REPUBLICAN CONSTITUTIONAL THOUGHT: ELITIST AND PLEBEIAN INTERPRETATIONS OF THE MIXED CONSTITUTION

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Abstract: Even if republicanism is one of the oldest traditions of political thought, it has defied internal classifications other than divisions between ancients and moderns, or by region or country. Republican thought has remained a broad tradition that has brought together diverse thinkers who, although they appear to have opposing views regarding who should rule in a free republic, have been interpreted as endorsing an idealized republican order that stems from Cicero and the 'civic humanism' that developed in the early *quattrocento* in Florence. Following recent plebeian reinterpretations of Machiavelli, which put into question this cohesion within the tradition, this article offers a classification of republicanism based on the division between elitist and plebeian approaches to the political order. It first engages with the development of the dominant 'elitist-proceduralist' interpretation of the republican constitution from Cicero to Montesquieu and James Madison, and then maps out the plebeian republican tradition in the works of Machiavelli, Condorcet and Jefferson. The third and fourth sections focus on contemporary republicanism, reviewing the reinterpretations of the mixed constitution offered by Philip Pettit and John McCormick, as two major exponents of the current elitist and plebeian strands of republican thought.

Keywords: republicanism, plebeianism, constitutionalism, inequality, oligarchy, corruption, Cicero, Machiavelli, Montesquieu, Jefferson, Condorcet, Madison, Pettit, McCormick.

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Introduction

As an intellectual tradition, republicanism originates in the political experience of the ancient Roman Republic. Different from democratic thought, developed mainly from the theory and praxis of Athenian democracy, a regime in which a single assembly, open to all citizens, was the sovereign power, Rome's mixed constitution with institutions and prerogatives for the *one*, the *few* and the *many*, begins from the fundamental division between patricians and plebeians. Moreover, the recognition of systemic political corruption as a relentless process of structural decay prompted republican thinkers to design a regime that could endure for hundreds of years uncorrupted.[3] The theory of the mixed constitution — which can be traced back to Aristotle's

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[3] For a brief intellectual history of corruption see Camila Vergara, 'Corruption as Systemic Political Decay', *Philosophy and Social Criticism*, 47 (3) (2021), pp. 322–46.

politeia, a mixture of oligarchy and democracy[4] — originated as a critique of 'pure' constitutions and proposed a realist cure for systemic corruption. Only the institutionalization of different forms of power representing the social orders, checking each other by following their own expansionary tendencies rather than purely out of virtue or legal obligation, could enable a long-lasting free regime.

Different from democratic models of absolute and constitutional democracy coming from contemporary interpretations of ancient democratic governments, in which all citizens took turns to perform different functions,[5] the republican tradition rests on a dual model of sovereignty in which the powerful few rule and the common people have the authority to stop or direct their actions when necessary. Furthermore, Rome's constitution was not set up by one virtuous man, as was Sparta's and most of the constitutions in the ancient world, but came about in an evolutionary manner, through the struggle between the nobles and the commons over debt and war.[6] Perhaps because the Roman constitution was never written down in a single document, but was rather a tradition that incorporated fundamental institutions as well as written and unwritten norms (*ius*) and evolving practices (*mos*),[7] the republican tradition itself has remained elusive and difficult to categorize beyond chronology and linguistic communities. While democratic theory has been classified in many strands — deliberative, procedural, epistemic and radical, to name a few — republicanism has defied internal classification, remaining a broad tradition in desperate need of more analytical precision. This article aims at providing such a taxonomy, by dividing republicanism along the lines of the dual-sovereignty model into two major strands of interpretation of the mixed constitution: elitist and plebeian.

By setting apart elitist and plebeian interpretations of the mixed constitution, I am challenging not only the continuity that J.G.A. Pocock saw in modern republican thinkers from Machiavelli to the American Founders,[8] as well as the idealized republican model based on 'civic humanism' that emanated from this supposed continuity, but also complicating the national and regional similarities on which the study of republicanism is premised. My intention is not to discard current classifications but to add a fundamental division within the tradition, based on a sharp distinction between schools of interpretation

[4] Aristotle, *Politics*, IV.8 1293b; P. Pasquino, 'Machiavelli and Aristotle: The Anatomies of the City', *History of European Ideas*, 35 (2009), pp. 397–407.

[5] Athenians were selected by lot to set the legislative agenda, direct policy, judge, and determine the constitutionality of law.

[6] A. Lintott, *The Constitution of the Roman Republic* (Oxford, 2015), pp. 32–8.

[7] *Ibid*., pp. 4–7.

[8] 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 in J.G.A. Pocock, *The Machiavellian Moment* (Princeton, 1975).

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that take as their point of departure the position and role of the 'elite' and 'popular' elements in the constitutional structure. Thus, instead of conceiving of republican thought as exclusively divided between ancients and moderns,[9] or by region or country, I argue traditions should be studied in addition through the division between elitist and plebeian approaches to the political order. The dominant elitist strand of interpretation has been developed from the vantage point of elites and thus tends to be conservative of existing socio-economic hierarchies. Elitist thinkers argue the few should rule — authorized and checked by the people — and have final decision-making power. The plebeian strand, which developed from the experience of resistance of the common people against oligarchic domination, begins from the premise of actual or potential oppression and therefore seeks to change the status quo, not preserve it. Thinkers in this strand of interpretation argue that ordinary people should effectively control the few who govern by *actively* participating in politics through plebeian institutions empowered to make final decisions.

To offer a compelling reading of the fundamental division between elitist and plebeian strands of republican thought, the article traces the ideas, proposals and philosophical justifications that yielded the dominant 'elitist-proceduralist' interpretation of the republican constitution. The *elitism* of this tradition 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 plebeians. After engaging in the first section with the constitutional thought of the most prominent exponents of ancient and modern elitist republicanism — Cicero, Montesquieu and James Madison — I dedicate the second part to mapping out the plebeian republican tradition in the works of Niccolò Machiavelli, Nicolas de Condorcet and Thomas Jefferson. The third section focuses on contemporary republicanism and the neo-republican interpretation of the mixed constitution offered by Philip Pettit. Section IV charts the plebeian republican strand of thought, focusing on John McCormick's proposal to incorporate plebeian institutions into the constitutional structure of the United States.

I
Elitist Republican Thought: Cicero, Montesquieu and Madison

Cicero is a foundational figure in ancient republican thought, not only because of the quality of his writings on politics, law and morals but also because he is

[9] See for example P. Rahe, *Republics Ancient and Modern* (2 vols., Chapel Hill, 2010), Vol. 2.

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the author of the vast majority of the surviving sources from the Late Roman Republic. His unapologetic elitism closely followed Plato's — both thinkers thought the corruption of popular governments was caused by 'extreme liberty' and a decay of mores,[10] and that the perfect regime was one in which the aristocratic element had ruling and final decision-making power: only virtuous elites could keep the republic uncorrupted. But Cicero's elitism was moderate compared to that of his contemporaries. After the failed attempt by the Gracchi tribunes to force an agrarian reform to redistribute property to plebeians and bring more equality to the republic, patricians generally agreed that the power of the tribunes was 'excessive'.[11] Cicero tells us that while his senatorial peers wanted to eliminate the office altogether, he thought plebeian representation was necessary and beneficial to the republic.[12] According to him, the people in the streets are more dangerous to liberty and security than their political representatives, who are likely to moderate their agendas out of self-interest; and even if a few individual tribunes could be pernicious, Cicero warned that the plebeian office must not be abolished if Rome was to avoid 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.'[13]

For Cicero the ideal mixed constitution is one in which the aristocratic order is dominant, and the power of plebeians is kept subordinate and formal. Institutions and procedures are for him means to tame popular power. By giving plebeians institutional power but retaining the veto by the divine auguries, which could render any resolution void,[14] Cicero stated: 'my law gives the appearance of liberty while keeping the authority of the respectable and eliminating an occasion for dispute'.[15] In addition to this indirect divine-based limit on plebeian decisions, Cicero envisioned the Senate as dominant within the legislative process, giving to patricians the power to deliberate and decree to maintain harmony.

