist or revisionist strategies, but by the need to strengthen the council system.⁷¹

⁶⁷ Luxemburg, “Our Program,” p. 372.

⁶⁸ For an account of the development and operation of soldiers, workers and peasants councils see Allan Mitchell, *Revolution in Bavaria, 1918-1919: the Eisner Regime and the Soviet Republic* (Princeton, N.J: Princeton University Press, 1965).

⁶⁹ Luxemburg, “The Socialization of Labor,” p. 343-4.

⁷⁰ Luxemburg “National Assembly”

⁷¹ Kautsky’s notion that workers councils, while a vital part of the revolutionary process, are restricted to the local and firm level, necessitating the continued existence of parliamentary forms that address overall societal needs. “To opt exclusively for the council form would be to introduce a system based on work place and occupation, that would exalt particularist and corporatist tendencies, creating and consolidating divisively localist interests and loyalties.” Massimo Salvadori, *Karl Kautsky and the Socialist Revolution 1880-1938* (London: Verso, 1990).

III. Luxemburg's Transitional Constitutional Structure

Luxemburg's materialist approach made her understand that revolution, the political action that is the origin of constitution, is conditioned by the current stage of class struggle and the legal and extra-legal means available to the masses. Political action, the "deed," is the starting point of the revolution, and the factors conditioning these actions become a constitutive part of it. Being not only a materialist thinker, but also very much a realist like Engels, Luxemburg envisioned a period of transition between the capitalist and socialist societies, a regime in which both bourgeois and proletarian institutions would coexist. Even if she did not propose a proper constitutional structure for this transition period, her material legal thought reveals two basic elements the revolutionary constitution must have in order to enable the path to socialism: democratic rights to free speech, assembly, and suffrage to assure the conquest of representative structures, and local, autonomous working-class councils as constitutive institutions of the new socialist society. As I discussed above, democratic rights need not only to be formally respected, but also equally exercised, which would require the socialization of burdens preventing proletarians from engaging in political action. In the case of proletarian women, for example, the socialization of child-care and domestic labor would be a necessary condition for their equal access to politics.⁷²

According to Luxemburg, what makes the proletarian revolution radically distinct from bourgeois revolutions is the spontaneous organizing of the masses in councils, "the stamp of a proletarian socialist revolution."⁷³ Even if she does not mention the exercise of constituent power in this spontaneous self-constitution of the councils, this is the power workers and soldiers are actually wielding when defying the existing structures of power and setting up their own autonomous political institutions of self-rule. Consequently, the establishment of local worker councils marks the origin of a constituent revolution "from below," and therefore its fate is tied to the strength of the council system, which is supposed to replace the bourgeois ruling structure in the long run. This transitional phase in which the new proletarian institution is added to the existing political structure, corresponds to the type of 'composite' constitutionalism endorsed by Machiavelli;

⁷² Luxemburg, "The Junius Pamphlet"

⁷³ Luxemburg, "Our Program," p. 366

because it is realist, it does not seek to abolish current oligarchic structures of power, but to add new autonomous institutions resting on plebeian authority rather than on existing legality. The mere existence of an institutional source of proletarian authority, even if not properly “constitutionalized,” would imply the recognition of organized proletarians as political agents, and establish the institutionalization of class conflict. The continual agonistic opposition of the councils to the liberal representative structure appears moreover as the effective cause of the revolution in this transition period, which would only be completed when proletarian institutions acquire supreme authority and decision-making power, and a new legality expresses a socialist society rather than a capitalist one.

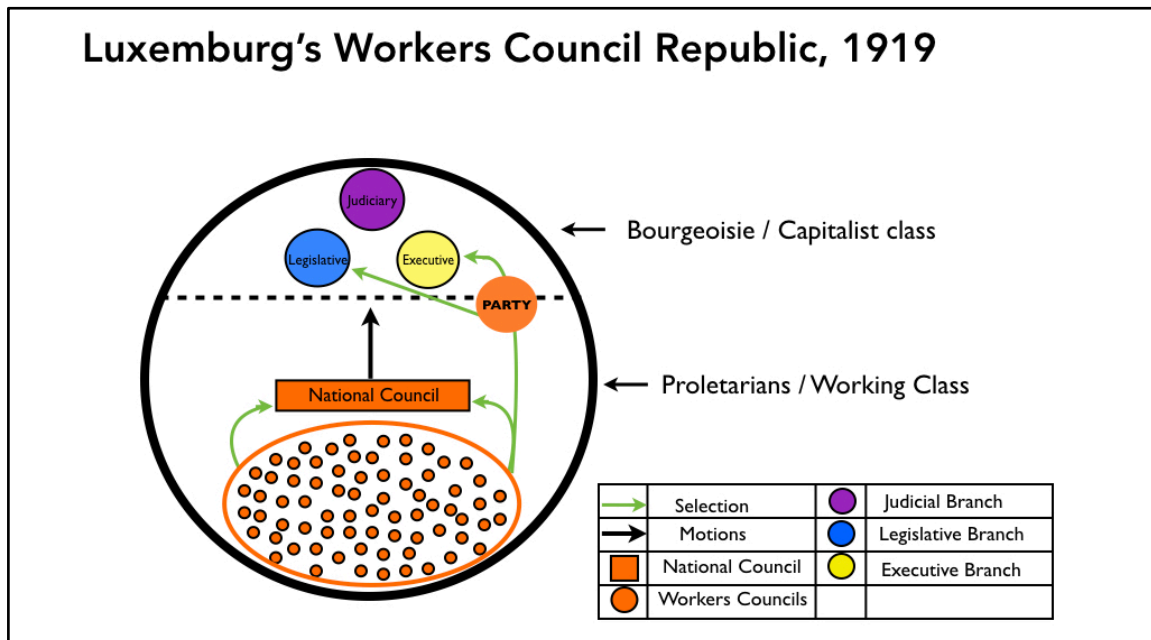


Figure 6.1 Luxemburg's Workers' Council Republic, 1919

I would argue Luxemburg's transitional regime constitutes a hybrid constitutional framework in which two sources of authority—the liberal democratic order and its proceduralist justifications, and the proletarian order based on the collective activity of the councils— compete for power. This combination of legal and extra-legal forms of authority within one political system should moreover be interpreted as a Marxist iteration of the republican mixed constitution, in which the legal power of the oligarchy is checked by the constituent power of the proletariat as a universal agent of emancipation. Through Luxemburg's materialist approach, the establishment and development of

proletarian organs of power, far from being an idealist position, appears as the necessary material ground from which the new socialist society can begin to be collectively conceived.

Arendt and the Republic of Parties and Councils

Hannah Arendt's first encounter with Rosa Luxemburg and revolutionary action was in 1919 when her mother took her to a public discussion circle about the recent uprising of the Spartacus League.¹ Luxemburg became for Arendt a role model, not only because of their shared cultural Jewish heritage and gender, but also in what respects to her position as an ideological pariah, an outsider bound to be misunderstood and even demonized.² In this chapter I analyze Arendt's most controversial, understudied, and misunderstood work, *On Revolution*, which was conceived after her engagement with Luxemburg's critical essay on the Russian Revolution.³ Most Arendt specialists have tended to neglect or dismiss her proposal to establish a republic of councils as an anomaly in her thought—an idealist move in a rather realist thinker,⁴ critique that was also raised against Luxemburg. Through a materialist analysis of Arendt's thought, I conceive of her proposal for a council system not as a marginal thought experiment, but

¹ E. Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven CT, 1982), p. 29.

² J.N. Shklar, "Hannah Arendt as Pariah" *Political Thought and Political Thinkers* (Chicago: University of Chicago Press 1998), p. 371.

³ Letter from Arendt to Blumenfeld, 31 July 1956, cited on J. Muldoon, "The Origins of Hannah Arendt's Council System" *History of Political Thought* (2015)

⁴ See for example M. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge: Cambridge University Press 1993); S. Benhabib, *The Reluctant Modernism of Hannah Arendt* (New York: Rowman & Littlefield Publishers 2003).

as central to her political philosophy, as inseparable from her conception of political freedom as action, and her critique of the liberal republic, and in this way very much in tune with Luxemburg's own theory of political action and critical assessment of constitutional democracy.

In her review of J.P. Nettle's 1966 biography of Luxemburg, Arendt claims that Luxemburg's "insight into the nature of political action" came out of her experience in the 1905 Russian revolution.

The main point is that she had learned from the revolutionary workers' councils (the later *soviets*) that "good organization does not precede action but is the product of it," that "the organization of revolutionary action can and must be learnt in revolution itself, as one can only learn swimming in the water," that revolutions are "made" by nobody but break out "spontaneously," and that "the pressure for action" always comes "from below." A revolution is "great and strong as long as the Social Democrats [at the time still the only revolutionary party] don't smash it up."⁵

Arendt not only adhered to Luxemburg's basic idea that political action precedes organization, springing from the people who necessarily perform their own political emancipation, but also to the grave threat revolutionary parties posed for the councils. She argues that what made Luxemburg a real outsider within the revolutionary left was her staunch commitment to the republic and its guarantee of democratic rights such as free speech and assembly.⁶ Even if she is right about this assessment, Arendt's 'republican' reading of Luxemburg makes sense only if we understand republicanism in its plebeian strand, as an ideological framework that conceives of the political action of the people as a necessary condition for liberty. If by a republic we mean a system in which basic democratic liberties are protected and there are institutional spaces for the people to engage in political action, then yes, Luxemburg was very much a republican. This does not mean that Arendt is trying to deny Luxemburg's revolutionary

⁵ Hannah Arendt, "A Heroine of Revolution" *New York Review of Books* (OCTOBER 6, 1966). For an analysis of Luxemburg and Arendt see Maria Tamboukou, "Imagining and Living the Revolution: An Arendtian Reading of Rosa Luxemburg's Letters and Writings" *Feminist Review* 106 (2014), p. 27–42.

⁶ Arendt, "A Heroine of Revolution"

commitments or, on the contrary, that Arendt is a closeted Marxist,⁷ but that Arendt's interpretation of republican thought attempts to be purely political, stripped from socio-economic considerations. This reduction of republican constitutional thought to a political framework of democratic rights and spaces of freedom makes it possible for it to be compatible with Luxemburg's strand of revolutionary socialism without necessarily sharing its Marxist ideological commitments, and even challenging the dominance of Marxism in the study of revolution.

The failure of the revolutionary tradition to give any serious thought to the only new form of government born out of revolution can partly be explained by Marx's obsession with the social question and his unwillingness to pay serious attention to the questions of state and government.⁸

Arendt claims that the council system, as a political structure, has been neglected by the Left primarily because of its "obsession with the social question" in the study of revolutions. Setting aside the issue of this obsession with exploitation and material necessity being reasonable, Arendt's critique of Marxist interpretations of revolutions is that they neglect what is fundamental about them: the establishment of a constitutional order where freedom can dwell. This approach to Arendt's work certainly does not solve the contradictions and paradoxes in it, but certainly sheds new light on the council system as a space of freedom in which the revolutionary spirit can be preserved, a strictly political realm of appearances that needs to remain distinct from the administration of the social.

Despite Arendt's political commitments appearing as quite different from those of Luxemburg's, I would argue their political philosophies are connected at the root:⁹ in the understanding that political liberty is only possible in political action, and that revolutionary action is the source of political liberty.¹⁰ Reading Arendt's constitutional

⁷ For an analysis of Arendt's relation between social and political see Sidonia Blattler and Irene M. Marti, "Rosa Luxemburg and Hannah Arendt: Against the Destruction of Political Spheres of Freedom" *Hypatia*, Vol. 20, No. 2, (Spring, 2005), pp. 88-101.

⁸ Arendt, *On Revolution* (New York: Penguin Books, 2006), p. 250.

⁹ And thus radically, according to Marx. "To be radical is to grasp the root of the matter. But, for man, the root is man himself." *A Contribution to the Critique of Hegel's Philosophy of Right 1844*, Introduction.

¹⁰ "The spontaneous political activity, demanded by Luxemburg against party officials, forms the essential center of Arendt's essays on revolution." Sidonia Blattler, Irene M. Marti and Senem Saner, "Rosa

proposal as well as her critique of the modern revolutions and their outcomes through Luxemburg's "prophetic words of warning against the suppression of political freedom" in the name of revolution,¹¹ allows us not only to better understand Arendt's intellectual position as a pariah but also to distinguish her unique contributions to a plebeian constitutionalism in which equal access to political action and new beginnings is to be guaranteed and fostered. Even if Arendt's project was not to advance the socialist revolution but to recuperate politics from the murky waters of the social, nor to organize the working class but to abstract the councils from their historical roots in the labor movement, I would argue her consistent support for a system of inclusive councils as an alternative form of government—from the late 1940s¹² until her last major publication *The Life of the Mind* in 1971—should be interpreted as a development of Luxemburg's political project. Arendt, picking up where Luxemburg left off, developed novel philosophical justifications for the council system, detaching it from Marxism and the primacy of necessity, and decisively connecting it to 'democratic' republicanism and the primacy of politics, without in any way betraying Luxemburg's project of proletarian emancipation through political action. In this chapter I analyze Arendt's move away from the social and towards the political through her critical engagement with the French and the American revolutions, and how her particular analysis of the political nature of the councils allows for a new interpretation of the mixed constitution as a framework combining parties and councils, administration and politics.

I. Freedom and New Beginnings

Arendt's thought has two gravitational poles, constantly competing for primacy, but open to the possibility of synergy. On the one hand, her conception of the political as the realm of appearances, informed by the Greek political experience of the polis, is based on natality, the capacity of human beings to initiate something anew, a creative force capable of transcending the limits of the constituted reality. On the other hand, her conception of politics as the common world of institutions, informed by the Roman

Luxemburg and Hannah Arendt: Against the Destruction of Political Spheres of Freedom" *Hypatia*, 20.2 (Spring,2005), p. 92.

¹¹ Arendt, *On Revolution*, p. 314 f.82

¹² J. Muldoon shows how her commitments to the council system can be traced back to her experience with kibbutzim. "The Origins of Hannah Arendt's Council System"

political experience of the republic, is based on authority, the source of stability and permanence that makes possible the preservation of freedom. This dualism between Greek and Roman political traditions —innovation and stability, power and authority— is brought to the fore and synthesized in Arendt’s theory of new beginnings, as “something new [that] comes into an already existing world.”¹³

Arendt’s interpretation of the political is intrinsically linked to her conception of freedom as action. Following Aristotle, the political realm is also fundamentally ethical; the good life is the political life, a life of freedom marked by action in the public sphere. In the polis to be free

...meant both not to be subject to the necessity of life or to the command of another *and* not to be in command oneself. It meant neither to rule nor to be rule... Equality, therefore, far from being connected with justice, as in modern times, was the very essence of freedom: to be free meant to be free from the inequality present in rulership and to move in a sphere where neither rule nor being ruled existed.¹⁴

Equality is then the precondition for freedom; without equality men’s ability to act in concert for the common good is compromised. Freedom as action is only reserved for the ones who are free from the yoke of rulership —those who already have negative freedom in the republican sense, freedom as non-domination,¹⁵ and do not exercise command over others. In addition, Arendt’s conception of freedom also presupposes plurality, which demands in turn the actualization of individuality, for which it is essential to be free from interference.

As Patchen Markell suggests in his interpretation of Arendt, beginning is for her an “action, whether disruptive or not, [that] involves attention and responsiveness to worldly events,”¹⁶ and therefore “what makes a beginning a beginning for Arendt, what lends it its eruptiveness, is not its degree of departure from what preceded it, but rather our attunement to its character as an irrevocable event, which also means as an occasion

¹³ Arendt, “What is Freedom?” *Between Past and Future. Six Exercises in Political Thought* (New York: Meridian Books, 1969), p. 167.

¹⁴ Arendt, *The Human Condition* (Chicago: Chicago University Press, 1998), p. 32-33.

¹⁵ See P. Pettit, *A Theory of Freedom; Republicanism*.

¹⁶ P. Markell, “The Experience of Action,” in *Thinking in Dark Times: The Legacy of Hannah Arendt*, R. Berkowitz, J. Katz, and T. Keenan, eds., (New York: Fordham University Press, 2010), p. 65.

for response.”¹⁷ The condition of natality, the capacity of beginning something anew, is what makes men able to engage in action, which is the political activity *par excellence*.

For Arendt humans differ from animals in their tendency to strive for immortality; men are capable of attaining immortality through their deeds and their collective remembrance, which gives them a “divine” nature.

Only the best (*aristoi*), who constantly prove themselves to be the best... are really humans; the others, content with whatever pleasures nature will yield them, live and die like animals.¹⁸

Even if her embrace of excellence in politics has certainly fueled an interpretation of Arendt as a conservative, elitist thinker, I would argue her realist assessment of common individuals under a system devoid of politics should not be confused with elitism.¹⁹

Freedom in a positive sense is possible only among equals, and equality itself is by no means a universally valid principle but again, applicable only with limitations and even within spatial limits.

Similar to Condorcet, for whom structures of dependence autonomy made the exercise of autonomy nearly impossible, Arendt’s spatial conception of freedom allows her to peg the incapacity of political action to the lack of spaces of freedom. How can one determine the capacity of individuals to be political if there are no spaces in which they can exercise freedom? An assessment of the structural conditions of domination in which the masses are atomized and deprived of political spaces, and how these conditions impede political action, is not an argument for the inherent incapacity of the masses to be political. Quite the contrary. Arendt’s critique pushes her to envision a necessary political infrastructure to realize equality.

The same as acknowledging that the majority of workers, who lack class consciousness under a capitalist system, are similar to cogs in a machine does not make

¹⁷ Markell, “The Experience of Action,” p.75.

¹⁸ Arendt, *The Human Condition*, p. 19

¹⁹ For an extended discussion of Arendt’s elitism and relation to democracy see J.C. Isaac, “Oases in the Desert: Hannah Arendt on Democratic Politics, *American Political Science Review*, Vol. 88, No. 1 (Mar., 1994), pp. 156-168.

Rosa Luxemburg less of a revolutionary, recognizing that without politics we are just animals —instead of *political* animals— does not make Arendt less committed to equal liberty in politics. For Arendt, as for Aristotle, politics is what makes us human, and can only be attained collectively, by engaging in speech and action in the polis. Even if one could argue that valuing the aspiration for excellence is a form of elitism, because her political philosophy is not aimed at preserving the privileges of “the best,” this elitism should be conceived as inclusionary since she does not conceive of any exclusion to participation in political action. She supports a self-selected political elite, an organic political class springing from popular councils that are open to all.

The joys of public happiness and the responsibilities for public business would then become the share of those few from all walks of life who have a taste for public freedom and cannot be ‘happy’ without it. Politically, they are the best, and it is the task of good government and the sign of a well-ordered republic to assure them of their rightful place in the public realm.²⁰

Close to Luxemburg, who gave to the revolutionary government the crucial task of organizing and strengthening the council system, Arendt argues a well-order republic needs to institutionalize spaces for freedom for anybody who feels drawn to politics to be able to engage in political action. Recognizing that the majority of individuals would choose not to engage in voluntary politics despite having the spaces to do so, and that therefore there would inevitably be a political elite, exposes her as a skeptical realist but hardly an elitist thinker.

Even if it is clear that Arendt’s drive was to elevate politics from the realm of necessity and underscore the collective essence of political freedom, her relentless inquiry into the realm of appearances drove her work in multiple directions, sometimes obscuring extraordinary insights in topics as neglected as political foundations. Arendt’s first major discovery regarding new beginnings was that plurality is at the core of the human essence. In *Origins of Totalitarianism* —thought and written during increasing domination of Stalinism and Nazism within their respective borders— Arendt encounters the quintessence of the human condition as it was gradually being destroyed by the first totalitarian movements of the twentieth century. According to her, the driving force of

²⁰ Arendt, *On Revolution*, p. 271.

totalitarianism revealed itself as a constant “organization” of plurality, as the elimination of what makes every human being unique and a potential agent of change, “for to destroy individuality is to destroy spontaneity, man’s power to begin something new out of his own resources.”²¹

Arendt expands this finding in *The Human Condition* and in her essays in *Between Past and Future*, where plurality is defined as the condition of human action, the prerequisite of all political life, which appears intrinsically connected with political liberty. According to Arendt, it is the capacity of new beginnings inherent in natality what gives us the capacity to act, to initiate something anew, to create and reproduce liberty.

