

Machiavelli's Plebeian Constituent Power

Camila Vergara
Columbia Law School

Machiavelli was perhaps the first modern thinker to argue that politics has its own logic and morality, detached from both ancient virtue and Christian precepts. Machiavelli famously argued that political ends justify any necessary means, that sometimes cruelty “well used” is essential to acquire and maintain power.¹ Even though this idea has prompted scholars to interpret Machiavelli as a teacher of evil and his work as justifying naked power in political competition, to the contrary I argue that in the *Discourses* he lays out a normative theory of constituent politics. The crucial discussion for Machiavelli is not about good or bad means employed to preserve political power, but about the means that are necessary to achieve the appropriate goal: the establishment and maintenance of a republic.

As a theorist of extraordinary politics, Machiavelli was concerned primarily with the mutation of the constitutional order.² Before the *Discourses* there is no consistent attempt to theorize political foundings beyond a mythical lawgiver.³ As his preface to book one makes clear, Machiavelli seeks to unveil new “ways and methods” that could serve to guide someone wishing to imitate ancient leaders in the most difficult and glorious task: to remodel a corrupt republic by bringing it back to its beginnings. Despite Machiavelli’s novel insights on radical change and constituent renewal—a “path not yet trodden by anyone”⁴—his ideas did not have much traction in the history of political thought. His account of refoundings has been mostly omitted or acknowledged without much analysis of its theoretical and practical implications,⁵ or pushed beyond its limits,⁶ leaving Machiavelli’s proposals for remodeling corrupt republics mostly unexamined. This chapter seeks to fill this gap by analyzing the

¹ Machiavelli, *The Prince*, 1.8, 38. In *Machiavelli Chief Works and Others*. Vol. 1. Translated by Allan Gilbert (Durham: Duke University Press, 1989).

² See Gabriele Pedullà, *Machiavelli in Tumult: The Discourses on Livy and the Origins of Political Conflictualism* (New York: Cambridge University Press, 2019); Sebastián Torres, “Tempo e politica: una lettura materialista di Machiavelli.” In *The Radical Machiavelli: Politics, Philosophy and Language*, 174–189. Edited by Filippo Del Lucchese, Fabio Frosini, and Vittorio Morfino (New York: Brill, 2015).

³ Only Plato undertook this task in his *The Republic*, exploring the best organization for the polis. But Plato’s focus was on the organization of power and the necessary conditions to keep the structure from decaying, and not on the founding itself. Plato, *The Republic* (New York: Cambridge University Press, 2008).

⁴ Machiavelli, *Discourses on the First Decade of Titus Livius*. 1, Preface, 190. In *Machiavelli Chief Works and Others*. Vol. 1.

⁵ Even if Hans Baron identifies the founding of a republic by the civic prince as key to Machiavelli’s thought, he does not dwell on its analysis. Baron, “The Republican Citizen and the Author of ‘The Prince,’” *The English Historical Review*, 76.299 (Apr., 1961), 217–253.

⁶ Antonio Negri’s interpretation of Machiavelli in *Insurgencies* leads him to stretch his theory beyond republicanism, toward absolute democracy. He mistakenly argues that the aim of the new prince is to establish an absolute democracy. However, because domination arises from the desire to dominate in part of society, a pure regime such as an absolute democracy—which for Machiavelli would mean the absolute rule of the *popolo*—does not have a counterpower, and thus rapidly degenerates into domination. Negri, *Insurgencies: Constituent Power and the Modern State* (Minneapolis: University of Minnesota Press, 2009).

contributions of the *Discourses* to our understanding of constituent politics within the republican tradition of the mixed constitution in which the nobles and the people share in the control of the state.

Machiavelli's political philosophy begins from a realist conception of human nature which presupposes, for the sake of designing a well-ordered state, that "all men are evil and that they are always going to act according to the wickedness of their spirits whenever they have free scope," and that they "never do anything good except by necessity."⁷ Moreover, as a republican thinker Machiavelli's ideas are situated within an already constituted reality determined by the socio-ontological division between the powerful few and the common people. For him "in every republic there are two opposed factions, that of the people and that of the rich, and that all laws made in favor of liberty result from their discord."⁸ Using history as a resource for radical political innovation, he positions Rome as a realist model of political organization in which the conflict between these two unequal parts of society are productive of liberty. 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. However, liberty is not caused by the institutional *balance* of these two unequal forces,⁹ but by the periodical pushback of the people against the inevitable and constant overreach of the powerful few. Only when the Roman plebeians rose up against the insolence of the powerful few, they were able to institutionalize their political power in the Tribunes of the Plebs, an office "designed for the protection of Roman liberty,"¹⁰ allowing the Roman republic to become a "perfect state."¹¹ After the "nobility was obliged to grant the people their share,"¹² the conditions for the republic became firmer, and for "more than three hundred years, the dissensions in Rome rarely caused exile and very rarely bloodshed."¹³