> 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

[10] Cicero, *On the Laws*, I. In *Cicero: On the Commonwealth and On the Laws*, ed. and trans. James E.G. Zetzel (New York, 2009).

[11] The refusal of the Senate to sanction the reforms to the Agrarian Law passed by the people in 133 and 122 BC, provoked violent upheavals in which the Tribunes Tiberius and Gaius Gracchus were murdered.

[12] Cicero, *On the Laws*, III §23, p. 166.

[13] *Ibid*., §§23–4.

[14] Lintott, *The Constitution of the Roman Republic*, p. 198.

[15] Cicero, *On the Laws*, III §38, p. 171.

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> 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.'[16]

Cicero's elitist interpretation of the mixed constitution, in which the subordination of the many was instrumental for attaining harmony, was preserved and later reproduced in medieval Europe, mainly through Augustine's citations.[17] For Augustine all earthly governments are inherently corrupt because rooted in original sin, so therefore a perfect regime could not be attained; only civic stability, within an order subordinated to divine law, is the highest attainable political good. Within this framework, conflicts and rebellions are a sign of corruption. Scholastic thought had a profound impact on the humanists of the early *quattrocento* in Florence and on the English republicans of the seventeenth century. Despite differences within modern republicanism, according to Quentin Skinner the scholastic idea that *pax et concordia* is the highest end of the state was the dominant belief.[18] It is in this Ciceronian-scholastic humanist legacy that the anti-monarchical position of elitist republican thinkers across Europe was forged.[19] The mixed constitution was conceived as a tool to push for a limited monarchy, and the doctrine of separation of powers that developed based on this tradition came to be ultimately confused with it.[20]

In England the mixed constitution was discussed in relation to the commonwealth in the mid-1500s, becoming the 'dominant political theory' in the seventeenth century.[21] The first to conceive of the mixed constitution as a regime of separation of powers was Baron de Montesquieu. Picking up the Ciceronian legacy that placed a virtuous ruling elite at the centre of a well-ordered republic, Montesquieu wrote one of the most influential texts in the modern republican canon, *The Spirit of the Laws* (1748), which was inspired by the English model and argued for embracing an aristocratic version of the mixed constitution as a way to guarantee liberty through moderation. Democracy is not for him a desirable form of government because it is by nature a regime without moderation, in which power is easily abused. 'As in democracies the people seem very nearly to do what they want, liberty has

[16] *Ibid*., III §28, p. 168.

[17] For an account of the tradition of the mixed constitution in the Middle Ages through the study of Aristotle see J. Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton, 1992).

[18] Q. Skinner, *The Foundations of Modern Political Thought: Volume 1* (Cambridge, 1978), p. 56. Machiavelli is the outlier for endorsing conflict in the making of laws beneficial to freedom.

[19] *Republicanism: A Shared European Heritage*, ed. M. van Gelderen and Q. Skinner (2 vols., Cambridge, 2004), Vol. I, 'Part 1: The Rejection of Monarchy', pp. 9–81.

[20] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford, 1967), p. 37.

[21] *Ibid*., p. 41.

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been placed in this sort of government and the power of the people has been confused with the liberty of the people.'[22]

While for Montesquieu liberty is an individual 'tranquillity of spirit' based on the absence of fear and a sense of security,[23] in democracies liberty is equated to self-government, which means that the regime would be directed solely by the will of the masses, which would ultimately become despotic.

Montesquieu's analysis rests on his theory of the constitution, which is bound to the *nature* and *principles* of government.[24] He distinguished three basic regime forms based on the bearers of ruling power (one, few or many), and attached to each of them a principle, which he conceived of as a 'spirit' that interacts with the laws by 'tighten[ing] all the springs of the government', enacted and reproduced through a dynamic process of action and reaction.[25] According to his political taxonomy, republican government could take either the form of democracy — a regime in which the people are the sovereign — or of aristocracy — a regime in which the ruling power is in the hands of a few. Deviating from ancient thought, in which the principle of democracy was *liberty*, Montesquieu argued that the spirit of a democratic republic was not liberty but *virtue* understood as the 'love of equality and frugality', a 'feeling' of 'love of the republic',[26] and a desire to have 'only one's equals as masters'.[27] This egalitarian principle is according to him immoderate and ends up corrupting the republic because it makes the people want to do everything themselves, which causes a loss of respect for authority.

> 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.[28]

As in Plato's critique of democracy, virtue and liberty are lost in democracy because excessive equality inevitably leads to arbitrariness, corruption and despotism.[29] After demonizing ancient popular government as inherently excessive, Montesquieu endorses a constitutional model based on a Whig

[22] Montesquieu, *The Spirit of the Laws* (Cambridge, 1989), II.11, 2.
[23] *Ibid*., II.11, 6.
[24] *Ibid*., I.1, 3.
[25] *Ibid*., I.5, 1.
[26] *Ibid*., I.5, 2.
[27] *Ibid*., I.8, 3.
[28] *Ibid*., I.8, 2.
[29] *Ibid*., I.8. 2 and 5.

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interpretation of the English political system: a hybrid commercial republic that would incorporate the 'spirit of commerce' as a moderating force alongside the 'love of equality' 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, and the dominant position of the few in the power structure is preserved through formal institutional balance.

Following Cicero's arguments, Montesquieu argues that even if human beings have a natural ability to perceive merit and select good representatives, the common people are not competent to rule.[30] Thus, even though he 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 people should not enter the government except to choose their representatives; this is quite within their reach'.[31] Consequently, the introduction of popular representation appears in Montesquieu's model not as a device to indirectly empower the common people,[32] but as a mechanism to keep the people *away* from power through the formal expansion of the aristocratic procedure of election[33] to the common people.[34] Despite its modernity, the continuities of Montesquieu's commercial republic — a mixed constitution in which the common people's sovereignty was limited to selecting representatives and the aristocratic element was predominant, *de facto*, within the organization of power — with Cicero's ideal political order are remarkable.

Inspired by ancient republican experiences, Montesquieu proposed a bicameral legislative institution composed of two separate bodies: one upper chamber for the nobles — 'people who are distinguished by birth, wealth, or honors' — and a lower chamber for the common people's representatives. However, Montesquieu's arguments for preserving the political privileges of the nobility in the lawmaking process[35] do not follow the ancients but are rather based on a realist assessment of elite behaviour. The need for an aristocratic institution was not premised on the superior virtue of elites as it was for Cicero, but on the understanding that elites are likely to subvert liberty if they are a permanent minority in a shared institution: 'if they [the nobles] were mixed among the people and if they had only one voice like the others, the

[30] *Ibid*., I.2, 2.

[31] *Ibid*., I.11, 6.

[32] See for example Thomas Paine, who argued that since representation centralized knowledge from diverse parts of the republic, good government was impossible without it. Thomas Paine, *The Rights of Man* (New York, 1985), p. 181.

[33] See B. Manin, *The Principles of Representative Government* (Cambridge, 2010).

[34] Montesquieu, *The Spirit of the Laws*, I.2, 2.

[35] He also advocated that nobles be judged by a special aristocratic tribunal to avoid the envy of the common people.