Every act, seen from the perspective not of the agent but of the process in whose framework it occurs and whose automatism it interrupts, is a “miracle” —that is, something which could not be expected. If it is true that action and beginning are essentially the same, it follows that a capacity for performing miracles must likewise be within the range of human faculties... It is in the very nature of every new beginning that it breaks into the world as an “infinite improbability,” and yet it is precisely this infinite improbable which actually constitutes the very texture of everything we call real... the very impact of an event is never wholly explicable; its factuality transcends in principle all anticipation.²²

The faculty of new beginnings is that infinite improbability that breaks into the probable, an action that cannot be fully explained by common practices and that actualizes “miracles” that come to interrupt current patterns of behavior and structures of interaction. Despite the importance she gives to the individual aspect of freedom —the liberty of the moderns or negative freedom as lack of interference—²³ Arendt heavily leans towards a collective liberty, a freedom that is the *raison d’être* of politics,²⁴ a freedom that presupposes liberation —emancipation from empire, religion, oppression, necessity— and the entering into the realm of appearances “into which each of the free

²¹ Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1985), p. 455.

²² Arendt, “What is Freedom?”, p. 169.

²³ B. Constant. “The Liberty of the Ancients Compared with that of the Moderns” *Political Writings*. (Cambridge: Cambridge University Press, 1988).

²⁴ Arendt, “What is Freedom?”, p. 146.

men could insert himself by word or deed.”²⁵ Individuality and action, the highest manifestation of human life, are only possible in the public realm allowed by political freedom, which is actualized through its collective performance.²⁶ Consequently, it is not the regularity of norms per se what undermines individuality, freedom, and the capacity for new beginnings, but “the erosion of the contexts in which events call for responses and, thus, in which it makes sense to act at all.”²⁷

As a republican, Arendt understands political freedom not as a good that can be acquired and maintained in degrees, but as a state of being in which one partakes in through action.²⁸ For her, freedom as action can only be therefore conceived in absolute terms, in its exercise, within a given space. Within this space in which individuals can act, freedom is both relational, because we can only perceive it in our intercourse with others through action or disclosure in the realm of appearances, and inherently limited, because the possibility of action and disclosure presupposes a politically-guaranteed public realm, which “entails the recognition that no man can act alone, that men if they want to achieve something in the world must act in concert... [that] political freedom is always limited freedom.”²⁹

Even if plurality and the possibility of the improbable are part of the human condition, this does not mean that freedom, the necessary premise of plurality, is natural and should not be interfered with. In other words, action and interaction, “the patterns of engagement and responsiveness” allowed within a certain constitution are not “accidental” but arise within a framework of “social and political practices and institutions, which structure and mediate people’s experiences of the world.”³⁰ Freedom is not natural or accidental; it needs an extraordinary event to be actualized and an artificial infrastructure enabling plurality and the possibility for the improbable, to be materialized.

²⁵ Arendt, “What is Freedom?”, p. 148.

²⁶ Political freedom on the public realm has as precondition individual liberty and the right to a private life.

²⁷ Markell, “The Experience of Action,” p. 66.

²⁸ Liberals and neo-republicans such as Pettit think of freedom in terms of degree. An individual confronts an amount of interference and domination, which determines how free he/she is.

²⁹ Arendt, “Willing” *The Life of the Mind* (New York: Harcourt, 1978), p. 201.

³⁰ Markell, “The Experience of Action,” p. 80.

II. Revolution as the Foundation of Freedom

Arendt recognizes that only rarely does freedom become the direct aim of political action, that only “in times of crisis or revolution” freedom is revealed through action.³¹ Her consequent interest on the extraordinary politics of foundings³² explored in *On Revolution* should then be seen not as a secondary theme inserted in a text plagued with controversial and sometimes cryptic arguments regarding the social question and the political, but as a fundamental theory, a milestone in her thinking on freedom and the necessary foundation needed for enabling political action.

Arendt begins her exploration of revolution from Aristotle’s “materialistic view of history,” which connected economic and political power, and embraced the role of interest in politics.³³ Even if “overthrows and upheavals” against oppression were common in pre-modern times, Arendt follows Condorcet in arguing that to properly label a popular rebellion as revolutionary it needs to directly aim at freedom:³⁴ at dismantling hierarchies and achieving emancipation, and not simply at the bettering of social conditions within a system of domination. Only in modern times, she argues, is the materialist view of history able to be deployed for the direct emancipation of the masses. According to Arendt, only after social hierarchies are de-naturalized and “men began to doubt that poverty is inherent in the human condition” did the “social question and the rebellion of the poor come to play a truly revolutionary role.”³⁵ Only after the poor acquired the appropriate epistemic grounds to overturn the current hierarchy —by learning about the pre-modern American experience as a “society without poverty,” and demanding to actualize the paradigm put forward by John Locke and Adam Smith in which labor is the source of all wealth— could a popular rebellion be properly called a revolution.³⁶

³¹ Arendt, “What is Freedom?”, p. 146.

³² For an analysis of extraordinary politics and the role of constituent power see A. Kalyvas, *Democracy and the Politics of the Extraordinary. Max Weber, Carl Schmitt and Hannah Arendt* (Cambridge: Cambridge University Press, 2008).

³³ Arendt, *On Revolution*, p. 12.

³⁴ N. Condorcet, *Sur le sens du mot révolutionnaire*, Oeuvres, 1847-9, vol. XII, cited on p. 19 of *On Revolution*.

³⁵ Arendt, *On Revolution*, pp. 12 & 13.

³⁶ Arendt, *On Revolution*, p. 13.

Machiavelli, the “spiritual father of revolution,” is for Arendt the first thinker to “visualize the rise of a purely secular realm,” a realm of human affairs in need of periodic renewal.³⁷ Arendt follows Machiavelli and the Roman notion that all foundations are “re-establishments and re-constitutions,”³⁸ in arguing that new beginnings are always relative, a renovation of what exists, the irruption of something new that comes from within an existing world to change the world through its active engagement with it. Revolution understood as new beginning then necessarily defies the opposition between rules and the liberal interpretation of liberty as lack of interference; a new beginning is for Arendt a revolutionary political action able to transform the world by precisely setting a normative structure in which the conditions for freedom as action and the possibility of the improbable are re-established and preserved. A new beginning therefore is not defined by its degree of rupture from the present condition of the world, but by its capacity to generate and preserve juridical and physical spaces for a political freedom that is conceived as inherently limited.³⁹

Having experienced directly the violence and arbitrariness of Nazism, Arendt seems to construct her theory of new beginnings against an almost inescapable original crime, searching for a peaceful new beginning, a bloodless birth of the political. However, she acknowledges that because liberation is the *conditio sine qua non* of freedom,⁴⁰ violence is present during the revolutionary experience. Whereas violence assures liberation —the necessary first step for a potential place for politics— if it endures past this initial stage and becomes internalized, it could bring the political to its demise. Therefore, while she argues that the “aim of revolution was, and always has been, freedom,”⁴¹ the realization of this pursuit through violence could easily turn into its opposite, the elimination of the political and the negation of plurality. Consequently, one could argue that even if violence and politics can coexist chronologically, they cannot be performed within the same space. While violence could be exerted ‘outside’ of the political realm, against an oppressive ‘other’ from which the community must be liberated, it should not permeate the political because if violence is exerted within the

³⁷ Arendt, *On Revolution*, p. 26–7.

³⁸ See a reengagement with beginnings in “Willing” 213.

³⁹ Arendt, “Willing”, p. 201

⁴⁰ Arendt, “Willing”, p. 207.

⁴¹ Arendt, *On Revolution*, p. 1.

realm of appearances, politics inevitably becomes mute. Persuasion and force cannot spatially coexist.

Despite the fact that both the American and the French Revolutions began with a violent liberation —from the British Empire and the French monarchy, respectively— Arendt does not dwell in the analysis of this common act of emancipation, which she states comes from the desire “to be free from oppression,” but rather concentrates in their abysmal differences regarding what she calls the “foundation of freedom,” the establishment of a republic as a “new, or rather rediscovered form of government.”⁴² While the French Revolution was for her an utter failure due to the revolutionaries’ fixation with the fictions of an absolute break with the *ancien régime* and the sovereignty of the people-as-one, Arendt praised the American Revolution as the highest political moment of the modern age due to its acknowledgement of previous shared political practices and the cooperative essence of the constituent power it enacted.

With the death of the king and the evacuation of theology as the source of political power and authority in France, the most emblematic modern revolution destroyed the old order in the name of popular sovereignty and attempted to create *ex nihilo* a new body politic, “abolish[ing] the sequence of temporality,”⁴³ to redefine the ‘people’ and the basic principles that would allow for the new political unity to come into existence. Arendt explains that even though this new beginning as absolute rupture from a regime based upon divine royalty allowed for the creation of a secular constitutional order and popular self-determination, the price for this type of revolution was the elimination of transcendental sources of authority and the consequent groundlessness of the new legal framework:

Those who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out to achieve.⁴⁴

The juridical void in which the non-authorized, arbitrary act of founding took place created the space for rightlessness and violence where the individual had no legal

⁴² Arendt, *On Revolution*, p. 23.

⁴³ Arendt, “Willing,” p. 208.

⁴⁴ Arendt, *On Revolution*, p.175-176.

protection against the revolutionaries, who became the official voice of an abstract and never finalized popular will.

The direction of the French Revolution was deflected almost from its beginning from this course of foundation through the immediacy of suffering; it was determined by the exigencies of liberation not from tyranny but from necessity, and it was actuated by the limitless immensity of both the people's misery and the pity this misery inspired. The lawlessness of the 'all is permitted' sprang here still from the sentiments of the heart whose very boundlessness helped in the unleashing of a stream of boundless violence.⁴⁵

According to Arendt, this situation of total arbitrariness that characterized the French Revolution was a consequence of the attempt to resolve the perplexity of foundations by deriving both power *and* authority from the same immanent source: the people. However, the need for a new absolute to become the fountain of legitimacy, the need for "a divine principle, for some transcendent sanction in the political realm," proved difficult to resolve and drove the revolutionaries to deify 'the people' and believe that "like the absolute prince, the nation, in terms of public law, could do no wrong."⁴⁶ Yet, the excesses of the Terror made explicit the dangers of tyranny lurking beneath the supreme power of such formless and unorganized subject.

...to find a new absolute to replace the absolute divine power, is insoluble because power under the condition of human plurality can never amount to omnipotence, and laws residing on human power can never be absolute.⁴⁷

Absolute authority cannot be derived from the will of fallible human beings, and therefore laws need to remain limited and open to contestation and the improbable. What made the incipient structure unstable and ultimately terminated the republican experience in France was not its openness to plurality and new beginnings, but its grounding on the will of an unorganized multitude in need of material welfare

The French Declaration of the Right of Man, as the Revolution came to understand it, was meant to constitute the source of all political power, to establish not the control

⁴⁵ Arendt, *On Revolution*, p. 82.

⁴⁶ Arendt, *On Revolution*, p. 182.

⁴⁷ Arendt, *On Revolution*, p. 29.

but the foundation-stone of the body politic. The new body politic was supposed to rest upon man's natural rights, upon his rights in so far as he is nothing but a natural being, upon his right to 'food, dress, and the reproduction of the species', that is, upon the right to the necessities of life. And these rights were not understood as prepolitical rights that no government and no political power has the right to touch or violate, but as the very content as well as the ultimate end of government and power.⁴⁸

The extreme volatility of the will of the unassembled multitude could never have yielded a stable constitutional order because it "is ever-changing by definition, and that a structure built on it as its foundation is built on quicksand."⁴⁹

The violent resistance to the imposition of social rights was, on the other hand, met with the violent reaction of the Terror. Following the argument of the impossible coexistence of violence and politics within the realm of appearances, one could argue that for Arendt Robespierre betrayed the revolution by bringing the violence (and arbitrariness) that was exerted against the oppressive 'other' —the king and his Court— into the political sphere, through the imposition of the social question as a political project, which precluded deliberation, and the insistent search for traitors and the purging of the body politic.

The direction of the French Revolution was deflected almost from its beginning from this course of foundation through the immediacy of suffering; it was determined by the exigencies of liberation not from tyranny but from necessity, and it was actuated by the limitless immensity of both the people's misery and the pity this misery inspired. The lawlessness of the 'all is permitted' sprang here still from the sentiments of the heart whose very boundlessness helped in the unleashing of a stream of boundless violence.⁵⁰

Seen under this light, the French Revolution, through its constant creation of an "objective opponent,"⁵¹ the recognition of an internal enemy as existential 'other,' against which the nation's virtuous identity was permanently constructed, degenerated into a movement that seek to impose a fictional unity based upon an ever-changing popular

⁴⁸ Arendt, *On Revolution*, p. 99.

⁴⁹ Arendt, *On Revolution*, p. 154.

⁵⁰ Arendt, *On Revolution*, p. 82.

⁵¹ Arendt, *The Origins of Totalitarianism*, p. 425.

will, a revolutionary subject in permanent becoming. But for Arendt this degeneration of the French revolutionary experience due to the lack of proper foundations, even if close at the height of the Terror to the totalitarian experiences of the twentieth century, was not a form of totalitarianism. It was clear to her that the aim of the French Revolution was freedom, and that the violence of the Terror was not in the essence of the movement but “the reaction to a series of broken oaths and unkept promises that were the perfect political equivalent of the customary intrigues of Court society.”⁵² The excesses of the revolution were in part responses to a counterrevolutionary enemy that threatened the revolutionary party and therefore the securing of the republican project.⁵³ Violence seemed inevitable within a framework of lawlessness in which the revolutionary party concentrated power, and spaces of freedom were weak or non-existent.

I would argue we should understand Arendt’s controversial analysis of the French Revolution through Luxemburg’s critique of Lenin’s centralism after the Russian Revolution, criticism which in part inspired *On Revolution*. Neither the French Revolution nor Lenin’s Soviet Republic respected free speech and assembly, or fostered autonomous organs of the people, and therefore both failed at constituting appropriate foundations for freedom. While the French Revolution degenerated into Terror and its inchoate republic was quickly overthrown, the Russian Revolution degenerated into a collectivist statism that morphed into a full-blown totalitarian regime under Stalin. While the critique of Lenin and bolshevism relegated Luxemburg to the margins of socialist thought, Arendt’s critique of the French Revolution made her a pariah within the intellectual Left, especially because she not only was critical of the most emblematic revolution in the popular imaginary, but also seemed to uncritically embrace the American Revolution, which yielded a constitution not based on the principles of equality, fraternity, and solidarity, but on free enterprise.

While in her critique of the French Revolution Arendt denounces the will of the multitude as an inappropriate foundation for freedom, her charitable assessment of the

⁵² Arendt, *On Revolution*, p. 95.

⁵³ For a historical analysis of revolution and counterrevolution during this period in France see A. Mayer, *The Furies. Violence and Terror in the French and Russian Revolutions* (Princeton: Princeton University Press, 2000).

American founding is based on the revolutionaries' respect for individual rights and political institutions.

The direction of the American Revolution remained committed to the foundation of freedom and the establishment of lasting institutions, and to those who acted in this direction nothing was permitted that would have been outside the range of civil law.⁵⁴

It is only from the American founding experience that she is able to extract positive lessons for the establishment of “artificial structures that are more permanent and durable than the unpredictable actions of human beings” as the proper foundation of freedom.⁵⁵ In contrast to the French constituent attempt, Arendt praises the American revolutionaries because they acknowledged their previous political and legal practices as a common base for creating a common future, thus performing a *relative*, rather than an *absolute* beginning, as “something new [that] comes into an already existing world.”⁵⁶ In addition, Arendt sees the American Revolution as the first truly *political* revolution, one that was not about the social question but fundamentally aimed at constituting a new enduring political structure. According to Arendt, when signs of conflict emerged between the American colonies and the British Empire, representatives from newly constituted bodies of the thirteen colonies were selected to assemble and discuss a possible common response. The soon-to-be revolutionaries, informally authorized by their respective self-organized communities, decided by virtual unanimity to declare independence from the British Empire and embark in the creation of a legal framework for the new body politic. As I showed in Chapter 2, this narrative neglects the acute social conflict that prompted the setting up of a counterrevolutionary constitutional convention in which the legal framework was deliberated and crafted in secrecy by a group of selected few. Even if Arendt's omission of conflict serves her project because it allows her to focus on the constructive elements of the founding, her sanitized assessment and strategic deployment of the American founding experience, completely detached from its

⁵⁴ Arendt, *On Revolution*, p. 82.

⁵⁵ J. Muldoon, “Arendt's Revolutionary Constitutionalism: Between Constituent Power and Constitutional Form” *Constellations*, Volume 23, No 4, (2016), p. 602.

⁵⁶ Arendt, “What is Freedom?”, p. 167.

socio-political conjuncture, is not only historically inaccurate but also obscures the particular pitfalls of the new, liberal beginning.

Arendt dismisses the materialist analysis of the American Revolution, criticizing Charles Beard's economic interpretation of the founding as a matter of "sheer" history of ideas obsessed with "unmasking [the hypocrisy] of the Founding Fathers and by the hunt for ulterior motives in the making of the Constitution."⁵⁷ She argues that it was precisely a "war upon hypocrisy" what brought the French Revolution to the Terror "as an institutional device, consciously employed to accelerate the momentum of the revolution," and that American historiography was only mimicking in paper what the French had done with blood.⁵⁸ This quest to unveil the hypocrisy of the founding, of the original "vice through which corruption becomes manifest," appeared to her more as an echo from the old world than a productive immanent critique of the liberal republic's origins.⁵⁹ Even if applying the most charitable interpretation of Arendt's analysis of the American and French revolutions, as aiming to "defend the notion of political freedom against the usurpation of the public sphere by powerfully organized private interests,"⁶⁰ her rejection of an 'economicist' approach to politics blinded her to the material conditions determining the constitutional convention, the Constitution, and its implementation. Arendt's attempt to rescue the politics from the managing of necessity did not leave much room for considering socio-economic conditions during the founding or the exclusion and lack of freedom of those not present or represented in the constituent process. Nevertheless, from the relative and cooperative aspects of the American foundational experience, Arendt, in an attempt to escape the inherent arbitrariness of the founding act,⁶¹ and against the voluntarism of popular sovereignty, elaborated a theory of new beginnings that introduced the distinction between power and authority.⁶² For her, the contrast between the French and American experiences evidenced that even though

⁵⁷ Arendt, *On Revolution*, p.89.

⁵⁸ Arendt, *On Revolution*, p.90.

⁵⁹ Arendt, *On Revolution*, p.94.

⁶⁰ Blättler, Marti and Saner, "Rosa Luxemburg and Hannah Arendt," p. 93.

⁶¹ Arendt, "Willing", p. 207.

⁶² For further analysis of the separation of power and authority as a form of dual constitutionalism see A. Arato, "Forms of Constitution Making and Theories of Democracy," *Cardozo Law Review* 17 (1996), p. 191–231.

the people is the source of power in modern republics, it cannot be the foundation of authority for the new legal order.

What saves the act of beginning from its own arbitrariness is that it carries its own principle within itself, or, to be more precise, that beginning and principle, *principium* and principle, are not only related to each other, but are coeval... The way the beginner starts whatever he intends to do lays down the law of action for those who have joined him in order to partake in the enterprise and to bring about its accomplishment. As such, the principle inspires the deeds that are to follow and remains apparent as long as the action lasts.⁶³

Through a formal argument that traces the source of authority to the principles contained in the act of founding itself, Arendt seeks to solve the perplexity of new beginnings and situate *political* action at the foundation of freedom.⁶⁴ Through this lens, the unthematized, implicit immanent principles of the constitutive act become explicit through performance, guiding the revolutionaries during the founding moment and giving stability and endurance to the constitutional project. Arendt's theory of principled action would then allow for the exercise of political freedom at the moment of founding without any external limitations and, at the same time, preclude the dangers of boundless action by conceptualizing normativity as internal to the act of foundation.⁶⁵ If the founding is done through collective political action, in which equals come together to create something new and incorporate it into their existing world, the foundations of the new constitution should maintain and reproduce this freedom by allowing for the actualization of liberty through political action.

Even though Arendt's theory gives a promising alternative to both absolute beginnings and mere evolutionary change by placing authority in the principles inherent in the act of founding, what are these principles and how can they be recognized and correctly codified, remains undertheorized. If every act of founding has its own principles within itself, does this mean that every collective attempt at a new beginning will have the necessary authority to endure? Is the establishment of a new constitutional order

⁶³ Arendt, *On Revolution*, p. 205.