Different than in Sparta and Venice, where the guardianship of liberty was in the hands of the nobles—which is also the case in most representative democracies today, in which the power to protect the constitution is placed on judges and high courts—Machiavelli chooses the common people over the elite to provide final judgement on liberty. Since most "disturbances" in a republic are caused by the powerful few, who fear to lose their position and seek to acquire more to secure it, plebeians are for him better suited to protect liberty because they merely long "not to be ruled, and as a consequence [have] greater eagerness to live in freedom."¹⁴ Their aspirations result "either from oppression or from fear that there is going to be oppression" and thus are "seldom harmful to liberty."¹⁵ It is Machiavelli's choice of the common people as gatekeepers of freedom what defines him, from a constitutional perspective, as a plebeian political philosopher, setting him apart from elitist republican thinkers, who prefer the wise few to be the final arbiters of what should be allowed or not under the constitution.¹⁶ By giving the people the legitimate power to subvert oppressive rules

⁷ Machiavelli, *Discourses* 1.3, 201.

⁸ Ibid., 1.4, 203.

⁹ Like in the thought of Polybius, and later Montesquieu.

¹⁰ Machiavelli, *Discourses* 1.4, 204.

¹¹ Ibid., 1.2, 200.

¹² Ibid.

¹³ Ibid., 1.4, 203.

¹⁴ Ibid., 1.5: 204.

¹⁵ Ibid., 1.4, 203.

¹⁶ See the proposal by his contemporary Francesco Guicciardini, *Dialogue on the Government of Florence*. Edited by Alison Brown (Cambridge: Cambridge University Press, 1994).

to protect their liberty, Machiavelli ties the plebeian power to resist oppression to the constituent power to establish and remodel republics.

In what follows I first analyze Machiavelli's description of the founding of Rome by Romulus as a free republic based on limited government, and the kingly power that is necessary to bring a republic back to its beginning, as in the refounding of Sparta by Cleomenes, and then focus on Machiavelli's ideas on the remodeling of republics depending on their degree of existing corruption. I dedicate the third section to Machiavelli's arguments to incorporate instances of extraordinary political action into the basic order so to avoid corruption and the need for revolutionary reformers. I conclude by highlighting Machiavelli's contributions to our understanding of constituent power from a republican perspective.

I. Foundings and Kingly Power

Kingly power is for Machiavelli essential to establish a new, well-ordered republic, as well as to remodel a corrupt one. Different from social contract theorists, who begin from a natural state in which individuals live in liberty, Machiavelli starts from already constituted societies in which the people chose the strongest and bravest for the purpose of common defense. According to Florentine Secretary, it is from obedience to a good leader that "came understanding of things honorable and good, as different from what is pernicious and evil,"¹⁷ while justice developed through the experience of establishing a rule of law with common rules and punishments.¹⁸ However, following Polybius' theory of regime cycles, Machiavelli argues that monarchy —the same as the other pure forms, aristocracy and popular government— is "pestiferous" because it is inevitably short-lived, quickly becoming corrupt due to abuse of power.¹⁹ The only way out of the cycle of corruption and regime change is to establish an order in which the *one*, the *few*, and the *many* share power and check their mutual ambitions. While in book 1 of the *Discourses* Machiavelli analyzes historical examples of the exercise of kingly power to constitute and remodel republics, in book 3 he proposes to institutionalize extraordinary measures, making the use of constituent power an ordinary mode to keep the republic uncorrupted. Taking as a model Rome, a city that had a "free beginning"²⁰ but was not a well-ordered republic from its origin, only acquiring liberty "by chance and at several times and as a result of unforeseen events,"²¹ Machiavelli proposes to establish a republic in which renewal of the basic order is not left to chance but is built into the institutional structure.

The founding of Rome is one of the few myths in which a city-state is created from scratch. Although Romulus did not have to struggle against a corrupt establishment, which would have required force and sometimes even violence, the founding of Rome was not bloodless. Romulus killed his brother Remus because he did not honor the auguries, the rule authorizing the sacred space of the new city in the Palatine Hill. When Remus directly challenged the foundation by stepping outside of the city boundary, he became the first enemy of the city of Rome. The original fratricide was thus a necessary act, justified by the foundation of the free city. Then, after a bloody war with the Sabines over their women, a type of mixed

¹⁷ Ibid., 1.2, 197.

¹⁸ Ibid.

¹⁹ Ibid., 199.

²⁰ Ibid., 1.1, 195.