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common liberty would be their enslavement and they would have no interest in defending it, because most of the resolutions would be against them'.[36]

The only way to avoid this weakness would be 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 a veto power over attempts by the representatives of the common people to 'enslave' them. Even if Montesquieu also gives veto power to the lower chamber, and thus *formally* allows the people's representatives to resist new attempts at domination from the few, his model of power allocation entrenches *de facto* existing power relations. By giving the nobility institutional power commensurate with their socioeconomic power in addition to a veto power, the few are procedurally empowered to stop any attempts at socioeconomic reform coming from below. In the same way that Cicero's basic laws gave the 'appearance of liberty', the formal equality of legislative prerogatives helped to mask the status quo bias that gave political dominance to the few. Moreover, 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, equating it to the separation of powers doctrine, which became the cornerstone of the first representative government in the United States.

Despite his defence of hereditary aristocracy as being necessary to preserve liberty, Montesquieu was the most influential thinker informing the theoretical framework of the United States Constitution, which tried to accomplish the Lockean state as protector of property.[37] Based on the tenet that 'power checks power' and that adequate distribution of powers was enough to avoid corruption,[38] Montesquieu put forth a mechanistic system of checks and balances designed to produce liberty through correct procedures and institutional interactions, with the people exercising sovereign power only when voting for representatives.[39] Even if the model of representative government and separation of powers established in the United States was different from Montesquieu's elitist regime in which the nobles had their own institution, the

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[36] Montesquieu, *The Spirit of the Laws*, II.11, 6.

[37] The influence of Locke's writings on the founders was indirect. As Bailyn shows, political pamphlets and sermons in the revolutionary period often quoted Locke's ideas, making them familiar, like pre-conceived truths. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge MA, 1967). Montesquieu was the most cited author during the constitutional debates, accounting for 8.3% of all citations to specific thinkers, 'almost without peer during the founding era for prominence', Donald S. Lutz, 'The Relative Influence of European Thinkers on Late Eighteenth-Century American Political Thought', *American Political Science Review*, 78 (1984), pp. 189–97.

[38] Montesquieu refers to 'distributed powers' (*pouvoirs distribues*) not separation of powers. Montesquieu, *The Spirit of the Laws*, XI.7.

[39] *Ibid*., II.11, 6.

continuities of its basic tenets and structure make the nascent American republic an heir of elitist republican constitutionalism.

Even if the American republic was based on the liberal principle of universal equality and the formal denial of aristocracy, the commitment to formal equality did not mean that the founders were establishing a democracy — a regime in which the common people are in control of the government. Quite the opposite. What was established in the United States was a republic, which James Madison defines simply as a 'government in which the scheme of representation takes place'.[40] This new regime type was defined by its representative character, by 'the delegation of the government . . . to a small number of citizens elected by the rest'.[41] The normative standards for considering this 'elected aristocracy' a free form of government hinged on the existence of open elections through which the 'persons administering [the government] be appointed, either directly or indirectly, by the people', and that they hold their office according to the law.[42] Consequently, the central institution of this new type of republic is the procedure of election, which is according to Madison both the method of selecting a ruling elite and the source of normativity for the regime, the 'essence of a free and responsible government'.[43]

To elect good representatives, it is essential to examine them, and therefore the right to freedom of speech and the press is the most fundamental political right in the republic, giving 'value and efficacy' to elections by allowing for government accountability.[44] Madison's interpretation of the right to free speech was decisively functional, aimed at enabling the proper exercise of the right to elect by ensuring the exposure of the truth about public officials and affairs. A free press is a means to achieve accountability and virtuousness in politics, by aiding citizens in judging characters and measures to elect good leaders. The burden of virtue in the Madisonian republic was therefore placed on citizens' informed election, which depended on the surveillance role played by the press. Elections, a method traditionally associated with aristocracy (selection of the best) rather than democracy (random selection of the unqualified), was not only designated by Madison as the best way to allocate political power within the new structure but also as intrinsically connected to liberty.

Despite the rights to elect and express facts and opinions about candidates for office being necessary conditions for free government, the United States Constitution did not originally contain an explicit declaration of such rights.

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[40] A. Hamilton, J. Madison and J. Jay. *The Federalist Papers*, ed. C. Rossiter (New York, 2003), #*10*, p. 76.

[41] *Ibid*.

[42] Hamilton, Madison and Jay, *Federalist Papers #39*, p. 237.

[43] Madison, *The Virginia Report of 1799–1800, Touching the Alien and Sedition Laws* (Clark NJ, 2004).

[44] *Ibid*.

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Despite a meticulous description of rules, procedures and prerogatives of executive, legislative and judicial institutions, the text that emanated from the Federal Convention did not include a list of individual rights.[45] Madison was initially opposed to the codification of rights because a list could never be comprehensive or effectively enforced, and thus its value would be purely symbolic, amounting to no more than 'parchment barriers' against government oppression.[46] Nevertheless, the first ten amendments to the Constitution, which are now part of the Bill of Rights, enshrined a list of individual rights that came to constitute 'the most exhaustive legal bulwark for the private realm against public power'.[47]

In addition to representation and elections, the framers of the American Constitution adhered to Montesquieu's conception of liberty as individual tranquillity and security. Following Locke's theory of the natural right to property, the discussions in the Federal Convention took it for granted that property was the 'primary object of society',[48] and that therefore the new regime needed to make sure that property was respected and protected from the redistributive impulses coming from below. According to Madison, not only would the chasm between rich and poor increase over time, but the levelling spirit would also grow stronger.

> 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 this Country, but symptoms, of a levelling spirit, as we have understood, have sufficiently appeared in certain quarters to give notice of the future danger. How is this danger to be guarded against on republican principles?[49]

Because the central aim of the new republic was the protection of private property, procedures and institutions were established to stave off pressures for wealth redistribution that would be channelled through the electoral process. Since 'according to the equal laws of suffrage, the power will slide into

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[45] The only rights mentioned are Habeas corpus (Art. I sec. 9); bills of attainder & ex post facto laws (Art. I sec. 10); and the treason procedure (Art. III sec. 3).

[46] Hamilton, Madison and Jay, *Federalist Papers #48*, p. 305.

[47] H. Arendt, *On Revolution* (New York, 2006), p. 244.

[48] *The Records of the Federal Convention of 1787*, ed. M. Farrand (New Haven, 2008), pp. 405, 407 and 411.

[49] *Ibid*., p. 328.

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the hands of the [poor]',[50] the challenge for Madison was how to combine the electoral enfranchisement of the masses with strong safeguards against the 'levelling spirit', within the republican framework laid out by the 'oracle'.[51] In Montesquieu's blueprint the nobility in the upper chamber could veto unfavourable motions coming from the representatives of the people; legal equality prevented a comparable institution in the United States.

Nevertheless, in the Federal Convention, the Senate was openly conceived of as the embodiment of aristocracy, having as 'one of its primary objects the guardianship of property', and thus as able to check the 'excesses against personal liberty, private property & personal safety'.[52] The Senate was supposed, on the one hand, 'to refine and enlarge the public views', impeding 'intemperate and pernicious resolutions' resulting from the people being 'seduced by factious leaders',[53] and on the other, to *represent* propertied interest. Given that at least two thirds of citizens in the thirteen colonies were at that time yeomen farmers, the Senate was seen as an institution representing the *current* majority of property owners, guarding against a future majority of propertyless citizens. What in Montesquieu's thought was implicit — that the upper chamber *resists* changes to the socioeconomic order — becomes the main argument in the Unites States for instituting a strong Senate through which property owners could protect their property rights against redistributive claims.