⁶⁴ Political action is the performance of freedom as well as its constitutive origin.

⁶⁵ For an extended analysis of performative norms see A. Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 241–244.

enough evidence of a successful revolution? If so, can principled action only be acknowledged in retrospect, after a considerable amount of time has passed, allowing us to judge if the framework put in place by the founders managed to successfully stabilize and channel the revolutionary thrust? Even if clearly “the character of one act as a beginning hangs on its future reception,”⁶⁶ and stability and endurance could be the appropriate categories to assess the success of revolutionary foundings, Arendt’s theory is normative, which demands bringing substantive criteria into evaluation.

Despite the absence of an unequivocal identification of which are the desirable principles and how a successful post-revolutionary political order should look like, Arendt’s focus on the American Revolution seems to suggest that the only “good” principles that would create the necessary authority for political freedom to thrive are the ones derived from mutual promise and common deliberation, and that a successful constitutional order is the one that allows for these principles to be permanently enacted. The central idea of revolution for Arendt “is the foundation of freedom, that is, the foundation of a body politic which guarantees the space where freedom can appear.”⁶⁷ Thus, for a revolution to be successful, it is not only fundamental for promise and deliberation to become part of the legal structure, but it is also essential that spaces where people can meet, deliberate, and act together are recognized and legally established.

The founding act of constitution making finds its authority not in a previous legal framework or in the collective will, but in its performance, in the collective endeavor of the people who create, in action, a new constitutional framework allowing for freedom to be preserved, enlarged, and strengthened. This action, for Arendt, is first an act of mutual promise.

...power comes into being only if and when men join themselves together for the purpose of action, and it will disappear when, for whatever reason, they disperse and desert one another. Hence, binding and promising, combining and covenanting are the means by which power is kept in existence; where and when men succeed in keeping intact the power which sprang up between them during the course of any particular act or deed, they are already in the process of foundation, of constituting a stable

⁶⁶ Markell, “The Experience of Action,” p. 76.

⁶⁷ Arendt, *On Revolution*, p. 116.

wordly structure to house, as it were, their combined power of action. There is an element of world-building capacity of man in the human faculty of making and keeping promises.⁶⁸

Because there is only political power in collective action, and power can only be sustained within the appropriated structure, then the capacity to make promises to sustain that structure is essential to the world-building capacity of humans. Promise is inherently relational, a faculty that is necessarily based upon previous experiences among individuals. For a promise involving a whole community to be binding, individuals need to believe that others will respect their allegiance, and that their membership is too valuable to decide to break it. Therefore, the basic condition underpinning a mutual promise would be social trust, an informal and “invisible institution”⁶⁹ that according to Pierre Rosanvallon has three dimensions: moral, substantive, and temporal.⁷⁰ While the moral dimension of social trust would be “integrity in the broadest sense,”⁷¹ which would translate as honesty and wholeness, its substantive aspect has to do with the concern for the common good. The temporal dimension of social trust is what allows for a promise to endure pass the moment of initial allegiance, the aspect that projects past and present interpersonal relations into the future, allowing for a community to endure after its birth. Consequently, the constitutive promise is what makes the civil community possible, what allows for a diverse group of people to imagine themselves as a “We” [that] is constituted as an identifiable entity,⁷² into the future.

If the substantive dimension of social trust is the common good, something that is socially constructed and that, at the same time, creates *the people* as an entity when acting upon it, promise—the temporal dimension of trust, the projection of the present into the future—is what makes possible the endurance of the collective subject over time and the creation of a legitimate constitutional structure. However, in order for the people to yield a legal framework in which plurality and freedom can flourish, the interpersonal

⁶⁸ Arendt, *On Revolution*, p. 166.

⁶⁹ K. J. Arrow, *The Limits of Social Organization* (Norton: New York, 1974), p. 26 quoted on P. Rosanvallon, *Counter-Democracy. Politics in an Age of Distrust* (New York: Cambridge University Press, 2008), p. 3.

⁷⁰ Rosanvallon, *Counter-Democracy*, p. 3.

⁷¹ Rosanvallon, *Counter-Democracy*, p. 3

⁷² Arendt, “Willing,” p. 203.

relations upon which social trust is based upon must rely on a commitment to political equality, the necessary premise of the Arendtian founding principle of deliberation. The same as mutual promise, which could only be understood in relation to the unity created based on already existing social trust, the principle of deliberation presupposes a realm of appearances based upon political equality. Political equality, under the rule of law, is the basic condition for the creation of the *citizen*, the symbolic projection of the members of a community as legal entities, which makes possible equality in the public sphere. However, the juridical category of the citizen by itself is unable to guarantee equal liberty if the promise remains at the formal level, without yielding an adequate infrastructure to house common power.

In addition to political equality, deliberation also presupposes liberty understood both as the protection of individual rights and the space for political action. Besides positive liberty —freedom as participation in the public sphere aimed at judging and deciding on common affairs— the principle of deliberation requires the negative aspect of freedom to be present at the moment of disclosure. It is in the public realm where members of the community actualize, through speech and action, their individuality, the “unique distinctness” that allows for the second birth of man in the political.⁷³ Therefore, while positive freedom, the acting together, is essential for the maintenance of spaces for deliberation, it is through the actualization of individuality in action that plurality is able to exist. Consequently, in addition to political equality, both positive and negative freedom must be fostered through the founding performance and codified in the constitution.

For Arendt, the spaces for freedom in a modern republic are bounded areas reserved for action, like “islands in a sea or as oases in a desert.”⁷⁴ These islands of freedom surrounded by the stale waters of administration and the desert of the non-political life are for Arendt not natural but human-made infrastructures designed to house the revolutionary spirit. Freedom as action is more demanding than the republican notions of freedom as tranquility and non-domination⁷⁵ because it requires the equal possibility of disclosure and performance of liberty, and consequently a revolutionary

⁷³ Arendt, *The Human Condition*, p. 176.

⁷⁴ Arendt, *On Revolution*, p. 267.

⁷⁵ Machiavelli, *Discourses*: I.XVI; Montesquieu, *The Spirit of the Laws*. II. XII. 2 & 1.

founding à la Arendt would differ substantially from a republican founding à la Machiavelli, in which popular political action is demanded not as an end in itself, as a way of performing and actualizing liberty, but as a means to ward against domination. While for Machiavelli the founding of a republic justifies any means, for Arendt means and ends, new beginnings and political freedom, constituent process and constituent form, appear as intrinsically connected.

The Arendtian founding is the highest political moment, the greatest expression of freedom, which demands extraordinary engagement by individuals in collective action. Since the French Revolution, revolutionary beginnings have taken the form of spontaneous popular councils, organs that “consciously and explicitly desired the direct participation of every citizen in the public affairs of the country.”⁷⁶ For Arendt, without councils, a new beginning would be unable to properly constitute freedom. Because she learned from Luxemburg that political action—the deed—is the origin of revolution, and that there is no revolution without the self-emancipatory actions of the workers themselves, the constitution of freedom therefore needs to be the result of political action of the people themselves. In contrast, Machiavelli’s founding is the highest moment of *virtù* in which one man is able to seize power to make the republic anew.⁷⁷ For Machiavelli, the republican founding demands an extraordinary leader able to transcend the inherent dualism of society, a kingly power able to overcome vested interests and bring the republic back to its foundations. The founder must remain autonomous, beholden only to his own judgment. Even if the leader allies with the people, the act of founding comes out of pure will; a one-man task, a triumph of virtue over fortune, only guided by the common good.⁷⁸ While extraordinary virtuous action is required in both foundings, in Machiavelli this action is given to the new prince, the leader of the people, who concentrates all authority to establish the institutions of liberty; in Arendt the founding and the new order are intrinsically connected, the latter being the result of the particular constituent action being performed in the former.

Even if her conception of liberty and its relation to political action would make Arendt’s new beginning *democratic*, in the sense that political action is a end in itself,

⁷⁶ Arendt, *On Revolution*, p. 255.

⁷⁷ Machiavelli, *The Prince*, VI; *Discourses* I.XXVI.

⁷⁸ Machiavelli, *Discourses*, I.II.

rather than strictly republican, her reverence for institutions and procedures, and the authority vested in them, gives to her model a distinctive republican character in which power and authority are separated.

Power springs up whenever people get together and act in concert, but it derives its legitimacy from the initial getting together rather than from any action that then may follow.⁷⁹

By separating power and authority at the moment of founding, Arendt is able to ground the new beginning in institutions (such as the shared rules and practices of semi-constituted political communities in the case of the American Revolution), while keeping the people's constituent power open and productive of liberty. Republican authority, based upon the initial foundations of the republic, is in this way able to channel the power of the people by limiting it from within. The solution against the boundlessness and instability of action during the founding moment is for Arendt found within action itself, in the act of promising.

The remedy for unpredictability, for the chaotic uncertainty of the future, is contained in the faculty to make and keep promises (...) binding oneself through promises, serves to set up in the ocean of uncertainty, which the future is by definition, islands of security without which not even continuity, let alone durability of any kind, would be possible in the relationships between men.⁸⁰

While republican authority is linked to the birth of the political community, to the binding, constitutive promise to respect and augment the foundations of the republic, democratic authority is expressed in deliberation, in the way the legal structure is decided upon, reproduced, and renewed. Then, from her theory of principled action, in which normativity is contained in the act of founding, one could argue that the initial promise of the political community is the source of republican authority, which in turn is conditioned by the democratic principle of deliberation. While republican authority is concerned with the relation between individuals and the political community they belong to, to the duty involved with preserving and augmenting the foundations,⁸¹ democratic authority has to

⁷⁹ Arendt, "On Violence," *Crises of the Republic* (New York: Harcourt, 1972), p. 151.

⁸⁰ Arendt, *The Human Condition*, p. 237.

⁸¹ Arendt, "What Is Authority," p. 121-122.

do with the relation among citizens *within* the spaces of freedom, with the way political freedom is exercised.

This dual, more demanding conception of authority presupposes, in addition to social trust, rules of political engagement allowing for continued self-rule by the community and the permanent actualization of the degrees of freedom contained in the foundational political practices. In other words, for democratic-republican authority to be capable of maintaining a constitutional framework in which freedom can dwell, the political relation between individuals must be based on the principle of no-rule,⁸² which is actualized in the act of deliberation, in the disclosure of oneself in the realm of appearances and the persuasion of others in relation to the definition of the common good and how to achieve it. While republican authority is necessary for the community to codify and preserve its shared practices and rules, which allows for ongoing commonality, democratic authority demands a substantive character from political institutions.

In what follows I focus on Arendt's proposal to incorporate a council system of government as a necessary condition for freedom. Following Jefferson's plan of "elementary republics," which demanded continual interaction among citizens alongside representative government, Arendt puts forward a council system as an alternative form of government aimed at the continual reintroduction of freedom as action and expansion of the public sphere, so to carve out political space out of the dominance of the social. I argue that we should understand Arendt's proposal as a novel interpretation of the mixed constitution, one in which the division between the few and the many is replaced by that of parties dedicated to administration, and councils dedicated to political judgment.

III. Parties and Councils as Mixed Government

Even if Arendt praises the relative new beginning of the American colonies because of its protection of civil liberties and respect for previous institutions, she

⁸² This principle of no-rule does not mean that there is not rule in the self-governing bodies. There is rule, but based on deliberation and persuasion, which are inimical to hierarchy and force. For an analysis of the no-rule principle see P. Markell, "The Rule of the People: Arendt, Archê, and Democracy" *American Political Science Review*, 100.1 (2006), p. 1-14. On the relation between sovereignty and no-rule see A. Arato, and J. Cohen, "Banishing the Sovereign? Internal and External Sovereignty in Arendt" *Constellations*, 16 (2009), p. 307-330.

strongly criticizes the exclusively representative form of government of the new liberal republic. The combination of representative institutions and individual rights, conceived as restraints on the power of government, yielded a framework in which politics was reserved for the few while the many enjoyed freedom *from* politics.⁸³ As a republican thinker, Arendt understands the decay of the public realm as a form of corruption associated with the pursuit of private interest against the common good. This decay is for her connected to the lack of spaces for political action and the political apathy that comes along with the neglect for the *res publica* and political action. Corruption is the result of the privatization of the public realm and the alienation of individuals from their political condition, “the atrophy of the space of appearances and the withering of common sense.”⁸⁴ The process of estrangement from the world, the prevalence of the private, and the loss of a sense of togetherness that characterizes corrupt republics appears as intrinsically connected to a constitutional lack: the failure to institutionalize spaces of freedom where individuals could engage in political action. The American founding institutionalized a representative government selected by the people, mediated by a party system, but neglected to give institutional standing to the town-halls and local councils that were also part of the socio-political revolutionary realm. The aim to institutionalize representation and not assemblies of the people in which politics could be exercised was for Arendt the beginning of the end of the republic project.

Arendt sees party and council as almost coeval, springing both from revolutions; while the councils are the organs of the people, parties are the organs of the selected elite.

...parties, because of their monopoly of nomination, cannot be regarded as popular organs, but they are, on the contrary, the very efficient instruments through which power of the people is curtailed and controlled.⁸⁵

Parties are not only not representative of the popular will, but also are aimed at taming the masses. Close to Cicero’s assessment of the Plebeian Tribune as an institution functional to the republic because it helped to tame and direct the people, Arendt sees in the party a means of elite control over the citizens instead of a vehicle

⁸³ Arendt, *On Revolution*, p. 272.

⁸⁴ Arendt, *Human Condition*, p. 209.

⁸⁵ Arendt, *On Revolution*, p. 261.

through which popular opinion could be formed and represented.⁸⁶ This negative conception of representation negates the benefits that Luxemburg saw on class-based representative institutions as enabling the identity of the oppressed through the clashes of the revolutionary party with state power. Since Arendt's project is not to emancipate the working class from capitalist oppression but to purge politics from necessity, she sees the representation of interest —either of the working class or other groups in society— as non-political and therefore in no way beneficial for enabling freedom —even if representative government is indeed necessary for the operation of the modern state. One could argue that in Arendt's exchange of the working class for the citizen, representation completely loses its 'political' character —as partisan of the emancipation of the plebeian element. While for Luxemburg the revolutionary party's task was to give a structure to workers' councils, and in this way an agent of emancipation, by abstracting the plebeian subject the party becomes a mere vehicle of interest and not of freedom. In this way she accepts Schumpeter's theory of representative government as based on interest,⁸⁷ and denies the political nature of representation.

Representation is for Arendt what distinguishes modern republics from democracies.⁸⁸ In a constitution based on representative government, individual citizens may only wield —mainly through the vote— negative powers, which “claim not a share in government but a safeguard against government.”⁸⁹ For Arendt representative government precludes participation by the majority because it does not provide the space for public opinion to form.

In this system the opinions of the people are indeed unascertainable for the simple reason that they are non-existent. Opinions are formed in the process of open discussion and public debate, and where no opportunity for the forming of opinions exists, there may be moods —moods of the masses and moods of individuals, the latter no less fickle and unreliable than the former— but no opinion.⁹⁰

⁸⁶ For a view of representation as productive of opinion formation as connected to judgment see N. Urbinati, *Representative Democracy. Principles & Genealogy* (Chicago: University Chicago Press, 2008).

⁸⁷ Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, by Joseph A. Schumpeter (New York: Harper & Brothers, 1950).

⁸⁸ Arendt, *On Revolution*, p. 228.

⁸⁹ Arendt, *On Revolution*, p. 134.

⁹⁰ Arendt, *On Revolution*, p. 261.

If there is no formal, instituted space for the multitude to organize and for opinion to form, there is no acting together and no freedom. Arendt's material assessment of modern democracies comes close to the critical plebeian tradition that sees representative government not as a deficient form of popular government, but as a form of oligarchy.

That representative government has in fact become oligarchic government is true enough, though not in the classical sense of rule by the few in the interest of the few; what we today call democracy is a form of government where the few rule, at least supposedly, in the interest of the many. This government is democratic in that popular welfare and private happiness are its chief goals; but it can be called oligarchic in the sense that public happiness and public freedom have again become the privilege of the few.⁹¹

For Arendt representation is inimical to action, and the creation of a political system based upon representative government effectively vacated action from politics in the modern world.⁹² Where politics is transformed into administration, which demands the professionalization of representatives who are chosen according to non-political criteria, there is no space for the people to engage in politics and actualize political freedom. Even if representative governments have democratic ideals, they are *de facto* oligarchies because they reserve the privilege of politics for the selected few. Interestingly, the oligarchy Arendt unveils is not based on socio-economic privileges — the few using state power to accumulate wealth by dispossessing the many— but on political privileges; politics are a *de facto* monopoly of a few, while the many, deprived from spaces of freedom, are relegated to the social sphere, incapable of exercising freedom as politics through the political system and left only with extra-institutional avenues of protest to reclaim that freedom through political performance.⁹³

The party system —which is supposed to aggregate citizens' wills, providing shortcuts for decision making— is, the same as administration and management, not only

⁹¹ Arendt, *On Revolution*, p. 261.

⁹² Arendt, *On Revolution*, p. 265.

⁹³ Arendt argued voluntary association morphed into civil disobedience. "Civil Disobedience" *Crises of the Republic*, p. 102.

essentially non-political because its “business is dictated by necessity,”⁹⁴ but also instrumentalizes the people by turning them into supporters of parties instead of political agents.

...the party, whether an extension of parliamentary faction or a creation outside parliament, has been an institution to provide parliamentary government with the required support of the people, whereby it was always understood that the people, through voting, did the supporting, while action remained the prerogative of government.⁹⁵

Even revolutionary parties, as organs of representation, have traditionally agreed that “the end of government was the welfare of the people, and that the substance of politics was not action but administration.”⁹⁶ Following Luxemburg’s prescient analysis of the Russian Revolution, Arendt argues party and councils compete for authority. The revolutionary Russian leadership, after only “halfheartedly recogniz[ing] the councils as instruments of ‘revolutionary struggle,’ they tried even in the midst of revolution to rule them from within” and saw action after the conquest of the state as “unnecessary or subversive.”⁹⁷

Arendt argues that the councils of the people “were bound to become superfluous if the spirit of the revolutionary party prevailed.”⁹⁸ The Party wants to execute its program, apply it on the masses without discussion by the masses, which inevitably would make the councils rebel against the party because the “average citizen’s capacity to act and to form his own opinion” would be disregarded and negated. However, the rebellion of the councils against the party not only disregarded the necessity of administration, but also allowed for the confusion between management and politics, and led to attempts to make councils not only political organs but also managers in common.

If it is true that the revolutionary parties never understood to what extent the council system was identical with the emergence of a new form of government, it is no less true that the councils were incapable of understanding to what enormous extent the government machinery in modern

⁹⁴ Arendt, *On Revolution*, p. 264.

⁹⁵ Arendt, *On Revolution*, p. 263.

⁹⁶ Arendt, *On Revolution*, p. 273.

⁹⁷ Arendt, *On Revolution*, p. 265.

⁹⁸ Arendt, *On Revolution*, p. 256.

societies must indeed perform the functions of administration. The fatal mistake of the councils has always been that they themselves did not distinguish clearly between participation in public affairs and the administration or management of things in the public interests.⁹⁹

For Arendt, the councils are political organs and must not engage in the administration of things, not because it is beyond their competence but because the contamination of political judgment by the social and its consequentialism is pernicious.

Because for Arendt authority is vested on law *and* institutions, it is not only necessary to codify a strong Bill of Rights, as the Americans did, but also to create spaces where freedom could be exercised. Even if it was a republic what the framers were instituting—a political system in which the people are the ultimate source of power—and its Bill of Rights was for Arendt “the most exhaustive legal bulwark for the private realm against public power,”¹⁰⁰ the lack of spaces of freedom in which individuals could engage in political action meant the ultimate failure of the republican project because unable to preserve the freedom exercised at the moment of the founding.

This perplexity, namely, that the principle of public freedom and public happiness without which no revolution would ever have come to pass should remain the privilege of the generation of founders... has haunted all revolutionary thinking ever since.¹⁰¹

The moment the founders focused on representation and neglected “to incorporate the township and the town-hall meeting into the Constitution,” the revolutionary spirit was lost and government became according to Arendt mere administration.¹⁰² As the people’s *political* space—the realm of appearances where *all* individuals could engage in public speech and deed—disappeared, so did the democratic principle of deliberation and political freedom itself. This is a challenge for Arendt’s theory of principled action because the authority inherent in the founding act, which she praises as *political*, did not ultimately shape the constitutional framework in the way one could have expected. Even

⁹⁹ Arendt, *On Revolution*, pp. 265–6.