²¹ Ibid., 1.2, 196.

government was introduced: one monarch for each nation, Romulus ruling over the Romans and Tatius ruling over the Sabines, a common Senate, and a set of procedures for selecting leaders and ratifying legislation. Even though Tatius is also killed soon after, the foundation of limited government and power-sharing procedures remained.

Romulus is Machiavelli's model of founder not only because he sets up a mixed government but also because he achieved his task through his own ability. Romulus' founding was entirely immanent; his followers were compelled not by divine powers, but by Romulus leadership and the institutional framework he set up. The founding of Rome was done through *virtù* alone; *Fortuna* only provided Romulus with opportunity to build the character to become a founder of a free city. In *The Prince* Machiavelli sees as "essential that Romulus should not live in Alba and should be exposed at birth, if he was going to be king of Rome and the founder of that city as his home."²² Even if from noble lineage, Romulus was raised as a shepherd, and the same as the majority of the people, he was under the authority of the king. So, when he was in a position to inherit the throne, he decided, instead of having absolute ruling power, to create a new city with a limited government that would assure security to the common people. Following this example, Machiavelli puts forward in the *Discourses* a normative theory of foundings in which only a virtuous leader, who sets up a republic or brings her back to its beginnings, by laying down the institutional basis for a renewed, lasting liberty, is properly a founder; other leaders, deviating from this standard, are not founders, but tyrants.²³

Because politics has its own morality based on the *effects* of action rather than on revealed or imagined truth,²⁴ the wise new prince must do whatever he needs to acquire authority and preserve it.²⁵ This controversial claim—that ends justify the means—has been extensively analyzed, and Machiavelli's detailed descriptions of the wicked means through which tyrants have come to power have been used as examples of Machiavellian politics. However, the figure of the founder, which differs from both prince and tyrant, brings to the fore the question of virtue and good ends. While a good prince is someone who rules for the common good, bringing to the people general happiness,²⁶ and the tyrant rules for his own advantage, the task of the founder is to constitute a free republic and defend it against those who profit from the corrupt regime. The good founding is for Machiavelli the setting up of a free order, and the glory of the new prince is only reserved for the one capable of establishing republics with "mighty foundations for future power."²⁷

While in chapter 9 of *The Prince* Machiavelli tells us that it is a "civil prince" who, coming to power "not through crime or any other sort of unjust force but with the aid of his fellow citizens," establishes a regime of liberty out of the conflict between the rich and the people,²⁸ he dedicates chapter 9 of the first book of the *Discourses* to analyzing how a would-be founder could organize a republic from scratch or remodel it anew.

This we must take as a general rule: seldom or never is any
republic or kingdom organized well from the beginning, or

²² Machiavelli, *The Prince*, 6, 25.

²³ See the example of the tyranny of Appius, head of the Decemvirate in *Discourses* 1.40.

²⁴ For a discussion on necessity and *verità effettuale* in Machiavelli see Harvey Mansfield, "Machiavelli on Necessity," in *Machiavelli on Liberty and Conflict*, 39–57. Edited by David Johnston, Nadia Urbinati and Camila Vergara (Chicago: University of Chicago Press, 2017).

²⁵ Machiavelli. *The Prince*, 15–18.

²⁶ *Ibid.*, 26, 93.

²⁷ *Ibid.*, 7, 29

²⁸ *Ibid.*, 9, 39

totally made over, without respect for its old laws, except when organized by one man. Still more, it is necessary that one man alone give the method [modo] and that from his mind proceed all such organization [ordinazione]. Therefore a prudent organizer of a republic and one whose intention is to advance not his own interests but the general good [*bene commune*], not his own posterity but the common fatherland, ought to strive to have authority all to himself.²⁹

For Machiavelli, the founding of a republic —an order in which the *one*, the *few*, and the *many* share in the control of the state— can only be accomplished with the concentration of power and authority in one individual. For the foundations to be (re)organized well they need to be designed based on a top-down “method” rather than from inputs of the people, who “on account of their diverse opinions” are not able to discern the best organization for government.³⁰ Consequently, a regime of liberty can only be constituted through a kingly power, a unilateral action of the *one* —even if supported by the *many*. ‘Foundational’ or ‘original’ constituent power is in Machiavelli necessarily exercised by a virtuous leader in an authoritarian fashion.

In addition to giving the republic its order, according to Machiavelli the new prince will of necessity engage in extraordinary action [*azione straordinaria*] entailing violence to those who attack its foundations.

It is in any rate fitting that thought the deed accuses him, the result should excuse him; and when it is good, like that of Romulus, it will always excuse him, because he who is violent to destroy, not he who is violent to repair [*racconciare*],³¹ ought to be censured.