In addition to the role of the Senate in stopping popular demands, Madison conceived of representation itself in a large republic as an anti-majoritarian method. Having a larger electorate would not only be beneficial in terms of selecting 'proper guardians of the public weal', but 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.[54]

Given the factual pluralism in a large republic, collective action problems make it harder to transform the will of citizens into actual political power. Therefore, having a representative government in a large republic would constitute a permanent guard against the 'tyranny of the majority' by structurally impeding the organization of the masses at a grand scale. The federal structure would further heighten this anti-majoritarian feature of the large representative republic, by making it less likely for 'a rage for paper money,

[50] *Ibid*.

[51] Madison repeatedly refers to Montesquieu as 'the oracle' in the *Federalist Papers*.

[52] Madison in *The Records of the Federal Convention*, p. 433.

[53] Hamilton, Madison and Jay, *Federalist Papers #62*, p. 377.

[54] Hamilton, Madison and Jay, *Federalist Papers #10*, p. 78.

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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';[55] and if neither the Senate nor the federalist structure were able to stop socio-economic claims, then the judicial system would be the last line of protection.

Even if the role of the US Supreme Court was modelled on Montesquieu's conception of the judicial power as null and autonomous, limited to adjudicating the law,[56] early on, in *Marbury v. Madison* (1803), the Court arrogated to itself the power to review law and policy. Since 'those who apply the rule to particular cases must, of necessity, expound and interpret that rule',[57] the Court became the sole interpreter of the Constitution, effectively blocking or sanctioning social change. Therefore, final judgment on law and policy was not placed on voters or their representatives, but rather on appointed judges with life tenure. Although judicial review is not necessarily anti-progressive, the constitutional structure's move towards juristocracy[58] has not brought more equal liberty, but rather has blocked its expansion. The clearest example of the Court's role in stopping the advancement of equal liberty was its decision to nullify the 1876 Civil Rights Act aimed at enforcing the equal protection clause of the Fourteenth Amendment. As a result, the slave economy transitioned into a production dependent on prison labour and legal segregation enabled by this judicial decision that overturned progressive legislation. The white-supremacist Jim Crow regime in the South was deemed constitutional for almost one hundred years.[59]

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[55] *Ibid*., p. 79.

[56] For an analysis of judicial independence in Montesquieu see P. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago, 2010), chs. 1 and 2.

[57] Justice J. Marshall, *Marbury v. Madison*.

[58] A system in which contentious political issues are decided by the courts. R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge MA, 2007).

[59] Even if the Supreme Court has certainly emitted pro-liberty decision, the latest Supreme Court appointment of Amy Coney Barrett — a young (48), pro-corporation and religious liberty fundamentalist — who replaced the most liberal judge on the bench, Ruth Bader Ginsburg, has put into question the legitimacy of a Court that will be dominated by a conservative supermajority for at least a couple of decades. The consequent (re)politicization of judicial review has opened the discussion about imposing not only term limits to Supreme Court judges but also about re-balancing the Court by appointing more judges (i.e. court packing). While a procedural solution to the factual takeover of the Court by one faction could be successful in neutralizing attempts to permanently dominate the Court, it does not guarantee the desired 'neutrality' that gives legitimacy to the rule of law. Packing the Court as a strategy for diluting the conservative supermajority (six out of nine judges) lays bare the profoundly political nature of the Supreme Court and should make us sceptical of giving judges a monopoly over the interpretation of the Constitution.

II
Plebeian Republican Thought: Machiavelli, Condorcet and Jefferson

Machiavelli was the first republican thinker to have a materialist interpretation of the constitution based on a socio-ontological division between the few and the many, and to choose the people over the elite as guardians of liberty within the framework of the mixed constitution.[60] Instead of basing his republic on harmony, balance, security, tranquillity and order, Machiavelli embraces conflict as the effective cause of his political order. He argues that the few and the many are animated by two tendencies: the *grandi* desire to rule and dominate, while the *popolo* desire to live free from domination. '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.'[61] Discord is not only inevitable but also productive of liberty when properly channelled through institutions and procedures. 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 generates laws in favour of liberty.

Machiavelli sees the republic as a type of political organization that is inherently tied to the socioeconomic structure of society, and therefore republican liberty demands that citizens live in relative equality. For him those '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'.[62] Consequently, his institutional proposals are oriented at containing the power of the wealthy. This anti-oligarchic standpoint contrasts sharply with ancient as well as modern elitist republicans, for whom the best citizens are agents of moderation and virtue and therefore should directly control the government; for elitist thinkers the many are an unruly mob that has a duty to obey the law, and should only aspire to select the best citizens to rule.[63] In contrast to Cicero, for whom virtuous elites should control public deliberation to preserve a 'moderate and harmonious order', and also to Montesquieu, for whom elite representatives and formal equality keep a Newtonian balance that preserves the existing socio-political hierarchies, Machiavelli's institutional proposals are aimed at channelling conflict to prevent the inevitable overgrowth of oligarchy and the consequent loss of liberty for plebeians.[64]

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[60] For the Greek roots of plebeian republican thought see Eric Nelson, *The Greek Tradition in Republican Thought* (Cambridge, 2004).

[61] Machiavelli, *Discourses*, I.16, in *Machiavelli The Chief Works and Others*, trans. A. Gilbert (3 vols., Durham, 1989), Vol. I, p. 237.

[62] Machiavelli, *Discourses*, I.55, p. 308.

[63] Cicero, *On the Commonwealth*, 1[52], 23; Montesquieu, *The Spirit of the Laws*, I.3.4 and II.1.6; Hamilton, Madison and Jay, *Federalist Papers #62*, pp. 374–80.

[64] For further analysis of the relation between inequality and constitutions see J. McCormick. ' "Keep the Public Rich, But the Citizens Poor": Economic and Political

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The Machiavellian republic is a realist order, born out of a methodological effort to take 'the truth of the matter as facts show it rather than with any fanciful notion',[65] based on the permanence of socio-political conflict, and shaped by the strength of both oligarchs and common citizens to protect and advance their positions. Consequently, his model allows for the few to satisfy their ruling ambition and for the many to be able to effectively defend liberty against the inevitable overreach of the few, through their active participation in political power.[66] Basing his analysis on the humoral theory, in which illness is due to the excess or deficiency of fluids in the body,[67] for Machiavelli the corruption of the body politic was due to the overgrowth of oligarchy and the lack of periodical institutional conflict from below. When there is 'universal corruption' in a republic, the powerful few manage to extract consent from the many, who are 'deceived or forced into decreeing their own ruin'.[68] Machiavelli's aim is then to arm the common people to resist this oligarchic tendency so as to protect the republic from corruption and the loss of liberty for plebeians. A well-ordered republic needs therefore to incorporate, in addition to strong institutions for the common people to exert control over elites, periodic public trials to judge those who benefit from corruption, and renewals of the basic structure to disrupt the cycle of corruption.

While in *The Prince* Machiavelli explores monarchy as a typology, analysing sources of power, allies and strategies from a realist perspective, in the *Discourses* he undertakes the study of popular political orders. Much has been said about Machiavelli's intentions and covert endorsements hiding in the brief treatise on principalities, even if it is in his three volumes on republics that he unapologetically chooses plebeians over elites to wield legal power to protect liberty. Machiavelli begins his exploration of popular republics from his interpretation of the Roman plebeian experience, of 'the actual political prudence of the Romans through a hermeneutics of the ancient historical narratives'.[69] From the political praxis of the Roman republic and his own political experience in the Florentine republic, Machiavelli proposes a constitutional order in which discord is played out through institutions to produce liberty. In this way, the Machiavellian republic stands as an alternative to 'the classical

Inequality in Constitutions, Ancient and Modern', *Cardozo Law Review*, 34 (3) (2013), pp. 879–92.

[65] Machiavelli, *The Prince*, in *Machiavelli The Chief Works and Others*, Vol. 1, p. 57.