¹⁰⁰ Arendt, *On Revolution*, p. 244.

¹⁰¹ Arendt, *On Revolution*, p. 224.

¹⁰² Arendt, *On Revolution*, p. 227.

though the performed principles of the American Revolution were promise and deliberation, equal freedom as action was not institutionalized, codified, or respected as common law. Universal suffrage and equality under the law did not make up for the lack of spaces of freedom, where individuals could actively engage in politics. Despite the commitment to building a house where freedom could dwell, based on promise and deliberation among equals, “the Constitution itself provided a public space only for the representatives of the people, and not for the people themselves.”¹⁰³

I would argue the exclusive representative character of the constituent process,¹⁰⁴ in which delegates from representative bodies were appointed by their peers in a closed selection process, prevented the principles of mutual promise and common deliberation being actualized through performance in the convention from yielding adequate foundations for freedom. Political freedom was exercised not by the people themselves but by their representatives; representation (and not equal political freedom) is then replicated and reproduced in the constitutional structure. Consequently, one could argue that to establish adequate foundations the constituent process does not only depend on the authority inherent in the principles of promise and deliberation enacted in political action, but also the ‘membership’ of the deliberative body; who participates seems to be crucial in the collective building of spaces of freedom. Very different from the open spaces Arendt imagined for the ideal political founding—a founding that could establish strong foundations for freedom, “both in the negative sense of liberation from oppression and in the positive sense of the establishment of Freedom as a stable, tangible reality,”¹⁰⁵ in which anyone could step in and engage in political action—the American constituent process was exclusionary and closed. The original exclusion based on discriminative self-selection was coupled with a formalism in the constitutional text that allowed for the cohabitation of freedom and slavery within the polity without openly establishing exclusions from citizenship in the founding document. Even if the American Constitution did not explicitly specify who were ‘We the people’—those who were equal, and entitled

¹⁰³ Arendt, *On Revolution*, p. 230.

¹⁰⁴ Even if I do not agree in principle that the referendum is not an adequate source of authority, I do agree with J. Lenowitz that the referendum in a constituent process led by a national assembly should not be conceived as a source of popular legitimacy. Lenowitz, "A Trust that cannot be Delegated": The Invention of Ratification Referenda" *American Political Science Review*, 109. 4 (2016), pp. 803-816.

¹⁰⁵ Arendt, *Willing*, p. 203.

to liberty and the pursuit of happiness—the fact that the framers were all property-owning white males tacitly determined the characteristics of the members of the new body politic. This exclusiveness was then contested by a second liberation during the Civil War, liberation this time not from outside domination, but from slavery, the rule that plagued the American polity since its birth.¹⁰⁶

Despite the potentiality for inclusion of the constitutional document, which allowed for revolutionary legal reforms that ultimately extended citizenship to the majority of the population, freedom as spaces for action remained lost in the American polity. The new legal framework “had given all power to the citizens, without giving them the opportunity of *being* republicans and of *acting* as citizens.”¹⁰⁷ The liberal republic set up a system of constitutional liberties that “the best it has achieved is a certain control of the rulers by those who are ruled,” giving no space for participation in the political life of the republic.

The most the citizen can hope for is to be ‘represented,’ whereby it is obvious that the only thing which can be represented and delegated is interest, or the welfare of the constituents, but neither their actions nor their opinions.¹⁰⁸

Following Jefferson’s plan of ‘elementary republics,’ which demanded continual interaction among citizens, Arendt puts forward with the council system an alternative form of government aimed at reintroducing freedom as action and expanding the public sphere. As Andreas Kalyvas has convincingly argued, through the establishment of councils Arendt seek to insert extraordinary politics within the constitutional structure. Infusing the analysis of councils with “her theory of constituent power and the revolutionary spirit that survives the closure of the revolutionary period”¹⁰⁹ she attempts to bring together “radical change and legal continuity, the extraordinary and the ordinary.”¹¹⁰

¹⁰⁶ Internal liberations and enlargements of the political community appear to be a never-ending process because membership relies on the exclusion of the ‘other’ (non-whites, women, youth, immigrants...). Moreover, one could argue a political community is never finalized because with every new birth, there is a possibility of transformative action.

¹⁰⁷ Arendt, *On Revolution*, p. 245.

¹⁰⁸ Arendt, *On Revolution*, p. 260.

¹⁰⁹ Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 275.

¹¹⁰ Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 264.

According to Arendt's reconstruction of the history of the councils, a task both of "recollection and invention as she constructs a tradition that she believes, as a historical fact, has never really existed,"¹¹¹ this type of assemblies is inherently modern. The councils are a new form of government that, at least partially, sinks its roots in the medieval towns, and makes its appearance with the French Revolution.¹¹² Since then, different forms of councils have emerged spontaneously whenever there is a serious crisis of authority: the Paris Commune in 1871, the Russian soviets in 1905, the Bavarian *Räterepublik* in 1919, and the Hungarian councils in 1956. Despite its crucial role during revolutions, this spontaneous collective tradition of politics has been lost in modern democracy because it has not been properly institutionalized.

The failure of post-revolutionary thought to remember the revolutionary spirit and to understand it conceptually was preceded by the failure of the revolution to provide it with a lasting institution.¹¹³

More than focusing on the inner-workings of councils, on political action within those spaces of freedom, Arendt's assessment of these assemblies seems almost strictly constitutional. The councils are for her institutions aimed at establishing a new order, at constituting freedom.

The councils, moreover, were always organs of order as much as organs of action, and it was indeed their aspiration to lay down the new order that brought them into conflict with the groups of professional revolutionaries, who wished to degrade them to mere executive organs of revolutionary activity... [the councils] consciously and explicitly desired the direct participation of every citizen in the public affairs of the country...¹¹⁴

The councils are the organized multitude that decides to bind itself by shared rules and procedures, an institution that allows for power and freedom to be exercised, limited, and protected. They embody a particular order in which power is generated in collective political action, in which the revolutionary spirit—the capacity for new beginnings and

¹¹¹ Muldoon, "Arendt's Revolutionary Constitutionalism," p. 786.

¹¹² Arendt, *On Revolution*, p. 253.

¹¹³ Arendt, *On Revolution*, pp. 223-224.

¹¹⁴ Arendt, *On Revolution*, p. 255.

the exercise of constituent power— is preserved and exercised. However, the council system is more than the “embodiment of constituent power in the new constitutional order.”¹¹⁵ Arendt saw these local assemblies not only as “the best instruments” to allow for the self-constitution of a truly political elite, as spaces open for everyone to exercise judgment on the affairs of the republic, allowing for those who want to be political to engage with others in the realm of appearances, but also as serving other purposes such as “breaking up the modern mass society, with its dangerous tendency towards the formation of pseudo-political mass movements.”¹¹⁶

Despite the radical democratic implications of the council system, I would argue Arendt is not a radical democrat. Even though she saw as essential to freedom the preservation of the revolutionary spirit within the constituted framework, she did not intend for it to become supreme. The councils were an alternative form of government that ought to coexist with representative government, not replace it. She recognizes that what gives the new republics their stability is the party system and the recognition of the opposition as an institution in government.¹¹⁷ As Arendt implicitly concedes, the same as the Senate was the source of authority in the Roman republic, representative government based upon a party system is what still would make rule legitimate and stable in modern republics. In contrast to Rome, where the power of the elite was checked by the assembled people, modern republics lack a popular institution to counterbalance parties as the expression of elite power. Thus, following a republican structure of mixed constitution, and building on Jefferson’s “elementary republics,” Arendt introduced a council system that she conceives as a ward-type structure in a twofold way: as *local* assemblies of the people —such as town-halls— as well as a *containment* of representative government through the constant performance of freedom as action.

While we should consider Arendt’s constitutional model of parties and councils as a modern republican version of the institutionalized conflict between the elite and the people, the democratic principle inherent in the inner logic of the councils brings a new element into the analysis. I would argue that the introduction of the democratic element into a republican mixed constitution creates a complex political system in which different

¹¹⁵ Muldoon, “Arendt’s Revolutionary Constitutionalism,” p. 604.

¹¹⁶ Arendt, *On Revolution*, p. 271.

¹¹⁷ Arendt, *On Revolution*, p. 259.

conceptions of freedom and authority operate in different levels, coexisting but bound to conflict. While at the council level, deliberation is the source of authority and being free means to engage in speech and deed, at the system level authority would reside on the dual, republican institutional structure contained in the constitution, in which freedom is equivalent to security and balance of power. In order to preserve freedom, both as security and action, party and council must interact and coexist. Without the councils, the public-at-large is not free; only the representatives are equals engaging in deliberation about public affairs and yielding political power. But without parties, administration and continuity of government in large nation-states seems almost an impossibility.

I would argue the conflict between parties and councils cannot be resolved by simply acknowledging the councils as bearers of constituent power.¹¹⁸ For the conflicting authority of parties and councils to avoid constitutional crisis, the institutional conflict would need to be managed through a distinction and separation based, on the one hand, on a division of labor between administration and politics, and on the other hand, their position within the constitutional structure. While the parties and representative government would have as main task to channel interest and administrate the state for the common interest, I would argue the councils would be aimed at allowing for the exercising of judgment, “the most political of man’s mental abilities,”¹¹⁹ at allowing citizens to collectively “judge affirmatively or negatively the realities they are born into and by which they are also conditioned.”¹²⁰

Even if she left inconclusive her work on judgment, Arendt is clear that for her the capacity of judging is one of the “politically most important, rational faculties”¹²¹ that, following Kant, emerges only in praxis. Judgment needs to be exercised and cannot be learnt or arrived at by either deduction or induction.¹²² For Arendt the “condition prerequisite for all judgment”¹²³ is the “deliberate withdrawal from involvement and the partiality of immediate interests”¹²⁴ in order to judge “particulars [“this is wrong”]

¹¹⁸ Carl Schmitt’s sovereign deciding on the exception. Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 116, 119, 134.

¹¹⁹ Arendt, “Thinking” *The Life of the Mind*, p. 192.

¹²⁰ Arendt, “Thinking,” p. 71.

¹²¹ Arendt, *On Revolution*, p. 221.

¹²² Arendt, “Thinking,” p. 215

¹²³ Arendt, “Thinking,” p. 92.

¹²⁴ Arendt, “Thinking,” p. 76.

without subsuming them under general rules.”¹²⁵ Moreover, judging allows for the realization of thinking, “making it manifest in the world of appearances,”¹²⁶ and therefore the aim of the councils, as the institutionalization of the realm of appearance is to enable the exercise of judgment, which in turn allows individuals to construct and discover the community and its limits. According to Lisa Zerilli, for Arendt judging is an activity that is “formative of the public realm” but that is not defined “in terms of the production of a normative basis for political action.”¹²⁷ Judgment is a faculty that “at once expands our sense of reality and affirms freedom” instead of setting rigid standards of validity, when the imagination is allowed to be unrestrained from concepts and moral laws.¹²⁸

Because the object of judgment is the past,¹²⁹ the role of the councils within the constitutional structure would be to pass judgment on the actions of government. In this way, the councils would not share in administration (doing) but only pass judgment on it whenever becomes necessary to deliberate on the particulars. The councils’ judging function moreover would acquire a censorial authority from the position of these assemblies outside of the governmental structure. It would be their no-rule position, their lack of a stake in administration, that would allow for the councils to play a negative role in judging the outputs of government (law and policy). In order for the councils to be strictly political and avoid the temptation of directly ruling, I would argue the realm of appearances would need to be mostly devoted to political judgment of representative government and the role of the state in the shared world. However, because judging the past is connected to thinking the future, “that is, to speculate meaningfully, about the unknown” and to “will the impossible,”¹³⁰ arguing for the councils as organs of political judgment in no way precludes the possibility of the improbable and the capacity to renew the republic from within. Even if the councils are “the institutionalized embodiment of a stabilized, pacified, and thus de-revolutionized constituent power,”¹³¹ individuals in these

¹²⁵ Arendt, “Thinking,” p. 192.

¹²⁶ Arendt, “Thinking,” p. 193.

¹²⁷ L. Zerilli, “‘We Feel Our Freedom’ Imagination and Judgment in the Thought of Hannah Arendt” *Political Theory*, Vol. 33 No. 2, April 2005, p. 178-9.

¹²⁸ Zerilli, “‘We Feel Our Freedom,’” p. 178.

¹²⁹ Arendt, “Thinking,” p. 213.

¹³⁰ Arendt, “Thinking,” p. 71.

¹³¹ Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 276

councils would be able to exercise constituent power in the form of judgment, actively participating in the renewal of the republic.

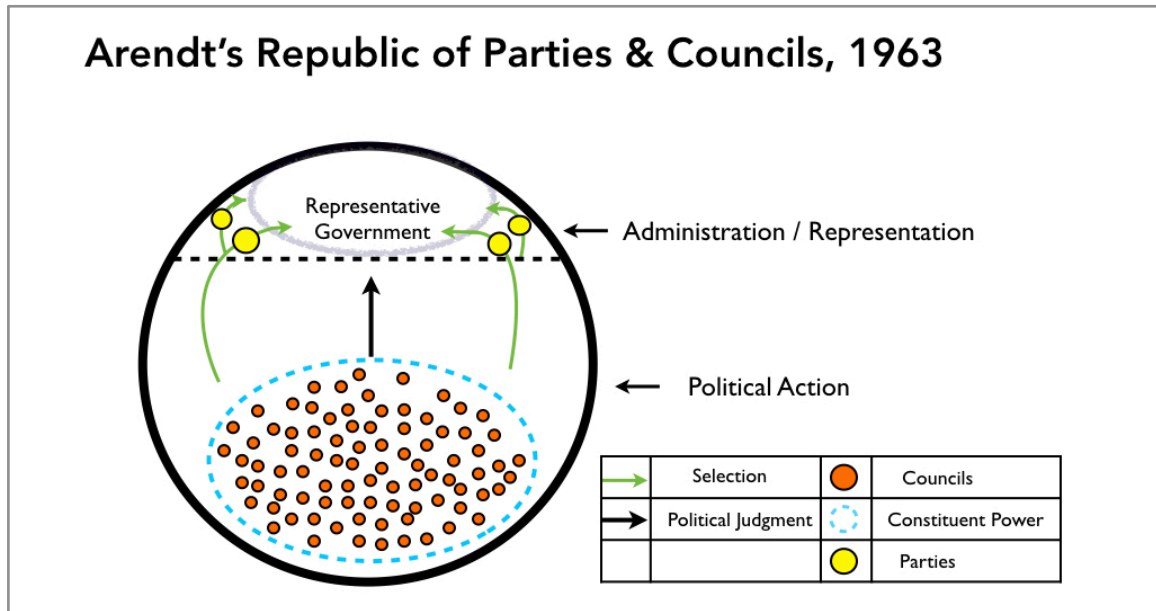


Figure 7.1 Arendt's Republic of Parties & Councils, 1963

Part III

THE MIXED CONSTITUTION RELOADED. PROPOSALS FOR A PLEBEIAN REPUBLIC

8.

Contemporary Plebeian Thought

Given the degree of systemic corruption in liberal democracies and the increasing oppression ordinary people suffer at the hands of employers, landlords, lenders, insurance companies, and state bureaucracy, it is not surprising that the study of plebeian politics and ideology coming out of the resistance of plebeians against oligarchic power is becoming less of an oddity.¹ The first academic work to directly deal with plebeianism is Martin Breugh's reconstruction of the intellectual history of plebeian politics in *The Plebeian Experience*, first published in 2007 in French. Breugh traces what he calls a "plebeian principle" that resurges from time to time in history and that defines the plebeian experience as one of freedom and revolt, a refusing of "the limits of the possible present of the dominant order."² From the historical expression of the plebeian principle from Rome to the Paris Commune, to its philosophical roots in Machiavelli up to Rancière, Breugh shows the discontinuous struggle for freedom of plebeians and argues for conceiving the plebeian subject neither as a social category nor as an identity, but as an experience, "the passage from a subpolitical status to one of a full-fledge political

¹ According to WorldCat, there has been no major publication in which the term "plebeian" was studied since the 18th century. Of course this does not mean that the word has not been used by theorists such as Foucault and Rancière, but that having plebeianism as an object of study had not been attempted until M. Breugh published *L'expérience Plebeienne* (New York: Columbia University Press, 2010).

² Martin Breugh, *The Plebeian Experience: A Discontinuous History of Political Freedom* (New York: Columbia University Press, 2016), p. xvi.

subject.”³ The plebeian experience only materializes when “people excluded from the *res publica* transform themselves into political subjects able to act in concert.”⁴ Plebeianism is therefore an experience of self-emancipation through political action that challenges the established hierarchical order in which plebeians are subordinate subjects. Even if plebeian experiences have tended to be ephemeral because unable to “found a sustainable new political order,”⁵ they have kept reappearing, irrupting spontaneously nevertheless.

Attempting to theorize the plebeian experience within liberal democracies, Jeffrey Green argues that plebeianism is defined by a “shadow of unfairness” resulting from plutocracy, “the inescapable incursion of socioeconomic inequality into civic spaces.”⁶ This shadow, moreover, is a constant feature of our political systems —“a permanent mar on liberal-democratic regimes’ capacity to fully realize the norms of free and equal citizenship”— even in the most “enlightened and advanced.”⁷ Plebeianism recognizes that “within liberal democracy *ordinary citizenship is second-class citizenship*”⁸ and aims at “the identification and regulation of the most advantaged class.”⁹ According to Green the most significant contribution of adopting a plebeian lens to analyze liberal democracies is that it unveils the illusions of equal liberty that undergird the liberal-democratic structure.

The premise of plebeianism is that prevailing accounts of liberal democracy today suffer from unreality insofar as they take the ordinary citizen to be (or potentially become) fully free and equal vis-à-vis citizens with significantly greater amounts of wealth, fame, and political influence... Overcoming these various forms of unrealism is a chief value of a plebeian contribution to the study and practice of liberal democracy.¹⁰

Different from Breugh, who analyzed plebeian politics as a discontinuous history of emancipation, Green sees plebeianism as a permanent feature of liberal democracies,

³ Breugh, *The Plebeian Experience*, p. 1.

⁴ Breugh, *The Plebeian Experience*, p. 241.

⁵ Breugh, *The Plebeian Experience*, p. 241.

⁶ J. Green, *The Shadow of Unfairness. A Plebeian Theory of Liberal Democracy* (New York: Oxford University Press, 2016), p. 4.

⁷ Green, *Shadow of Unfairness*, p. 13.

⁸ Green, *Shadow of Unfairness*, p. 9.

⁹ Green, *Shadow of Unfairness*, p. 13.

¹⁰ Green, *Shadow of Unfairness*, p. 20.

an ideology that does not prompt individuals to engage in political action, but rather to remain in a place of passive-aggressive resistance vis-à-vis oligarchy through what he calls “principled vulgarity,” a mode of behavior through which plebeians transgress the “well-established norms of civility.”¹¹ According to Green, through the recognition of “reasonable envy” originating in the contestation of the “superior power of the superrich,” plebeianism could contribute to make liberal democracy’s “ideas and institutions even more just.”¹² While in the past plebeian ideology and politics helped establish plebeian institutions able to veto and introduce legislation as well as self-government assemblies, for Green plebeianism today means engaging in “classism” and “rancor” to regulate the most advantaged class, and in “extrapoliticism” as “solace” for coping with an inevitable state of subordination.

Even if Green’s material diagnosis of second-class citizenship is certainly within a plebeian conception of the oligarchic republic, the moral philosophy that he derives from this condition of subordination is at best partial and at worst anti-plebeian. He argues that one of the purposes of plebeian theory is to “help ordinary citizens find solace in the face of the inevitable unease their second-class status will generate them.”¹³ He proposes to embrace a modern interpretation of Epicureanism—a philosophy teaching “to live unnoticed” and “avoid politics”—understood as form of *extrapoliticism*, which conceptualizes “egalitarianism in terms of a critical indifference toward politics,” but that would differ from antipoliticism and apoliticism.¹⁴ Extrapoliticism challenges “the desirability of high political office” and offers coping mechanisms “whereby political longings temporarily might be sublimated in non-political form.”¹⁵

Green argues that plebeian philosophy today should be understood as a form of Epicureanism, both because of the historical connection with this strand of philosophy and plebeians in the late Roman republic, and his own phenomenological study of the plebeian experience in contemporary liberal democracies. He argues that Epicureanism is a plebeian philosophy because it was one of the “dominant philosophical schools in late republican Rome” and “appears to have been especially popular among Roman

¹¹ Green, *Shadow of Unfairness*, p. 10 & 110.