Violent means are justified if they are used to establish and protect a free government. The same as Romulus deserved excuse for killing his brother and the Sabine king because “what he did was for the common good and not for his own ambition,” Machiavelli argues founders cannot escape engaging in extraordinary violence to protect the new order.³² He gives the example of Cleomenes, king of Sparta. Learning from his predecessor king Agis, who had attempted to bring Sparta back to the laws of Lycurgus but was killed by the Ephors,³³ Cleomenes understood that, because of “the ambition of men he could not do good to the many against the will of the few;” to successfully bring Sparta back to its beginnings he needed to “become the only one in authority” and kill “the Ephors and everyone else who could oppose him.”³⁴

Because they were necessary to “repair” the foundations, these acts of violence against those who protect the status quo were not only justified but also appear as constitutive to the founding. For Machiavelli there is no bloodless founding, and the fear caused by extra-legal

²⁹ Machiavelli, *Discourses*, 1.9, 218

³⁰ Ibid.

³¹ Gilbert translates *racconciare* as “restore.”

³² Machiavelli, *Discourses*, 1.9, 218

³³ The aristocratic office of overseers.

³⁴ Machiavelli, *Discourses*, 1.9, 219

violence plays a fundamental role in the reestablishment of liberty. Consequently, I propose to understand Machiavelli's constituent power not only as *creative* of a new order³⁵ but also as *subduing*, ruthlessly putting down the powerful few who profit from corruption and subvert liberty. In other words, the kingly power to constitute a new order is exerted necessarily alongside the power to inflict whatever extraordinary violence is necessary to protect the foundations of the nascent free government.

II. Corruption and Remodeling

Since for Machiavelli men are by nature wicked and fickle, prone to breaking the rules “at every chance for their own profit,”³⁶ every form of government has a natural tendency towards corruption. Even though a good foundation can counteract egotistic inclinations, it does not eliminate them, so the degeneration of political rule is a constant threat that needs to be averted through extraordinary measures.³⁷ In chapters 17 and 18 of book 1 of the *Discourses*, Machiavelli analyzes how a city in which inequality has bred corruption and the ability for “free life” [*vita libera*]³⁸ can preserve its free form of government or establish one anew.

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.³⁹ For him the corrupting process of the political structure 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. According to Machiavelli, “an evil-disposed citizen cannot effect any changes for the worse in a republic, unless it be already corrupt.”⁴⁰ It is this type of republic, a very corrupt city [*città corrottissima*] in which “there are no laws or rules sufficient to restrain a universal corruption,” that Machiavelli wants to bring back to its beginnings.

Where [the matter] is corrupt, well-planned laws are of no use, unless indeed they are prepared by one who with the utmost power can force their observation, so that the matter will become good.⁴¹

³⁵ Negri, *Insurgencies*. 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” (319) and “the negative power par excellence,” (21) due to the constructive/destructive force inherent in the process of permanent becoming.

³⁶ Machiavelli, *The Prince*, 16.

³⁷ For Machiavelli on dictatorship as the ordinary method to deal with extraordinary circumstances see Marco Geuna, “Extraordinary Accidents in the Life of Republics: Machiavelli and Dictatorial Authority.” In *Machiavelli on Liberty and Conflict*, 280–306.

³⁸ Machiavelli, *Discourses*, 1.17, 240

³⁹ *Ibid.*, 1.18

⁴⁰ *Ibid.*, 3.8

⁴¹ *Ibid.*, 1.17, 240.

Corruption is connected to ambition and the inequality of wealth and power that the pursuit of interest engenders in the city. Law must establish necessity and duty to create virtuous citizens and make sure the influence of wealth “is kept within proper limits.”⁴² Because republics need relative equality to exist,⁴³ and corruption springs from inequality, 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. When the inequality present in society is pervasive enough to impose interest—in opposition to the common good—as the final cause of the republic, the matter becomes corrupt and the form is useless to reverse the course. The corruption of the matter renders the existing form inadequate because it is unable to contain interest and the pernicious effects of wealth. Through the example of the Roman republic, Machiavelli argues that to properly deal with corruption the order needs to be dynamic, adapting at the changing levels of inequality and corruption. In Rome, because the basis of government “stood fixed” [fermi], changing only little over time, efforts to reform the corrupting regime through legal renewal were ultimately disabled. If the Roman republic had established, in addition to new laws, new orders [nuovi ordini] more suitable for a “bad subject,” she could have “kept herself free.”⁴⁴

In a republic in which corruption has become systemic, affecting matter, forms, and methods,⁴⁵ for Machiavelli the only realistic way for replacing the old order with new basic institutions would be to do it “all at once” rather than taking a slower path, one revolutionary reform at a time. Moreover, he deems this overhaul as extremely difficult and unlikely because it must be done through extraordinary, extra-legal means.