[66] 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* (Berkeley, 1973), pp. 37–71.

[67] On Machiavelli's *umori* see G. Pedullà, *Machiavelli in Tumult: The Discourses on Livy and the Origins of Political Conflictualism* (Cambridge, 2019), pp. 48–53.

[68] Machiavelli, *Discourses*, I.18, p. 242.

[69] Pedullà, *Machiavelli in Tumult*, Introduction.

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and humanistic tradition of concord'[70] on which the elitist republican tradition has been premised.

In addition to departing from the harmony-based framework by embracing conflict as productive of liberty, and advocating pursuing the example of the Romans and institutionalized socio-political discord to achieve 'good laws', Machiavelli makes another unprecedented argument: that it should be the common people, not the elites, who should be designated as the 'guardians of liberty'. He chooses the many over the few as stewards of liberty because the former merely long not to be ruled, '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'.[71] To adequately fulfil this role, the many need to be armed, not only with legislative and military power,[72] but also with constituent power and final judgment. Citizens in the Machiavellian republic would not only be soldiers — trained to defend the republic with force if necessary — and decision-makers — exercising power through ordinary plebeian institutions — but also would have the extraordinary power to intervene in the basic structure — able to create new institutions and rules to periodically renew the political order to liberate it from the overgrowth of oligarchic power — and to execute extraordinary justice in cases of corruption — able to punish those who illegitimately attempt to subvert liberty through legal and extra-legal means. According to Machiavelli, the republic needs to deal harshly with those who attempt to undermine the republican order to 'profit unlawfully',[73] such as the sons of Brutus and Melius the grain dealer who wanted to feed the people at his own expense and buy their favour. This is a tricky business since means of corruption tend to be legal and 'many times works that seem good, and that cannot reasonably be condemned, become culpable and are very dangerous to a state, if they are not at an early hour corrected'.[74]

Despite his strong support for the active participation of plebeians in the political structure as defenders of liberty, Machiavelli is not a theorist of democracy, advocating a democratic sovereign assembly,[75] but rather a plebeian thinker pushing to increase popular power *within* a mixed republican framework in which the *grandi* also have a role to play. From his realist point of

[70] *Ibid*.

[71] Machiavelli, *Discourses*, I.5, p. 204.

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

[73] '. . . 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'. Machiavelli, *Discourses*, I.16, p. 236.

[74] *Ibid*., III.28, p. 492.

[75] Against this interpretation, see Barthas 'Il pensiero costituzionale di Machiavelli e la funzione tribunizia nella Firenze del Rinascimento', in *Il Laboratorio del Rinascimento*, ed. L. Tanzini (Florence, 2016).

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view, the desire of the powerful few to be in command needs to be satisfied and consequently the ideal mixed constitution has to incorporate institutions capable of enabling elites to achieve glory for the benefit of the republic — instead of frustrating their desire and letting their efforts go to plotting against liberty. Even if he argues that the common people are better than a virtuous prince at maintaining liberty during ordinary times[76] — through voting for magistrates and tribunes, legislating, and judging in political trials — he does not propose a model in which the people rule on their own, but rather an order in which plebeians have enough power to curb both individual and structural oligarchic power. In addition to ordinary political power, Machiavelli argues that the people must periodically 'examine themselves' (*si riconoschino*) and go back to the beginning.[77] This 'reset' of the constitution needs to be activated in

> 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]

While in the *Discourses* Machiavelli lays out a theory of mixed constitution applicable to any republic order, his *Discourse on Remodelling the Government of Florence* is a pragmatic proposal for modifying the political system in Florence. His argument to reopen the Great Council as necessary to 'set up a stable government'[79] was based on past political practices and expectations. Given that the common people already had exercised political power in Florence, it was necessary to satisfy the expectations of political participation and control. He makes the same argument regarding the desire of the few to rule. Machiavelli's constitutional proposal for Florence envisioned a set of elitist institutions — an executive Council of Sixty Five[80] from which the Gonfalonier of Justice was to be selected, and a legislative Council of Two Hundred — as well as a set of plebeian institutions: the Great Council[81] and the Council of Provosts, an office aimed at providing a tiebreak vote in inter-institutional disputes and at overseeing government officials. This 'popular agent of elite accountability'[82] was composed of Sixteen Provosts, who were to be selected

[76] Machiavelli, *Discourses*, I.9, p. 218.

[77] *Ibid*., III.1, p. 420.

[78] *Ibid*., p. 421.

[79] Machiavelli, *A Discourse on Remodeling the Government of Florence* (1520), in *Machiavelli Chief Works*, Vol. 1, p. 110.

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

[81] The Great Council was a sovereign institution, electing and deciding. Machiavelli proposes a subordinate institution given the political context in which he was writing.

[82] J. McCormick, *Machiavellian Democracy* (Cambridge, 2011), p. 106.

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from the Gonfaloniers of the Company of the People to oversee the actions of the Signores in the palace. If the Provosts suspected misconduct, they had the authority to temporarily take away the power of the few and contest their decisions to 'make them abstain from actions that are not good'.[83]

Machiavelli's contribution to republican constitutional thought was revisited during the revolutionary experience in France. From a critical stance on the American constitutional experiment, the Marquis of Condorcet assessed the political order established in the thirteen colonies and argued that the system of separation of powers was not enough to control corruption. For him the principal concern in the design of any constitutional structure was how to avert decay, 'the vices which will corrupt even the best organized constitution if it remains unaltered'.[84] Condorcet criticized Montesquieu's doctrine of separation of powers and its proceduralism, and rejected the constitutional framework based on this doctrine put in place in the United States, as an ingenious but intricate machine that would end up concealing a parallel system of domination.

> 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.[85]

Condorcet's constitutional project, commonly known as *Le Girondine*, was designed to protect the republic against what he identified as a new form of domination: 'indirect despotism', a *de facto* oligarchy operating within the bounds of the rule of law, in which representation is 'neither equal nor real'.[86] As an alternative to the model of separation of powers, Condorcet proposed a mixed order that incorporated, in addition to representative institutions, popular organs able to initiate, veto and impeach, as well as to periodically exercise constituent power. Building on the village assemblies convened for the elections of the Estates-General,[87] and the self-governing experience of the communes, Condorcet proposed a dual structure in which representative government would be checked

[83] Machiavelli, *A Discourse on Remodeling the Government of Florence*, pp. 111–12.

[84] *Ibid*., p. 221.

[85] Condorcet, 'A Survey of the Principles', in *Condorcet: Foundations of Social Choice and Political Theory*, ed. Iain McLean and Fiona Hewitt (Cheltenham, 2007), p. 199.

[86] Condorcet, 'On Despotism', in *Condorcet Political Writings*, ed. S. Lukes and N. Urbinati (Cambridge, 2012), p. 164. Urbinati interprets indirect despotism as a 'degenerated form of representative government', N. Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago, 2008), p. 189.