¹² Green, *Shadow of Unfairness*, p. 13.

¹³ Green, *Shadow of Unfairness*, p. 66

¹⁴ Green, *Shadow of Unfairness*, p. 131.

¹⁵ Green, *Shadow of Unfairness*, p. 133.

plebeians.”¹⁶ Green also references Cicero derogatorily labeling Epicureanism as a “plebeian philosophy” as proof. First, I would argue that not because a philosophy is popular among plebeians (understood as a social category) does it mean that it is a plebeian philosophy. This is equivalent to saying that because liberalism today is one of the dominant political philosophies, it should be considered as a philosophy of the people. Apart from the “popularity” perspective, there is no necessary connection between Epicureanism and plebeianism—even if the majority of plebeians were indeed epicureans.

In addition to the weak historical connection, I would argue this association between Epicureanism and plebeianism runs into a serious temporality issue, both in its initial attachment to plebeianism as well as in its transposition to current political systems. As I discussed in Chapter 2, during the late Roman republic the political power of plebeians was highly institutionalized in the Plebeian Council and the Tribune, but due to the progressive oligarchization of plebeian leadership, plebeians saw a *de facto* retrenchment of their political prerogatives. It is in this context—in which plebeians had acquired legislative supremacy after the Senate’s pre-approval of legislation was eliminated, but plebeian magistrates had ceased to constrain oligarchic power—that Epicureanism becomes popular among plebeians. It is in the summit of plebeian institutional power, where decay of plebeianism as an ideology and political praxis of emancipation seems to have begun, when the popularity of a skeptical view of public office and the detachment from politics took hold of plebeians. To render Epicureanism—a philosophy that was popular at a moment of corruption and the retreat of plebeian political ideology—as a plebeian philosophy, is to my mind misleading given that it bears no resemblance with the plebeian principle that refuses the limits of the dominant order convincingly traced by Braugh. Green argues that while Braugh’s interpretation of plebeianism is based on revolution, his conception of plebeianism is based on an “already embraced political regime” and thus is inherently reformist,¹⁷ even if it is not clear how engaging in a Thoreau-type of civil disobedience in which plebeians withdraw from politics could achieve any meaningful reform.

¹⁶ Green, *Shadow of Unfairness*, p. 132-33

¹⁷ Green, *Shadow of Unfairness*, p. 13.

Even if one grants that Epicureanism was indeed a plebeian philosophy that aimed at liberating plebeians from a political arena in which plebeian institutions had become oligarchic, the analogy Green makes with today's plebeian experience brings its own temporal challenges. The political situation in which second-class, ordinary citizens are today—completely lacking institutional power—has little to do with the high degree of entrenchment of plebeian power in the late Roman republic. I would argue that for theorizing plebeianism as an ideology that could be useful to bring solace to the awareness of the subordinate status of ordinary citizens today, one would have to look at the philosophy prevalent during the long conquest of political power by plebeians: from the establishment of the Tribunes of the Plebs in 494 BC up to the passing of *lex Hortensia* in 287 BC, which eliminated the Senate's veto power over plebeian law. Unfortunately, there are no surviving texts by plebeian philosophers, so the precise principles and postulates of the original plebeian philosophy that underpinned the plebeian struggle for political recognition and power in Rome cannot be retrieved. Nevertheless, it seems commonsensical that such a philosophy would not have embraced the withdrawal from politics, but on the contrary, the takeover of political power. If we compare plebeian power in Rome and in contemporary democracies, the differences are so pronounced that it seems difficult to make a meaningful “analogical reasoning”¹⁸ and base a moral philosophy on it.

The main political power ordinary citizens have today is the right to elect representatives, and therefore, compared to the late Roman republic, there is still much political ground to be gained by plebeians, advances that in the past have only resulted from political action. A contemporary version of Epicureanism seems odd as an adequate plebeian philosophy because it is unlikely to produce the results that philosophical ideas achieved during the plebeian conquest of political power. Even if the “shadow of unfairness” cannot be eliminated from liberal democracies, plebeianism should be aimed not only at “identifying and regulating” elites through the expression of “reasonable envy,” but also at gaining political power by institutionalizing the power of plebeians. A philosophy that teaches the withdrawal from politics and the expression of reasonable

¹⁸ According to Green, his “analogical reasoning” can maneuver between the abstraction of purely analytical modes of thought... and the mere empiricism of purely historical modes of investigation...” Green, *Shadow of Unfairness*, p. 19.

envy instead, clearly does not contribute to reforming the system, at least not in a direct manner.

Green's phenomenological account of the emotions and behaviors prevalent among plebeians today seems close to what James Scott calls *infrapolitics*, the “low-profile forms of resistance”¹⁹ against oppression that are part of the hidden transcript — the discourse of “gesture, speech, and practices” that is excluded from the public sphere²⁰— once it has become public. According to Scott when the oppressed assume the resistance of the hidden transcript as common and legitimate, the political subjectivization of the subaltern classes is possible. I would argue that “principled vulgarity” should be understood as providing the philosophical justifications for plebeian *infrapolitics* to be recognized in the open, and in this way allowing for the collective consciousness of plebeians and the discursive reenactment of the divide between the few and the many. However, if this type of *infrapolitics* is combined with a withdrawal from politics, as Green suggests as solace for the awareness of subordination, the result is not plebeianism —understood as the ideology and politics that aims at emancipating plebeians from oligarchic domination— but the sabotage of the process of plebeian subjectivization by discouraging and thus thwarting political action.

Following Breugh's plebeian principle, I would argue plebeianism as an ideology and politics that aims at the emancipation of plebeians, and not only at the constraint of elites, should rest on a political philosophy that embraces conflict as productive of liberty, such as the one proposed by Jacques Rancière. Even if Rancière does not make the explicit connection between the construction of the democratic people as “those who have no part” and the plebeian conception of the people, as those who do not rule and resist oligarchic oppression, the influence of plebeian ideology in Rancière's thought is substantive and explicit. His political philosophy was heavily influenced both by his participation in *Les révoltes logiques* —a journal aimed at “reconstructing grassroots thought” while breaking away from “proletarian metaphysics”— and by Pierre-Simon Ballanche's theorization of the ‘plebeian principle’ in the history of the

¹⁹ J. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press 1990) p. 19.

²⁰ Scott, *Domination and the Arts of Resistance*, p. 27.

Roman republic,²¹ which Rancière uses as a foundational narrative in his theory of politics as disagreement.²² This plebeian principle, egalitarian and emancipatory, appears as intrinsically connected to democracy.

Even if influenced by Lefort in terms of his conception of democracy being a space of power, Rancière, also a student of Althusser, rejects the connection between politics and the tendency to embody this empty place, and embraces instead alterity, dissent, and equality as the principles of politics. Democracy is not a form of government or juridical framework, but a “community that is defined by the existence of a specific sphere of appearance of the people.”²³ Democracy is actualized when the people, understood as those who do not take part in the oligarchic structure of power, are able to become visible, modifying the realm of the visible with their mere existence, an irruption that “splits reality and reconfigures it as double.”²⁴ Democracy allows for an alternative image of society by providing a stage for the people to become a political subject. For Rancière democracy is not part of the oligarchic structures of power —what he calls the “police order”— but consists on the materialization of the logic of equality that is anti-hierarchical and conflictual.

For the forms of democracy are nothing less than the forms in which politics is constituted as a specific mode of human being-together. Democracy is not a regime or a social way of life. It is the institution of politics itself, the system of forms of subjectification through which any order of distribution of bodies into functions corresponding to their ‘nature’ and places corresponding to their functions is undermined, thrown back on its contingency.²⁵

Democratic politics are a politics of disagreement, “forms of expression that confront the logic of equality with the logic of the police order.”²⁶ True political action is always democratic because it attacks inequality and seeks to dismantle patterns of oppression that have been naturalized through the discipline of the police logic. Because

²¹ Breugh, *The Plebeian Experience*, p. 91-2.

²² J. Rancière, *Disagreement: Politics and Philosophy* (Minneapolis: University of Minnesota Press, 1998), Chapter 2

²³ Rancière, *Disagreement*, p. 99

²⁴ Rancière, *Disagreement*, p. 99

²⁵ Rancière, *Disagreement*, p. 101

²⁶ Rancière, *Disagreement*, p. 101

politics as disagreement has been completely foreclosed by consensus democracy —a post-democratic regime in which there is an “absolute removal of the sphere of appearance of the people”²⁷— instances of politics —popular performances of the egalitarian logic against the hierarchical logic of police— are only rare. The logic of police, which also structures the system of political representation based on the counting and aggregation of individual preferences and votes, floods the public space, making politics sporadic and ephemeral, outbursts of emancipation amidst the oligarchic structure of the police order.

The political act of plebeians is grounded on conflict, but not a systemic conflict of “interest between constituted parties of the population,” “a discussion between partners,” but a conflict “over the very count of those parties” that “undermines the very situation of interlocution.”²⁸ The political dispute challenges the foundations of the system of police through a radical egalitarian logic that does not speak to the system but disrupts it through the political performance of the people, of those who do not have a part in the system but nevertheless claim it. “*Politics* means the supplementation of all qualifications by the power of the unqualified,” the visible action of the people, those who are not supposed to act because ignorant and untrained.²⁹ Through this lens, there is no freedom without politics, and the only solace for plebeians is to claim a part in the political process by engaging in political action and performing their equality.

I. Reviving the Tribune

While “reasonable envy” could serve as a springboard for raising class consciousness among plebeians, plebeianism also demands effective institutional mechanisms to control ruling elites and successfully contest their domination. The first to develop the strand of plebeian thought that aims at institutionalizing plebeian power was John McCormick, who in *Machiavellian Democracy* sketched “a revived tribunate, combin[ing] elements of randomization, wealth-exclusion, and direct plebeian judgment”³⁰ as an institutional response “to the hegemony of elections in contemporary

²⁷ Rancière, *Disagreement*, p. 103

²⁸ Rancière, *Disagreement*, p. 100

²⁹ Rancière, *Dissensus: On Politics and Aesthetics* (London: Continuum, 2010), p. 53

³⁰ J. McCormick, *Machiavellian Democracy* (New York: Cambridge University Press 2011), p. 171.

republics.”³¹ Focusing his analysis in the political structure rather than on the plebeian experience in contemporary representative democracies, McCormick argues constitutional representative regimes lack two crucial elements: extra-electoral means to control elites, and a political distinction between elites and the common people.³²

...the aristocratic effect and the privileged access to resources and information enjoyed by magistrates in modern republics render elections inadequate mechanisms of elite accountability and responsiveness; moreover, a sociopolitical definition of ‘the people’ that includes wealthy citizens, rather than one that sets the latter apart from or even opposed to the people, allows the wealthy to dominate common citizens in quasi-anonymous and largely uncontested ways.³³

Elections are not enough to disable oligarchic domination, and lacking a division between the few and the many, the ruling elite and the plebeians, allows the few to exert covert domination with impunity while plebeians are left without the possibility of resisting and combating that oppression. Taking inspiration from Machiavelli’s Provost office, designed both to control elites and “place ‘rank-and-file’ plebs in positions of political authority on a regular basis,”³⁴ McCormick proposes the incorporation into the U.S. Constitution of a People’s Tribune: a collective plebeian office with the power to veto, call referenda, and initiate impeachment proceedings against public officials. This plebeian institution would be composed of 51 nonwealthy citizens selected by lottery, who would serve for one-year nonrenewable terms.³⁵ This proposal to add a plebeian institution to the constitutional framework of a representative democracy marks the origin of the theorization of a new form of mixed constitution. McCormick is therefore a twenty-first century pioneer within the institutional strand of plebeian constitutionalism to which I also attempt to contribute. In what follows I lay out his institutional proposal and analyze the challenges that arise from wealth exclusion, mode of selection, and

³¹ McCormick, *Machiavellian Democracy*, p. 172.

³² McCormick, *Machiavellian Democracy*, p. 179.

³³ McCormick, *Machiavellian Democracy*, p. 179.

³⁴ McCormick, *Machiavellian Democracy*, p. 173.

³⁵ McCormick, *Machiavellian Democracy*, p. 183. He also proposes appointment procedures for high office that combine lottery and election.

powers of the Tribunal.³⁶ I also analyze McCormick's most recent, highly controversial proposal: to establish "popularly judged political trials where public officials or private citizens, indicted for corruption or treason, face the penalty of death."³⁷

a) Composition

The People's Tribunal would be a political institution that excludes political and economic elites. While the exclusion of the political ruling class—defined as those who have held elected or appointed office—is not problematic because the exclusion is based on the temporary role performed by individuals, the exclusion of the wealthiest tenth percent of family households³⁸ raises a liberal challenge. Even if the aim of the exclusion is to redraw the boundary between the few and the many, and keep the rich from capturing plebeian institutions, introducing a class-based political institution in which representation would be attached to (the lack of) wealth, would be, at least in principle, unconstitutional because it would violate the fundamental right to equal liberty all citizens should enjoy under a liberal republic. Discrimination using suspect categories such as race, national origin, and religion, are subject to strict scrutiny, which forces the state to prove a *compelling governmental interest* and to show that the use of the suspect category is *narrowly tailored* to achieve that interest. Even if the Supreme Courts could agree that class is not a suspect category, because the division would be formal (10/90), giving plebeians exclusive political rights that other citizens are deprived of would infringe on voting as a fundamental equal right. A strong argument would need to be made to claim that the exclusion of the rich from plebeian institutions is necessary, and that there is no other way to achieve the objective of the Tribunal without excluding individuals from political power based on their wealth. Perhaps, the exclusion could be at least partially based on the pernicious effects of having elites present during deliberation—which speaks to the difficulties of “challenging dominant discourses that privilege elite interests when members of such elites are present in the deliberations.”³⁹ Given that the

³⁶ For an analysis of McCormick's Tribunal in comparison with participatory procedures—direct legislation, mini-publics, and participatory budgeting—see Graham Smith and David Owen, “Machiavellian Democratic Innovations: McCormick's People's Tribunal” *The Good Society*, Vol. 20, No. 2 (2011), pp. 203-215.

³⁷ McCormick, “Democracy, Plutocracy and the Populist Cry of Pain,” *draft*, p. 18.

³⁸ McCormick, *Machiavellian Democracy*, p. 183.

³⁹ Smith and Owen, “Machiavellian Democratic Innovations,” p. 210.

mere presence of members of the elite could negatively affect the performance of the Tribune, their exclusion would need to be categorical.

Even if the bending of the liberal framework to exclude the wealthy from political institutions could be construed as necessary and narrowly tailored, and therefore constitutional, and a class-based institution could be established in which the richest 10% of society is excluded from exercising a specific form of political power, this constitutional interpretation would give birth to a mixed constitution that does not embrace liberal principles as its overarching paradigm. In the illiberal beginnings of representative government, wealth requirements to participate in the political system, barring the poor from voting, were ubiquitous. Perhaps, after the franchise has been expanded to its maximal expression, and all discriminatory exclusions have been eliminated, the corrupted version of liberal democracies (already transforming into a new political form) could likely end with the reversal of the original gatekeeping rule with a twist: barring the wealthy from exercising political power in plebeian institutions. Although I agree that it is necessary to make the political distinction between the ruling elite and plebeians, as I argue in the next and final chapter, a class-based distinction is not the only way the division between the few and the many could be drawn.

b) Selection

Regarding the mode of selection for the Tribune, McCormick endorses lottery because it “keeps economic elites from monopolizing public offices” and materializes “the principle of equitable political participation among citizens.”⁴⁰ Even if as an anti-corruption mechanism lottery is certainly not infallible since plebeians could be bribed or manipulated, in terms of offering equal opportunities for participation, sortition clearly delivers. While there is no empirical evidence to support that elections “are especially capable of providing good government or are significantly constrained in their behavior by retrospective voting patterns,” selection by lottery guarantees the random distribution of offices among plebeians.⁴¹ Selecting members to the Tribune office by lot for short periods of time would not only make it very difficult for political corruption to become entrenched in that office, but also would offer equal chances of exercising political

⁴⁰ McCormick, *Machiavellian Democracy*, p. 173.

⁴¹ McCormick, *Machiavellian Democracy*, p. 174.

power, and in this way it would fulfill the role that Machiavelli's Provosts played in allowing common citizens to *see* and *experience* political power.

Even if lottery clearly is an equal-opportunity type of selection that seems most adequate to fill offices in plebeian institutions, the inclusion allowed by the Tribune office sketched by McCormick would be, in real terms, marginal given the small number of tribunes selected every year. The extremely low probability of being selected to serve in office,⁴² or know someone who has served and could transmit that plebeian political experience,⁴³ would allow only for limited political learning among plebeians and also potentially undermine the legitimacy of the office, especially if the motions pursued are controversial. Materially, the Tribune office would be run by a group of selected few, who even if plebeian from a socio-economic perspective, might not represent the multitude in terms of their particular worldviews. Discrepancies of opinion could easily lead to an attack on the mode of selection and calls for electing 'better qualified' plebeians. In the Roman case, the establishment of a plebeian political elite was the first step towards cooptation and the undoing of the plebeian project, therefore the possibility of introducing elections to solve a legitimacy problem should be avoided at all costs.

A final point regarding selection: McCormick endorses "institutional affirmative action for common citizens,"⁴⁴ taking into account "the particular history of the United States" in which racial discrimination is systemic. He suggests to have the pool of citizens from which members of the Tribune are drawn "altered to give African American and Native American citizens a greater chance of serving as tribunes."⁴⁵ Even if I sympathize with the redress of historic and current inequalities based on race, there is no reason, within the logic of the office, to give more chances of being selected to some groups of plebeians rather than others. If the intention of 'weighted sorting' is to achieve equity by over-representing oppressed groups, who gets to decide which groups suffer more oppression and therefore are deserving of special treatment? What about the historic and current subordinate position of women, whose domestic and reproductive labor is

⁴² In the US, where 245.5 million people are of voting age, about 220 million people would be eligible for the Tribune, which means that each citizen would have a 0.000023% probability of becoming selected through non-weighted lottery. Even if tribunician office are also implemented at state level, the probability would still be very low.

⁴³ After a decade, only 510 plebeians would have served in office.

⁴⁴ McCormick, *Machiavellian Democracy*, p. 184.

⁴⁵ McCormick, *Machiavellian Democracy*, p. 184.

extracted from them without compensation, who suffer pay discrimination, sexual harassment and violence?⁴⁶ What about Hispanics, the new underclass of the American economy, who are constantly harassed by immigration police? What about Muslims, who are labeled as terrorists, victims of hate crimes and harassment? And members of the LGBTQ community, who are targets of homophobic violence and social discrimination? The list of different types and degrees of oppression within the plebeian ranks goes on. The challenge to positively discriminate without negatively impacting other oppressed groups is one of the reasons why the U.S. Supreme Court ruled in 1978 as unconstitutional the use of racial quotas in university admission processes: discriminating negatively or positively based on race violates the Equal Protection Clause of the 14th Amendment.⁴⁷ While the goal of achieving diversity in the classroom is legitimate, special admission procedures or quotas in which race is a required category are not.

‘Weighted sorting’ brings an element of arbitrariness into lottery that could also undermine the legitimacy of the office. Deciding on which social group would deserve higher chances to become selected to exercise political power is in itself a complicated political question that could unnecessarily intensify racial division among plebeians. Moreover, individuals from ethnic minorities and other oppressed groups are not necessarily in support of progressive politics. The example of Justice Clarence Thomas—the only African-American member of the Supreme Court—who is against any form of affirmative action (even if he was himself a beneficiary of it) is the most visible and paradoxical case. Even if McCormick states that a “a veto exercised by the American Tribune ought to block oligarchically favorable as opposed to popularly progressive policy initiatives,”⁴⁸ there is no guarantee that the office would pursue a progressive agenda or a plebeian one. If due to random selection the Tribune ends up with a majority of middle and working class racists, for example, or a majority of conservatives wanting to restrict women’s reproductive rights and discriminate against LGBTQ citizens, there is no mechanism to assure that the Tribune would not be used for non-plebeian ends. Given that in terms of the degree of identification individuals experience,

⁴⁶ As Roger Smith has pointed out “it is not clear whether a government that gave special governing powers to the less affluent would do more to promote transformations in those practices.” Smith, “Machiavellian Democracy,’ Differentiated Citizenship, and Civic Unity *Good Society*, 20.2 (2011), p. 243.