As to reforming these basic methods [questi ordini] at one stroke, when everybody knows they are not good, I say their injurious quality, then easily recognized, is hard to correct because to accomplish it the use of lawful devices is not enough, since lawful methods are futile, but it is necessary to resort to unlawful ones [venire allo straordinario], such as violence and arms, and before anything else to become a prince of that city and have power to manage it in one’s own way.⁴⁶

Not only is the new prince devoid of legal authority to remodel the republic but the implementation of revolutionary reforms—especially those aimed at increasing the power of the people and reducing the clout of the few—are likely to demand some measure of violence. The type of founder Machiavelli has in mind is therefore a very rare kind of leader: an individual of extraordinary *virtù*, seeking to reorganize power in favor of the common good, willing to commit wicked deeds, and able to avoid becoming a tyrant in the process. Such a leader “holds to what is right when he can but knows how to do wrong when he must.”⁴⁷ And

⁴² Ibid., 1.1, 194.

⁴³ Ibid., 1.55. 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* 34.3 (2013): 879–92.

⁴⁴ Machiavelli, *Discourses*, 1.18, 242

⁴⁵ For an analysis of systemic corruption and an extended discussion of Machiavelli’s conception of corruption see my article. Camila Vergara, “Corruption as Systemic Political Decay” *Philosophy & Social Criticism* (OnlineFirst August 2019).

⁴⁶ Machiavelli, *Discourses*, 1.18, 243.

⁴⁷ Machiavelli, *The Prince*, 18, 66.

here lays the greatest obstacle for republican remodeling: the need for such a self-driven, extraordinary virtuous leader, willing to sacrifice everything, even his soul.

To reorganize a city for living under good government assumes a good man, and to become prince of a state by violence assumes an evil man; therefore a good man will seldom attempt to become prince by evil methods, even though his purpose is good; on the other hand a wicked man, when he has become prince, will seldom try to do what is right, for it never will come into his mind to use rightly the authority he has gained wickedly.⁴⁸

Machiavelli sees the revolutionary reformer not only as encountering a “dirty hands” dilemma⁴⁹ but also as facing complete uncertainty of success since attempting to bring a republic that is beholden to “universal corruption”⁵⁰ back to its beginnings had not been so far achieved. Neither of his two exemplary founders, Romulus and Cleomenes, had to deal with a republic stained with systemic corruption—in which not only laws (form) and procedures (methods) are used for corrupt ends, but also the people (matter) have acquired corrupt ways. Because the matter was good, and the deviation from the ‘good’ origin was not so great, they were able to impose a new beginning and even embellish their design [colorire il disegno loro].⁵¹ While to found Rome and constitute a limited government Romulus had of necessity to kill his brother and the Sabine King, Cleomenes killed the Ephors so to be able to bring Sparta back to its founding laws and in this way regain ancient virtue and strength. Even if Machiavelli does not speculate about the extraordinary measures that would be necessary to successfully remodel corrupt republics, the fact that Cleomenes had to get rid of the aristocratic council to successfully reinvigorate the republic, suggests that a virtuous leader seeking not just to revitalize but to *reinstate* liberty would need to use even more drastic measures. The new prince would have to fight not only against the aristocratic gatekeepers of the decaying republic, but also against representatives of the people and any other individual or group benefiting from the corrupt status quo.

After discussing the apparent impossibility of refounding a corrupt republic, requiring such extraordinary leadership and measures, in chapter 25 Machiavelli describes the way a revolutionary reformer might minimize the pushback coming from those who are used to operate within the current structure and might oppose change out of habit.

He who wishes or intends to remodel the government of a city, so that it will be accepted and can maintain itself to everybody's satisfaction, is under the necessity of retaining the shadow at least of the old methods [modi], in order that to the people the government [ordine] may seem not to have changed, even

⁴⁸ Machiavelli, *Discourses*, 1.18, 243.

⁴⁹ For a discussion about this moral dilemma see Giovanni Giorgini, “Machiavelli on Good and Evil: The Problem of Dirty Hands Revisited” in *Machiavelli on Liberty and Conflict*, 39–86.

⁵⁰ Machiavelli, *Discourses*, 1.18, 241

⁵¹ *Ibid.*, 1.18, 243. Gilbert translates this phrase as “to justify their design.”

though in reality the new forms [ordini] are altogether unlike [alieni] those of the past.⁵²

By respecting the old methods and institutions like the Romans did when exchanging kings for consuls and retaining customs and rituals, a reformer seeking to bring back political life [vivere politico] into the republic must strive to “have these upsetting changes retain as much of the old as is possible.”⁵³ A smart new prince could therefore exercise constituent power to establish new orders —basic institutions, procedures, and rules conducive to liberty— by repurposing old structures instead of tearing them down to create new ones. For Machiavelli radical change could be achieved without destabilizing too much the current regime if the shell of institutional forms is preserved to house a completely different order that would be conducive to a new and free way of life [vivere nuovo e libero].⁵⁴