[87] After the electoral statute was promulgated, local assemblies were convoked to elect delegates and put together a list of grievances. See P.M. Jones, *The Peasantry in the French Revolution* (Cambridge, 1988), pp. 62–4; M. Crook, 'The Persistence of the

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by a decentralized network of primary assemblies. In this way, instead of repressing the revolutionary spirit to impose agreement, the people would be able to exercise locally their 'protest power' during ordinary politics as well as to decide collectively to update the constitutional structure, initiating a constituent process from below. While in the declaration of rights of *Le Girondine* Condorcet stated that 'a generation has no right to impose its laws on future generations' and thus a people 'always has the right to review, reform and change its Constitution',[88] in its Title IX he set up three ways to initiate the constituent process: periodically through law at intervals of twenty years, by individual citizens through their primary assemblies, and by the national legislature after approval by a majority of primary assemblies.[89] In addition, like Machiavelli, Condorcet proposed an office specifically entrusted with keeping an eye on those in public office. The Council of Overseers, composed of 'officers of the people',[90] was to ensure that the expressed will of the people in their primary assemblies 'is carried out precisely, in an orderly and safe fashion'.[91]

Another exponent of this plebeian strand of republicanism was Thomas Jefferson, who also argued that the protest power of the people was necessary to prevent the inevitable 'degeneracy of government'.[92] In a series of letters from Paris, where he was a diplomatic envoy, Jefferson argued that active resistance was necessary to preserve liberty. For the sake of good government, rebellion should always be allowed to spontaneously arise, and rulers need to be prepared to 'pardon and pacify' the rebels: '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 its natural manure'.[93]

Jefferson also advocated self-government at the local level, proposing a 'republic of wards' in which every man would be an 'acting member of the common government, transacting in person, a great portion of its rights and

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Ancien Régime in France: The Estates General of 1789 and the Origins of the Revolutionary Electoral System', *Parliaments, Estates and Representation*, 13 (1) (1993), pp. 29–40. For the importance of popular reunions and committees at this time see A. Dalotel, A. Faure and J.C. Freiermuth, *Aux origins de la Commune* (Paris, 1980); M. Philip Johnson, *Paradise of Association* (Ann Arbor, 1997).

[88] *Le Girondine*, Déclaration des droits naturels, civils et politiques des hommes, Art. 33.

[89] *Ibid*., Titre IX — Des Conventions nationales, Art. 5, 6 and 7.

[90] Condorcet, 'A Survey of the Principles', in *Condorcet: Foundations*, p. 206.

[91] *Ibid*., pp. 204–5.

[92] T. Jefferson, 'Letter to James Madison', Paris, 30 January 1787, in *Political Writings* (Cambridge, 1999), p. 108.

[93] Jefferson, 'Letter to James Madison', 30 January 1787, p. 108; Jefferson, 'Letter to William Stephens Smith', 13 November 1787, p. 110.

duties'.[94] Similar not only to Condorcet's primary assemblies, but also to the Committees of Correspondence that self-organized against the British before and during the war of independence, Jefferson's plan was based on local town halls in which all citizens could act politically in person. Unlike Machiavelli and Condorcet who conceived popular institutions as resisting oligarchy and corruption, for Jefferson a republic of wards was desirable above all because it promoted self-determination. He also used this democratic rather than republican argument for establishing popular institutions at the local level to propose the periodic exercise of constituent power. Echoing Condorcet's declaration and institutional proposal, because 'no society can make a perpetual constitution', for Jefferson every constitutional order 'naturally expires at the end of 19 years', when a new cohort of citizens comes of age; no generation has the 'right to bind another'.[95]

III
Neo-Republicanism and the Limits of the Elitist Republic

Despite the republican origins of representative government, the contemporary study of constitutions has been conducted mainly within democratic theory, a political tradition that does not deal with mixed orders institutionalizing a socio-ontological split, but that rather begins from the premise of a unitary sovereign people, in which all individuals are formally equal. From radical democracy and the permanent revolution of the multitude[96] to epistemic democracy and 'wisdom of the crowd' arguments to justify popular participation in decision-making,[97] the push to reform our political orders has mainly come from a tradition alien to the founding ideology of representative government. This control of democratic theory over constitutionalism begun to be challenged in the early 1990s by neo-republican philosopher Philip Pettit, who pushed the boundaries of the interpretation of rights, criminal justice, and basic democratic institutions from the point of view of republican theory. His seminal book *Republicanism: A Theory of Freedom and Government* (1997) brought the republican tradition back into constitutionalism debates. His interpretation of liberal democracies as mixed constitutions and his aim to develop and strengthen the institutional checking power of the people was appealing to reform-minded scholars, and became a bridge between democratic theory and the plebeian republican thought that would emerge in full

[94] Jefferson, 'Letter to Major John Cartwright', Monticello, 5 June 1824, in *Political Writings*, p. 385.

[95] Jefferson, 'Letter to James Madison', 6 September 1787, in *Political Writings*, p. 596.

[96] See for example A. Negri, *Insurgencies: Constituent Power and the Modern State* (Minneapolis, 2009).

[97] See for example H. Landemore, *Democratic Reason* (Princeton, 2013).

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force in the 2000s through both a reinterpretation of Machiavelli and as a critical response to Pettit's neo-republican political philosophy.

Pettit's proposed constitutional model is premised on his conception of liberty as the 'lack of arbitrary interference'. Finding in republicanism a 'social philosophy that is at once anti-collectivist and anti-atomist', he interprets republican liberty as an 'intermediate between the ideals of non-interference and self-mastery'.[98] Within this framework, individuals are free if they are subject only 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'.[99] The objective of the legal order is then to allow only harmless non-arbitrary interference, in which 'the interests and ideas of those who suffer the interference'[100] are tracked, and to stop 'people from dominating one another without [legality] itself dominating anyone in turn'.[101]

Even though Pettit agrees with the basic premises of Montesquieu's and Madison's procedural constitutionalism based on the separation of powers, he nevertheless recognizes that institutional balance and good rules are not enough to guarantee equal liberty. To force public officials to obey popular authority[102] and respect liberty, Pettit proposes to enhance the 'contestatory' nature of liberal democracies by endorsing a 'dual-aspect model' aimed at providing citizens with an 'individualized, unconditioned, and efficacious influence that pushes [government] in a direction that they find acceptable'.[103] This duality in Pettit's mixed constitution is premised on the two temporal registers of popular influence: while only a plurality of citizens can exert short-term influence on law and policy, the people — conceived of as a 'group entity, taking the form of a singular agency' — is able in the long-term to ensure the compliance of laws with the norms that limit the exercise of power.[104]

Pettit's constitutional model includes democratic institutions endowed with what he calls 'authorial' and 'editorial' forms of control. Through these institutions, citizens can exercise a 'positive search-and-identify dimension' as well as a 'negative scrutinize-and-disallow dimension',[105] acting as both authors and editors of law and policy, and therefore exerting the type of popular

[98] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1999), p. 27.

[99] *Ibid*., p. 35.

[100] *Ibid*.

[101] *Ibid*., p. 105.

[102] *Ibid*., p. 304.

[103] *Ibid*., p. 239.

[104] *Ibid*., p. 309.

[105] P. Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge, 2001), p. 159.

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control envisioned in mixed constitutional regimes. However, this control depends on citizens' 'virtuous vigilance'[106] and their effective resistance to arbitrary power through the courts or technocratic bodies. By extracting the ancient checking role exerted by plebeians through class-specific institutions, and by placing it on multiple sites of contestation, Pettit offers a reinterpretation of the mixed constitution in which a system of popular 'discursive control' is able to influence and give direction to government in a decentralized manner. 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.[107] However, by abstracting the material conflict between the few and the many into a multi-agent and plur-directional 'contestation' that happens at different times and spaces, his 'contestatory constitution' marks a departure from both the elitist and the plebeian republican traditions, which recognized the fundamental split of society between the few and the many.

Despite the affinity of Pettit's ideal order based on contestation with the plebeian republican tradition based on conflict and popular resistance to domination, I would argue that his contestatory model is not neo-republican but is better understood as a republican-infused participatory democracy, and as such a necessary step in bridging democratic and republican theories of the constitution. His model originates in the democratic premise of the people as a single agency (the few and the many together) and chooses to enhance diversity and contestation in the system as a proxy for the role that republican thought assigns to popular power within the mixed constitution. The contestatory nature of the model is based on an 'acceptability game' that enables 'shared policy-making norms' and guarantees multiple 'sites of opposition' such as electoral debates, public justification of policy, and political exchanges in the media.[108] While the burden of virtue in the republic was for Cicero placed on elites, for Montesquieu on the system of checks and balances, and for Madison on the procedure of election premised on the right to free speech, Pettit places the burden of virtue on the 'resistive' character of the citizens who need to scrutinize and resist potentially dominating decisions by the government.