⁴⁷ *University of California Regents v. Bakke*, 1978.

⁴⁸ McCormick, *Machiavellian Democracy*, p. 186.

class is perhaps the weakest and most difficult identity to maintain,⁴⁹ I would argue a plebeian infrastructure needs to have procedures enabling actions pursuing plebeian, emancipatory ends and limiting attempts to use plebeian power to support the subjugation of one group to another. I would argue plebeian law, even if aimed at restraining the power of the wealthy, should not contain the seeds of domination within it, since laws are always in need of interpretation and application, there to be deployed and exploited in social and political struggle.

c) Powers

Regarding the constitutional powers of the People's Tribune, upon a majority vote, this plebeian institution would have the prerogative to veto one law, one executive order, and one Supreme Court decision every year. Following the example of the gradual expansion of plebeian institutional power after the establishment of the Tribune in Rome, and Machiavelli's support for the gradual expansion of plebeian power in Florence, McCormick proposes a quantitative limit to plebeian veto power in terms of the amount of items that could be vetoed at any time. Even if strategically this would be a sound proposal, imposing such limitations would not only open the possibility for manipulation from representative government and render the office ineffective,⁵⁰ but also needlessly restrict the anti-oligarchic prerogatives of the plebeian office, setting a procedural precedent that could stand oppose to plebeian reforms. It could be the case that several pieces of legislation, executive orders, and court decisions would need to be repealed at the same time to exert meaningful change. McCormick's decision to restrict the amount of times the veto power can be exercised appears as strategically in tune with Machiavelli's concessions toward the powerful few in his constitutional proposal for Florence.⁵¹ The same as Machiavelli attempts to put a plebeian foot in the oligarchic door of power, which eventually would allow for plebeians to finally push the door open, by

⁴⁹ See P. Aslanidis, "Populism as a Collective Action Master Frame for Transnational Mobilization" *Sociological Forum*, 33 (2018), pp. 443-464. Recognizing the weakness of class identity vis-à-vis other stronger identifications based on race, religion, and national origin, makes enabling ways of fostering plebeian identity a central task of plebeianism.

⁵⁰ As was discussed in a symposium of McCormick's book in *The Good Society* 10.2 (2011) Congress could pass controversial mock legislation anticipating a Tribunician veto, and then push through anti-plebeian legislation, effectively neutralizing plebeian power.

⁵¹ Machiavelli, *Discursus on Florentine Affairs* cited in *Machiavellian Democracy*, p. 124.

lowering the threat to the security of the few,⁵² McCormick proposes a Tribune that has power to grow out of an unnecessary limitation.

In addition, McCormick also restricts the power of the Tribune to initiate law or policy through a national referendum to only once per year, restriction that does not seem as problematic as the limits on the veto/repeal, since it is unlikely that the office could propose more than one issue per year. If the referendum wins a majority, the Tribune's legal project would become a nationally binding plebeian law. However, in a rather unplebeian move towards legislative supremacy, McCormick gives the power to overturn a national referendum to Congress if supermajorities in both chambers "declare the statute to be unconstitutional."⁵³ This legislative supremacy in which Congress is the final sovereign interpreter of the constitution, would position the modern Tribune in a subordinate position vis-à-vis representative government, equivalent to the position of the Roman Tribune before *lex Hortensia* eliminated the Senatorial veto on plebeian legislation, or to the position of the representatives of the commons in Montesquieu's model in which the Senate retains veto over legislation coming out of the lower house. This legislative veto power over plebeian law is especially troubling given that McCormick also gives the legal power to expand the basic powers of the Tribune to a supermajority in the House of Representatives. These provisions would render the Tribune innocuous if Congress turns out to be in the grip of oligarchy. If plebeian law could be vetoed by representatives of oligarchy, and the power to expand plebeian power and override the veto are to be granted by the same representatives, then the Tribune could be procedurally disarmed and effectively neutralized by institutionalized oligarchic power.

The third power assigned to the Tribune is the prerogative, upon a $\frac{3}{4}$ majority, to initiate impeachment proceedings against one public official in each branch of government; impeachment procedures and decision-making would be directed by the Senate according to the Constitution. McCormick gives to the Tribune the power to

⁵² McCormick, *Machiavellian Democracy*, p. 124.

⁵³ McCormick, *Machiavellian Democracy*, p. 184. Even if this does not preclude further transformation, giving the power to veto plebeian law to the Legislative would certainly cause a constitutional crisis in which institutional mechanisms to channel class conflict would be exhausted. For McCormick's response to this critique see "Machiavellian Democracy in the Good Society" *The Good Society*, Vol. 21, No. 1 (2012), pp. 90-117

exercise a prerogative that is today monopolized by the House of Representatives. This prerogative, however, is only to initiate proceedings and not to investigate and pass judgment. Even if initiating impeachment procedures in cases of political corruption is a great power to wield, it could be the case that impeachment cases brought up by the Tribune would be tried in the Senate, and then dismissed. Given the increasing difficulty to materially prove political corruption, the Senate could easily let corrupt officials off the hook, rendering the Tribune impotent as an anti-corruption office.

Perhaps because aware of the limitation of impeachment procedures to effectively fight corruption, McCormick proposes another institutional innovation that relates to Machiavelli's *avenging power* aimed at instilling the same fear of punishment to those who "had done wrong" as it was experienced during the founding: popular trials empowered to decide on corruption cases in which death is the ultimate penalty. Such popular trials would be modeled based on the "capital trials by large citizen juries like those that convicted Socrates in Athens and Coriolanus in Rome."⁵⁴ Even if progressive liberals have moved away from capital punishment, especially given discriminatory sentencing and evidence of *cruel and unusual punishment* in the way in which criminals are killed, McCormick follows Machiavelli's insight that the fear of capital punishment is the only way of "detering socio-economic and political elites from steering public policy toward their own private, self-enrichment."⁵⁵ According to Machiavelli, when only imprisonment and banishment were applied as political punishment, wealthy citizens circumvented penalties by using "their considerable resources to gain unwarranted pardons, to bust out of jail, or to return prematurely from exile."⁵⁶ Given the severity of capital punishment, the decision to apply the death penalty in cases of corruption should be reached through "institutional modes" in which a large number of common citizens decide "over the lives of elites indicted for political crimes."⁵⁷

Even if McCormick's method for adjudicating cases of political corruption is certainly unorthodox, it could be accommodated within current constitutional provisions either by defining corruption as a form of treason, and oligarchic domination as a form of

⁵⁴ McCormick, "Democracy, Plutocracy and the Populist Cry of Pain," p. 18.

⁵⁵ McCormick, "Democracy, Plutocracy and the Populist Cry of Pain," p. 19.

⁵⁶ McCormick, "Democracy, Plutocracy and the Populist Cry of Pain," p. 19.

⁵⁷ McCormick, "Democracy, Plutocracy and the Populist Cry of Pain," p. 19.

war against the republic, or by amending the constitution to give public juries the power to decide on impeachment cases, which today is prohibited by Article III section II. What is more difficult to accommodate within the liberal paradigm is McCormick’s suggestion for applying a form of *penal reparations* by “exempting the poor from the threat of execution” —given that individuals from lower classes are currently overrepresented in death row— and reserving capital punishment only “for wealthy citizens or public officials found guilty of political or economic corruption.”⁵⁸ First, to consider the amount of wealth one has in the punishment one receives in court would be in principle a violation of the Equal Protection Clause, since every citizen should be given equal protection of the laws regardless of their socio-economic status. And second, exempting the poor from execution in cases of corruption would place a pernicious incentive to bribe plebeians into corruption schemes, given the lesser penalty they risk if caught.⁵⁹ If corruption is conceived as treason to the republic because it is an existential threat to the liberty of plebeians, then it should not matter what is the socio-economic background of the person accused of enabling oligarchic domination.

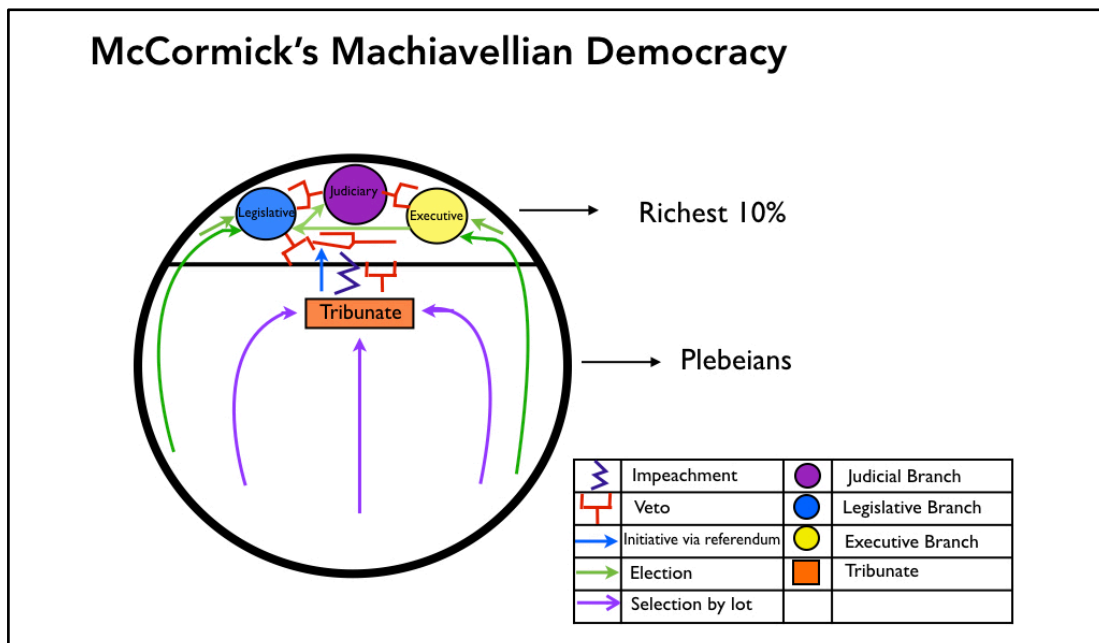


Figure 8.1 McCormick’s Machiavellian Democracy

⁵⁸ McCormick, “Democracy, Plutocracy and the Populist Cry of Pain,” p. 20.

⁵⁹ Similar to what happens with gangs that use children to sell drugs because they cannot be tried as adults and thus do not risk jail time.

II. Plebeian Representation and the Challenge of Competing Authorities

With a South African republic still dealing with the aftermath of apartheid as his “contextual and imaginative context,” Lawrence Hamilton sets out to rethink political freedom from a more material perspective so to “deal comprehensively with the question of whether South Africans are now free.”⁶⁰ Pushing against a formal conception of freedom, Hamilton argues that:

states of domination are best overcome in practice by means of institutions of participation and power that take seriously the partisan nature of needs, interests and states of domination; and that therefore it is necessary to propose political institutions that act as counters to existing economic and political power balances in society and associated states of domination.⁶¹

Attempting to lay out a philosophical justification for incorporating class-based institutions, Hamilton argues that, given the proper procedural and institutional infrastructure, “freedom is power through representation”⁶² because representatives have the power to “advance the needs and interests of the citizens and reduce states of domination,” and citizens have the power to restrain their representatives.

*Representation enables the two main forms of power necessary for freedom: the power of representatives to determine the general trajectory of a state’s macroeconomic path and thus the power of its citizens, and the power of the citizens to control representatives in positive and negative ways.*⁶³

Following the Machiavellian idea that institutionalized conflict is productive of liberty, Hamilton argues that the freedom of individuals is better understood in relation to the group they are part of, and the power that the representatives of the group have to shape government policy.

Given the complexity, division of labour and interdependence characteristic of modern conditions — freedom as power is not normally a matter simply of

⁶⁰ Lawrence Hamilton, *Freedom Is Power. Liberty Through Political Representation* (Cambridge: Cambridge University Press, 2016), p. 1.

⁶¹ Hamilton, *Freedom is Power*, p. 12.

⁶² Hamilton, *Freedom is Power*, p. 193.

⁶³ Hamilton, *Freedom is Power*, p. 193

individual power but of the power of group representatives and their power to influence political representatives, especially in the determination of macroeconomic policy.⁶⁴

With the aim of enabling usually dominated groups to exert power through their exclusive representatives to influence government, Hamilton proposes four institutional arrangements —two non-plebeian (a network of district assemblies and a conciliar system) and two plebeian (a tribune office and an electoral procedure/quota)— as well as a popular constituent process. Hamilton argues a new popular infrastructure based on his institutional proposal would help “keep states of domination to a minimum,” allowing to better identify common interests and to garner the “support for partisan interests of normally powerless groups.”⁶⁵

The first two institutions Hamilton proposes —district assemblies and a conciliar system— are not class-based, partisan institutions but rather institutions that are local and inclusive. Hamilton envisions a network of district assemblies, not as decision-making institutions but rather conceived mainly as aggregators of local knowledge, as spaces in which citizen could articulate and evaluate needs and interest. District assemblies would also be a forum for the “presentation” of amendments to existing legislation and for voting on proposals coming from other assemblies, even if decisions reached in these assemblies do not appear to be binding or demand any active response from government.⁶⁶ From each district assembly one counselor would be selected by lot for a two-year period to serve in a conciliar system: a group of local delegates to the national assembly aimed at *advising* representatives on local needs and interests.⁶⁷ Even if both district assemblies and the conciliar system only have non-binding, consulting power vis-à-vis representative government, they are thought of as institutions that would allow for bridging the gap between representatives and their constituents, but without restricting the freedom representatives need to adequately advance the vital interests of the people.⁶⁸ Needs and interests would be first discerned and aggregated in district assemblies, then communicated by the counselors to representative officials, who then would have the

⁶⁴ Hamilton, *Freedom is Power*, p. 197.

⁶⁵ Hamilton, *Freedom is Power*, p. 201.

⁶⁶ Hamilton, *Freedom is Power*, p. 202.

⁶⁷ Hamilton, *Freedom is Power*, p. 202-3.

⁶⁸ For an analysis on freedom and representation see Chapter 5.

freedom to decide which needs and interests to pursue at any given time. This first non-plebeian part of Hamilton's model is perfectly compatible with a liberal constitutional framework, a complement to the existing representative structure, even if its exclusively consulting power would have to be met with political will by representative government to achieve meaningful reform.

Hamilton also proposes two plebeian institutional arrangements: an "updated tribune of the plebs" and a plebeian election procedure/quota for the national assembly. Similar to McCormick's Tribunate, Hamilton's tribune would be a class-based institution composed of representatives selected by lot from "dominated groups and classes in society," defined "either by a net-household-worth ceiling or associated measures."⁶⁹ This collective office would have two powers: to propose and veto/repeal legislation, and to impeach national representatives. The same as McCormick, Hamilton places restrictions to the exercise of plebeian power by suggesting "strict and low" limits on the number of vetoes and impeachments that could be carried out every year.⁷⁰

The second plebeian arrangement, aimed to "offset the potentially merely reactive character" of the tribune, would be a "partisan, separate and independent electoral procedure" by which "the least powerful groups or classes in society" would elect 25% of the national assembly, "alongside the normal, open party-dominated processes of electing representatives within most existing representative democracies."⁷¹ In effect, this partisan procedure would carve out a supposedly 'plebeian quarter' out of the national legislature. Similarly to the introduction of electoral quotas for women and indigenous people, this partisan procedure would introduce a class-based quota that not only would presumably require representatives to be from plebeian origin but also that only plebeians elect them. Even if electoral quotas would be unconstitutional in the U.S., they are perfectly legal in other democracies around the world, which provides international legal precedents and empirical evidence for supporting them to solve class-based inequalities.⁷² However, the effectiveness of having a plebeian section in the legislature, in terms of the advancement

⁶⁹ Hamilton, *Freedom is Power*, p. 204.

⁷⁰ Hamilton, *Freedom is Power*, p. 204.

⁷¹ Hamilton, *Freedom is Power*, p. 204.

⁷² For a review of gender quotas in Latin America see Pär Zetterberg, "Do Gender Quotas Foster Women's Political Engagement? Lessons from Latin America" *Political Research Quarterly*, Vol. 62, No. 4 (Dec., 2009), pp. 715-730; Mala Htun, "Is Gender like Ethnicity? The Political Representation of Identity Groups" *Perspectives on Politics*, 2.3 (Sept. 20-4)

of issues specific to oppressed groups, is questionable. Not because 90% of citizens lack privileges and therefore share an experience of second-class citizenship, does it mean that they would challenge class domination if elected, or elect a representative that would on her behalf. To guarantee the plebeian character of these reserved seats, special rules would need to be put in place to strengthen the partisan character of this ‘plebeian quarter’ by, for example, limiting the motions that could be initiated by these plebeian representatives only to plebeian-specific proposals.

Even if having plebeian quotas in the legislature could potentially be accommodated within the liberal framework, what would be a harder sell in any constitutional democracy is the fact that some social groups would have the right to elect more representatives than others, which would constitute a violation of the principle of equal suffrage. To have reserved seats in Congress for plebeians to assure their adequate representation is not the same as allowing plebeian citizens to vote twice to select two representatives—one plebeian and one ordinary— instead of one representative like the other 10% of citizens. Moreover, even if the liberal challenge of attaching some political rights to only a part of the citizenry to the exclusion of others were overcome, this proposal would give the legislative body a dual source of authorization coming from the people-as-plebs and the people-as-a-whole, which could result with voters being represented by different officials taking opposing political stances. This added complexity could further dilute political responsibility and accountability.

The most challenging issue raised by Hamilton’s proposal for incorporating a plebeian quota to the legislative power is that it creates competing authorities between the tribune and the plebeian representatives.⁷³ What would happen if plebeian representatives in the legislature propose and pass a law that is then vetoed by the tribune? Or if the tribune proposes a law that is then not supported by plebeian representatives? Should the veto of the tribune—an office composed of randomly selected plebeian citizens to advance plebeian interests— be more authoritative than the vote of plebeian representatives who have also been elected to defend plebeian interests? This fundamental problem of competing authorities that comes along with the adding of

⁷³ Having two plebeian institutions claiming to represent plebeians is different from having competing positions within a single plebeian institution like in the Roman Tribunate, where tribunes could veto each others motions.

participatory decision-making institutional arrangements such as citizen assemblies, public juries, and direct democratic procedures into constitutional democracies, needs to be accounted for when deciding between the different options available (in praxis and theory) that could be included in a plebeian republic. Even if participatory democratic theory and practice strives to increase participation by multiplying the instances of deliberation and decision, I would argue participatory addendums could only be compatible if kept, as Hamilton suggests, at the consulting level, in which having a plurality of opinions and interests is beneficial. However, from the plebeian point of view, I would argue that having multiple loci of decision-making would blur the sharp distinction that should be drawn between the few and the many, and would also dilute the authority of plebeian institutions. In a plebeian republic, the authority of plebeians, as a part of the people that stands opposed to the ruling elite, should be unitary and must be final—even if decisions could be reached in a decentralized manner and certainly be reconsidered by plebeians.

The final feature of Hamilton’s constitutional proposal is a participatory constituent process in which citizens would approve through a plebiscite a new constitution. The vote would be preceded by:

a month-long carnival of citizenship—a public holiday—in which all citizens would have equal formal freedom and power to assess existing social, economic and political institutional matrices and their effects on the determination and satisfaction of vital and agency needs.⁷⁴

The constituent power, which could also be activated by any citizen through a “right of constitutional revision,” would also have “*procedural* safeguards giving priority to the satisfaction of *vital* needs.”⁷⁵ Hamilton’s proposals for periodic constituent change attempt to institutionalize popular constituent power but its provisions are so vague and partial that it is not clear how could plebeians participate effectively and not be mere receipts of information; or if the role of plebeians in the process would be merely advisory, like the role citizens would play in district assemblies, or binding, being able to introduce and veto constitutional provisions through the tribune. As I argued in Chapters

⁷⁴ Hamilton, *Freedom is Power*, p. 204.