In addition to creatively repurpose old institutions, kingly power is also needed to restrain the powerful few: those “gentlemen who without working live in luxury on the returns from their landed possessions” and are hostile to all civil life [inimici d'ogni civiltà].⁵⁵ In chapter 55 of book 1, Machiavelli states that a revolutionary reformer attempting to remodel a republic that has become oligarchic and corrupt must have a “kingly hand [mano regia] that with absolute and surpassing power puts a check on the over-great ambition and corruption of the powerful.”⁵⁶ A new founder cannot succeed unless first using this absolute power to subdue [spegne]⁵⁷ the powerful few. Consequently, the successful exercise of republican constituent power would require not only to establish new orders but also to subjugate those who are powerful enough to threaten the (re)nascent republic. This duality of the constituent power —creative of new orders and subduing of the few— is further analyzed in book 3 within the plebeian guardianship of liberty and the need for periodic institutional renewal.

III. Periodic constituent power and extraordinary politics

In addition to a theorist of extraordinary politics, Machiavelli is the founder of a “plebeian philosophy”⁵⁸ that originates in the material conditions of the common people and strives for their emancipation from the domination of the powerful few. Different from social contract theorists who begin their analysis from natural right and the creation of a community of equals, Machiavelli begins from the fundamental premise of a society that is irremediably split between the powerful few and the people. After the founding of a republic by a civic new prince, Machiavelli argues this regime of liberty should be maintained by the many. While in

⁵² Ibid., 1.25, 252.

⁵³ Ibid., 1.25, 253.

⁵⁴ Ibid.

⁵⁵ Ibid., 1.55, 308–309.

⁵⁶ Ibid., 1.55, 309.

⁵⁷ Gilbert translates “spegne” in this passage as *wiping out*, which is not a common definition of this word. 20th century definitions related to turning off electrical devices. Common usage in Machiavelli’s time would be “subdue.” See John McCormick, “Subdue the Senate: Machiavelli’s “Way of Freedom” or Path to Tyranny?” *Political Theory*, 40.6 (2012): 714–735.

⁵⁸ John Adams, “Defence of the Constitutions and Government of the United States of America.” In *John Adams, Works*, Vol. VI, 396. Edited by C.F. Adams (Boston: Little & Brown, 1850–56). See Jérémie Barthas, “Machiavelli in Political Thought from the Age of Revolutions to the Present.” In *The Cambridge Companion to Machiavelli*, edited by John M. Najemy, 265–266 (Cambridge: Cambridge University Press, 2010).

his ideal mixed order the *one*, the *few*, and the *many* share in the control of the state, the crucial guardianship of liberty —the right to make the last decision on what is deemed oppressive— must always rely on one of the parts. Machiavelli chooses the people over the elites 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.”⁵⁹ Giving constituent power to the many is perhaps the clearest evidence of Machiavelli’s plebeian commitments.

For him most of the “very great disturbances” in a republic are caused by the few, who “fear to lose what they have gained,” not by the many, who hope to gain what they do not have. The rich are the ones promoting factionalism because they need to secure their possessions; by acquiring more, they can have greater resources to ignite rebellion and instill in the many the wish to possess and dominate.⁶⁰ Consequently, the powerful few must not have the final say on the liberty of plebeians; the rich would probably undermine it and effectively enslave the many. The powerful few, given the position of power they hold in society, could never be the bearers of constituent power because the regime that they would impose would not be a republic but an oligarchy.

According to Machiavelli, plebeians, given the position they occupy in the political structure, should not merely be the guardians of the constitution or the basic laws, as it is today the judicial branch deciding on the constitutionality of law and policy, but the defenders of liberty itself, which could even run against the established order. Consequently, we should consider the plebs as the bearers of constituent power within the republican order, able to amend the basic institutional and juridical structure of society. While in extraordinary moments the revolutionary reformer exercises constituent power by establishing lasting foundations for liberty that can be maintained after the founder’s death,⁶¹ the common people are the bearers of the power to resist oppression during ordinary politics, being able to add anti-oligarchic institutions to the constitutional structure in order to deal with inequality and the corruption of older institutions.

...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.⁶²

This maintenance of the new order by the many does not refer only to the mere administration of ordinary state power (government) but to the extraordinary actions needed to periodically reset the power structure and, in this way, avoid corruption and the overgrowth of oligarchic power. In Machiavelli’s model, constituent power is exercised during the founding by a leader to both *establish* a constitutional framework that liberates plebeians and to *subdue* the powerful few, and during ordinary politics by the many who are to periodically engage in extraordinary actions to *preserve* the republic. While the *one* exercises constituent power to create new emancipatory, anti-oligarchic orders and restrain the powerful by force,

⁵⁹ Machiavelli, *Discourses*, 1.5.