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 in which the common people are effectively disempowered, despite formal equality, because of their

[106] Pettit, *Republicanism*, Introduction.

[107] P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, 2014), p. 286.

[108] *Ibid*., p. 261.

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precarious material conditions. Despite its democratic commitments, this contestatory framework is closer to the elitist than the plebeian strand of republicanism since the 'popular element' does not have an institution to assemble and exercise direct collective power, nor are plebeians able to choose exclusive representatives; individuals have nothing else than the *duty* to resist oppression through the resources provided by the system. Pettit conceives of the people as a collection of individuals who are charged with the responsibility to push back against oppression through channels that are time-consuming and costly, such as going to court against other, more powerful individuals.[109] Material conditions determine the possibility of civic virtue and therefore placing the burden of vigilance on individuals instead of on popular institutions makes such a system more prone to corruption and the domination of the powerful few over the many.[110]

Notwithstanding the important contribution to the decoupling of domination from interference,[111] Pettit's neo-republican account of liberty detaches the issue of domination from that of material conditions, displacing the threat of oligarchy that was identified as central by Machiavelli and Condorcet. Moreover, his conception of liberty seems closer to a liberal one in which individual rights (especially property rights) are conceived of as absolute against the state (and others), rather than to a republican view of liberty in which rights are political and thus subject to legitimate curtailment for the sake of keeping the republic free from oligarchic domination. Under Pettit's normative framework, interference by the state to redistribute wealth, depriving a minority to empower a majority, would be a form of domination because it would not track 'the interests and opinions of those affected'. To this liberal argument based on individual interests, Pettit adds that the actual redistribution of resources is likely to be inefficient and could even end up decreasing liberty in general.

> 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

[109] Resisting oppression in this manner requires individuals to appear in court multiple times during business hours and therefore demands that workers take time off from their jobs, something that employers resent and could lead them to terminate the labour relation. Hiring a lawyer to access the justice system is also necessary to have a good chance at redress, which could be extremely expensive. Hourly rates for lawyers in the state of New York range from $80 (subsidized services for the poor) to $500 and up. Considering the minimum wage is $15/hr the cost of litigation is exorbitant.

[110] Modern elitist republicans, such as Locke and Montesquieu, instead of providing the common people with the necessary resources to exercise their political functions, preferred to exclude the poor from suffrage.

[111] Pettit broadened the conception of negative liberty to account for domination even in the absence of interference.

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> 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.[112]

The framework Pettit proposes does not offer new tools to deal with the threat of oligarchy; his contestatory model would be as insulated from redistributive claims coming from below as the current liberal political system, which has been unable to control increasing degrees of income and wealth inequality. The United States is today as unequal as it was during the *laissez-faire* golden years of the 1920s, or as pre-revolutionary France.[113] Within Pettit's contestatory constitution there are no specific rules or institutions to effectively deal with those who want to 'profit unlawfully' through legal means. Our current legal frameworks have left the republic with no means to defend the liberty of plebeians against the oligarchs of our globalized world.[114] Contestation and resistance are dependent on a civic virtue that has been defunded and diminished, while the power of oligarchs keeps growing without any limits. Being blind to the dominating consequences of inequality and endless accumulation, this framework is also not equipped to contest structural forms of domination such as sexism[115] and racism,[116] which are reproduced through institutions, laws and procedures that keep gender and racial hierarchies in place. Structural forms of domination are unlikely to be dismantled piecemeal, especially if it is mainly up to the victims of domination to fight back and push for reform.

IV
Machiavelli and the Plebeian Republican Revival

While in the early nineteenth century Machiavelli's work was analysed as a plebeian political philosophy[117] that set the foundations for those who 'have written in favour of equality',[118] in the twentieth century the plebeian interpretation of Machiavelli came mainly from a Marxist perspective. From Antonio

[112] Pettit, *Republicanism*, p. 161.

[113] T. Piketty, *Capital in the Twenty-First Century* (Cambridge, 2014).

[114] E.g. Jeff Bezos, owner of Amazon, and Mark Zuckerberg, owner of Facebook.

[115] D. Gädek, 'Does a Mugger Dominate? Episodic Power and the Structural Dimension of Domination', *Journal of Political Philosophy*, 28 (2) (2020), pp. 199–222.

[116] J.F. 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', Prague, Czech Republic, 4 November 2017.

[117] John Adams quoted in J. Barthas, 'Machiavelli in Political Thought from the Age of Revolutions to the Present', in *The Cambridge Companion to Machiavelli*, ed. J.M. Najemy (Cambridge, 2010), pp. 265–6.

[118] B. Constant, *Principles of Politics Applicable to All Governments*, trans. D. O'Keeffe, ed. E. Hofmann, Introduction by N. Capaldi (Indianapolis, 2003), p. 164.

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Gramsci in the 1920s to Claude Lefort in the 1970s and Antonio Negri in the 1990s, Machiavelli's project was seen as an effort to empower the common people against oligarchy. This plebeian reading existed alongside the two dominant schools of interpretation initiated by Leo Strauss and the Cambridge School, which negated Machiavelli's plebeian commitments, interpreting his work as either supporting elite rule or based on separation of powers and electoral contest, instead of on socio-political conflict. In the early 2000s a few novel plebeian interpretations of Machiavelli and of republican thought more generally arose almost in parallel. In a decentralized fashion, instead of growing out of a particular author or methodological school, this strand of thought sought to confront the elitist reading of the Florentine Secretary's work, the neo-republican framework installed by Philip Pettit, and the corruption of contemporary democratic regimes. Below I analyse the main strands of plebeian republicanism as: critical, liberal and materialist.

One of the first to put forward a critical reading of Machiavelli within the republican tradition was Miguel Vatter, who saw the Florentine philosopher as seeking to institutionalize a plebeian principle of 'no-rule' arising from the desire not to be dominated.[119] Contributing to this critical approach, Martin Breaugh traced the 'plebeian principle' both in the history of political thought from Machiavelli to Jacques Rancière, and in historical cases, as resurging periodically from an experience of freedom and revolt that refuses 'the limits of the possible present of the dominant order'.[120] In both accounts, the plebeian principle and its revolutionary subject appear tied to the event and therefore resisting institutionalization. While for Vatter Machiavelli's republican freedom 'encounters the necessity to realize itself, to give itself a form and disappear as event', for Breaugh the plebeian experience is one of self-emancipation through political action and therefore has been ephemeral because it has been unable, so far, to 'found a sustainable new political order'.[121]

From a liberal philosophy perspective, Jeffrey Green diagnosed the maladies of contemporary democracies through a plebeian lens. He argued that the majority of citizens today endure a plebeian condition determined by a 'shadow of unfairness' resulting from plutocracy and 'the inescapable incursion of socioeconomic inequality into civic spaces'.[122] Given its realist stance, plebeian republicanism is for him able to redraw the division between

[119] M.E. Vatter, 'Machiavelli After Marx: The Self-Overcoming of Marxism in the Late Althusser', *Theory & Event*, 7 (4) (2005); M.E. Vatter, *Between Form and Event: Machiavelli's Theory of Political Freedom* (New York, 2014).

[120] M. Breaugh, *The Plebeian Experience: A Discontinuous History of Political Freedom* (New York, 2016), p. xvi.

[121] *Ibid*., p. 241.