⁷⁵ Hamilton, *Freedom is Power*, p. 205.

2 and 3, the issue of who is the bearer of the final decision-making power in a given constitutional arrangement—the few or the many—is of crucial importance to properly classify a mixed constitution as plebeian.

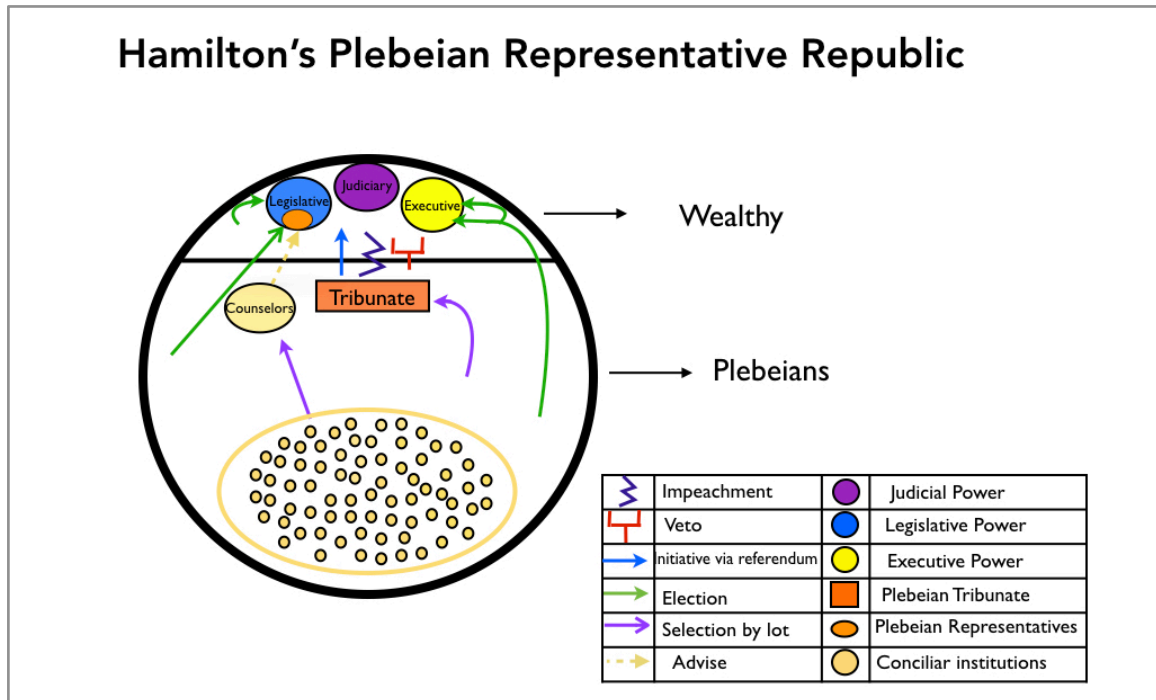


Figure 8.2 Hamilton's Plebeian Representative Republic

9.

Constitutionalizing the Power of Those Who Do Not Rule

It is in times of crisis when political imagination is of absolute necessity—even if thinking outside of the constitutional box may seem for many simply ridiculous. This final chapter aims at contributing to the ideas and proposals I have analyzed in the previous five chapters, and in this way pay tribute to those who dared to think of ways of institutionalizing the power of the many—even if this brought them the contempt of those in power; Machiavelli was demonized as the teacher of evil, Condorcet was persecuted for treason and died in prison, and Luxemburg was shot to death and her work was vilified and marginalized. While the three of them wrote in moments of revolutionary upheaval, and thus the consequences for their intellectual deviance was more severely punished, Arendt's proposal for a system of councils was written in a moment of relative expansion of individual rights and analyzed after representative democracy had become the only game in town, and thus was not viciously attacked but simply dismissed as a utopia, the product of a lack of realism on her part. Given our current political conjuncture, I would argue there is a possibility to move away from ridicule and dismissal, and towards a renewed, serious engagement with the idea of giving institutional form to the plebeian constituent power that Machiavelli identified as crucial for keeping a republic free from oligarchic domination.

My proposal for constitutionalizing the power of those who do not rule is aimed at establishing a mixed constitution in which the people, understood as the assembled many, are the guardians of liberty. The juridical infrastructure I propose is meant as a contribution to the plebeian constitutional strand I have identified here, and takes core elements from proposals and insights for institutionalizing popular power from Machiavelli, Condorcet, Luxemburg, Arendt, and McCormick. I articulate these proposals aimed at addressing not only the liberal challenges raised by the introduction of class-based institutions but also the demands posed by a strong commitment to gender equality and the urgent challenge to deal with increased migration due to material deprivation, violence, and climate change.

The proposal is informed by Machiavelli's political philosophy, which is premised on the socio-ontological divide between the powerful few and the many—the *grandi* and the *popolo*—and that liberty-producing qualities of their conflict. A free republic would demand plebeian institutions able to exercise a constituent power that is both creative of law and institutions aimed at liberty, as well as avenging, being able to punish those who, by engaging in political corruption, have betrayed the republic. I propose a way to institutionalize this dual constituent power following Machiavelli's 'composite' approach to constitutionalism, which seeks to add new institutions and procedures while maintaining old forms and methods for the sake of stability. Therefore, these institutions, even if having a logic external to the current political framework, are design to conform to the basic principles of the liberal constitutional structure. I would argue that, the same as the introduction of an foreign object into a body could be accepted or rejected, plebeian institutions have a higher probability of acceptance by the liberal order if they are able to create as few anti-plebeian bodies as possible. Regardless, the successful establishment of plebeian institutions would presuppose a state of hegemony favorable for the introduction of a plebian political subject

In what follows I first give arguments for dividing the few and the many based on the position they occupy in the political system instead of along class lines, and then introduce a sketch for a Plebeian Branch composed of two institutions: a sovereign network of Primary Assemblies aimed at censoring governmental actions and renewing

the republic, and a Tribune office aimed both at enforcing the will coming out of these assemblies and fighting corruption.

I. Separating the Few from the Many

Even if having class-based institutions, such as the ones in the Roman and Florentine republics, is certainly an effective way of dealing with plutocracy, in the sense that it separates the wealthy from the rest of the people, making it easier to scrutinize and punish them, and would also promote the construction of a class-based identity among plebeians, I would argue the political division should be done based on political power rather than wealth. Even if the powerful few are almost always wealthy, it is not necessarily wealth what defines their *umore* but rather their power to exert domination over ordinary people. Domination can be exerted in many ways, and even if money is a required resource to exert domination at a grand scale, the power to dominate is distinct from the amount of money a person possesses—even if all wealth is a social product and thus created through direct and indirect modes of exploitation.¹ Therefore the *political* division between the few and the many does not need to be along class lines but could be done based on the power individuals are able to exert given the role they occupy. I would argue that a division based on the governing position of the few instead of how much money they have is less arbitrary and reifying of class. While excluding the richest 10% cannot overcome the arbitrariness of cut-offs for wealth requirements (e.g. one year a person could be rich enough to be excluded from the many, and the next unwealthy enough to be included), excluding those who have the ability to formally exert power *over* others and unduly influence the creation of law and policy—e.g. public officials and their staff, lobbyists, judges, military commanders, and religious leaders— would establish a strictly *political* division between those who govern and those who do not, which would give an opportunity to members of the elites to become partisans of the people without the need to become ‘poor enough.’ Excluding only the *powerful* few should give plebeian institutions enough protection against direct oligarchic domination, since the wealthy individuals who would be eligible to participate in plebeian institutions would be so few that their influence in terms of promoting oligarchic interests would be

¹ Reproductive labor based on the indiscriminate exploitation of women is at the base of all social wealth.

marginal. The argument barring elites because they would negatively influence deliberation within plebeian institutions is a sound one, however the amount of money a member of the elite has does not necessarily track the capacity to persuade others in favor of supporting oligarchic interests. Moreover, alienating progressive elites —especially the new generations of political subjects who need to be socialized into politics— from becoming plebeian partisans would be, in my view, not only a strategic mistake but also against equal political rights. Nobody chooses to be born into a wealthy family or in a low-income one, and thus allocating political rights based on wealth would reify class differences in a way that could have detrimental effects for plebeian objectives.

Exclusions cause resentment if they are not self-exclusions —giving away wealth just to be eligible to participate in plebeian institutions would require an *a priori* extraordinary commitment to the plebeian cause, something that does not come naturally to those born into wealth. Consequently, the wealthy are likely to resent the exclusion and therefore would be unlikely to support the introduction of plebeian institutions. Imposing wealth restrictions to participate in plebeian institutions seems unnecessarily contentious—even if this controversy would certainly prove beneficial to the plebeian cause, allowing for a stronger class consciousness to emerge among plebeians. As Rosa Luxemburg argues, working-class political experiences, even if it unable to establish a free society, are crucial because they allow for the workers to become a political subject and accumulate experience to be able to achieve the desired transformation in the future.

II. The People as Network

Building on Condorcet’s institutional proposal for establishing primary assemblies and Arendt’s philosophical distinction between administration and politics, I propose to conceive the people-as-plebs as the assembled many who engage in political action: as a sovereign network of primary assemblies, making decisions based on the aggregation of decentralized and autonomous collective judgments. Similar to the neurobiological structure of plants, in which there are ‘brains’ in every root, local assemblies would operate as a bounded system, gathering information, processing it, and sending political signals through the network. And the same as a plant “decides” in precisely what direction to deploy its roots or leaves after gathering responses to the

environment from its sentient parts,² the people-as-network would decide to initiate or oppose political actions based on local responses to domination spreading through the decentralized system; approved motions would work as a “signaling” mechanism to bring awareness of domination to the network and prompt a response to it.³

Different from a federation, in which diverse units with specific interests operate under an alliance, assemblies in a network would not be stand-alone units but equal constitutive parts of a whole. Moreover, their collective decision would have legal power over representative government and its command structures, which would determine the plebeian nature of the mixed constitution. The people-as-network would constitute an institutional popular sovereign—and not an unorganized multitude in slumber⁴—with the strongest authority to judge the domination coming from the powerful few.

While as a plebeian institution, the network of assemblies would be functional to check on systemic corruption and resist oligarchic domination, embodying the most proximate will of those who ‘do not rule,’ the internal organization of assemblies would need to be democratic and foster political action in order to achieve liberty for plebeians. Following Luxemburg’s insights on the need for the self-emancipation of the workers through political action, and Arendt’s argument for a space in which individuals can engage in action and new beginnings as a necessary condition for political liberty, each assembly would constitute a material political space, open to all those residents who do not rule. This realm of appearances, grounded on equality and aimed at the disclosure of opinions about life in common, would enable political discussions of what is just and unjust, what Plato and Aristotle deemed as the core of political rhetoric and action.⁵ Given that political liberty is inherently limited, speech would need to be bounded within rules of engagement aimed at enabling the exchange of facts and opinions, and discouraging the use of discriminatory speech so to avoid bringing violence into the realm of appearances. Therefore, for political speech to be emancipatory and productive

² Michael Pollan, “The Intelligent Plant” *The New Yorker* (December 15, 2013)

< <https://www.newyorker.com/magazine/2013/12/23/the-intelligent-plant>>

³ Plants of a same specie signal each other to alert of pests by producing chemicals that work as neurotransmitters.

⁴ Tuck, Richard. *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016.)

⁵ In Plato’s *Gorgias*, deciding what is just and unjust is the aim of political rhetoric and in Aristotle’s *Politics* it is what defines our collective human nature.

of liberty and not a vehicle for supremacist ends, its exercise would need to be adequately limited by anti-discriminatory provisions (see II.E.2).

Since political freedom is not only exercised by disclosing opinions, but also by acting together, individuals aggregated in the network of assemblies would have the power to decide collectively, not only to propose and repeal any decision from any branch of government they consider unjust and a means of domination, but also to exercise constituent power and revise the constitutional framework. Consequently, the juridical infrastructure of plebeian assemblies would need to enable not only ‘ordinary’ political action by plebeians, but also the possibility of new beginnings to renew the republic from the ground up. Therefore, the proposal contains specific provisions for a constituent process to be initiated and ratified by the network of assemblies (IV).

Following Condorcet’s radical inclusiveness, every adult residing for one year in a particular district would be eligible to attend and vote in primary assemblies, without distinguishing between citizens and non-citizens. Since plebeians constitute a political subject determined by its ‘no-rule’ position in the constitutional structure, the institutionalization of plebeian power should not conform with current juridical boundaries but integrate newcomers through political equality instead of reserving politics only to citizens and in this way continue with the political apartheid between citizens and non-citizens. Against increasingly reifying the citizenship boundary between natives and non-natives, radical inclusiveness based on residence —the material occupancy of space— aims instead at redrawing the political boundary between the few and the many.

If each assembly has in average 600 active members (Condorcet recommends between 450 and 900) this would mean that there would be several assemblies even in small towns, which would enable assemblies to effectively channel diversity even *within* specific communities, allowing for a more engaged, less polarized citizenry, especially in regions divided across ethnic and religious lines.⁶ If such a system of local assemblies were to be implemented in the state of New York, for example, in which there are 51.5

⁶ Even if Jane Mansbridge has shown with her research on the town meetings in Shelby that there can also be intimidation and exclusion within consensus-building practices, and thus shattering the illusion of equal deliberation, these problems can be dealt with through adequate rules of engagement and material support. Moreover, the assemblies I am proposing are not aimed at consensus but at channeling conflict. *Beyond Adversary Democracy* (New York: Basic Books, 1980).

million individuals of voting age, there would be about 85,800 assemblies in the entire state. Manhattan, one of the most populous counties, with about 1 million voting-age residents, would have about 1,660 assemblies.

Where my proposal departs from Condorcet's model is in the method he proposes for the assemblies' self-governance: a Council with elected members. To avoid the corrupting effects associated with elections and campaign finance—which Condorcet was unable to foresee and are so ubiquitous today—I would argue the members of the self-governing structure of local assemblies should be selected by lottery. Following the experience of the Ancient Greek Boule (βουλή), the agenda-setting council for the sovereign assembly (ἐκκλησία), members to the self-government Councils would be selected by lot for a year, from a pool of volunteers, in a rotating basis to allow for institutional learning (II.C.5–10).⁷ The main task of these Councils would be to put together the agenda for meetings, effectively enable the exposition of topics, and enforce anti-discriminatory rules of engagement. Regarding the size of this council, Condorcet recommends one member every 50 active citizens. I would add this number would need to be an odd number to avoid gridlock. Councils thus would be composed of 9-19 members depending on district size. One third of the Council would be renewed every four months to enable collective learning. After serving for one term, citizens may not volunteer again for this office for 15 years, which means that in one decade about 1/4 of assembly members would have served in the Council. This would allow every plebeian to serve in the Council 1–4 times in her lifetime. To allow for equal access, Council members would receive a salary equivalent to the mean annual income in the district and would have their jobs back after their service.

Another departure from Condorcet's plan is that assemblies should not be convoked in a reactive manner, triggered by a proposal coming from the citizens or the government. I would argue this reactive mode of assemblage would mean that meetings could be either overwhelmingly frequent or too sporadic to serve as a proper way to politically educate its members. Given the busy lifestyles of 21st century individuals, I

⁷ For a historical analysis of these Greek institutions see Josiah Ober, *Democracy and Knowledge: Innovation and Learning in Classical Athens* (Princeton, N.J: Princeton University Press, 2010); *Demopolis: Democracy Before Liberalism in Theory and Practice* (Cambridge, U.K: Cambridge University Press, 2018)

would argue meetings should be periodic, prescribed by law, and convoked only three times per year. Meetings would be held in a national political holiday, attendance would be voluntary, and assembly goers would be paid on an hourly basis for their participation with a special tax levied for covering the operational costs of plebeian institutions.⁸ To assure gender equality, in addition to a civic payment for attendance, food and childcare must be provided.

“Signaling” among assemblies would also follow Condorcet’s proposal in which motions approved in one assembly would be considered in other assemblies in the district. If 1/3 of assemblies in a district agree to a motion, then the proposal would be considered by all the assemblies at the city/county level. If the issue were exclusively a city/county one, a decision by a majority of assemblies would constitute the will of the people at that level of political organization. This mechanism would be replicated at the state/region and national levels. In this way, political action aimed at resisting oppression and initiating change could arise in any part of the network of political judgment, giving individuals the material power to defend liberty against systemic corruption and oligarchic domination.

If, for example, a county as Manhattan were to be divided into eight districts, containing about 200 assemblies each, it would take a motion passed in one assembly to prompt the other 199 other assemblies in the district to consider analyzing the issue in the next assembly meeting. If 1/3 of these assemblies agree with the motion, then it would be added to the agenda of all the assemblies in the Manhattan for the following meeting. If a majority of assemblies in Manhattan agrees to the motion, it is to be sent to the city Tribune office, which would present it to the appropriate branch of city government and oversee its appropriate enforcement. The whole process to have a motion passed at every level of government could take as little as four months if enough assemblies begin the process of inquiry simultaneously in the first meeting, and then a majority of assemblies votes in favor of the motion during the second meeting, or 12 months if the motion begins in a single assembly and follows the ordinary signaling mechanism. If the motion

⁸ The civic pay for attendance should be pegged to an hourly rate (e.g. minimum wage, or based on GDP per capita and 40-hour week, or portion of universal basic income). If the state is going to end up paying people a universal basic income, I would argue it would be better to link at least part of the UBI to active membership in political assemblies; unconditional UBI would just subsidize consumers for the market.

where one concerning state government, the motion would be put in the agenda of the all assemblies in every county, adding four months to the process. If the motion where one concerning the federal government, the motion would be put in the agenda of the assemblies in every state, adding at least four more months. Consequently, a motion under federal jurisdiction could be approved by a majority of assemblies in 4 to 20 months.

III. The Tribune as Enforcer and Anti-Corruption Office

The proposal also sketches a Tribune office that would be subordinate to the network of assemblies, combining features of Machiavelli's Provost office and Condorcet's council of overseers, with the impeachment prerogative of McCormick's Tribune and public trials for political corruption. In its role of overseer and enforcer, the Tribune would make sure mandates coming out of the network of assemblies are properly and promptly carried out.⁹ In its anti-corruption function, the Tribune would investigate complaints of political corruption, having the power to initiate impeachment and prosecution procedures according to the constitution, and recommending a penalty. If the verdict of the appropriate branch of government in charge of impeachment or prosecution were not in line with the recommendation of the Tribune, then the case would be decided in a public trial in which all the members of the Tribune would pass judgment. The decision by the Tribune would be final.

To enforce the will of assemblies and persecute political corruption at every level of government, there would be offices of the Tribune at the city/county and state/region levels, as well as the national level. Offices at the city/county level would each have nine members selected by lot from plebeian residents, while the state/region and national offices would have 27 members. To allow for collective learning and avoid corruption, tribunes would serve for one year, and 1/3 of the posts would be renewed every four months. If such a plebeian institution were to be implemented in the state of New York,

⁹ The same as Rousseau's censorial tribunal, the plebeian Tribune would only "declare" the judgment of assemblies. The radical difference is that while the censorial tribunal declares de opinion of the people, which is "derived from its constitution," the Tribune would declared the decisions reached in a majority of assemblies of the people. There is nothing to derive but just to declare and enforce. *Social Contract* IV.7.

there would be 62 county-level offices staffed with a total of 558 plebeian members, and one state office with 27 plebeian members, who would serve for one-year terms.

Finally, following Machiavelli's insight that for plebeians to live in liberty they need not only good laws, but also weapons to defend the republic against oligarchic takeover, the proposal reinforces the legal power of the Tribune to command the different branches of government with the constitutional prerogative to direct the forces of order if necessary. While the Roman tribunes had only the threat of popular mobilization to force the Senate to enforce plebeian law, the modern Tribune would have the constitutional power to command the state's forces of order to back up plebeian decisions that the ruling elite would prefer to disregard. Instead of resolving a constitutional crisis in which a part of the government refuses to yield to the Tribune with the complete disregard of plebeian authority and the killing of the tribunes like in Rome, the proposal attempts to resolve a potential crisis by transferring the command over the forces of order to the Tribune in case the government decides to disregard plebeian authority.