⁶⁰ *Ibid.*, 206.

⁶¹ *Ibid.*, 1.11

⁶² *Ibid.*, 1.9

the *many* exercise constituent power to preserve liberty by recreating the founding through amendments to the institutional structure and extraordinary public trials.⁶³

The constitutionalization of plebeian ordinary and extraordinary powers is for Machiavelli a necessary condition for keeping a republic free from domination. 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. 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 3 of the *Discourses*, Machiavelli identifies these two means — law and virtuous action — as the appropriate ones for a republic to be periodically brought back to its beginnings and remain free. Since the birth of republics is marked by creation and punishment — institutionalization of popular power and foundational violence —⁶⁴ Machiavelli proposes a periodic renewal of the republic through law and an extraordinary public impeachment of those who have transgressed the egalitarian foundations of the republic.

Based on the Roman example, Machiavelli argues in favor of the reconciliation of law and liberty through the creation of new anti-oligarchic institutions such as the “Tribunes of the People, the Censors, and all the other laws that opposed the ambition and pride of the citizens.”⁶⁵ Machiavelli’s response to corruption and oppression is thus not to get rid of institutions and procedures that have become corrupt 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.”⁶⁶ Consequently, even if laws and institutions against corruption are established, the courage of extraordinary plebeian leaders to enforce them appears for Machiavelli as inescapable.

Similar to the extraordinary measures the founder must take to protect the new republic, during ordinary times the republic need to protect itself by dealing harshly with those who have schemed against liberty. Among Machiavelli’s examples of transgressors are the sons of Brutus, who conspired against the republic to “profit unlawfully,”⁶⁷ 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.⁶⁸ The power to subdue the powerful few during the founding needs to be replicated in extraordinary punishment during ordinary politics. From the experience in Florence under the Medici, Machiavelli identifies

⁶³ For a comparison between Machiavelli and his elitist contemporary Guicciardini on public trials see John McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011), chapter 5.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ “...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*, 1.16.

⁶⁸ Machiavelli, *Discourses*, 3.1.

fear⁶⁹ as a crucial emotion that must be present both in the founding of liberty and in renewal moments. Going “back to the beginnings” was not only an attempt at reconciling law and liberty through the creation of new institutions, but was meant to instill the same fear of extraordinary punishment as in the founding.

By revising the government they meant inspiring such terror and such fear in the people as they had inspired on first taking charge, for at that time they punished those who, according to that kind of government, had done wrong. When the memory of such punishment disappears, men take courage to attempt innovations and to speak evil; therefore it is necessary to provide against them by moving the government back towards its beginnings.⁷⁰

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 corrupt constituted order. This constituent power as extraordinary enforcement of liberty should be legally and periodical convoked so to avoid giving individuals “room for growing wicked.”⁷¹

For this reason, from one such enforcement of the law to the next, there should be 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.⁷²

Because Machiavelli 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. Machiavelli 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.”⁷³ A good republican constitution should therefore codify these instances of constituent power to allow for new methods of *adaptation* and *deterrence* to periodically curb corruption and the overgrowth of oligarchy.

...nothing is more necessary to a community... than to give back to it such a 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

⁶⁹ 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.

⁷⁰ Machiavelli, *Discourses*, 3.1, 421.

⁷¹ *Ibid.*, 3.1.

⁷² *Ibid.*, 3.1.

⁷³ *Ibid.*, 3.49.

force. Because, though sometimes the latter may be the best remedy, as it was in Rome, it is so dangerous that it is not in any way to be desired.⁷⁴

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.”⁷⁵ 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...⁷⁶

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.”⁷⁷ For Machiavelli, elections—which imply the possibility of attaining glory through virtuous action, allowing for the moralizing authority of kingly power⁷⁸ 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.⁷⁹

IV. Plebeian Constituent Power

The political philosophy that originated in the 17th century, during and after the crumbling of the dynastic orders, yielded the theory of popular sovereignty which came to justify the modern revolutions and the establishment of representative government. The constituent power within this tradition could not be legitimately exercised by the king and the nobles but belonged to ‘the people’ understood as the community as a whole. Moreover, since this power was conceived as absolute, it had no limits or final cause other than realizing the will of the popular subject. Machiavelli precedes this voluntarist popular sovereignty tradition

⁷⁴ Machiavelli, *Discourses*, 3.1, 422–423.

⁷⁵ Ibid., 3.1.

⁷⁶ Ibid., 3.34.

⁷⁷ Ibid., 3.1.

⁷⁸ From the obedience to the first good chief came “understanding of things honorable and good, as different from what is pernicious and evil...” *Discourses*, 1.2

⁷⁹ Ibid., 3.1.

by more than one and a half centuries, and therefore his ideas on constituent power need to be conceived as distinct, part of an entirely different republican tradition of thought in which the community is never whole but divided into the few and the many, and the constitution is designed to channel conflict productively instead of achieving harmony or consensus.