[122] J. Green, *The Shadow of Unfairness: A Plebeian Theory of Liberal Democracy* (Oxford, 2016), p. 4.

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the few and the many by recognizing that 'within liberal democracy *ordinary citizenship is second-class citizenship*'.[123] Differing from Breaugh's plebeian principle, which is actualized in political action, Green conceives of plebeians today as resisting oligarchy through what he calls 'principled vulgarity', a set of behaviours such as 'classism' and 'rancour' that transgress the 'well-established norms of civility'[124] and are aimed at regulating the most advantaged class.

Finally, the most developed of the three strands of plebeian republicanism is the materialist interpretation. Tracing Machiavelli's political thought to the Greek historian Dionysius of Halicarnassus and connecting it within a longer tradition of plebeian political thought, Gabriele Pedullà has recently read Machiavelli as the first constitutional theorist of conflictualism, against the interpretations of the mixed constitution based on concord.[125] According to Pedullà, the Machiavellian republic is an order that is 'subject to a series of cyclical alterations that force it to rid itself of fluids that are not necessarily damaging but that cannot be allowed to accumulate, at the risk of them erupting in more violent forms'.[126] The mixed constitution, premised on the liberty-producing effects of conflict and the people's guardianship of liberty — instead of on balance of power and elite control over basic norms — is a republic in which 'there are checks but no balance: conflict is always omnipresent'.[127]

In agreement with the role of conflict in Machiavelli's republic, John McCormick, the most prominent thinker within the plebeian strand of republican constitutional thought, has consistently pushed against the predominant 'aristocratic' readings of Machiavelli.[128] He criticized the Cambridge School for overemphasizing Machiavelli's continuities with elitist republicanism and neglecting the central role that class conflict places in his theory. He denounces Skinner's interpretative lens through which discord in Machiavelli's work is seen in 'terms of an "equilibrium" where equally dangerous motivations, those of the nobility and those of the people, are balanced'.[129] This reading not only obscures Machiavelli's unique contributions to republican theory but also neglects 'the institutional means by which the people

[123] *Ibid*., p. 9.

[124] *Ibid*., pp. 10 and 110.

[125] For an earlier engagement on *tumulti* and the beneficial role of conflict in Machiavelli's thought see Nelson, *The Greek Tradition*, pp. 79–86.

[126] Pedullà, *Machiavelli in Tumult*, p. 51.

[127] *Ibid*., p. 124.

[128] J. McCormick, 'Machiavelli Against Republicanism: On the Cambridge School's "Guicciardinian Moments" ', *Political Theory*, 31 (5) (2003), pp. 615–43. For a recent anti-oligarchic reading of Machiavelli that engages in depth with his diplomatic dispatches see John M. Najemy, *Machiavelli's Broken World* (Oxford, 2022).

[129] McCormick, 'Machiavelli Against Republicanism', p. 626.

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rendered elites responsive and held them to account'.[130] McCormick also criticizes Pettit's neo-republican contestatory model because of its anti-majoritarian institutions. Even if he acknowledged Pettit's 'potentially radically egalitarian theory of freedom', he argues that it is missing a 'radically democratic institutional model' that would push for its materialization.[131]

Transcending critique, in *Machiavellian Democracy* McCormick proposed a tribunician model of democracy as a realist response to the domination of the powerful few. 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',[132] McCormick argues for the establishment of a People's Tribunate, whose fifty-one members would be selected by lottery from plebeian ranks (bottom ninety percent of the income distribution), serving for one-year non-renewable terms.[133] He endows the Tribunate with the power to veto, call referenda and initiate impeachment proceedings against public officials. McCormick's proposal to add a tribunician institution to the representative system, together with the (re)politicization of socio-economic inequality and the recognition of plutocracy as the most dangerous threat to freedom, mark the revival of the plebeian interpretation of the mixed constitution in the twenty-first century.

Despite the qualms one may have about McCormick's anti-oligarchic institutional proposal,[134] his push for class-based institutions to control the rich has helped to reopen the structural debate around representative democracy from a materialist perspective.[135] I have also contributed to further develop an economically-engaged republican constitutional model, arguing to go beyond plebeian *representative* organs such as the Tribunate, to embrace the kind of organized council-based popular power advocated by Condorcet and Jefferson,

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[130] *Ibid*., p. 636.

[131] J. McCormick, 'The New Ochlophobia?: Populism, Majority Rule, and Prospects for Democratic Republicanism', in *Republicanism and the Future of Democracy*, ed. Y. Elazar and G. Rousselière (Cambridge, 2019), p. 141.

[132] McCormick, *Machiavellian Democracy*, p. 173.

[133] *Ibid*., p. 183. He also proposes appointment procedures for high office that combine lottery and election.

[134] See for example the critiques levelled in the symposium on *Machiavellian Democracy*, in *The Good Society*, 10 (2) (2011). I also criticized his proposal for being illiberal and having weak authority *vis-à-vis* representative institutions. Vergara, *Systemic Corruption*, pp. 227–35.

[135] Discussions about imposing a wealth tax and democratic control over basic economic institutions find strong justification in plebeian republicanism. See for example, D. Casassas and J. De Wispelaere, 'Republicanism and the Political Economy of Democracy', *European Journal of Social Theory*, 19 (2) (2015), pp. 283–300. See also my proposals to keep inequality and corruption under control. C. Vergara, 'Republican Constitutionalism: Plebeian Institutions and Anti-Oligarchic Rules', *Theoria*, 69 (171) (2022), pp. 25–48.

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as the only long-term solution to the oligarchic threat and the systemic corruption of the republic.[136]

Conclusion

As the French historian Patrick Boucheron recently stated in his biography of Machiavelli, the Florentine Secretary always 'heralds tempests', forcing us 'to think in heavy weather'.[137] The current revival of Machiavelli scholarship and plebeian republicanism is therefore no coincidence. We are in a 'Machiavellian moment', a moment of political crisis in which 'the ideal of republicanism has to confront its own powerlessness'[138] against plutocracy and its indirect despotism, all of which has managed to force the many into authorizing their own oppression. Despite the invaluable contributions of republican scholars such as J.G.A. Pocock, Quentin Skinner and Philip Pettit in recovering and developing the tradition during the last four decades, their anti-materialist reading of Machiavelli[139] has obscured the crucial insights of his plebeian framework, leaving the republican tradition bereft of institutional proposals to confront increasing oligarchic power within the bounds of the rule of law.

Even if, as an intellectual tradition, republicanism has been dominated by centuries of elite bias, it has much to offer in terms of the anti-oligarchic toolbox contained in its plebeian strand. To guarantee liberty from oligarchic domination, republican models need to transcend the predominant elitist tradition, which can only give us blunt tools for controlling oligarchic power, and incorporate strong plebeian institutions able to keep the powerful few in check as well as mechanisms to activate the constituent power as a way to update the anti-oligarchic capabilities of the constitutional structure. Taking into account the fact that our liberal regimes have allowed for dangerous degrees of socioeconomic inequality and for oligarchic co-optation of the political structures, tapping into the inherited wisdom of the plebeian experience of resistance to the domination coming from the powerful few opens not only new lines of research within republican studies but also alternative paths for radical reform.

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136 Vergara, *Systemic Corruption*, pp. 245–64.

137 P. Boucheron, *Machiavelli: The Art of Teaching People What to Fear*, trans. Willard Wood (New York, 2020), p. 144.

138 *Ibid*.

139 Even if Pocock identifies inequality as central to Machiavelli's thought, he argues that this inequality is 'neither inequality of wealth nor inequality of political authority — there is no reason to suppose that Machiavelli objected to either'. Pocock, *The Machiavellian Moment*, p. 209.

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