In what follows I provide a juridical sketch for a Plebeian Branch aimed at constitutionalizing the power of the people as way to adequately deal with systemic corruption and oligarchic domination. The sketch has four parts. Part I offers a preamble with general consideration framing the institutions. Part II establishes the network of primary assemblies and details their functions, membership, organization, and procedures. Part III established the office of the Tribune and details its functions, membership, and organization. Finally, Part IV establishes the mechanisms to initiate constituent processes, and the procedures involved in revising and ratifying draft constitutions. As an Appendix I have included an example of how the veto power would operate within the Plebeian Branch.

The Plebeian Branch

I. GENERAL CONSIDERATIONS

1.

Plebeian institutions allowing for the direct participation of all adult residents in deliberation and public judgment are foundational to free government; equal liberty for all residents cannot be guaranteed without them.

2.

The Plebeian Branch is to be composed of two basic institutions:

- a) A decentralized network of Primary Assemblies —local assemblies of residents. See Section II.
- b) A Tribune —an office aimed at enforcing motions approved by the network of Primary Assemblies, and fighting political corruption. See Section III.

3.

The total aggregation of Primary Assemblies is to be considered the sovereign subject of the republic; a decision reached in the majority of Primary Assemblies is to be considered the legitimate will of the people, and all branches of government must yield to it and properly enforce it.

4.

The Plebeian Branch is to be funded by a national tax collected for the sole and direct purpose of funding all the costs associated with the operations of Primary Assemblies and Tribune offices, and their appropriate exercise of constitutional powers.

5.

All branches of government —Executive, Legislative, and Judicial— are to obey decisions reached by the Plebeian Branch.

II. PRIMARY ASSEMBLIES

A. Functions

1.

Residents meet in Primary Assemblies to deliberate on issues that affect the general interest of a district, city, county, or state, or the republic as a whole.

2. Members vote to:

- a) Initiate, veto or repeal laws, policies, executive actions, judicial decisions, and appointments for public office.
- b) Initiate a constituent process;
- c) Propose amendments to the Constitution;
- d) Accept or reject a draft Constitution

B. Membership

1.

Any person 18 years of age may register to be a member of a Primary Assembly in any district if three conditions are fulfilled:

- a) One-year residence in the district without interruption;
- b) Must not occupy a position of political, judicial, cultural or religious authority—including all public officials serving in political posts and their staff, judges, and religious leaders;
- c) Must not occupy a position as lobbyist advocating for wealthy individuals or corporations.

2.

Membership in a Primary Assembly is to be temporarily lost by:

- a) Residence in another district for more than six months;
- b) Use of discriminatory speech or violent behavior in the assembly (see II.E.3);
- c) Occupying a position of political, judicial, cultural or religious authority;
- d) Becoming a lobbyist or advocate for wealthy individuals or corporations.

3.

Any person who is absent for more than a year from the district is to regain voting in that district after three months.

4.

All members have the right to vote in all resolutions passed in their respective Primary Assembly, and are eligible for holding office in the Plebeian Branch in a rotating basis.

5.

No person is to vote for the same motion in more than one Primary Assembly.

6.

Members have the right to propose a motion to be voted in their Primary Assembly after collecting signatures from 10% of assembly members in support of the motion.

C. Organization

1.

Primary Assemblies are to be established throughout the republic according to residential districts. Districts are to be set up in such a way that none of them have less than 450 eligible members, or more than 600.

2.

Primary Assemblies are to be grouped by neighborhood, city/county and state/region.

3.

Primary Assemblies are to meet three times a year in national political holidays for ordinary sessions. On the day of the meeting, communal meals as well as child-care are to be provided, paid with the public funds set aside for the operations of the

Plebeian Branch.

4.

Attendance to assembly meetings is voluntary and is to be compensated based on a predetermined hourly rate above the national minimum wage, using the public funds set aside for the operations of the Plebeian Branch.

5.

Each Primary Assembly is to be governed by a Council selected by lottery from a pool of volunteers taken from the registered members of the Primary Assembly. The Council is to be composed of one councilperson per every 50 registered members in the assembly rolls. To avoid gridlock, the number of Council members is to be an odd number. Councils thus are to be composed of 9-13 members depending on district size. Members are to serve as Council president, leading and mediating meetings, in a rotating basis.

6.

Members of the Council are to be compensated for their service with a salary equivalent to the median wage in their district using the public funds set aside for the operation of the Plebeian Branch, and guaranteed the return to their jobs once service is concluded.

7.

Members of the Council are to serve in their posts for one year. To allow for collective learning, 1/3 of the Council is to be renewed every four months, before each general meeting of Primary Assemblies.

8.

After serving for one term, citizens may not volunteer again for serving in the Council for 10 years.

9.

Duties of the Council:

- a. Keep the register of members up to date;
- b. Convene the Primary Assembly in cases determined by the Constitution;
- c. Open and mediate member-exclusive fora in which members can raise concerns and proposals;
- d. Present an agenda for meetings based on the systematization of concerns and petitions coming from the members of the assembly, and motions passed in other assemblies;
- e. Gather and provide adequate information for deliberation;
- f. Enforce rules of engagement to enable adequate interaction in the assembly geared toward achieving a well-informed, deliberated decision;
- g. Present approved motions to other Primary Assemblies and register them with the Tribune office.

10.

Within the duration of their service, Council members must remain neutral during Primary Assembly meetings. Council members are not to use their office to offer publicly their own judgment on any issue. They shall exercise their individual right to vote according to their own judgment, regardless.

D. Deliberation & Voting

1.

After Primary Assemblies are convened, their respective Councils are to introduce subjects for deliberation, reduced to simple propositions, asking members to decide if they merit further discussion.

2.

Primary Assemblies are to vote to accept or reject the further discussion of proposals. Proposals for deliberation are accepted with a simple majority of members present.

3.

If a proposal is accepted for further discussion, during the adjournment each Council is to enable deliberation by opening a member-exclusive media platform (such as a blog) and also enable an exchange of opinions among members once a week in the Primary Assemblies' meeting spaces. Deliberation is to conform to basic rules of engagement. See I.E.2.

4.

Primary Assemblies' meeting spaces are to be open every Sunday of the year for informal discussion. At least one Council member is to be present to enable discussion and maintain order. Food and child-care are to be provided, paid using the public funds set aside for the Plebeian Branch.

5.

Members interested in presenting their view to the Primary Assembly on the issue to be deliberated are to send statements to the Council, which is to aggregate these statements and structure a discussion to be held in the next meeting based on these statements. The structured discussion is to include as many different opinions as possible considering time constraints.

6.

To ensure adequate information, in the following ordinary assembly meeting the Council is to first recall the object of deliberation and then present facts, testimonies, and expert opinions whenever pertinent.

7.

After adequate information has been provided, the Council is to allot time for exchange of opinions and to moderate a structured discussion.

8.
After the presentation of evidence and opinion, the Council is to present the issue as a simple proposition for members to vote yes/no.
9.
A break of no less than 15 minutes for informal discussion and caucusing is to precede every vote.
10.
All votes are public except for the ones directed at disciplining members because of their use of discriminatory speech or violent behavior (see II.E.3.).
11.
All motions approved in Primary Assemblies are decided by simple majority.
12.
If the result of the vote is to support a motion, the issue is to be considered in the next meeting by all Primary Assemblies in the city/county.
13.
If an issue is a city/county one, a simple majority of Primary Assemblies in support of a motion is to be understood as equivalent to the will of the people of that city/county. The decision is to be communicated to the local Tribune office, which is to present it to the appropriate public office for enforcement.
14.
If an issue were under the jurisdiction of state/regional authority, 1/3 of Primary Assemblies in a city/county supporting a motion would put the issue for consideration in all assemblies in that state/region. If at the state/region level 1/3 of Primary Assemblies support the motion of a national concern, it is to be put for consideration in all Primary Assemblies in the republic.
15.
A simple majority of Primary Assemblies at the city/county and state/region is understood to be the will of the people at that particular level of organization.
16.
If a majority of Primary Assemblies in the republic approves a motion, this decision constitutes the will of the people, and the motion is to be presented by the Tribune to the appropriate public office for enforcement.
17.
If a majority of Primary Assemblies in the republic approves to veto or repeal a law, the Legislative body is to be renewed: legislators who voted in favor of the vetoed or repealed law are to step down if still in office and their seats are to be up for election in the next cycle according to the Constitution.

18.

If a majority of Primary Assemblies in the republic approves to veto or repeal a policy, the elected public official(s) who approved that policy are to step down and their positions are to be filled according to the Constitution.

19.

If a majority of Primary Assemblies in the republic approves to veto a judicial decision, the judges who approved that decision are to step down and their positions filled according to the Constitution.

20.

If a majority of Primary Assemblies in the republic approves to veto an appointment for public office, the persons who approved that appointment are to step down and their positions filled according to the Constitution.

21.

The Executive and Legislative branches may consult Primary Assemblies on issues that interest the entire republic. If the issue is urgent, an extraordinary meeting of Primary Assemblies may be convoked by the Tribunalate after a formal request from government.

22.

If there are concerns regarding the legitimacy of voting processes within Primary Assemblies, these are to be addressed to the national Tribunalate office.

E. Rules for Internal Order

1.

The enforcement of order in Primary Assemblies belongs essentially and exclusively to each assembly, and is to be exercised by the Council.

2.

The use of discriminatory speech, symbols, images, and actions aimed at demeaning individuals or groups based on their race, ethnicity, religion, gender, sexual orientation, disability, or place of birth is to be prohibited.

3.

The Council is to callback to order, give warnings, and censor members who engage in discriminatory speech or violent behavior. The Council is to recommend to the assembly in such cases a penalty of temporary exclusion. The Primary Assembly is to approve or reject the penalty with a simple majority. Ballots in cases of temporary exclusion are to be secret so to avoid personal retaliation.

4.

In the case of assault and serious excesses, the Council may, after authorization from the Primary Assembly, issue warrants against the accused.

5. Weapons are prohibited in Primary Assemblies.

III. TRIBUNATE

A. Functions

1. As exclusive delegate of the people, the Tribunalate is to oversee that the will of the people —equivalent to a decision by a majority of Primary Assemblies in a certain city/county, state/region, or in the whole republic— is carried out properly.
2. As a surveillance office, the Tribunalate is to oversee government to thwart corruption.
3. Duties of the Tribunalate:
 - a) Present approved motions to initiate, veto, and repeal laws, policies, executive actions, judicial decisions, and appointments for public office to the appropriate branch of government;
 - b) Scrutinize the enforcement of the will of the people;
 - c) Investigate cases of political corruption and initiate prosecution proceedings;
 - d) Initiate impeachment procedures of public officials;
 - e) Give final judgment on cases of political corruption when required;
 - f) Analyze procedural issues arising from primary assemblies;
 - g) Initiate a constituent process by convoking Constituent Primary Assemblies.
4. Members of Primary Assemblies have the right to present cases of abuse of power and violation of the law to the appropriate Tribunalate office; cases are to be investigated and a report is to be sent back to the member(s) who submitted the case. If 2/3 of the pertinent Tribunalate office agrees there is enough evidence on political corruption, the Tribunalate is to recommend a penalty, and the case is to be prosecuted in open court or according to the Constitution.
5. If the verdict reached by the courts or other institutions sanctioned by the Constitution contradict the Tribunalate's recommendation, the case would be decided in a public trial in which all members of the Tribunalate are to participate in passing judgment. A 2/3 majority decision by the Tribunalate invalidates the previous judgment.
6. If public officials disregard the mandates emanating from the Tribunalate, they are to be stripped from their office and forced to resign their posts immediately. Any public official who is noncompliant is to be physically removed by the forces of order, put under arrest, and tried for treason.

7.

The Tribunal is to direct the national police if necessary to enforce decisions reached by the Plebeian Branch in cases of noncompliance. The Tribunal is to override the authority of the Executive over the forces of order.

B. Membership

1.

Any member person of a Primary Assembly is eligible to serve in the Tribunal. Selection is to be done by lottery from a pool of volunteer members.

2.

Members of the Tribunal are to serve in their posts for one year. To allow for collective learning and avoid corruption, 1/3 of the Tribunal is to be renewed every four months, before each general meeting of Primary Assemblies.

3.

After serving for one term, members are not eligible to serve in the Tribunal for 15 years.

4.

Members of the Tribunal are to be compensated for their service with a salary equivalent to the median wage in their State using the public funds set aside for the operation of the Plebeian Branch.

5.

Members serving in the Tribunal must give up their position immediately if any of the requirements for membership in primary assemblies prescribed in II. B 1 & 2 are not met. Vacant positions are to be filled before the next ordinary meeting of Primary Assemblies.

6.

Members of the Tribunal who have completed their term may be indicted on corruption charges by 2/3 vote in the renewed Tribunal office.

C. Organization

1.

Tribunal offices are to be established at each level of government —city/county, state/region, and federal/national levels.

2.

Each office at city/county is to be composed of nine members selected by lottery from a pool of volunteers.

3.

At each level, offices are to have jurisdiction over the corresponding government and public officials serving in that government at that level.

4.

Tribunate offices at the state and national levels are to be composed of 27 members each selected by lottery from a pool of volunteers. The offices are to be further divided into three committees dedicated to deal with government, corruption, and procedures.

IV. CONSTITUENT PROCESS

A. General Considerations

1.

The constituent process is aimed at reviewing and improving the constitution of the republic.

2.

Modifications to the constitutional structure can neither eliminate the foundational network of primary assemblies nor go against the principle of equal liberty.

3.

Every generation has the right to analyze and improve the basic structure of the society in which they live.

4.

Any member of a primary assembly has the right to initiate a constituent process, after gathering 50 signatures from other members in the primary assembly supporting the motion. The process is the same as for any other motion initiated in primary assemblies. See II.D.

5.

The constituent process is to be funded by an extraordinary tax levied specifically for this purpose. Allocation of funding is to be managed by the Tribunate.

B. Initiation and Processes

1.

The constituent process is to be initiated periodically, in the 17th year after the acceptance of the current constitution, or when a majority of Primary Assemblies in the republic demands it.

2. The constituent process is to go through three basic stages:

- a) Propositional —Constituent Primary Assemblies are to be convoked by the Tribunate to review the Constitution and propose amendments.
- b) Redaction— proposed amendments are consolidated and redacted in a

National Convention convoked by the Executive branch and elected by the people at large.

c) Approval— amendments are voted in Constituent Primary Assemblies.

3.

After the last ordinary meeting of Primary Assemblies in the 17th year after the acceptance of the current constitution, or if a majority of Primary Assemblies approve, the Tribune is to initiate a constituent process by convoking Constituent Primary Assemblies. Four meetings are to be scheduled, beginning in the first month of the 18th year after the acceptance of the current constitution. Meetings are to be held every three months within that year.

4.

Each Constituent Primary Assembly is to follow the basic organization of ordinary Primary Assemblies and be governed by a Council selected by lottery from a pool of volunteers taken from the registered members. The Council is to be composed of one councilperson per every 50 registered members in the Assembly rolls. To avoid gridlock, the number of council members is to be an odd number. Councils thus are to be composed of 9-13 members depending on district size. One of the members is to serve as president of the Council.

5.

Members of the Council are to be compensated for their service with a salary equivalent to the median wage in their State, using the public funds set aside for the operation of the Plebeian Branch.

6.

Members are to serve in their posts for one year. This post can only be held once in a lifetime.

7.

Duties of the Council:

- a. Open and moderate a member-exclusive forum for concerns and proposals;
- b. Prepare and present a presentation of current constitutional framework;
- c. Present a series of simple propositions for amendments based on concerns and proposals coming from members, or motions passed in other assemblies;
- d. Gather and provide adequate information for deliberation;
- e. Enforce rules of engagement to enable adequate interaction in the Assembly geared toward achieving a well-informed, deliberated decision;
- f. Present approved motions to other Primary Assemblies and register them with the Tribune office.

8.

Within the duration of their service, Council members must remain neutral during Assembly meetings. Council members are not to use their office to offer publicly their own judgment on any issue. They shall exercise their individual right to vote according to their own judgment, regardless.

9.

The Executive branch is to convoke a National Convention in the first month of the 19th year after the acceptance of the current constitution, or when prompted by the Tribunate after a motion is accepted by a majority of Primary Assemblies.

10.

Each state of the republic is to select by popular vote three individuals to the National Convention.

11.

The National Convention is to systematize and redact proposals into amendments to the Constitution.

12.

All meetings of the National Convention are to be public, and detailed minutes are to be kept in a public record.

13.

Members elected to the National Convention are prohibited from incorporating new proposals; they are to channel, as accurately as possible, popular judgment into constitutional form.

14.

The National Convention is to present a draft constitution to the Tribunate in six months time.

15.

Upon receiving a draft constitution from the National Convention, composed according to the constituent process rules specified above, the Tribunate is to convoke a general meeting of Constituent Primary Assemblies to reflect and vote on the amended constitutional framework.

16.

A new constitution is to be approved or rejected in a general meeting of Constituent Primary Assemblies. The document is to be approved by a simple majority of Primary Assemblies in the republic.

17.

If the new constitution abolishes or disables Primary Assemblies, or contains provisions undermining the principle of equal liberty, even if approved by a majority of Primary Assemblies is to be considered null and void; such a constitution is not a

republic.

18.

If the draft constitution is approved by a majority of Primary Assemblies, it is to be implemented in the first month of the 19th year after the acceptance of the current constitution.

19.

If the draft constitution is rejected, the National Convention has to present within one-month time a revised draft to the Tribune, which is to convoke an extraordinary meeting of Constituent Primary Assemblies to vote on the new draft.

20.

If the draft constitution is rejected a second time, the National Convention is to be immediately dissolved. The Executive is to call elections for a new National Convention, which is to present a new draft constitution to the Tribune within three months time. The constituent process is to unfold following articles 15 & 16 of this section.

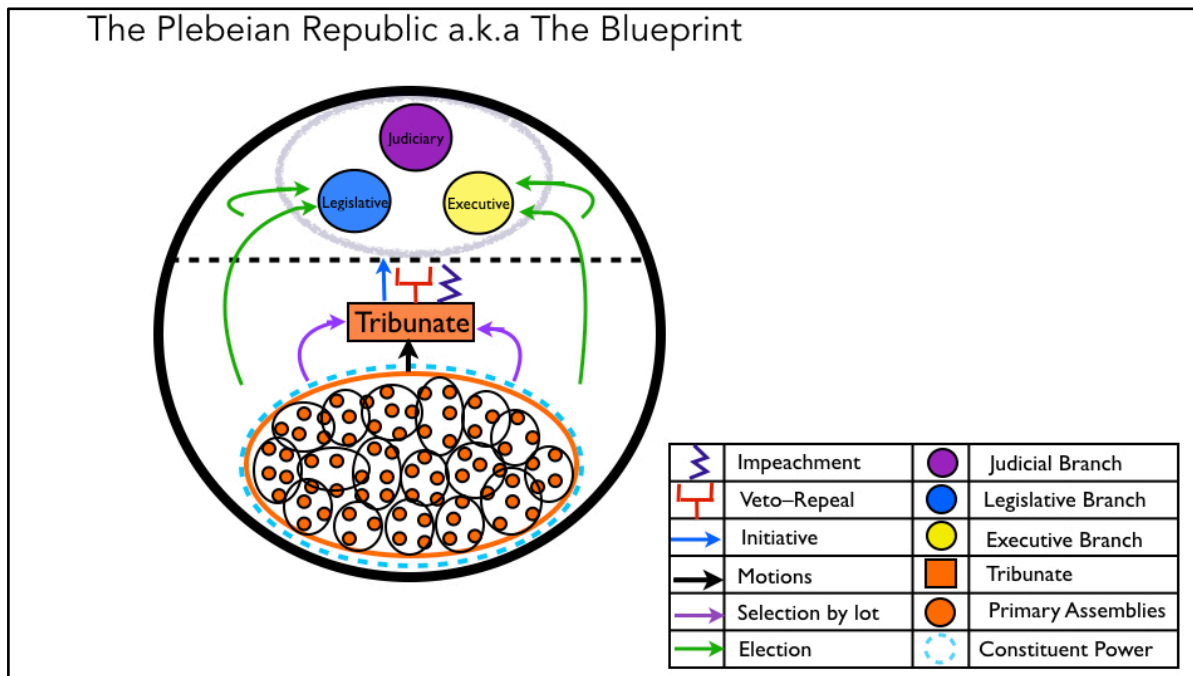


Figure 9.1 The Plebeian Republic

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