The conceptions of constituent power that have developed within democratic theory begin from the absolute sovereignty of the community. The people-as-a-whole is the sovereign subject who exercises constituent power as an absolute, undetermined rapture and creation. Born out of the struggle against the monarchical regime, democratic constituent power was conceived as the power “to constitute, abolish, alter, reform forms of government,”⁸⁰ which is separated from the sovereign power exercised to manage the constituted order, the ability to govern, command, and prohibit within the bounds of the constitution. The commonwealth constitutes itself and then submits to the structure that it has itself created, laying in a state of dormancy allowed by the democratic structure, only to be partially reawakened and expressed under the constitution as civil disobedience and social mobilization. The relation between constituent and constituted power under this framework is one of antagonism, and democratic constitutionalism has resolved this struggle in favor of stability by suppressing the constituent power. Since those who occupy positions of power in the constituted order should not intervene the constitutional structure, constitutions incorporate amendment mechanisms such as legislative supermajorities, which are extremely difficult to achieve. Thus, democratic constitutionalism, founded on pre-commitments aimed at stabilizing the foundation of the modern state,⁸¹ has tended to sacralize the constituted order, making legitimate radical change a near impossibility.

Analyzing Machiavelli’s ideas on foundings, remodelings, and extraordinary measures against corruption through the lens of constituent politics allows us not only to understand the *Discourses* under a new light, but also to radically reconceptualize the constituent power from a republican perspective. Machiavelli makes at least five contributions to the theory and praxis of constituent power. First, conceiving this foundational power as goal-oriented rather than subject-centered, allows us to effectively depart from philosophical justifications based on the will of the sovereign. While in democratic theory the constituent power has been conceived as the *autopoietic* power of the community, as the self-constitution of the people, a republican theory of constituent power does not have a determined subject, but it is rather defined by the necessity to establish a well-ordered republic. Republican constituent power is defined functionally, determined by the goal of achieving a free, mixed order conducive to liberty in equality. The constituent power is the power to (re)establish liberty, and thus, as Machiavelli argues, only the civil prince, allied with the people, is able to constitute a republic.⁸²

In addition to a constituent power defined for its effects rather than its subject, Machiavelli conceives of three different temporalities in which this power becomes active: founding, remodeling, and maintenance. The founding moment refers to the original constitution of free government in which a virtuous leader decides to limit his own power by establishing counterbalancing institutions. The need to remodel a republic comes from the corruption of the regime into an oligarchy of consent, in which inequality has allowed for an overgrowth of the power of the few. The new prince as revolutionary reformer, aided by fellow citizens, needs to both establish new anti-oligarchic institutions and subdue those who

⁸⁰ Geroge Lawson, *Politica Sacra et Civilis* (Cambridge: Cambridge University Press, 1993 [1660]), 47.

⁸¹ Stephen Holmes, “Precommitment and the Paradox of Democracy.” In *Constitutionalism and Democracy* edited by Jon Elster and Rune Slagstad, 195–240 (Cambridge: Cambridge University Press, 1988)

⁸² Machiavelli, *The Prince*, 9.

threaten the new order. Finally, a well-ordered republic allows for the periodic activation of this power during ordinary politics through which the people protect liberty by establishing new institutions and punishing transgressors. Because in Machiavelli's republic the many are not merely the guardians of the constitution, but the defenders of liberty itself, beyond and even against law and tradition, they are the bearers of the self-emancipatory force of the community against the powers that attempt to enslave it. Machiavelli proposed to harness and channel the spirit of resistance that allows for the republic to periodically renew its foundations. Given the productive role afforded to conflict in the constitutional structure, constituent power is conceived not as a threat to the constituted structure, but as a source of periodic renewal of the constitution to update its anti-oligarchic capabilities, as a necessary means to preserve the original thrust of a constituted order built on the plebeian struggle against oligarchic domination.

Finally, Machiavelli's analysis of extraordinary politics brings to the fore the role of leadership and violence in the constituent process. It is through kingly power that, according to Machiavelli, the system of limited government came first into existence, and it is only through the citizen prince that liberty can be reestablished once it has been lost. Such a plan to overhaul a corrupt order "in one stroke" by concentrating power in a leader is certainly authoritarian, and today it seems almost unthinkable to even entertain the possibility that a leader may need to act in an authoritarian manner, transgressing limits and exceeding prerogatives, to protect liberty. Machiavelli forces us to grapple not only with the role of strong leadership in the constituent process, but also with the need of subduing the powerful few to allow the new order to take root amidst oligarchic conspiracies and counterrevolution.